



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

AYŞE ZIRAMAN AND CENNET YEŞİLYURT APPLICATION

(Application Number: 2012/403)

Date of Decision: 26/3/2013

SECOND SECTION

DECISION

President	: Alparslan ALTAN
Members	: Recep KÖMÜRCÜ Engin YILDIRIM Celal Mümtaz AKINCI Muammer TOPAL
Rapporteur	: Selami ER
Applicants	: Ayşe ZIRAMAN Cennet YEŞİLYURT
Counsel	: Att. Nezih DAĞDEVİREN

I. SUBJECT OF APPLICATION

1. The applicants asserted that their freedom to claim rights and rights to property were violated due to the decision of dismissal issued in the case which they filed with the request for the cancellation of the registry upon the fact that the land of which they were the owners in shareholding (co-ownership) in the title deed was recorded and registered in the name of another person through the cadastral work carried out in 1994.

II. APPLICATION PROCESS

2. The applications was lodged on the date of 23/10/2012 via the 4th Civil Court of First Instance of Konya. As a result of the preliminary examination of the petitions and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent submission thereof to the Commission.

3. As it was deemed necessary on 25/12/2012 by the Second Commission of the Second Section that in order for the the first application to be concluded and on 20/2/2013 by the Third Commission of the Second Section that in order for the second application to be concluded a principle decision be taken by the Section, it was decided that the admissibility examinations be carried out by the Section and that the files be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. It was decided on the date of 26/3/2013 that the file numbered individual application 2012/404 be joined with the individual application numbered 2012/403 as they were related to the same subject, that the examination be conducted over the individual application numbered 2012/403.

III. FACTS AND CASES

A. Facts

5. The relevant facts within the application petitions are summarized as follows:

6. The applicants found out in 2008 that the entire land of which they were the owners in shareholding (co-ownership) in the title deed was recorded and registered in the name of another person through the cadastral work carried out in 1994.

7. The applicants applied to the General Directorate of Land Registry and Cadastre on the date of 18/3/2008 in order for the action claimed to have occurred as a result of the gross negligence of the administration to be corrected, but the application was dismissed on the date of 22/5/2008 on the ground that the 10-year foreclosure period for filing a case had elapsed.

8. The case which the applicants filed with the request for the registry of the mentioned land in their own names was dismissed through the decision of the Civil Court of First Instance of Marmara dated 23/12/2010 and numbered M.2008/53, D.2010/94 on the ground that it was not filed within the 10-year foreclosure period.

9. The applicants' request for appeal was dismissed through the decision of the 16th Civil Chamber of the Supreme Court of Appeals dated 2/4/2012 and numbered M.2011/6032, D. 2012/3010. The decision was notified to the applicants on the date of 27/9/2012. The applicants filed a request for correction against this decision on the date of 5/10/2012. The request for correction is pending before the 16th Civil Chamber of the Supreme Court of Appeals as of the date of application.

B. Relevant Law

10. Paragraphs (1) and (II) of provisional article 3 of the Code of Civil Procedure dated 12/1/2011 and numbered 6100 are as follows:

(1) Until the date when the regional courts of justice will start their duties which will be announced in the Official Gazette as per provisional article 2 of the Code on the Establishment, Duties and Authorities of Judicial Courts of First Instance and Regional Courts of Justice dated 26/9/2004 and numbered 5235, the implementation of the applicable provisions of the Code numbered 1086 which relate to appeal shall be continued.

(2) Regarding the decisions against which the appeal remedy has been seized prior to the date when the regional courts of justice will begin their duties, the implementation of the provisions of articles 427 to 454 of the Code numbered 1086 before the amendment made with the Code dated 26/9/2004 and numbered 5236 shall be continued until these decisions are finalized.

11. Paragraph (I) of article 440 of the abolished Code of Civil Procedure dated 18/6/1927 and numbered 1086 is as follows:

“Correction can be requested against the decisions of the Supreme Court of Appeals due to the following reasons within 15 days following pronouncement or notification:

1 - (Amended sub-clause: 16/07/1981 - 2494/31 art.) The fact that the objections which are asserted in the appeal petition and , on the condition that it is submitted within its legal period, the bill of answer of the opposite party and have effect on the judgment are partly or completely left unresponded,

2 - The fact that there are paragraphs which are contrary to each other in the decision of the Supreme Court of Appeals,

3- *The fact that a deception or falsity becomes evident in the documents which affect the basis of the judgment during the examination of the Supreme Court of Appeals.*

4- *The fact that the decision of the Supreme Court of Appeals is found to be contrary to the procedure and law,”*

IV. EXAMINATION AND JUSTIFICATION

12. The individual applications of the applicants dated 23/10/2012 and numbered 2012/403 and dated 23/10/2012 and numbered 2012/404 were examined together during the session held by the court on 26/3/2013 and the following were ordered and adjudged:

A. Claims of the Applicants

13. The applicants asserted that the registry of the land of which they were the owners in the name of another person violated the freedom to claim rights and the right to property by stating that the land of which they were the owners in the title deed was recorded and registered in the name of another person through the cadastral work carried out in 1994 and that they were able to find out about this situation in 2008 as they resided abroad, that the acquisition of property through unlawful registry needed to be null and void, that a case filed in 2003 for the same cadastral action needed to interrupt the foreclosure period, that the protection of the properties of private persons was under the responsibility of the state.

B. Evaluation

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

“...In order to make an application, ordinary legal remedies must be exhausted.”

15. Paragraph (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/11/2011 and numbered 6216 with the side heading of *"Right to 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."

16. According to the mentioned provisions of the Constitution and the Code, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. The respect to fundamental rights and freedoms is a constitutional obligation of all state organs, and the correction of rights violations that emerge as a result of the negligence of this obligation is the duty of administrative and judicial authorities. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward firstly before courts of instance, that they be evaluated and resolved by these instances.

17. For this reason, individual application to the Constitutional Court is a legal remedy of secondary nature that can be seized in the event that the alleged rights violations are not rectified by courts of instance. Due to the secondary nature of the individual application remedy, it is obligatory that ordinary legal remedies be exhausted in order for an individual application be lodged at the Constitutional Court. In accordance with this principle, the applicant needs to primarily convey the complaint which she has brought before the Constitutional Court to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that she has

about this subject within due period and to have paid the necessary attention to following her case and application in this process.

18. In accordance with paragraphs (1) and (2) of provisional article 3 of the Code numbered 6100, until the date when the regional courts of appeal will begin their duties which will be announced in the Official Gazette, the applicable provisions of the Code numbered 1086 with regard to appeal shall continue to apply.

19. In civil cases, according to paragraph (1) of article 440 of the Code numbered 1086, the remedy of correction can be resorted to against the decisions of the Supreme Court of Appeals within 15 days following pronouncement or notification. In the event that this remedy is resorted to, until a decision is issued with regard to the request for correction, it is not the case that the court decision becomes final and application remedies are exhausted. In this case, it cannot be said that legal remedies are exhausted without a decision being issued with regard to the request for correction.

20. Within this framework, if the remedy of correction has been resorted to in civil cases, in order for an individual application to be lodged to the Constitutional Court, it is clear that, first of all, this remedy needs to be exhausted by awaiting the decision with regard to this request. In the incident which is the subject matter of the application, as it has not been decided on the applicants' request for correction yet, it is considered that ordinary legal remedies are not exhausted.

21. Due to the reasons explained, as it is understood that an individual application was filed before all judicial application remedies prescribed in the code against the action which is the subject matter of the application were exhausted, it should be decided that the applications are inadmissible due to "*the fact that application remedies were not exhausted*" without examining them in terms of other conditions of admissibility.

V. JUDGMENT

It is decided **UNANIMOUSLY** on 26/3/2013 that the applications are **INADMISSIBLE** due to "*the fact that application remedies were not exhausted*", that the trial expenses be left on the applicants.

President
Alparslan ALTAN

Member
Recep KÖMÜRCÜ

Member
Engin YILDIRIM

Member
Celal Mümtaz AKINCI

Member
Muammer TOPAL