



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 6 November 2017
Ref. No.: RK 1149/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI29/16

Applicant

Afërdita Gashi-Sinanaj

**Constitutional review of Judgment Rev. No. 236/2015 of the Supreme
Court of Kosovo, of 5 October 2015**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicant is Afërdita Gashi - Sinanaj, from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. No. 236/2015 of the Supreme Court of Kosovo of 5 October 2015, which was served on the Applicant on 18 November 2015.

Subject matter

3. The Applicant requests the constitutional review of the challenged Judgment, which allegedly has violated her right to fair and impartial trial and the right to property [Article 31, namely Article 46 of the Constitution].

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 11 February 2016, the Applicant submitted the Referral through mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 14 March 2016, the President of the Court by Decision appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Artta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 11 October 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.
8. On 30 May 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 17 November 2011, the Municipal Court in Prishtina rendered Judgment C. No. 610/2010, which approved the statement of claim of claimant SH.H. as grounded and confirmed that he is entitled to the right of using the property-land in Prishtina based on the sale-purchase contract VR. No. 2712/2000, of 10 October 2000 concluded between him as a buyer and a lawyer H.S., who with the power of attorney represented SH.A. (now deceased) the owner of the immovable property.
10. By the Judgment as above in item III, the Court found that the contract for sale-purchase concluded and certified in the Municipal Court in Prishtina, on 25 April 2001 between the spouse of the owner SH.A., now deceased, in the capacity of a seller, who claimed to be the owner of the same land on the basis of inheritance according to Decision T. No. 69/2001 of 23 March 2001, and here, the Applicant in the capacity of a buyer.

11. On 9 December 2013, the Applicant and SH.A. filed appeal with the District Court in Prishtina on the grounds of: a) violation of the contested procedure provisions, and b) erroneous application of the substantive law.
12. On 3 March 2015, the Court of Appeal of Kosovo, by Judgment AC. No. 3055/12 rejected the Applicant's appeal as ungrounded and upheld the Judgment of the first instance court.
13. On 24 April 2015, the Applicant submitted to the Supreme Court of Kosovo a request for revision on the grounds of the substantial violation of the contested procedure provisions and the erroneous application of the substantive law.
14. On 5 October 2015, the Supreme Court of Kosovo by Judgment Rev. No. 236/2015, rejected the Applicant's request for revision as ungrounded.

Applicant's allegations

15. The Applicant alleged that she had no knowledge of a lawsuit filed against her, she did not attend at all the first instance trial, and further emphasized that the Court of Appeal and the Supreme Court failed to properly assess the key fact to this process, which is the legal action of the authorized representative (lawyer) to enter into a sale-purchase contract on behalf of the grantor of authorization almost a year after the authorization provider (the landowner for whom the dispute was conducted) had died.
16. The Applicant further alleges that in a completely legitimate manner she has become the owner of the disputed immovable property and registered it without any obstacles in the cadastral books and had taken the possession of it. According to her, the court decisions clearly violated Articles 31 and 46 of the Constitution.

Admissibility of Referral

17. In order to adjudicate the Applicant's Referral, the Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and the Law on the Constitutional Court and further specified in the Rules of Procedure of the Court.
18. In this regard, the Court refers to Article 113.7 of the Constitution which establishes:

“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.”
19. In addition, the Court takes into account Article 48 of the Law on the Constitutional Court regarding the accuracy of the Referral, which stipulates that:

“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.”

20. The Court also takes into account Rule 36 of the Rules of Procedure, where it is determined:

(1) “The Court may consider a referral if:

(...)

(d) the referral is prima facie justified or not manifestly ill-founded.

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.”

21. Based on the foregoing, the Court finds that the Applicant filed an individual referral after exhausting all available legal remedies within the time limit provided for in Article 49 of the Law, and, therefore, the Court will examine the merits of the case in relation to the allegations raised for constitutional violations.

22. The Court recalls that Article 53 of the Constitution obliges the Constitutional Court that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights,”* therefore, in the course of the case review, this practice will be taken into consideration.

23. In light of the allegations raised in the Referral, the Court finds that the Applicant challenged Judgment Rev. No. 236/2015 of the Supreme Court of Kosovo of 5 October 2015 which was a final decision, emphasizing that the right to fair and impartial trial and the right to property, guaranteed by the Constitution of Kosovo have been violated, which in the relevant part for the case, have this content.

Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[.....]

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. *Use of property is regulated by law in accordance with the public interest.*

3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

[.....]

24. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in its entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia, mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).
25. Although in the judgments of the regular courts the Court noticed some repeated errors such as the date of certification of the sale-purchase contract concluded between the Applicant and SH.A., somewhere is stated as 25 April 2014 and somewhere as 25 January 2014, or in the court decisions of various instances the names of the parties to the proceedings are mixed. However, the Court notes that in principle it is not its task to deal with errors of fact or law, committed by the regular courts, unless and insofar as that such errors may have infringed the rights and freedoms protected by the Constitution (See case *Garcia Ruiz v. Spain*, Application no. 30544/96 [GC], Judgment of 21 January 1999, para. 28). Therefore, in this respect, the constitutional control over the court decisions is limited only for the purpose of protecting the constitutional rights of an individual.
26. Regarding the foregoing, the Court notes that the Applicant claimed that the Judgment of the Supreme Court regarding the revision, but also other judgments of the regular courts, did not respect the guarantees of Article 31 of the Constitution, because of not notifying her of the proceedings initiated against her, and, consequently, her non-participation in the first instance trial and also because of insufficient reasoning of the court decisions on the key facts, because the regular courts have failed to clearly explain the key element of the process of certification of the sale-purchase contract in the Municipal Court in Prishtina by an authorized lawyer who used the power of attorney almost a year after the death of the grantor of the authorization.
27. In this regard, the Court finds that the Municipal Court in Prishtina in its Judgment C. No. 610/2010 in the reasoning part emphasized: "*The deceased person – Sh.A. has granted authorization to the Attorney-at-Law H.S. from Prishtina, for the sale of the contested immovable property, an authorization which was registered under the number 5/99, of 10 February 1999 at the Municipal Court in Prishtina, where after this, the deceased Sh.A. has passed away on 14 December 1999 in Prishtina. Following the death of Sh.A., the*

claimant concludes a contract on the purchase of the contested immovable property and the representative of Sh.A., a contract which was certified at the court under the number VR. No. 2712/2000, of 10 February 2000."

28. The Municipal Court further reasoned: *"The respondent (the spouse of the deceased SH.A.), following the death of Sh.A., reviewed the inheritance and on the basis of Decision T. No. 69/2001 of 23 March 2001, she is declared as inheritor and she sells this immovable property to Afërdita Gashi from Prishtina by Contract VR. No. 2172/2001, of 15 January 2001 and delivers this immovable property in her possession and use."*
29. Regarding the issue of the validity of the power of attorney and its use by the lawyer after the death of the grantor of the authorization, the court reasoned: *"After the deceased Sh.A. passed away on 14 December 1999, whereas on the basis of the authorization granted on 10 February 1999, the claimant has confirmed the signatures in the contract at the Municipal Court in Prishtina by number VR. No. 2712/2000 of 10 February 2000, therefore when Sh.A. was not alive any more, and in terms of the provision of Article 94, paragraph 3 of LCT, this authorization is valid in cases when a transaction already commenced cannot be interrupted without causing damages to the legal successors or by taking into account the character of the transaction and the intention of the grantor of authorization."*
30. The Court of Appeal, by rejecting the Applicant's appeal, by Judgment AC. No. 3055/12, fully accepted the assessment of the first instance court and in the judgment *inter alia* stated: *"In this situation of the legal – civil matter, this court assessed the conclusion of the first instance court and found that it is fair and grounded, that it has a basis on the conducted pieces of evidence and in the case files, and that justifiable reasons have been provided which are accepted by this court as well."*
31. This court reasoned that *"Moreover, this court considers that the first instance court has not committed a violation of the provisions of the contested procedure, for which this court takes care ex officio and that it has determined the factual situation correctly and completely as it has also applied the substantive law in a correct manner"*.
32. The Court further notes that the Supreme Court deciding upon the Applicant's request for revision has concluded: *"The Supreme Court of Kosovo assessed that the lower instance courts, on the basis of the correct and complete determination of factual situation, have correctly applied the provisions of the contested procedure and the substantive law; that the challenged Judgment and the judgment of the first instance court do not contain essential violations of the provisions of the contested procedure, for which this court acts ex officio; that the lower instance courts in their Judgments have provided sufficient reasons for the decisive facts, for a fair adjudication of this legal matter, which are accepted by this Court as well."*
33. The Court finds that the Supreme Court in the Judgment related to the revision referred to the issue of authorization specifically challenged by the Applicant ascertaining that: *"now the deceased Sh.A. has authorized the Attorney-at-*

Law Halim Sylejmani from Prishtina, to take all necessary procedural actions for a confirmation of the purchase contract before the court and transfer all the ownership rights to the claimant, an authorization which was confirmed at the court by number Vr. No. 5/99, of 10 February 1999, where afterwards, on 14 December 1999, Shaip Hamidi passes away, as grantor of authorization.”

34. In the present case, the Court notes that the Supreme Court by the challenged Judgment decided to reject the request for revision by supporting the determination of the factual situation and the law applied by the lower instance courts and also extensively elaborated the Applicant's allegations regarding all matters raised, by giving answer to the challenged authorization as well as the validity of the sale-purchase contract on immovable property that was the object of the dispute.
35. The Court also finds that the allegation of non-participation in the court hearing as another ground raised for violation of the right to fair and impartial trial, was answered by the Municipal Court in Prishtina concluding that the Applicant was regularly summoned in the court hearings and she did not justify her absence in any way “*so the court within the meaning of Article 423.4 of the LCP held the main hearing in her absence.*”
36. In these circumstances of the case, when the key issues raised by the Applicant were extensively reviewed by the regular courts, when three judicial instances provided legal assessment and legal solution to the dispute between the parties, the Court could not find that there was a violation of Article 31 of the Constitution regarding the right to fair and impartial trial.
37. As it is assumed that the violation of Article 46 (Protection of Property) was committed as a result of unfair and impartial trial, accordingly, the Court does not find violation of Article 46 of the Constitution.
38. Based on the principle of subsidiarity, the Court cannot take the role of the fourth instance court and it does not adjudicate on the final outcome of the court decisions (see: *Fc Metrebi v. Georgia*, par. 31, Judgment of ECHR, of 31 July 2007), while judging by the circumstances of this case, the Applicants' primary goal seems to have been precisely the challenging of the outcome of the court proceedings.
39. Based on the aforementioned, the Court finds that the facts presented by the Applicant do not in any way justify the allegation of violation of the right to fair and impartial trial and the right to property, therefore, pursuant to Rule 36 paragraph (2), item (b) and (d), finds that the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 of the Law, and Rules 36 (2) (b), (d) and 55 (4) of the Rules of Procedure, in the session held on 30 May 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi