



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

Pristina, 17 August 2011
Ref. No.: RK 134/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 18/10

Applicants

Mr. Denic D. Mladen and Mr. Vitkovic-Denic D. Milorad

**Constitutional Review of the Decision of the Supreme Court of Kosovo, Cml.-
Gzz. br. 36/2007, dated 13 December 2007**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Mr. Denic D. Mladen and Mr. Vitkovic-Denic D. Milorad, residing in Kraljevo, Serbia, represented by Mr. Vitkovic M. Branislav, a practicing lawyer in Kraljevo, Serbia.

Challenged decision

2. The challenged decision is Decision Cml.-Gzz. br. 36/2007 of the Supreme Court of Kosovo, dated 13 December 2007, which was served upon the Applicants on 21 January 2008.

Subject Matter

3. The Applicants allege that the decision of the Supreme Court is in violation of Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to a Fair and Impartial Trial], Article 32 [Right to Legal Remedies], and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: “the Constitution”).

Legal Basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: “the Law”) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: “the Rules of Procedure”).

Proceedings before the Court

5. The Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”) on 24 February 2010.
6. On 15 March 2010, the President of the Constitutional Court, by Order No.GJR. 18/10, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Constitutional Court, by Order No.KSH. 18/10, appointed the Review Panel consisting of Judges Kadri Kryeziu (Presiding), Iliriana Islami and Gjyljeta Mushkolaj.
7. On 12 April 2011, the Review Panel, consisting of Kadri Kryeziu (Presiding), Iliriana Islami and Gjyljeta Mushkolaj considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. The Applicants are the exclusive legal heirs of Mr. Danic Dragoljub, their late father, who was the owner of k.p. 1536/1, a plot of land in Jagnjilo, KZ Pristina. On 20 July 1946, 3 December 1947 and 20 August 1953, multiple sections were expropriated without compensation.
9. Ownership of the land was officially transferred by a contract between the owner (Danic V. Dragoljub) and the General Agricultural Cooperative “Gomje Dobrevo.” This contract was signed on 12 June 1961 and certified by the District Court in Pristina on 30 October 1962. The contract terms provided Mr. Dragoljub with 100,000 dinars (2,533.84 Euro in today’s currency) as compensation for the land.
10. On 29 January 1964, “Gomje Dobrevo” was attached to the Industrial Agricultural Cooperative “Kosovo-Export” from Kosovo Polja. As a result, “Kosovo-Export” gained ownership of the land.

11. On 21 February 1997, the Municipal Court of Pristina issued Judgment P.br. 395/96, which transferred the right of ownership of the land to Mitrovic Pane Marko. At a later stage, Judgment P.br. 395/96 was discovered to be a forged document, as confirmed by the District Public Prosecutor in Pristina by ruling PP.br. 415-1/2005. Nonetheless, before the Judgment was known to be fake, the Office of Cadastre and Geodesy in the Municipality of Pristina used that faked Judgment as the basis for transferring the ownership of the land to Marko on 20 August 1998 (br. 208/03).
12. On 7 March 1997, the Applicants filed a law suit with the Municipal Court of Pristina (P.br. 236/97), requesting restitution of the land of their predecessor. These proceedings remained suspended during the war.
13. On 19 March 2004, Marko sold the land to two buyers.
14. On 4 December 2006, the Applicants re-filed the law suit with the Special Chamber of the Supreme Court for Kosovo Trust Agency Related Matters. By decision SCC-06-0498 of 31 January 2007, the Special Chamber granted authority to the Municipal Court of Pristina to act as the court of first instance, but also mandated that any appeals should be filed with the Special Chamber.
15. On 16 April 2007, the Municipal Court of Pristina ruled, by Decision P.Gr. 236/97, that the 12 June 1961 contract transferring the disputed land to "Gomje Dobrevo" had been concluded under coercive conditions, thus rendering the contract null and void and that Marko's right to ownership had been dissolved by the fact that the court decision, which he had used to obtain ownership of the land, had been forged.
16. Therefore, the Court held that the last legitimate owner of the land was the predecessor of the Applicants and returned the right of ownership to the Applicants. The Court also held that the Applicants were under the obligation to reimburse the compensation received by their predecessor (2,533.84 Euro) to Kosovo Export.
17. According to the Municipal Court, this decision would become final (*res judicata*) 15 days after receipt of the decision. The Applicants received their copy of the Municipal Court's decision on 20 April 2007. Therefore, according to the directive of the Municipal Court, the decision should be regarded as final as of 5 May 2007, whereas, according to the UNMIK Rules, the decision should be regarded as final as of 20 June 2007. In their Referral, the Applicants calculate the time period for the decision having become "*res judicata*" by using the UNMIK Rules.
18. On 6 July 2007, after the decision of the Municipal Court had become "*res judicata*" according to the Rules of both the Municipal Court and UNMIK, the Public Prosecutor submitted a Request for the Protection of Legality against the Judgment of the Municipal Court P.br. 236/97 with the Supreme Court. The Applicants were not a party to these proceedings.
19. On 13 December 2007, the Supreme Court issued Decision Cml-Gzz br. 36/2007, which annulled Judgment P.br. 236/97 of the Municipal Court and returned the law suit for retrial to the Court of first instance.
20. The hearing in that case has apparently not yet taken place.

Applicant's Allegations

21. The Applicants claim that the Public Prosecutor did not have the right to submit a Request for Protection of Legality.

22. The Applicants further claim that the Public Prosecutor did not file the appeal in the correct court and assert that only the Special Chamber of the Supreme Court had competence to hear the appeal, as indicated in Decision SCC-06-0498 of the Special Chamber.
23. The Applicants also claim that the Public Prosecutor's appeal was not filed within the time limit prescribed by the Rules of the Special Chamber.
24. For the above reasons, the Applicants allege that the decision of the Supreme Court, Cml.-Gzz. br. 36/2007, of 13 December 2007 violates Articles 22(1) [Universal Declaration on Human Rights], 22(2) [European Convention for the Protection of Human Rights] and 22(5) [Convention on Elimination of All Forms of Racial Discrimination] of the Constitution, respectively.
25. The Applicants also claim that the Supreme Court decision violates Article 31 [Right to Fair and Impartial Trial], paragraph 1 of the Constitution, which provides: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*
26. The Applicants further claim that the Supreme Court decision violates Article 32 [Right to Legal remedies] of the Constitution, which states: "Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."
27. Finally, the Applicants assert that the Supreme Court decision violates Article 46 [Protection of Property], paragraph 1 of the Constitution, providing: "The right to own property is guaranteed."
28. The Applicants request the Constitutional Court to quash the Decision of the Supreme Court Cml.-Gzz. br. 36/2007 of 13 December 2007 and to restore the decision of the Court of first instance, P.br. 236/97 of 16 April 2006.
29. The Applicants also seek interim measures that prohibit the Municipal Cadastre Office (Pristina) to administer any property ownership changes regarding the disputed land, prohibiting the Department of Urban Planning from issuing building permits on the land, and preventing the construction of any civil works thereon.

Assessment of the request for Interim Measure

30. The Applicants have requested the Court to impose interim measures on the Municipal Cadastre Office.
31. However, the Court considers that the submissions of the Applicants do not contain sufficient evidence or reasons, which might justify the imposition of interim measures. In particular, the Applicants have not shown, as required by Article 27 of the Law, that they will suffer irreparable damage, if interim measures are not granted. Moreover, it has not been established that the imposition of interim measures would be in the public interest.
32. Therefore, the requirements for the imposition of interim measures are not satisfied and the Applicants' request must be rejected.

Assessment of the admissibility of the Referral

33. As to the Applicants' complaint that they have been deprived of their property by Decision Cml.-Gzz br. 36/2007 of the Supreme Court dated 13 December 2007, the Court

notes that, in order to adjudicate the Applicants' Referral, it must first be examined whether the Applicants have fulfilled the admissibility requirements laid down by the Constitution, the Law and the Rules of Procedure.

34. From their submissions it appears that the Applicants were served with the decision of the Supreme Court on 21 January 2008, that is to say, before the entry into force of the Constitution, and that they submitted their Referral to the Court on 24 February 2010.
35. The Court must, thus, first establish, whether the matters raised in the Referral "fall under its jurisdiction". In this respect, the Court considers that the public authorities of the Republic of Kosovo can only be required to answer to facts and acts which occurred subsequent to the entry into force of the Constitution on 15 June 2008. Accordingly, the Court cannot deal with a Referral relating to events that occurred before the entry into force of the Constitution.
36. As to the present Referral, the Court notes that it deals with issues, which happened before 15 June 2008 and, thus, fall outside the Court's jurisdiction. The Court would, therefore, have to reject the Referral as incompatible *ratione temporis*.
37. Even assuming that there might be a continuing situation in the present case, if the violation of the Constitution was caused by an act committed prior to the entry into force of the Constitution and the consequences of that original act still exist, granting the Court jurisdiction to examine the complaint, the Referral is inadmissible.
38. At the proceedings on 13 December 2007, where the Applicants were not present, the Supreme Court allowed the State Prosecutor's Request for Protection of Legality, annulled the Judgment of the Municipal Court of 16 April 2006 and returned the case to the Municipal Court for retrial. So far, the Applicants have not submitted any evidence showing that the Municipal Court has already scheduled a hearing and has taken a decision on the matter, let alone that they have raised the same complaints, at least implicitly or in substance, before the Municipal Court as they have done before this Court.
39. In this connection, reference is made to Article 113.7 of the Constitution and 47(2) of the Law, according to which individuals, who submit a referral to the Court, must show that they have exhausted all legal remedies available under the applicable law.
40. The Court emphasizes that 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. This rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, *mutatis mutandis*, ECHR, *Azinas v. Cyprus*, no 56679/00, decision of 28 April 2004).
41. This Court applied the same reasoning, when it issued Resolution on Inadmissibility in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case KI 41/09 of 27 January 2010, and in the Resolution on Inadmissibility in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. 73/09 of 23 March 2010.
42. As to the present case, it is clear from the Applicants' submissions, that, so far, they have not raised or pursued the alleged violations in the pending proceedings before the Municipal Court or before any higher instance courts, if their claim before these regular

courts would not be successful, then the Applicants' can bring a new Referral before this Court.

43. It follows, that the Applicants have 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.

FOR THESE REASONS

The Court decides, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56(2) of the Rules of Procedure, decides, in its session held on 12 April 2011, unanimously,

DECIDES

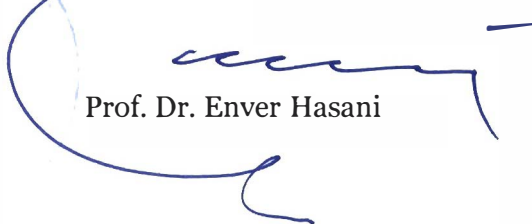
- I. TO REJECT the Request for Interim Measures;
- II. TO REJECT the Referral as inadmissible;
- III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court; and
- IV. This Decision is effective immediately.

Judge Rapporteur



Snezhana Botusharova

President of the Constitutional Court



Prof. Dr. Enver Hasani