



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

---

Pristine, 6 February 2013  
Ref. No.:RK375/13

## **RESOLUTION ON INADMISSIBILITY**

In

**Case no. KI 89/12**

Applicant

**Brahim Delijaj**

**Constitutional Review of the Judgment of the Supreme Court of Kosovo  
Rev. No. 374/2009 of 2 May 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 applicant is Brahim Delijaj, residing in the village of Lower Ratish, Municipality of Dečan.

### **Challenged Decision**

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, served on the Applicant on 18 June 2012.

### **Subject Matter**

3. The subject matter is the referral of the Applicant on the annulment of the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, and upholding of the Judgment of the District Court in Peja, Ac. No. 83/2008, dated 22 April 2009, related to the right of permanent servitude.

### **Legal Basis**

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court (hereinafter: the Law) and Rule 56 (2) of Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

### **Proceedings before the Court**

5. On 4 October 2012, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. By decision of the President No. GJR. KI 89/12 of 31 October 2012, Judge Arta Rama-Hajrizi was appointed as Judge Rapporteur. On the same date, by decision of the President No. KSH. 15/12, the Review Panel was appointed, composed of Judges: Almiro Rodrigues (presiding), Kadri Kryeziu (member), and Prof. Dr. Enver Hasani (member).
7. On 19 November 2012, the Constitutional Court notified the Applicant and the Supreme Court of Kosovo on the registration of the Referral.

### **Summary of the Facts**

8. In his Referral, the Applicant claims to be the owner of the cadastral parcel No. 114, total surface area 0.08,24 hectares, in the village of Lower Ratish, Municipality of Deçan. According to the documents attached to the Referral, on its eastern side, this parcel borders on cadastral parcel No. 111, registered in the name of the late Sejd Hasan Delijaj, father of Isuf, Përparim and Hasan Delijaj, who are users and possessors thereof, and also cousins of the Applicant. on the north-eastern angle of the parcel, there is a yard door belonging to the Applicant, connected to the public road, and passing through the cadastral parcel No. 111 of 8 meters length and 4 meters width, also located in the village of Lower Ratish, Municipality of Deçan.
9. On 18 August 2004, the Applicant filed a claim with the Municipal Court in Deçan demanding recognition of the right to permanent servitude on parcel no. 111. The Applicant, on 5 July 2007, based on cadastral records, clarified his submission thereby claiming that he is the owner of parcel No. 114/2, surface area of 0.04.12 hectares.

10. The Municipal Court in Deçan, by judgment C. No. 130/06, of 19 December 2007, pursuant to Article 59 of the Law on Property Relations, rejected the claim of the Applicant as ungrounded, thereby finding that the Applicant was not isolated, and had normal communication and connection with the public road of the village. The Municipal Court in Deçan reasoned further that the Applicant, in the case of the division of property between him and his brother, had not exercised the servitude right of passage for 35 years, and also failed to secure the passage way.
11. The Applicant filed a complaint against the Judgment of the Municipal Court with the District Court in Peja. By Judgment Ac. No. 83/08, of 22 April 2009, the District Court approved the claim of the Applicant, only as to the part regarding the recognition of the existence of a permanent servitude right of passage through the western side of the cadastral parcel No. 111.
12. The District Court in Peja, by judgment AC. No. 83/08, of 22 April 2009, reasoned that “it does not approve as legitimate and proper the legal stance of the court of first instance”. The District Court further found that [...] *“in this legal case, the decisive fact was ascertained that the extent and magnitude of exercise of servitude rights by the claimant were changed, nevertheless, this does not lead to the finding that the claimant has not used the contested passage”, and in conclusion, it found that [...] “in this legal case, substantive law was erroneously applied [...]”*.
13. The opposing party filed a revision against the Judgment of the District Court in Peja with the Supreme Court of Kosovo, claiming essential violations of the provisions of contested procedure, and erroneous application of substantive law.
14. The Supreme Court, by judgment Rev. No. 374/2009, of 2 May 2012, served on the Applicant on 18 June 2012, accepted the revision filed by the respondents as grounded, thereby amending the judgment of District Court in Peja, and upholding the judgment of the Municipal Court, reasoning that the District Court erroneously applied the substantive law. The Supreme Court, in its reference to Article 49, paragraph 1, Law on Property Relations further reasoned that [...] *“the real servitude is the right of an owner of an immoveable property (dominant estate) to undertake certain actions, for the needs of such property, into the immoveable property of the other owner (servient estate), or to require from the serving property owner to refrain from actions which otherwise would be entitlement of that owner in his immoveable property, which ultimately implies that persons who are not owners of the served property are not entitled to claim judicial protection.”* The Supreme Court, in its judgment, concludes that *“the possessor of the parcel who is not an owner is not entitled to claim ascertainment of the existence of rights to real servitude of passage against the owner of the servient estate.”*
15. On 7 July 2012, the Applicant filed a proposal with the State Prosecutor to initiate the request for protection of legality against the Supreme Court Judgment.

16. The State Prosecutor, on 30 July 2012, upon review of the case, rejected the initiation of a request for the protection of legality. In its notice, the State Prosecutor considered that [...] *“in this civil case, the Supreme Court rendered a judgment acting upon the revision of the respondents, and a Request for Protection of Legality is not allowed against such judgment.”*

### **Applicable law applied by the Supreme Court**

17. The Law on Contested Procedure (Law no. 03/L-006), Article 182, paragraphs 1 and 2, and Article 224, paragraph 1, provide the following:

*“182.1 Essential violation of contested procedures provisions shall exist in cases in which the court, during procedure, fails to apply or erroneously applies the provisions of this law, thereby affecting a rightful legal decision.*

*182.2 Essential violation of contested procedures provisions shall always exist; n) if the decision contains flaws due to which it cannot be examined, especially if the enacting clause of the decision is incomprehensive or contradictory in itself with the reasoning of the ruling, or the ruling fails to reason or to provide reasoning on decisive facts, or such reasoning is unclear, contradictory, or in ascertaining decisive facts, there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;*

*224.1 If the court of revisions ascertains that the material good right was applied wrongfully, through a decision it approves the revision presented or changes the decision attacked.”*

18. The Law on Basic Property Relations, of 30 January 1980 (published in the Official Gazette no. 6/80), Article 49, paragraph 1, and Article 59, provides:

#### Article 49, Paragraph 1

*“The real servitude is the right of an owner of an immovable property (served property) to undertake certain actions, for the needs of such property, upon the immovable property of the other owner (serving property), or to require from the serving property owner to refrain from actions which otherwise would be the entitlement of that owner upon his immovable property, which ultimately implies that persons who are not owners of the served property are not entitled to claim judicial protection.”*

#### Article 59

*“In case of division of served property, the real servitude shall remain on all its divisions.*

*The owner of the serving party may require ceasing of the real servitude of owner of any part of the served property divided, if such real servitude does not serve such division of property.*

*In case the serving property is divided, real servitude shall remain only on parts upon which it is exercised.”*

## **Allegations of the Applicant**

19. As stated above, the Applicant claims that the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, rejecting the revision filed, has violated his constitutionally guaranteed rights, specifically Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 121 [Property] of the Constitution, and Article 6.1 [Right to fair and impartial trial] of the European Convention on Human Rights (hereinafter: ECHR).
20. The Applicant requests the Constitutional Court to annul the judgment of the Supreme Court Rev. No. 374/2009, of 2 May 2012, thereby upholding the Judgment of the District Court in Peja, Ac. No. 83/2008 of 22 April 2009.

## **Admissibility of the Referral**

21. In order to be able to adjudicate the Applicant's Referral, the Court has first to examine whether the Applicant has met the admissibility criteria, which are foreseen by the Constitution as further specified by the Law and the Rules of Procedure.
22. The Court must first examine whether the Applicant is an authorized party to submit a referral with the Court, in accordance with the requirements of Article 113.7 of the Constitution.

Article 113, paragraph 7 of the Constitution 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."*

In relation to this Referral, the Court notes that the Applicant is a natural person, and is an authorized party in accordance with Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution.

23. The Court must also determine whether the Applicant, in accordance with the requirements of Article 113 (7) of the Constitution, and Article 47 (2) of the Law, has exhausted all legal remedies available to him under Kosovo law. In the present case, the Court notes that the complaints and revision have been filed by the Applicant according to the procedure stipulated by Law, namely with the Municipal Court in Deçan, the District Court in Peja, and the Supreme Court of Kosovo, thereby exhausting all legal remedies, in compliance with Article 113.7 of the Constitution.
24. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law in relation to the submission of the Referral within the legal time limit. It can be seen from the case file that the Decision of the Supreme Court was served on the Applicant on 18 June 2012, while the Applicant filed the Referral with the Court on 4 October 2012, meaning that the Referral was

submitted within the four month time limit, as prescribed by the Law and the Rules of Procedure.

25. In relation to the Referral, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

*“(1) The Court may review referrals only if: c) The referral is not manifestly ill-founded.”*

26. Based on the Applicant’s submissions, the Court notes that the reasoning provided in the decision of the Supreme Court is clear, and that, after having reviewed the entire procedure, the regular court proceedings have not been unfair or arbitrary (See, *mutatis mutandis*, *Shub v. Lithuania*, Decision of the European Court of Human Rights on admissibility of referral, no. 17064/06, of 30 June 2009).
27. The Court recalls that the Constitutional Court is not a fact-finding court and, in this case, it states that the full and fair ascertainment of the factual situation is in the jurisdiction of regular courts, and that its role is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments (See, *mutatis mutandis*, i.a., *Akdivar v. Turkey*, 16 September 1996, R. J. D, 1996-IV, para. 65).
28. The Court further recalls that the Constitutional Court is not a court of fourth instance, when considering decisions taken by regular courts. It is the mandate of regular courts to interpret and apply rules of procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain [DHM]*, no. 30544/96, para. 28, *European Court on Human Rights [ECHR] 1999-I*. See also, *Resolution on Inadmissibility in the case No. 70/11, Applicants Faik Hima, Magbule Hima and Besart Hima, Constitutional review of the Supreme Court Judgment, A. No. 983/08, of 7 February 2011*).
29. The fact that the Applicant is not content with the outcome of the Supreme Court decision does not entitle him to raise an arguable claim as to the violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 121 [Property] of the Constitution, and Article 6.1 [Right to Fair and Impartial Trial] of the ECHR (See, *mutatis mutandis ECHR Judgment Appl. No. 5503/02, Meztur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005).
30. In conclusion, based on the facts provided by the Applicant, the Court notes that the Applicant has not submitted any *prima facie* evidence demonstrating a violation of his rights guaranteed by the Constitution (See, *mutatis mutandis, Vanek v. Republic of Slovakia*, EHCR decision on admissibility of referral, no. 53363/99, on 31 May 2005).
31. Consequently, the Referral is manifestly ill-founded, in compliance with Rule 36.2 (b) and (d) of the Rules of Procedure.

## FOR THESE REASONS

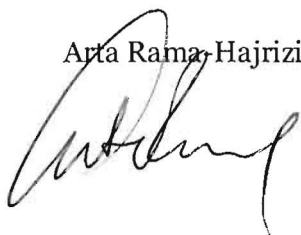
The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of Law and Rule 36.2 (b) and (d) of the Rules of Procedure, on 29 January 2013, unanimously:

### 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  
Court**

Arta Rama Hajrizi



**President of the Constitutional**

Prof. Dr. Enver Hasani

