



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 11 August 2014
Ref. no.: RK 695/14

RESOLUTION ON INADMISSIBILITY

in

Case KI47/14

Applicant

Mustaf Zejnullahu

**Constitutional review of Judgment Rev. no. 89/2013 of the Supreme
Court of Kosovo of 8 October 2013**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral is submitted by Mr. Mustaf Zejnullahu from Ferizaj (hereinafter, the Applicant).

Challenged decisions

2. The Applicant challenges Judgment Rev. no. 89/2013 of the Supreme Court of Kosovo of 8 October 2013 which was served upon him on 15 November 2013, in connection with Judgment Ac. no. 361/2011 of the District Court in Prishtina of 13 November 2011, and Judgment C. no. 305/02 of the Municipal Court in Ferizaj of 19 January 2011.

Subject matter

3. The subject matter is the constitutional review of Decisions of the regular courts of Kosovo which allegedly *"have violated the Applicant's right to fair and impartial trial and the right for protection of his property"*.
4. In this respect, the Applicant claims a violation of Article 31 [Right to Fair and Impartial trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter, the Law), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Court

6. On 14 March 2014, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, Court).
7. On 1 April 2014, the President of the Court by Decision No. GJR. KI47/14, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court by Decision No. KSH. KI47/14, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.
8. On 8 May 2014, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Supreme Court of Kosovo.
9. On 26 June 2014, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 12 September 2008, the Municipality of Ferizaj filed a lawsuit with the Municipal Court in Ferizaj in order to oblige the Applicant to release and give

back possession of immovability at a place called "Saraiste" to the Municipality of Ferizaj.

11. On 19 January 2011, the Municipal Court in Ferizaj by Judgment C. no. 305/02:
i) approved the lawsuit of the Municipality of Ferizaj as lawful, ii) upheld that the Applicant illegally and without legal basis is exercising factual possession of an immovability (cadastral plot no. 486/4) property of Municipality of Ferizaj, iii) obliged the Applicant to give back possession of the said immovability to the Municipality of Ferizaj, and iv) rejected in its entirety the counterclaim of the Applicant claiming that he acquired the possession over the immovability based on statutory limitation or the right of permanent use of immovability as an alternative request.
12. On 13 November 2012, the District Court in Prishtina by Judgment Ac.no.361/201 rendered the following:

"The appeal of respondents-counterclaimants TE "MODA" in Ferizaj owned by Mustafe Zejnullahu (Applicant) from Ferizaj is REJECTED as UNFOUNDED, and the Judgment of Municipal Court in Ferizaj C.no.305/02 of date 19.01.2011 is UPHELD".

13. On 8 October 2013, the Supreme Court of Kosovo by Judgment Rev. no. 89/2013, determined:

"The respondent's-counterclaimant's (Applicant) Revision submitted against the Judgment of District Court in Prishtina Ac.no.361/2011 of date 13.11.2012 is REJECTED as unfounded".

14. In the abovementioned Judgment, the Supreme Court of Kosovo further reasoned:

From the case file it is found that the claimant-counter respondent seeks with the claim the handover of the immovable properties is registered as cadastral plot 486/4 and 586/1, which in 1983 were transferred in permanent use to the Contracting Organization "Univerzal" (hereinafter: CO "Univerzal") in Ferizaj for the purpose of exercising the textile activities, whereas starting from 1990 until NATO forces entered in Kosovo, the same were used by the Serbian regime to shelter Serb refugees. After the war in Kosovo ended the respondent Mustafe Zejnullahu entered in the possession of this immovable property. The respondent's-counterclaimant's owner Mustafe Zejnullahu claims that he has received these immovable properties in use and possession and pursuant to adverse possession he has acquired the right of property over the same.

Considering this confirmed factual situation the lower instance courts have correctly applied the material right upon approving the statement of claim of claimant-counter respondent and rejected the respondent's-counterclaimant's claim in the counterclaim. This because the right to permanently use the contested plots was transferred by Ferizaj Municipality to the Contracting Organization "Univerzal" for the purpose of exercising the activities of the mentioned contracting organization. In the period between 1990 until the end of the war in Kosovo, the same were used

by the Serbian regime to shelter Serb refugees. After the war in Kosovo ended the owner of the respondent-counterclaimant Mustafe Zejnullahu entered in the possession of this immovable property, where TE "Moda" exercises its activity. This immovable property is registered in the cadastral evidence as public property under the claimant's name. Pursuant to Article 20 of the Law on Basic Property Relationships it is specified that the ground for acquiring the ownership is the law, legal affair and inheritance. Pursuant to the Special Chamber of the Supreme Court of Kosovo (hereinafter: SCSCK) the respondent-counterclaimant have none of these grounds for acquiring the ownership of the contested immovable property.

