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

Prishtina, 6 March 2013
No. Ref.:RK 397/13

RESOLUTION ON INADMISSIBLITY

in

Case No. KI77/12

Applicant

Rifat Hamiti

Constitutional Review of the Resolution of the Supreme Court of Kosovo Rev. I no. 89/2011 dated 5 March 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, 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 Applicant is Rifat Hamiti from Mushetisht village, Municipality of Suhareka, represented before the Constitutional Court by Ekrem Agushi, a practicing lawyer from Prishtina.

Challenged decision

2. The challenged decision is the Resolution of the Supreme Court of Kosovo Rev. I no. 89/2011 of 5 March 2012, served on the Applicant on 26 April 2012, by which was rejected the revision against the Judgment of the Municipal Court in Suhareka C. no. 211/02, of 17 December 2007, and the Judgment of the District Court in Prizren AC. no. 48/08, of 20 January 2011.

Subject matter

3. Subject matter is the legal property dispute between the Applicant and the third parties, regarding the right to use the apartment, which is concluded by the Resolution of the Supreme Court of Kosovo Rev. no. I. 89/2011, of 5 March 2012, served on the Applicant on 26 April 2012, which according to the claims of the Applicant violated a number of Articles of the Constitution of the Republic of Kosovo.

Legal basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 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 56.2 of the Rules of Procedures (hereinafter: Rules of Procedures).

Proceedings before the Constitutional Court

5. On 17 August 2012, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. The President by Decision (br. GJR.77/12 of 04 September 2012), appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, by Decision no. KSH. 77/12 the President appointed the Review Panel composed of Judges: Robert Carolan (presiding), Altay Suroy and Ivan Čukalović.

7. On 24 September 2012, the Constitutional Court requested from the Applicant to submit additional documentation in order for the Court to decide on the merits of the Applicant's Referral. The Court requested the following documents:

   - ✓ Resolution of the Supreme Court of Kosovo rev. I. no. 89/2011, of 5 March 2012,
   - ✓ The power of attorney that authorizes Ilaz Kadolli, lawyer, to represent you before the Court
   - ✓ Judgment of the Municipal Court in Suhareke no. 164/01 of 1 August 2002.

8. On 4 October 2012, the Court was informed by the Post and Telecommunication of Kosovo that the letter addressed by the Court was not served on the Applicant because the Applicant lives abroad.

9. On 23 October 2012, the Constitutional Court again requested from the Applicant and from his lawyer to provide additional documentation, in order for the Court to decide on the merits of the Applicant's Referral.

10. On 9 November 2012, the Applicant submitted the documents which the Court requested from the Applicant, and the authorization by which he changed the lawyer representing him before the Constitutional Court.

11. On 23 January 2013, the Constitutional Court of Kosovo requested from the Municipal Court in Suhareka and the District Court in Prizren to furnish it with the following documents:

- ✓ The entire case files with no. C.br.94/2004, of 20 March 2006, of the Municipal Court in Suhareka;
- ✓ The entire case files of the Resolution of the Supreme Court of Kosovo no. Rev.I.br.89/2011, of 5 March 2012, by which was rejected the Revision against the Judgment of Municipal Court in Suhareka C.br.211/02, of 17 December 2007, and the Judgment of the District Court in Prizren AC.br.48/08 of 20 January 2011.
- ✓ The entire case files no. C.no.146/2001, of 8 May 2002 of the Municipal Court in Suhareka.

12. On 4 February 2013, both the Municipal Court in Suhareka and the District Court in Prizren submitted the entire case files as requested by the Constitutional Court.

13. On 6 March 2013, after having considered the Report of Judge Snezhana Botusharova, the Review Panel composed of Judges Robert Carolan (presiding), Altay Suroy and Ivan Čukalović, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

14. Based on the contract of the construction of the apartments, A.SH. from Mushetisht, with the consent of the provider of the apartment, Municipality of Suhareka and the Kosovo Assembly, has acquired tenancy right over the apartment at "M. Tito" Str. now "Martyrs" , namely apartment no.1., entry no.1., first floor, consisting of two rooms, one kitchen, one bathroom and a toilet, which is signed by the provider of the apartment under number no. 04.no. 360-84 in the name of Municipality of Suhareka, while in Prishtina is under no. 05.no. 360-120/82 of 24 April 1982 .

15. On 13 April 1984, the Applicant and A.SH. signed a contract on lease of the socially owned apartment Vr.br. 319/84 which has been certified by the court.

16. On 23 April 1984 the same persons concluded another contract on sales and purchase of the said immovable property which has not been certified by the court.

17. According to the allegations of the Applicant, this written contract, uncertified by the court, has been fully implemented by the contractors since the seller A. Sh., handed over in possession the sold apartment to the buyer.

18. The Applicant alleges that between him, as the buyer and A.SH. as seller, there is an additional agreement prepared on 3 January 1988 in the presence of witnesses S. H., S. A., S. A., Sh. Sh. and A. J., all from village Mushetisht, based on which the Applicant and the seller A.SH. have agreed to fulfill their contractual obligations in the agreement toward each other, and that the seller A.SH. is obliged to withdraw the previously submitted claim with the Municipal Court in Suhareka against the Applicant.

Proceedings before the court upon request for eviction (to vacate the apartment)

A. The first claim

19. The holder of tenancy right (plaintiff) A.SH. filed a lawsuit with the Municipal Court in Suhareka requesting that "*the respondent R. A. be obliged to vacate the apartment located in "M.Tito", now "Martyrs", specifically apartment no.1, entrance 1, first floor, within 15 days and the said apartment be handed over to the plaintiff*". However, during the proceedings the plaintiff A.SH. withdrew the claim.

20. Due to this created factual situation, the Municipal Court in Suhareka issued the resolution C.No. 419/87 of 6 January 1988, stating in the enacting clause that:" *The claim and the lawsuit of the plaintiff A. R. Sh., from Mushetisht village against the respondent Rifat Hamiti ....is considered to be withdrawn*" with the reasoning that "*as they agreed on this issue with the respondent to this manner of using the apartment*".

B. The second claim

21. On 9 May 2004, the holder of tenancy right (the plaintiff) A.SH. submitted a new claim with the same content to the Municipal Court in Suha Reka, thereby requesting that "*the respondent R. A. be obliged to vacate the apartment located in "M.Tito", now "Martyrs"str., specifically apartment no.1, entrance 1, first floor, within 15 days and the said apartment be handed over to the plaintiff*".

22. This contested procedure against the Applicant as the respondent, was concluded by the Judgment of the Supreme Court in Suhareka C.BR. 94/2004 of 20 March 2006, by which the court rejected the lawsuit as being inadmissible with the reasoning:

> ***„It is rejected the lawsuit and the statement of claim of the plaintiff as the plaintiff on 06.01.1988 waived the lawsuit and the statement of claim for the same issue"***
>
> *"According to the case C.nr. 490/87, and the view in the civil case file it appears that the plaintiff on 17.04.1987 filed with this Court a lawsuit for the vacation of the apartment against the same respondent Rifat Hamiti from Suhareka. In the minutes dated 06.01.1988 it appears that the plaintiff stated that he waived from the lawsuit and the claim so that the Court issued the decision C.nr. 490/87 considering that the lawsuit and the statement of claim of the plaintiff were withdrawn and that resolution is effective since 01.03.1988"*

Proceedings before the court upon request for confirmation of the tenancy right

C. Third claim

23. The holder of the tenancy right (plaintiff) A.SH. filed a new claim with the Municipal Court in Suhareka requesting "*CONFIRMATION that the plaintiff is holder of the tenancy right over the apartment located in "M. Tita" str. 1/1 in Suhareka with area 50,28 m2 on the basis of apartment exchange contract of 20 April 1984...*"

24. Deciding upon the lawsuit of the holder of the tenancy right (plaintiff) A.SH. Municipal Court in Suhareka rendered Resolution C.br. 146/2001 dated 8 May 2002, rejecting the lawsuit as inadmissible with the following reasoning:

"In the preliminary review of the lawsuit based on the attached document of this case the Court found that according to the effective decision C.nr. 419/87 between the same parties in the procedure and for the same judicial case it was considered that the lawsuit and the statement of claim of the plaintiff were withdrawn.

As Article 193 of LCP which is applicable according to UNMIK regulation no. 24/99 provides that when the plaintiff withdraws the claim he cannot file a claim again for the same case therefore the court pursuant to this regulation and applying Article 288 par. 1 of LCP rejected the lawsuit of the plaintiff as inadmissible and decided as in the enacting clause of this decision".

25. Against the Resolution of the Municipal Court in Suhareka C.br.146/2001, of 8 May 2002, the tenancy right holder (plaintiff) A.SH. filed an appeal with the District Court in Prizren on 22 May 2002.

26. The District Court in Prizren by Resolution Ac.br. 167/02, of 21 October 2002, approved the appeal of the plaintiff and quashed the Resolution of the Municipal Court in Suhareka C.br.146/2001, of 8 May 2002, and ordered that the case be remanded for retrial, thereby giving the following reasoning:

"In fact the court rejected the lawsuit considering that it has been previously decided in the same matter and that the plaintiff waived lawsuit in case C.br.419/87 but this court cannot accept this conclusion as being correct because in case C.br.419/97 it was requested that the apartment be vacated, whereas in the present lawsuit he is requesting the confirmation of the tenancy right, in this court's assessment a new legal basis is in question completely different from the previous..."

27. In the repeated procedure, the Municipal Court in Suhareka by Resolution C.br. 211/02,of 21 March 2007, in accordance with Article 84 paragraph 4 and Article 287 paragraph 1 of LCP appointed a temporary representative B. N., a lawyer from Prizren for the Applicant, because the Applicant could not be reached in the address specified in the lawsuit.

28. The temporary representative of the Applicant, lawyer B. N. from Prizren, in principle challenged the claim and the lawsuit, adding that the respondent based on the contract of sale and purchase of the state-owned apartment of 13. 04. 1984 is the owner of the disputed apartment, where according to this contract, the contract on sale purchase of the apartment was preceded by another contract on sale and purchase of a vehicle.

29. In the sense of Article 8 of CPA/ZPP, the court has administered all the registered evidence, including the contract on exchange of apartment no. 360- 84 of 20.04.1982, the contract on sale and purchase of apartment established on 13.04.1984 which is a photocopy and is not certified in the court, then, the contract, of 12.04.1984, on sale and purchase of the vehicle, which is a photocopy but is evident that it is certified by the Court under no. V. no. 336/84. Following the assessment of each of them separately and jointly, the Municipal Court in Suhareka in the Judgment C. no. 211/02 of 17 December 2007, decided that: "**The claim and the statement of claim of the plaintiff are approved as grounded**" for the following reasons:

"The applicable Law on Housing Relations does not recognize the category purchase of the right to use as legal category, and on the grounds of this law the plaintiff is the user of the apartment, and that this is an inalienable right. The alienation of the socially owned apartment is acknowledged only to the owner of the apartment- the provider of the apartment for use, in this specific case the

plaintiff does not have the right to alienate the apartment as the same is the user of it and it is forbidden to sell it respectively to buy it, or in other way to transfer respectively to obtain the right of the ownership of the apartment in contradiction with the provisions of this law.

"The Court assessed in all aspects the argument of the temporary authorized representative of the Applicant, but as such it was rejected as unfounded as the contract on the sale-purchase of the apartment dated 13.04.84 does not produce legal effect as the same it has not been validated in the court while the contract on the sale-purchase of the vehicle drafted on 12.04.1984 is not subject matter of the claim in the lawsuit".

30. The Judgment of the Municipal Court in Suhareka C. no. 211/02, of 17 December 2007, was confirmed by the Judgment of District Court in Prizren Ac. no. 48/08, of 20 January 2011, with the following reasoning :

"The Court of the first instance duly acted when approved the claim statement as in the enacting clause of the challenged judgment. Such a conclusion results from the administered evidence by the Court of the first instance and that of the contract on the exchange of the apartments 04. nr. 360-84 dated 20.04.82, the contract on the sale of the socially owned apartment dated 13.04.1984, not certified in the Court, the contract on the sale and purchase of the vehicle V.no.336/84. From the administered evidence it doubtlessly results that the plaintiff, according to the contract on exchange, is holder of the occupancy right of the mentioned apartment, as in the enacting clause of the challenged judgment and according to the provisions of the Law on the Housing Relations the user of the apartment is not permitted to sell the apartment as the plaintiff is only the user but not the owner".

31. The revision against the Judgment of the District Court in Prizren AC. no. 48/08, of 20 January 2011, was rejected as inadmissible by the Resolution of the Supreme Court of Kosovo rev.I. No. 89/2011, of 5 March 2012, on the grounds that the parties in the proceedings have stated that the value of the dispute is 200 German marks (DM).

Applicant's allegations

32. The Applicant alleges the following:

"The seller - plaintiff A.SH. for the apartment that was subject of the contract and of the mentioned agreement in the Municipal Court in Suhareka, had filed a claim thus establishing the civil case C.nr.419/87, and in the course of proceedings the plaintiff A.SH. withdrew the claim. The withdrawal of the lawsuit is confirmed by the resolution of the Municipal Court in Suhareka C.nr.419/87 dated 06.01.1988"

"In reference to the same case the seller A.SH. as plaintiff, in the same Court according to the case C.nr.146/2011 has initiated the contested procedure against the applicant as respondent, which by decision of the same Court C.nr.146/2011 dated 08.02.2002, the lawsuit was rejected as inadmissible (we are dealing with a res judicata/ adjudicated case)".

"The Applicant considers that the basic principle of the contested procedure "not twice for the same case" has been violated (ne bis in idem)since the plaintiff in the same Court according to the case C. no. 146/2001 initiated a contested procedure against the applicant as respondent. By the resolution of the same court C. no.

146/2001 of 8 May 2002, the claim was rejected as inadmissible (enclosed the resolution C/no/146/2001 of 8 May 2002)".

33. The Applicant further considers that:

> *"...that the Municipal Court in Suhareka violated his rights for a fair and impartial trial and the use of remedy, this is because the Municipal Court in Suhareka has decided on a case that has been previously adjudicated by the judgment and the decision referred in the item II of the referral, hence the Court has violated the prohibition -"not twice for the same case" (ne bis in idem), then the Court assignment of the temporary representative to the applicant without complying with the legal criteria of the LCP prevented the applicant to participate in the review. For all this serious violations of proceedings, were introduced reasons in the revision of the applicant.*
>
> *"...that during the proceedings in the Municipal Court in Suhareke were violated his rights provided by the provisions of the article 21 (General Principles) article 31 (Right to Fair and Impartial Trial) article 32 (Right to Legal Remedies) article 54 (Right to Judicial Protection of the Constitution of the Republic of Kosovo) and article 6 (of the European Convention on Human Rights)".*

34. The Applicant addresses with the Constitutional Court with the following request:

> *"...the Judgment of the Municipal Court in Suhareke C. no. 211/02 of 17 December 2007 and the Judgment of the District Court in Prizren AC. no. 48/08 of 20 January 2011, to be QUASHED.*

Assessment of the admissibility of the Referral

35. The Applicant states that Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Right to Judicial Protection] of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights are the basis for his Referral.

36. Article 48 of the Law on Constitutional Court of the Republic of Kosovo provides:

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

37. Under the Constitution, the Constitutional Court is not a court of appeal when it reviews decisions taken by regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain [GC], no. 30544/96, § 28, European Court on Human Rights [ECHRJ1999-1).

38. The Applicant has not provided any *prima facie* evidence which would point to a violation of his constitutional rights (see Vanek vs. Slovak Republic, ECHR decision on admissibility, Application no. 53363/99 of 31 May 2005). The Applicant does not specify in what way Articles 21, 31, 32, and 54 of the Constitution as well as the Article 6 of EHCR support his Referral, as it is stipulated in Article 113.7 of the Constitution and Article 48 of the Law.

39. The Applicant alleges that his rights have been violated due to the erroneous establishment of the facts by the regular courts, stating that "*the court has violated the*

prohibition -"not twice for the same matter" (ne bis in idem), and by resolution of the same Court C.nr.146/2011 dated 08.02.2002, the lawsuit was rejected as inadmissible (we are dealing with a res judicata/ adjudicated case).

40. From the case file it can be clearly seen that the Resolution of the Municipal Court in Suhareka C.br. 146/2001, of 8 May 2002, for which the Applicant claims that is *res judicata*, has been quashed by the District Court in Prizren through Resolution Ac.br.167/02, of 21.10.2002, where in the reasoning of the Resolution it is explained in details that it was not a new adjudication in the same matter *Ne bis in idem* which the Applicant stated as a basis for filing a Referral with Constitutional Court.

41. In the present case, the Applicant has been provided numerous opportunities to present his case and to challenge the interpretation of the law, which he considers as being incorrect, before the Municipal Court in Suhareka, the District Court in Prizren and the Supreme Court. After having examined the proceedings in their entirety, the Constitutional Court did not find that the pertinent proceedings were in any way unfair or arbitrary (see *mutatis mutandis,* Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

42. Finally, admissibility requirements have not been met in this Referral. The Applicant has failed to substantiate the allegation that his constitutional rights and freedoms have been violated by the challenged decision.

43. Therefore, the Referral is manifestly ill-founded in accordance with Rule 36 (2b) of the Rules of Procedure which provides *"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights".*

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2b) of the Rules of Procedure, in its session held on 6 March 2013, 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;

III. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani