REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

THE APPLICATION OF GÜHER ERGUN AND OTHERS

(Application Number: 2012/13)

Date of Decision: 2/7/2013

FIRST SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Hicabi DURSUN
		Erdal TERCAN
Rapporteur	:	Şebnem NEBİOĞLU ÖNER
Applicants	:	Güher ERGUN
		Tosun Tayfun ERGUN
		Olcay KOÇ
Counsel	:	Att. Murat NAS

I. SUBJECT OF APPLICATION

1. By asserting that their right to a fair trial was violated due to the fact that the civil case filed in 2002 had not yet been concluded by the court of first instance, the applicants claimed that the violation be determined and that a decision be issued on the compensation of the material and moral damage they suffered.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on the date of 25/9/2012 . In the preliminary examination that was carried out in administrative terms, it has been determined that there is no situation to prevent the submission of the application to the Commission.

3. As it was deemed necessary by the Second Commission of the First Section that a principle decision be delivered by the Section in order for the application to be concluded, it was decided that the file be sent to the Section in order for the admissibility examination to be carried out by the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. Pursuant to the interlocutory decision of the First Section dated 12/3/2013, it was decided as per subparagraph (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court that the examination on admissibility and merits be conducted jointly and that a copy be sent to the Ministry of Justice for its opinion.

5. The opinion letter of the Ministry of Justice dated 16/4/2013 and numbered 37071 was notified to the counsel of the applicants on the date of 11/5/2013; although the counsel of

the applicants submitted a petition for declaration with the referral date of 10/6/2013, they did not submit their statements against the response of the Ministry of Justice within its legal period of fifteen days.

III. FACTS AND CASES

A. Facts

6. The relevant facts in the application petition are summarized as follows:

7. During the land registration of the immovable with the parcel number of 1330 which is located in the locality of Tunçpınarı of Kaya Village of Fethiye District of Muğla Province, it was decided that half of its shares be determined in the name of Aziz Bolel who is the testator of the applicants.

8. A case for objection against determination was filed by the Forestry Operation Directorate of Fethiye representing the General Directorate of Forestry against the determined owners of the immovable in the file of the Land Registration Court of Fethiye numbered M.1957/466.

9. As a result of the trial held before the Land Registration Court of Fethiye, it was decided through the decision of the Court numbered M.1957/466, D.1971/3 that the immovable be registered, as determined, in the title deed in the name of the inheritors of the determined owners in accordance with the submitted certificates of inheritance.

10. Cases for the cancellation of title deed and registration were filed by the Forestry Operation Directorate of Fethiye representing the General Directorate of Forestry against the owners of the immovable through the files of the 1st Civil Court of First Instance of Fethiye numbered M.2002/175 and M.2002/699.

11. In these cases which were filed, it was stated by the General Directorate of Forestry that a practice was performed in the village in which the parcel which was the subject of the case was located as per articles 10 and 11 of the Forestry Code numbered 6831 amended by the Code numbered 3302 and article 28 of the By-Law on Places to be Taken Outside the Scope of Forestry Boundaries and that a portion of the parcel which was the subject of the case remained within the finalized forestry delimitation boundaries and requested that the title deed of the specified part be annulled and that a decision be issued on the recording and registration of it in the title deed in the name of the treasury with the quality of a forest.

12. The cases which were filed by the General Directorate of Forestry were joined over the file of the 1st Civil Court of First Instance of Fethiye numbered M.2002/175.

13. During the trial which was held in the file of the 1st Civil Court of First Instance of Fethiye numbered M.2002/175, it was stated by the Cadastral Court of Fethiye through the letter dated 27/12/2011 that the immovable which was the subject of the case was subjected to a practice as the immovable with the block number of 251 and parcel number of 4 in the practice works which were performed in accordance with subparagraph 22-A of the Cadastre Code dated 21/6/1987 and numbered 3402 and that the minutes of determination were sent to the Cadastral Court.

14. Upon the mentioned letter of the Cadastral Court of Fethiye , it was decided that the file be sent to the Cadastral Court of Fethiye through the decision of the lack of

competence of the 1st Civil Court of First Instance of Fethiye dated 29/5/2012 and numbered M.2002/175, D.2012/295.

15. In the letter of the Cadastral Court of Fethiye dated 22/4/2013 and numbered correspondence 2013/223, it was stated that the file of the 1st Civil Court of First Instance of Fethiye numbered M.2002/175 had not yet been transferred to the Cadastral Court of Fethiye.

B. Relevant Law

16. Article 30 of the Code of Civil Procedure numbered 6100 with the side heading of *"Principle of economy in procedure"* is as follows:

> *"The judge is liable to ensure that the trial is carried out in a reasonable amount of time and in orderly fashion and unnecessary expenditures are not made."*

IV. EXAMINATION AND JUSTIFICATION

17. The individual application of the applicants dated 25/9/2012 and numbered 2012/13 was examined during the session held by the court on the date of 2/7/2013 and the following were ordered and adjudged:

A. Claims of the Applicants

18. The applicants claimed that the trial held in the file of the 1st Civil Court of First Instance numbered M.2002/175 with regard to the immovable which was inherited from their testator lasted for a period which was longer than ten years, that given the decision of the lack of competence issued, it would continue for a longer time, that the case filed was a case for the cancellation of the title deed and registration and that the owners of the immovable were determined in accordance with the title deed record, that it was also possible and easy to determine the inheritors of the owners of the immovable and to involve them in the case and to ensure the constitution of parties, that in terms of this aspect, the case was not complicated, that however, the trial procrastinated by dealing with the ensuring of the constitution of parties for a long time, that for this reason, the trial was not completed in a reasonable time.

B. Evaluation

1. In Terms of Admissibility

19. The applicants stated that there was no decision which had a quality of concluding the trial held by the court of first instance with regard to the present application, that as also specified in the decisions of the ECtHR, the condition of having exhausted application remedies could not be sought in terms of the applications which were based on the claim that trial was not held in a reasonable time, that as a matter of fact, the applicant was mainly based on the reason for the failure to conclude the trial.

20. In the opinion letter of the Ministry of Justice , it was stated that the venue of the Constitutional Court for examining individual applications in terms of time covered the applications with regard to the final acts and actions which became final after the date of 23/9/2012, it was reported that the fact that the trial which is the subject of the application was continuing for nearly eleven years as of the date of initiation of the venue of the Constitutional Court in terms of time and that it was still pending before the court of first instance needed to be taken into consideration in the examination of admissibility.

21. Paragraph (8) of provisional article 1 of the Code numbered 6216 is as follows:

"*The court shall examine the individual applications to be lodged against the last actions and decisions that were finalized after the date of 23/9/2012.*"

22. In accordance with the mentioned provision, the date of initiation of the venue of the Constitutional Court in terms of time is the date of 23/9/2012 and the fact that the Court's venue is not applied retrospectively is a requirement of the principle of legal security. Therefore, the Court can only examine the individual applications that are lodged against the final actions and decisions that were finalized after this date.

23. The case which is the subject matter of the application was filed before the date of 23/9/2012 which is the date of initiation of the venue of the Constitutional Court in terms of time and as it is understood that it is pending as of the date of 25/9/2012 which is the date of application, examination of the application is within the venue of the Constitutional Court in terms of time.

24. Paragraph three of article 148 of the Constitution is as follows:

"*Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. In order to make an application, ordinary legal remedies must be exhausted.*"

25. Paragraph (2) of article 45 of the Code numbered 6216 with the side heading *of "The right of individual application"* is as follows:

"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

26. In accordance with the mentioned provisions, all administrative and judicial application remedies which are prescribed in the code for the act, action or negligence that forms the basis of a violation claim need to be exhausted before lodging an individual application. The fact that the courts of instance are primarily liable to resolve violations of fundamental rights renders compulsory the condition of exhausting legal remedies (App. No: 2012/1027, § 19,20, 12/2/2013).

27. However, the implementation of the principle of exhausting application remedies in an absolute manner will prevent the effective use and protection of fundamental rights and freedoms. The fact that an individual application can be lodged in a trial which is still going on with the claim that the liability of holding trial in a reasonable time constitutes one of the exceptions of the rule of exhausting application remedies. As a matter of fact, in this case, seeking the condition of exhausting application remedies will not remove the consequences which occur because of acting contrary to the liability of holding trial in a reasonable time. On the contrary, it will result in the extension of the trial activity which is claimed not to be reasonable even more and the fact that the damage increases in terms of the applicant.

28. In terms of the applications which contain the claim that the liability of holding trial in a reasonable time is not fulfilled, the condition of exhausting legal remedies prescribed in paragraph three of article 148 of the Constitution and paragraph (2) of article 45 of the Code numbered 6216 can be valid only if there is an effective application remedy with regard to the liability of holding trial in a reasonable time. In the event that there is an administrative or judicial application remedy which ensures that the trial activity is conducted in a

reasonable time, or in other words, has an effect which prevents the extension of trial or has a quality of determining and compensating the damages which occur as a result of the fact that trial is not conducted in a reasonable time, the condition of exhausting this application remedy will be stipulated before lodging an individual application. However, in our legal system, there is no effective application remedy which prevents the extension of the trial activity or redresses the damages arising out of the extension of the trial activity (Bahçeyaka v. Turkey, Application Number: 74463/01, 13/7/2006, § 27–29; Tamar v. Turkey, Application Number:15614/02, 18/7/2006, § 21–24; Ezel Tosun v. Turkey, Application Number:33379/02, 10/1/2006, §18,19; Danespayeh v. Turkey, Application Number: 21086/04, 16/7/2009, § 37).

29. Although the application remedy which was created with the Code on the Resolution of Some Applications Which Are Lodged to the European Court of Human Rights by Paying Compensation dated 9/1/2013 and numbered 6384 as an application remedy in terms of the right to trial in a reasonable time is accepted by the European Court of Human Rights as an application remedy which needs to be exhausted in terms of these sorts of violation claims (Müdür Turgut and others v. Turkey, Application Number: 4860/09, 6/3/2013), in article 1 and paragraph (1) of article of the relevant Code, it is provided that the mentioned Code will be implemented on the applications which are registered before the European Court of Human Rights as of the date of 23/9/2012. Moreover, by considering the intensity of violation decisions issued in line with the established case-law of the European Court of Human Rights with regard to the rights which are protected within the scope of the European Convention on Human Rights and the additional protocols to which Turkey is a party, although it is prescribed that the provisions of this Code can be implemented through a resolution of the Council of Ministers also in terms of other areas of violation to be proposed by the Ministry of Justice according to the provision of paragraph (2) of article 2 of the same Code, it is understood that no such application remedy has not been created yet.

30. As per paragraph three of article 148 of the Constitution and paragraph (2) of article 45 of the Code numbered 6216, as it is understood that there is no effective application remedy which has a quality of removing the violation and its consequences in terms of the present application, the application has a quality of being admitted in terms of exhausting legal remedies.

31. Due to the reasons explained, it should be decided that the application which is not clearly devoid of basis and where no other reason is deemed to exist to require a decision on its inadmissibility is admissible.

2. Examination on Merits

32. The applicants claimed that their right to a fair trial defined in article 36 of the Constitution was violated by stating that the trial held in the file of the 1st Civil Court of First Instance of Fethiye numbered M.2002/175 with regard to the immovable which was inherited from their testator was not completed in a reasonable time.

33. In the opinion letter of the Ministry of Justice, it is understood that it was stated that in terms of the examination with regard to reasonable period, the period after 23/9/2012 which was the date of initiation of the venue of the Constitutional Court in terms of time needed to be taken into consideration, that however, the trial period before this date needed to be taken into consideration in parallel with the case-law of the European Court of Human Rights (ECtHR) and that whether or not the trial period which is the subject matter of the application and which exceeded ten years was reasonable needed to be determined by also

considering the criteria which were developed by the ECtHR in terms of whether or not the period was reasonable.

34. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the European Convention on Human Rights (Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, § 18, 26/3/2013).

35. Paragraph one of Article 36 of the Constitution with the side heading of *"Freedom to claim rights"* is as follows*:*

> *"Everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means."*

36. Paragraph four of article 141 of the Constitution with the side heading of *''Publicity of hearings and the need for verdicts to be justified''* is as follows:

> *"It is the duty of the judiciary to conclude cases with minimum cost and as soon as possible."*

37. The relevant part of article 6 of the Convention with the side heading of *"Right to a fair trial"* is as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing* ***within a reasonable time*** *by an independent and impartial tribunal established by law."*

38. The sub-principles and rights, which stem from the text of the Convention and the judgments of the ECtHR and are present manifestations of the right to a fair trial, are also, in principle, elements of the right to a fair trial stipulated under article 36 of the Constitution. In many decisions where it carried out the examination as per article 36 of the Constitution, the Constitutional Court refers, within the scope of article 36 of the Constitution, to the principles and rights that are either contained within the wording of the Convention (the decision of the Constitutional Court dated 19/1/2012 and numbered M.2011/43, D.2012/10) or incorporated within the scope of the right to a fair trial through the case-law of the ECtHR by interpreting the relevant provision in the light of article 6 of the Convention and the case-law of the ECtHR (the decision of the Constitutional Court dated 11/10/2012 and numbered M.2012/69, D.2012/149).

39. The right to trial in a reasonable time which constitutes the basis of the present application also falls into scope of the right to a fair trial in accordance with the aforementioned principles and moreover, it is clear that article 141 of the Constitution which stipulates that the conclusion of cases with minimum expense and as soon as possible is the duty of the judiciary should also be taken into account in the evaluation of the right to trial in a reasonable time as per the principle of holism of the Constitution.

40. Aim of the right to trial in a reasonable time is to protect parties against material and moral pressures and distresses to which they will be subject due to a long-lasting trial activity. A trial which mostly remove the benefit out of a judgment to be achieved by extending the process of resolving legal disputes will damage effectiveness and security in the fulfillment of justice. However, although the conclusion of trial with regard to a dispute in a short period of time in terms of the right to trial in a reasonable time is important, paying due attention in the resolution of the legal dispute is also of great importance. For this reason, it is necessary to evaluate whether or not the trial period is reasonable in an individual manner for each application.

41. Matters such as the complexity of a case, how many instances the trial has, the attitude of the parties and the relevant authorities during the trial and the quality of the interest of the applicant in the speedy conclusion of the case are the criteria which are developed by the ECtHR through the case-law in order to determine whether or not the period of a case is reasonable (Frydlender v. France, Application Number: 30979/96, 27/6/2000, § 43; Ezel Tosun v. Turkey, Application Number: 33379/02, 10/1/2006, §21,; Namlı and Others v. Turkey, Application Number: 51963/99, 23/5/2007, § 24; Alhan v. Turkey, Application Number: 8163/07, 2/4/2013, § 21; Danespayeh v. Turkey, Application Number: 21086/04, 16/7/2009, § 28).

42. The fact that the case material which is composed of the material facts which are submitted to the court and the means of proof or the legal rules to be applied are complex can be effective on the period of a trial activity. For this reason, the evaluation of the period for each application mostly requires the holding of an examination in terms of both quality and quantity.

43. Although there are differences in terms of the effectiveness of parties among trials in which the principle of preparation by parties and the principle of *ex officio* investigation are valid in terms of our legal system, the impact of the attitude of parties on the extension of the trial process is an important element which needs to be taken into consideration in the evaluation of the quality of the trial period in terms of being reasonable. As a matter of fact, it is necessary for parties to abstain from behaviors aimed at extension of the trial and to show attention and prudence while exercising procedural rights which are granted to them.

44. Another element which needs to be taken into consideration in the evaluation with regard to the period of the trial activity is the attitude of the relevant authorities. In this context, not only the attitude of the judicial authorities should be taken into consideration, but it should also be considered whether or not there is a delay which can be attributed to all bodies of the State which use public force. As the delays which can be attributed to competent authorities can result from the failure to show due diligence for the speedy conclusion of trial, so can they also arise out of structural problems and lack of organization. As a matter of fact, article 36 of the Constitution and article 6 of the Convention impose on the state the responsibility of regulating the legal system in a way which can fulfill the conditions of a fair trial including the liability of courts to conclude cases in a reasonable time.

45. In addition to the aforementioned elements, what the benefit of the applicant out of the realization of legal protection as soon as possible is in the determination of whether or not the period which is taken as the basis for the evaluation should also be taken into consideration and this element strengthens the preference of not creating a common standard in terms of the rationality of each trial period.

46. However, none of the specified criteria is distinctive by itself in the evaluation of reasonable period. By evaluating the total impact of these criteria through the determination of all delay periods in the trial process individually, which element is more effective in the delay of trial should be determined.

47. In order to determine whether the trial activity is conducted within a reasonable time or not, it is primarily necessary to determine the dates of beginning and completion which may vary depending on the type of dispute.

48. In the fact which is the subject of the application, it is understood that it was decided that the case for the cancellation of the title deed and registration filed before the courts of general venue about an immovable be transferred to the cadastral court through the decision of the lack of competence due to the fact that cadastral application activities were performed with regard to the immovable and that the trial activity was still going on as of the date of application.

49. In accordance with article 36 of the Constitution and article 6 of the Convention, it is necessary to conclude disputes in relation to civil rights and liabilities in a reasonable time. In the fact that is the subject of the application, there is a property problem with regard to the recording and registration of the immovable in the name of the plaintiff administration and there is no doubt that the present trial activity which is aimed at the resolution of this problem and is conducted according to the procedural provisions stipulated in the Code numbered 6100 is a trial which is relevant to civil rights and liabilities.

50. In the evaluation of reasonable period with regard to disputes related to civil rights and liabilities, the beginning of the period is, as a rule, the date on which the trial process that will conclude the dispute is commenced to run. Nevertheless, the date on which a case is filed and the date on which the venue of the Constitutional Court in terms of time for the examination of individual applications commenced can be different. As a matter of fact, as there is a similar situation in terms of the present application, the determination of the period to be taken into consideration requires the holding of a separate evaluation.

51. As specified above (§ 21–23), the date on which the venue of the Constitutional Court in terms of venue commenced is 23/9/2012 and in accordance with paragraph (1) of article 76 of the Code numbered 6216 and paragraph (8) of provisional article 1 of the same Code, the Constitutional Court has the venue of examining the individual applications to be lodged against final acts and decisions which become final after the date of 23/9/2012. It is seen that the mentioned provisions, while determining the venue of the Constitutional Court in terms of time, take as the basis not the date on which facts and cases occur, but the date on which legal remedies which can be resorted to against the acts and actions that constitute a violation of right are exhausted or, in other words, on which the act or decision becomes final. Therefore, the matter to be taken into consideration in terms of whether or not a claim of the violation of a right falls within the venue of the Constitutional Court in terms of time is not the date on which the act or action which is the subject of application occurs, but the date on which the decision issued following legal remedies which are resorted to against this act or action becomes final. In this context, the period to be taken into consideration in the complaints which are relevant to the claim that the right to trial in a reasonable time has been violated as filed with regard to the cases which were filed before the date of 23/9/2012 and are pending as of this date is not the period which has elapsed after the mentioned date, but the period which has elapsed from the date on which the dispute commenced. Therefore, on the condition that it was pending on the date of 23/9/2012, the period which has elapsed from the date on which the dispute commenced to the date on which it came to an end or, if it is still

continuing, to the date on which the Constitutional Court concludes the application. As it is understood that the trial which is the subject of the application commenced before the date of 23/9/2012 which constitutes the beginning of the venue of the Constitutional Court in terms of time, that it was continuing for an approximate period of ten years as of the date of application and that it was still pending as of the mentioned date, the beginning of the period to be taken into consideration in the evaluation of reasonable period to be conducted with regard to the present application is the date on which the case was filed.

52. The date of completion of the period is mostly the date on which the trial comes to an end in a way which will also cover the stage of execution. However, as specified above (§ 27–30), the condition of exhausting application remedies will not be sought for the complaints which are relevant to the claim that the right to trial in a reasonable time has been violated with regard to ongoing trials As there is a possibility of being able to lodge an application during the continuation of the trial activity in terms of these sorts of complaints, the moment at which the period to be taken as the basis for evaluation comes to an end is the date on which the application is concluded.

53. In the case which is the subject of the application, it is understood that the applicant Olcay Koç is among the defendants shown in the case petition with the referral date of 27/11/2002, that the applicants Güher Ergun and Tosun Tayfun Ergun were included in the trial as title deed owners who were not involved in the case based on the interim decision dated 6/12/2005.

54. In the evaluation of the trial process which is the subject of the application, it is understood that the subject of the trial is the request for the issuing of a decision on the cancellation of a title deed which belongs to an immovable of one parcel and its registration in the title deed in the name of the treasury by specifying its quality as a forest and the prevention of the intervention made in the immovable. The relevant case has one plaintiff and forty one defendants together with the involved defendants including the applicants. Following the arrangement of the preliminary proceeding report of the case whose trial is understood to have commenced through the petition with the referral date of 27/11/2002, a total of thirty four hearings were held in the trial which was concluded with the decision of the lack of competence. It is understood that there were periods of two to four months between the mentioned hearings and that in general, a total of three or, for some years, four hearings were held each year during the trial.

55. From the examination of the relevant trial documents, it is seen that following the preliminary hearing, the plaintiff party was granted a period for submitting the addresses and notification expenses of the defendants to whom no notification could be made within an approximate period of eighteen months and at a total of four hearings, that then, address investigation was initiated through public institutions. In the process of ongoing trial, the plaintiff party was granted a period this time for submitting the certificates of inheritance of the title deed owners who passed away and an approximate period of seventeen months elapsed for the completion of the mentioned deficiency, in the meantime, the petitions of excuse submitted by the plaintiff party were accepted. Upon the submission of the relevant documents, a period was granted to the plaintiff party again for the inclusion of the inheritors of the title deed owners in the case so as to ensure the constitution of parties and it is understood that a period which was over fifteen months elapsed for the completion of these actions. It is seen that after the constitution of parties was ensured, the interim decision of viewing was issued three times on various dates, that however, viewing postponement minutes were drawn up as to the effect that the viewings could not be performed based on

reasons such as the absence of application, weather conditions and the petitions of excuse of the counsel of the plaintiff. By waiting for a period which was over four months in contrary to the period granted in the viewing minute in order for the experts to submit their reports following the viewing performed on the date of 28/11/2008, the reports were notified at the hearing by hand and the parties were granted a period for making a statement. Following the viewing performed, writs were written to various public institutions again for the supply of missing documents on the ground that there were missing documents in the file, the mentioned deficiencies were completed within an approximate period of ten months, in the meantime, the excuses of the counsel of the plaintiff were accepted and an interim decision of viewing was issued again, but this decision and two interim decisions of viewing which were subsequently issued could not be performed within an approximate period of fifteen months due to excuses such as the fact that the competent judge was assigned at a different court, weather conditions and the failure to appoint an expert. After the deferral of the trial for another period which was more than four months for the evaluation of the request for intervention which was filed, at the hearing dated 16/12/2012, it was stated by the court of the case that it was notified by the Cadastral Court of Fethiye through the letter dated 27/12/2011 that the immovable which was the subject of the case was subjected to a practice as the immovable with the block number of 251 and parcel number of 4 in the practice works which were performed in accordance with subclause (A) of article 22 of the Cadastre Code dated 21/6/1987 and numbered 3402 and that the minutes of determination were sent to the Cadastral Court, the file was taken into examination and at the hearing which was held after a period which was more than three months, a decision of the lack of competence was issued in favor of the Cadastral Court of Fethiye.

56. As a result of the evaluation of the application, it is understood that the trial which is the subject of the application is a dispute with regard to the ownership of an immovable , that a total of twenty two persons were present as the parties to the case, that the trial had a complex quality depending on the fact that it required procedural actions such as viewing and expert examination due to the fact that it was a dispute especially in relation to involving the inheritors of the title deed owners who passed away in the case and ensuring the constitution of parties, that however, when the delay periods in the process of trial were separately evaluated, the periods which elapsed between hearings were kept quite long, three hearings were held in average per year and that periods were granted to the plaintiff party for the completion of deficiencies in contrary to the procedural provisions in many of the interim decisions which were issued.

57. Article 30 of the Code numbered 6100 which contains general procedural provisions that are valid for the trial activities which are relevant to disputes with regard to civil rights and liabilities puts forth the necessity of resolving disputes in a reasonable time.

58. Although the fact that the principle of preparation of the case material by the parties is valid in terms of the present trial which is subject to the aforementioned procedural provisions supports the thought that the parties bear the consequences of the fact that the trial activity cannot be concluded in a reasonable time, these principles do not relieve the judicial authorities of their liability to conduct the case with due speed.

59. Although the acts and behaviors of parties except for applicants which would delay the trial in the trial process are, as a rule, accepted as the fault of the party in the extension of the trial, trial authorities have the responsibility for preventing these attempts by using the relevant procedural means.

60. In terms of the present trial, it is understood that the plaintiff party was granted periods for the completion of some deficiencies time after time and in a quality which was contrary to the provisions with regard to final periods, that the sanctions with regard to final periods as specified in the procedural code were not imposed in the face of the fact that the requirements of the interim decisions were not fulfilled, the interim decisions of viewing which were issued time after time were not fulfilled especially due to the absence of application, that the excuses of the counsel of the plaintiff were accepted on several occasions in processes during which the requirements of the interim decisions were not fulfilled and the viewings were not performed, that however, sanctions against the failure to abide by the final period and procedural means such as the determination of a hearing fee were not used by the trial authorities either (the Code numbered 1086, art. 163, 271, 278/last, 282, 414; the Code numbered 6100, art. 94, 114/1-g, 115/2, 120, 253, 269, 280; the Act of Fees dated 2/7/1964 and numbered 492, art. 12).

61. In addition to the aforementioned matters, it is seen that the letter of the Cadastral Court of Fethiye dated 27/12/2011 indicating that the practice works were performed with regard to the immovable was included into the file at the hearing dated 16/2/2012, that the file was taken into examination at the same hearing and that a decision of the lack of competence was issued on the date of 29/5/2012 after a period which was more than three months and that the file was not transferred to its competent Court as of the date of 22/4/2013 within an approximate period of eleven months.

62. It could not be determined that the attitude of the applicants had a special effect on theextension of the trial.

63. Although the number of persons involved in the case and the quality of procedural actions which need to be performed due to the nature of the case put forth that the trial which is the subject of the application is complex, when the case is taken into consideration as a whole, it has been concluded that there is an unreasonable delay.

64. Due to the aforementioned reasons, it should be decided that the applicants' right to trial in a reasonable time guaranteed by Article 36 of the Constitution was violated.

3. In Terms of Article 50 of the Code Numbered 6216

65. The applicants requested that the equivalence of the loss which they wanted to be determined through an expert by considering their shares in the immovable as of the trial period be ruled as a material compensation and that a moral compensation be adjudged for redressing the moral loss to which they were subjected due to the long trial by stating that they were not able to use their immovable during the long-lasting trial.

66. In the opinion of the Ministry of Justice, although it was stated by the applicants that the annotation of interim injunction was placed on the immovable which was the subject of the case by the court of first instance and that for this reason, they were not able to make use of the immovable during the trial, it was specified that there was no injunction on the immovable due to the present trial, that only the information as to the effect that the relevant immovable was in dispute in the file numbered merits 2011/75 of the cadastral court was present in the title deed record with regard to the immovable.

67. Paragraph (2) of Article 50 of the Code numbered 6216 with the side heading of *"Decisions"* is as follows:

"If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation."

68. Although it was claimed by the applicants that the annotation of interim injunction was placed on the title deed record of the immovable and that their authorities of disposition on the immovable were prevented in this way, it is understood that two records containing the expression of "22461.25 m2 of the immovable is within the boundaries of forest" and "the Cadastral Court 2011/175" with regard to the current dispute are present in the section of declarations of the title deed record of the immovable and that these records which have a quality of declaration do not have a quality of restricting the authorities of disposition of the applicants on the immovable. Although it has been determined in the present application that article 36 of the Constitution was violated, as it is understood that there is no causal relation between the determined violation and the material damage which is claimed, it should be decided that the demands of the applicants for material compensation be dismissed.

69. When approximate trial periods of eight years are taken into consideration for the applicants Güher Ergun and Tosun Tayfun Ergun,eleven years are taken into consideration for the applicant Olcay Koç, respectively, due to the lengthiness of the trial activity of the applicants, it should be decided that a moral compensation of 5.200,00 TL be separately paid by discretion to the applicants Güher Ergun and Tosun Tayfun Ergun and 8.300,00 to the applicant Olcay Koç in return for their moral damages which cannot be redressed only with the determination of the violation.

70. It should be decided that the legal expenses of 2,812.50 TL in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TL, which were made by the applicants and determined in accordance with the documents in the file, be paid to the applicants.

71. Taking into consideration the fact that the trial which is the subject of the application lasted for nearly eleven years and that this matter violated the right to trial in a reasonable time, in a trial file in which it is clear that a constitutional right was violated, in order to prevent the continuation of the damage incurred by the principle of confidence in the law, justice and court, it should be decided that a copy of the decision be sent to the relevant court so as to ensure that the trial be concluded as soon as possible.

V. JUDGMENT

In the light of the reasons explained; it is **UNANIMOUSLY** decided on 2/7/2013 that

A. The application is ADMISSIBLE,

B. The right to trial in a reasonable time enshrined in Article 36 of the Constitution WAS VIOLATED**,**

C. A moral COMPENSATION of 5.200,00 TL be separately PAID to the applicants Güher Ergun and Tosun Tayfun Ergun and 8.300,00 to the applicant Olcay Koç,

D. The other requests of the applicants in relation to compensation BE DISMISSED,

E. The trial expenses of 2,812.50 TL in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TL, which were made by the applicants BE PAID TO THE APPLICANTS,

F. The payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

G. A copy of the decision be sent to the relevant court.

President	Member	Member
Serruh KALELİ	Burhan ÜSTÜN	Nuri NECİPOĞLU

Member	Member
Hicabi DURSUN	Erdal TERCAN