The contested immovable property was given in permanent use to CO "Univerzal" and not TE "Moda", therefore the assessment of the lower instance courts that there is no legal continuity between the CO "Univerzal" and TE "Moda" and that the later is a new legal entity is correct.

The claims in the respondent's-counterclaimant's (Applicant) Revision that the claimant performed all the changes in the cadastre in relation to the contested immovable properties on the ground of the Board of Directors and the same was annulled by the Supreme Court, have no impact in rendering a different decision in this legal matter, because the alienation of the immovable property from public ownership is done through a public auction and pursuant to Article 9 of the Law on the Circulation of Immovable Properties of Kosovo ("Official Gazette SAPK 45/81, 29/86 and 28/88) it is specified that the contract on the alienation of the contested immovable property from public ownership against this particular provision is void. The right of property over the contested immovable property has not been transferred pursuant to any legal ground but only the right of use, and it was transferred to CO "Univerzal" that no longer exists as a legal entity.

Applicant's allegations

15. The Applicant alleges that regular courts have violated the principle of equality of arms, the proceedings were delayed, and that his main allegations were disregarded.
16. The Applicant has also attached the following decisions: Decision of the Commercial District Court St.br. 1/88 of 24 December 1991, Decision of the Commercial District Court SA. br. 1/88 of 29 September 1988, Decision of the Supreme Court of Kosovo Pr.br. 414/88 of 29 July 1988, Decision of the Supreme Court of Kosovo Pr.br. 571/89 of 7 June 1989, Decision of the Supreme Court of Kosovo A. nr. 251/2002 of 16 December 2004, Judgment A.nr.1336/89 of the Supreme Court of Kosovo of 15 March 1990, Decision 01.nr.463-22 of the Municipality of Ferizaj of 28 September 1983, Decision 04 br. 464-12/84 of the Municipality of Ferizaj of 21 December 1984, Decision 05 br. 351-436-83 of Municipality of Ferizaj of 26 December 1984.
17. The Applicant alleges that regular courts in Kosovo have violated Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a fair

trial), Article 1 of Protocol 1 (Protection of property) of the European Convention on Human Rights (hereinafter, the Convention), and Article 7 (Equality before the law), Article 10 (Right to a fair trial) and 17 (Protection of property) of the Universal Declaration of Human Rights.

Assessment of admissibility

18. The Court observes that, in order to be able adjudicate the Applicants complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

19. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.

20. Furthermore, the Court refers to Article 49 of the Law, which provides:

“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force”.

21. In the concrete case, the Court notes that the Applicant has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and has submitted the referral within the legal deadlines as provided for in Article 49 of the Law.

22. The Court also takes into account Rule 36 (1) c) of the Rules of Procedure, which provides:

“(1) The Court may only deal with Referrals if

...

(c) the Referral is not manifestly ill-founded”.

23. In the concrete case, the Court notes that the regular courts have provided: i) coherent explanations in relation to legal continuity of legal persons, ii) legal basis for acquisition of property, and iii) replied to central issues of the legal matter before them which render Applicant's allegations unsubstantiated.

24. Furthermore, the Court notes that Applicant's allegations concerning the breach of the equality of arms, delay of proceedings are raised by him for the first time before this Court and not before the regular courts. Moreover, the Court considers that a period of three years for development and conclusion of judicial proceedings in three instances of regular court jurisdiction does not

render them excessive and as such it does not give rise to a breach of paragraph 1 of Article 6 of the Convention.

25. As to other decisions attached by the Applicant, the Court notes that they were rendered under different legal system in different circumstances and at a time when the Court had no temporal jurisdiction and are as such *ratione temporis* incompatible with the Constitution which entered into force on 15 June 2008.
26. The Constitutional Court notes that it is not a fact finding Court, the Constitutional Court wishes to reiterate that the correct and complete determination of the factual situation is a full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, *Applicant Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
27. Moreover, the Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).
28. The fact that the Applicant disagrees with the outcome of the case cannot of itself raise an arguable claim of a breach of Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution (See case *Mezotur-Tiszazugi Tarsulat v. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005).
29. In these circumstances, the Applicant has not substantiated his allegation for violation of Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution, because the facts presented by him do not show in any way that the regular courts have denied him the rights guaranteed by the Constitution.
30. Consequently, the Referral is manifestly ill-founded and should be declared inadmissible pursuant to Rule 36 (1) c) of the Rules of Procedure.


FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rules 36 (1) c) of the Rules of Procedure, on 26 June 2014, unanimously

DECIDES

- I. TO DECLARE the Referral Inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Ivan Čukalović



President of the Constitutional Court



Prof. Dr. Enver Hasani