



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristine, 24 December 2012
Ref. No.: RK332/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 68/12

Applicant

Haxhi Morina

**Constitutional Review of the Judgment of the Supreme Court, A. no.
313/2009, dated 26 March 2012**

THE 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
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral was submitted by Mr. Haxhi Morina, residing in Gjakova (hereinafter: the “Applicant”), represented by Mr. Rexhep Gjikolli, a practicing lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court, A. no. 313/2009, of 26 March 2012, which was served on him on 23 May 2012.

Subject matter

3. The Applicant alleges that the abovementioned judgment violated his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”), namely Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial].

Legal basis

4. Article 113.7 of the Constitution, Article 22 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

5. On 13 July 2012, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”).
6. On 4 September 2012, the President of the Constitutional Court, with Decision No.GJR.KI-68/12, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-68/12, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Kadri Kryeziu.
7. On 26 September 2012, the Referral was communicated to the Supreme Court, the Special Chamber of the Supreme Court, the Kosovo Cadastral Agency and the Privatization Agency of Kosovo.

8. On 5 November 2012, the Court requested information from the Municipal Court in Gjakova and from the Special Chamber of the Supreme Court as to the status of the case No. SCC-06-0214, of 8 March 2010.
9. On 12 November 2012, the Municipal Court in Gjakova replied to this Court providing the information that the Applicant on 29 June 2011 has filed a complaint against the Municipal Court Judgment C. no. 700/06 of 25 November 2010. This complaint has been sent to the Special Chamber of the Supreme Court on 26 October 2011 for review and decision.
10. On 14 November 2012, the Special Chamber replied to this Court providing the information that regarding to the case SCC-06-0214 “[...] *the Special Chamber has not decided on the merits of the case yet. This case is due to be settled on the Appellate Panel of the Special Chamber.*”
11. On 27 November 2012, 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

12. On 7 May 1981, the Secretariat for Economy and Finances in the Municipality of Gjakova, (Decision 03-465-26/1978), expropriated the Applicant’s immovable property for the needs of SH.A.M. “Mustafa Bakija”. Pursuant to this decision this immovable property was registered in the cadastre under the name of SH.A.M. “Mustafa Bakija”, Gjakova.
13. On 12 July 1994, the Applicant filed a request to the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality requesting the return of the immovable property because SH.A.M. “Mustafa Bakija” never used the property for the purpose that it was expropriated.
14. On 27 May 2008, the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality (Decision 11 no. 19-465-11/94-08):
 - a. approved the Applicant’s request and returned possession and ownership of the immovable property that was expropriated from him;
 - b. the Directorate for Urbanism, Cadastre and Protection of the Environment in Municipality of Gjakova, has to un-register as owner SH.A. “STARTI” (former SH.A.M. “Mustafa Bakija”) in Gjakova, and register the immovable property in the name of the Applicant: and

- c. SH.A. "STARTI" (former SH.A.M. "Mustafa Bakija") in Gjakova was ordered to return the immovable property to the Applicant's possession.

The Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality held that the immovable property expropriated was not used for the set destination, i.e. to construct a polygon for practical exercise of drivers and buses, and this factual situation was concluded by visiting the site and respective experts. Hence, pursuant to Article 8 of the Law on Amendment and Supplement and Law on Construction (Official Gazette of KSAP, no.42/86), the Directorate of Legal and Property Issues and Land Consolidation of Gjakova came to the conclusion that the foreseen presumptions were fulfilled according to Article 8, for returning the expropriated immovable property, since within the time-limit of 5 years, from the day of determination of construction, the user did not attain the purpose for which the immovable property was expropriated.

Against this decision, was allowed a complaint within 30 days. Since no one complained against this decision, it became final and binding on 11 August 2008.

15. The Applicant, in accordance with the Decision of the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality, filed a request with the Cadastral Agency in the Municipality of Gjakova to register the immovable property under his name.
16. On 18 November 2008, the Cadastral Office in the Municipality of Gjakova suspended temporarily the administrative matter on transferring the ownership of the immovable property to the Applicant. The Cadastral Office in Gjakova held that in order to register the Applicant as owner of the immovable property, is needed the consent of the Privatization Agency of Kosovo, who is, according to UNMIK Regulation no. 2002/12 on establishment of Kosovo Trust Agency, competent for socially owned enterprises and its assets.
17. On 1 December 2008, the Cadastral Office in the Municipality of Gjakova rejected the Applicant's request to register the immovable property under his name in accordance with the Decision of the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality because the Applicant did not submit the consent of the Privatization Agency of Kosovo to register the immovable property under his name. The Cadastral Office in Gjakova held that *"Pursuant to UNMIK Regulation, no. 2002/12 KTA, now PAK, administers publicly owned enterprises and socially owned enterprises, therefore starting*

from this is required also the consent for transferring the ownership in the cadastres.”

18. The Applicant filed a request for re-assessment to the Cadastral Office in the Municipality of Gjakova.
19. On 9 December 2008, the Cadastral Office in the Municipality of Gjakova upheld the decision of 1 December 2008. The Applicant filed a complaint against this decision with the Kosovo Cadastral Agency.
20. On 31 March 2009, the Kosovo Cadastral Agency rejected as unfounded the Applicant's complaint and upheld the decision of the Cadastral Office of Gjakova of 9 December 2008. The Applicant filed a complaint against this decision with the Supreme Court.
21. On 26 March 2012, the Supreme Court (Judgment A. no. 313/2009) rejected as unfounded the Applicant's claim. The Supreme Court held that the Kosovo Cadastral Agency has properly decided the issue.

Procedure before the Special Chamber

22. On 11 May 2006, the Applicant initiated a procedure with the Special Chamber of the Supreme Court requesting it to confirm the ownership over the contested immovable property.
23. On 24 October 2006, the Special Chamber rendered a decision (SCC-06-0214) whereby the claim against SH.A.M. "Mustafa Bakija" was referred to the Municipal Court in Gjakova for adjudication. The case with the Municipal Court in Gjakova was registered with number C. no. 700/06.
24. On 8 March 2010, the Applicant filed a request for interim measures with the Special Chamber and the Municipal Court in Gjakova.
25. On 25 November 2010, the Municipal Court in Gjakova (Judgment C. no. 700/06) rejected the Applicant's claim as ungrounded. On 26 June 2011, the Applicant filed an appeal against this Judgment to the Special Chamber.
26. On 28 August 2012, the Appellate Panel of the Special Chamber served the Applicant's appeal to the respondent and Privatization Agency of Kosovo for response.

27. On 26 September 2012, Privatization Agency of Kosovo submitted a response on the appeal.
28. Therefore, regarding the concerned case, the Special Chamber has not decided on the merits of the case yet. This case is due to be settled on the Appellate Panel of the Special Chamber.

Applicant's allegations

29. The Applicant alleges that the Supreme Court judgment, the Decision of the Kosovo Cadastral Agency and the Decision of the Cadastral Office in Gjakova were taken in violation of Article 24 [Equality Before the Law] of the Constitution, because the Applicant has a final and binding decision from the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality of 27 May 2008, which approved the Applicant's request and returned possession and ownership of the immovable property that was expropriated from him. Further, the Directorate for Urbanism, Cadastre and Protection of the Environment in Municipality of Gjakova was ordered to register the ownership under the Applicant's name.
30. In this respect, the Applicant alleges that the Privatization Agency of Kosovo has been put above the law because the Cadastral Agency requested the Applicant to have the consent of Privatization Agency of Kosovo in order to register the ownership over the immovable property.
31. Furthermore, the Applicant alleges that the procedure for returning the property was initiated before Privatization Agency of Kosovo was established and that Privatization Agency of Kosovo has never taken any procedural action.
32. The Applicant also alleges that the Special Chamber of the Supreme Court violated his rights as guaranteed by the Constitution, Article 24 [Equality Before the Law], because the Special Chamber approved the Applicant's neighbors request for temporary measures while the Applicant's request, allegedly, was not even reviewed by the Special Chamber, although the case was identical with the neighbors.
33. Furthermore, allegedly, the Applicant claims that his right to a fair trial was violated.

Assessment of the admissibility of the Referral

34. The Applicant alleges that his right guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution have been violated. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
35. As to the challenged judgment of the Supreme Court of 26 March 2012, Judgment A. no. 313/2009, whereby the Applicant's claim was rejected as unfounded and the Kosovo Cadastral Agency decision was upheld, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus, the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
36. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case *Edwards v. United Kingdom*, App. No. 13071/87, adopted on 10 July 1991).
37. In the present case, the Applicant merely disputes whether the Supreme Court entirely applied the applicable law and disagrees with the Supreme Courts' factual findings with respect to his case.
38. As a matter of fact, the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that his rights and freedoms has been violated by the Supreme Court. Therefore, the Constitutional Court cannot conclude that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
39. Therefore, the Applicant did not show why and how the Supreme Court decided "in a partial manner", thus denying his right to property.
40. It follows that the Referral is inadmissible because it is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure.

41. As to the Applicant's allegation that the Special Chamber of the Supreme Court violated his rights as guaranteed by the Constitution, the Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective legal remedies available under applicable law pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law, providing:

"113.7 of the Constitution: 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."

"47.2 of the Law: The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

42. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).
43. In the present case, the Court finds that the Applicant has filed an appeal against the judgment of the Municipal Court in Gjakova, Judgment C. no. 700/06, to the Appellate Panel of the Special Chamber alleging that he is the owner of the immovable property because SH.A.M. "Mustafa Bakija" never used the property for the purpose that it was expropriated and requested that SH.A.M. "Mustafa Bakija", under administration of Privatization Agency of Kosovo, to recognize his right of ownership and to allow this right to be registered in the cadastre registers. The Appellate Panel of the Special Chamber has not yet rendered a decision in this matter.
44. It follows, that the Applicant has not exhausted all legal remedies available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law, because the issue of who is the rightful owner of the contested immovable property is still not resolved by the Appellate Panel of the Special Chamber.
45. For these reasons, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 27 November 2012, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- III. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Prof. Dr. Enver Hasani

