



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

Prishtina, on 30 November 2010
Ref. No.: RK 66/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 48/09

Jusuf Hashani

Assessment of the constitutionality of the

Supreme Court of Kosovo Resolution A Nr. 847/08

and

Supreme Court of Kosovo Resolution Mlc Nr. 43/2007

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
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Jusuf Hashani, residing at 26-A Pashko Vasa Str., Prishtina.

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.no.874/08, dated 28.08.2009 and the Decision of the Supreme Court of Kosovo Mlc no. 43/2007, dated 21.07.2009.
3. The Applicant claims that the Supreme Court of Kosovo, by REJECTING his suit concerning an Administrative Dispute for the assessment of legality of Decision 01 No. 07-5400, dated 26.05.2008, violated his constitutionally-guaranteed rights that he specified, in a general fashion, as violation of individual rights as per Article 113.7 of the Constitution and Article 47 of the Law on the Constitutional Court of the Republic of Kosovo.
4. In fact, the Applicant sought, through the suit before the Municipal Court of Prishtina, the withdrawal of the contract on the gift of immovable property, entered into between the Applicant, in the capacity of gift transferor, and his son, Mr. Shemsedin Hashani, in the capacity of gift recipient, which latter on led to the dispute before the Supreme Court of Kosovo.

Legal basis

5. Article. 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Summary of the proceedings before the Constitutional Court

6. On 05 October 2009, the Applicant lodged a Referral before the Constitutional Court. On 22 October 2009, the Court Secretariat informed the Applicant that his Referral was registered in the respective register as Case No.48/09, and that it shall be proceeded for adjudication in conformity with the Court's Rules of Procedure.
7. On 18 February 2010, the Constitutional Court sent a letter to the Supreme Court, requesting a reply in relation to the present referral.
8. On 03.03.2010, the Supreme Court submitted its reply in writing to the Constitutional Court of Kosovo, registered as No.AGJ 71/2010, which contained the Supreme Court's reasoning and clarification as well as the public decision served on the parties.
9. On 19.05.2010, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur for this case.
10. On 22.06.2010, the Constitutional Court sent a request in writing to the Municipal Court in Prishtina, requesting the copies of the case file before the Municipal Court under the number 1266/07, and which concerns the civil dispute for the annulment of the contract on gift.
11. On 16.07.2010, following the review of the report by Judge Rapporteur Altay Suroy, the Review Panel, composed of Judge Kadri Kryeziu (presiding), Judge Almiro Rodrigues and Judge Ivan Cukalovic, presented its recommendation before the full Court to reject the referral as inadmissible.

Facts

12. On 28.02.2009, Mr. Jusuf Hashani from Prishtina, in the capacity of the gift transferor, signed a contract on gift with his son, in the capacity of gift recipient, through which he granted him (the gift recipient) the immovable property evidenced in the possession list no.5971, cadastral zone Prishtina, plot 6916/12, in the total area of 52 square metres. The contract was confirmed by the signatory parties before the Municipal Court in Prishtina as no.VR.no.798/89, dated 24.03.1989.
13. On 22.05.2007, Mr. Jusuf Hashani filed a suit before the Municipal Court in Prishtina, requesting the withdrawal of the contract on gift based on the reasoning that he was very impoverished and requested from the Court to adopt its suit and to restore him the immovable property in question.
14. This suit was filed before the Municipal Court in Prishtina 17 years and 10 months after the legal deadline.
15. On 23.05.2007, i.e. on the next day, Mr. Jusuf Hashani filed before the Municipal Court in Prishtina the request for the imposition of interim measure to prohibit the alienation of the immovable property in question and to prohibit any construction on the immovable property until the conclusion of the court process.
16. In its Decision 780/07, dated 30.05.2007, the Municipal Court imposed the interim measure prohibiting the debtor, Mr. Shemsedin Hashani, the sale of the immovable property (house and courtyard) evidenced in the possession list no.5971, cadastral zone Prishtina, plot 6916/12 in the place called "R.Gajdiku".
17. The debtor, Mr. Shemsedin Hashani, filed an objection within the legal deadline against the Decision imposing the interim measure, and requested the adoption of this objection. The Municipal Court in Prishtina, through its Decision 780/07, dated 10.08.2007, suspended the previous Decision imposing the interim measure and terminated all executive proceedings.
18. The District Court in Prishtina, in its Decision Ac. no. 748/2007, dated 30.10.2007, confirmed the Decision of the Municipal Court for the suspension of the interim measure and termination of all executive proceedings.
19. On 16.11.2007, Mr. Jusuf Hashani filed a Request for the Protection of Legality before the Public Prosecutor's Office of Kosovo against the aforementioned decisions of the Municipal and District courts.
20. On 04.12.2007, the Public Prosecutor's Office of Kosovo filed the Request for the Protection of Legality before the Supreme Court of Kosovo PCK. No.135/07.
21. The Supreme Court of Kosovo, acting as per the request of the Public Prosecutor's Office, in its Decision Mlc. no. 43/2007, REJECTED as inadmissible the request against the Decision Ac.no.748/2007 of District Court in Prishtina, dated 30.10.2007, and the Decision E.no.780/2007 of the Municipal Court in Prishtina, dated 10.08.2007, which means that practically and legally the matter of imposition of the interim measure was terminated with the aforementioned Decision of the Supreme Court.
22. The debtor, Mr. Shemsedin Hashani, considering that the annulment of the interim measure posed no legal obstacles for constructions in the property in his possession, on 06.11.2007 signed a contract on joint construction with Mr. Avni

Maxhuni and both then filed a request for a construction license, which included the area that was the subject of the contract on gift. The request for a construction license was approved based on the Decision 05 no. 351-24646, dated 29.02.2008, by the Directorate of Urbanism, Cadastre and Protection of Environment of the Municipality of Prishtina.

23. Mr. Jusuf Hasani, in the capacity of the interested party, filed a complaint before the Municipality of Prishtina. The complaint was rejected as ungrounded as per Decision 01 no.07-5400, dated 26.05.2008.
24. Dissatisfied with the final administrative decision of the Municipality of Prishtina, Mr. Jusuf Hashani on 30.06.2008 filed a suit for Administrative Dispute before the Supreme Court of Kosovo.
25. The Supreme Court of Kosovo, deciding as per the filed suit, analysed all aspects of the suit and the presented facts by the parties in a detailed manner, and based on the foregoing it decided: TO REJECT THE SUIT.
26. The Constitutional Court of the Republic of Kosovo, in its official correspondence with the Municipal Court, was informed that the Court through Judgment C.no.1266/07, dated 11.06.2009, entirely rejected the claim-suit filed by plaintiff Jusuf Hashani for the annulment of the contract on gift, and that this case, pursuant to the appeal, is still before the District Court in Prishtina as case no.AC-1167/09 and thus still unsettled.

Assessment of the Admissibility of the Referral

27. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this respect, the Court refers to Article 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."

28. Article 48 of the Law provides that:

"In his/her referral, the Applicant 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."

29. From the submitted documentation in the referral, it appears that the Applicant did not exhaust all available legal remedies since his suit for the annulment of the contract on gift, which is the plaintiff's fundamental request, is still before the District Court in Prishtina registered with the reference no. AC 1167/09 and is still unsettled.
30. The Constitutional Court of Kosovo concluded that the court proceedings, terminated based on Judgment A.no.874/2006 and Decision Mlc 43/2007 of the Supreme Court, were auxiliary proceedings and were conducted for the matter related to the main subject of the suit, i.e., the annulment of the contract on gift, but in the meantime the civil dispute for the same matter (annulment of the contract on gift) is still unsettled.

31. In conformity with the Constitution, the Constitutional Court cannot act as an appeal court or a fourth instance court of review for decisions rendered by the regular courts. It is the task of regular court to interpret and implement the respective rules of the procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain (GC), no. 30544/96, § 28, the European Court of Human Rights (ECHR 1999-I).
32. The Court notes that the rationale for the rule of exhaustion of legal remedies is to provide the respective authorities, including the courts, an opportunity to prevent or remedy the alleged violations of the Constitution. This rule is based on the assumption that Kosovo's legal order shall ensure an effective legal remedy for the violation of the constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni v. France no. 25803/94; Decision of 28 July 1999).
33. The Court also notes that a mere suspicion on the perspective of the matter is not sufficient to exclude an applicant from his obligations to appeal before the competent local bodies (see Whiteside v the United Kingdom, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).
34. Moreover, the Applicant did not specify the Referral nor did he justify the referral in the procedural or substantive aspects, in order to prove that constitutional rights had been violated.

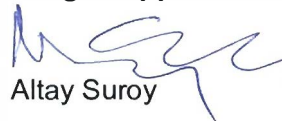
FOR THESE REASONS

35. The Court, following the review of all facts and presented proofs, and following the review of the case on 16 July 2010, concluded that the Applicant did NOT exhaust all available legal remedies, and 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


Altay Suroy

President of the Constitutional Court


Prof. Dr. Enver Hasani