REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/603

Date of Decision: 20/2/2014

SECOND SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Zehra Ayla PERKTAŞ
		Burhan ÜSTÜN
		Nuri NECİPOĞLU
		Hicabi DURSUN
Rapporteur	:	Selami ER
Applicant	:	Faik GÜMÜŞ
Counsel	:	Att. İsa UYSAL

I. SUBJECT OF APPLICATON

1. The applicant asserted that, in the case he filed with a request for the cancellation of the action of registration in the name of the Treasury of the immovable property which he claimed to have belonged to him by being considered to have a quality of forest as a result of the cadastral work, a hearing was held and a decision was issued by the Court two days before the date which was determined in the hearing prior to the decision hearing and appeared on the National Judiciary Informatics System (UYAP), that thus, his case was dismissed without granting him the opportunity of presenting his views, that moreover, the request for correction he filed before the Supreme Court of Appeals was dismissed and he was sentenced to a fine, that therefore, his rights to property and a fair trial were violated and filed a request for compensation.

II. APPLICATION PROCESS

2. The application was lodged through the Cadastral Court of Salihli on 7/11/2012. As a result of the preliminary examination of the petition and annexes thereof conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the First Section that the examination of admissibility be conducted by the Section, that the file be sent to the Section.

4. In the session held by the Section on 25/12/2012, it was decided that the examination of admissibility and merits be carried out together.

5. The facts and cases which are the subject matter of the application and a copy of the application were sent to the Ministry of Justice for its opinion on 21/5/2013, the opinion letter of the Ministry of Justice dated 17/7/2013 was notified to the counsel of the applicant on 25/7/2013. The counsel of the applicant did not make his statements against the opinion of the Ministry of Justice within the legal period.

III. FACTS AND CASES

A. Facts

6. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

7. As a result of the cadastral work which was performed in Demirci District in 2008, many immovable properties were registered through eight different minutes in the name of the applicant with the quality of field, vineyard, house, land, warehouse and stable.

8. Apart from the immovable properties which were registered in the name of the applicant, the immovable properties that he claimed to have been in his possession for 30 years as a field within the block number 103, parcel number 1 and the block number 104, parcel number 1 in Gülpınar Village were registered in the name of the Treasury through the cadastral practice dated 5/9/2008 and the cadastral minutes dated 13/9/2008 as they had the quality of a forest.

9. A criminal case was filed on the applicant in 2004 with the claim that he occupied the forestry area in an illegal way.

10. The applicant filed a case before the Cadastral Court of Demirci (the Court) with a request for the cancellation of the cadastral registration and for the registration of the immovable property in his own name by claiming that he purchased, with a bill of sale, some of the mentioned immovable property on 15/10/2008 from a person named Ali Yıldırım who was the owner of the immovable property according to the land register dated 17/1/1963, that the immovable property had a tax register on his own name and that he used the immovable property in question as the possessor.

11. The Criminal Court of Peace of Demirci issued an acquittal decision on the applicant in relation to the crime alleged to him on 19/10/2009.

12. A viewing was performed by the Court on the immovable property which was the subject of the case in company with a science, forestry and agriculture expert on 12/05/2011. The applicant showed three immovable properties to the court and viewing panel during the viewing although he had filed the case for two immovable properties. These were numbered as the immovable property numbered 1, 2, 3 by the Court. The applicant presented to the Court the basis title deed of the immovable property numbered 1.

13. Two witnesses and the local expert who were heard during the viewing declared that they did not know from whom the immovable property numbered 1 which was claimed to be within the scope of the title deed was purchased, two local experts and one of three witnesses that the applicant produced declared that the applicant purchased the immovable property from a person named Hikmet Koç and that the title deed in the name of Ali Yıldırım upon which the applicant relied did not cover the immovable property numbered 1. With regard to the immovable property numbered 2 for which no title deed record was relied upon, the local experts and the witnesses that the applicant produced stated that the applicant purchased this immovable property from Hikmet Koç and used it. With regard to the immovable property numbered 3 for which no title deed record was relied upon, the local experts and the witnesses that the applicant produced stated that this immovable property was not used.

14. In the examination performed by the Court on the title deed documents, it was seen that Ali Yıldırım who was one of the owners of the basis title deed register that the applicant presented sold his share in the immovable property to third parties other than the applicant.

15. The applicant and his counsel could not participate at the hearing dated 13/10/2011 because of their excuse, through the interim decision of the Court on the same date, the excuse that they presented was accepted and it was decided that *they find out the date of hearing via UYAP, that the next hearing be held on 23/11/2011, at 10:15*.

16. In the expert reports dated 18/10/2011, it was stated that there were valonia, mossy oak and cyprus oak trees which constituted coverage from place to place on the immovable properties which were the subject of the case, that the immovable property numbered 2 was plowed, that the immovable property numbered 1 was partially plowed, that the immovable property numbered 3 was not plowed and was not used as a field, that they remained within the green area on the country map, that it was seen, on the aerial photos dated 1953 and 1970, that they were covered with oak trees and bushes, that they were adjacent to the forest and the continuation of the forest, that therefore, they were among the places which were considered as forest.

17. Although the next date of hearing appeared on UYAP as 23/11/2011, the hearing was held on 21/11/2011 and at this hearing, the expert reports were read out and one copy of each of them was given to the representative of the defendant Treasury (Administration) and their objections were recorded in the minutes of hearing by asking their opinions on the expert report.

18. By deciding, through the decision dated 21/11/2011 and numbered M.2008/47, D.2011/39, that the immovable property be registered as determined on the ground that the immovable property did not have any title deed according to the title deed records, the statements of the experts and the witnesses and that they could not be considered as a possession as they had the quality of a forest, the Court dismissed the case.

19. The applicant filed an appeal application by asserting that the date of decision hearing of the court of first instance was notified to him in a wrong way, that the hearing was held two days prior to the date which was foreseen. The 20the Civil Chamber of the Supreme Court of Appeals which examined the request for appeal, through its decision dated 11/6/2012 and numbered M.2012/2577, D.2012/8867, dismissed the request and approved the decision of the local court on the ground that the forestry cadastre was performed according to the provisions of article 4 of the Code numbered 3402 amended with the Code numbered 5304, that the contested parcels were within the boundaries of forest and that for this reason, there was no possibility for it to be the subject of private property in legal terms. An explanation as regards the claim of the applicant as to the effect that he could not appear at the hearing during which the expert reports were read out due to the fact that it was held earlier than the determined date was not included in the decision.

20. The applicant's request for correction was also dismissed with the decision of the same Chamber dated 25/9/2012 and numbered 2012/10890, D.2012/10723 and the decision became final on the same date.

21. The finalized decision was notified to the applicant on 10/10/2012 and the applicant lodged an individual application on 7/11/2012.

B. Relevant Law

22. Article 705 of the Turkish Civil Code dated 22/11/2011 and numbered 4721 with the heading of *"Registration"* is as follows:

"Acquisition of the immovable ownership takes place upon registry.

Ownership is acquired before registration in cases of inheritance, court decision, compulsory enforcement, occupancy, expropriation and other cases foreseen in the code. However, in such cases the owner's ability to carry out disposition transactions shall depend on the property being registered in the title deed registry."

23. Paragraph one of article 713 of the Code numbered 4721 with the heading of "*Extraordinary statue of limitations*" is as follows:

"The person who retains an immovable that is not registered in the title deed registry under his/her ownership for twenty years without legal action and without interruption can request that a decision be taken concerning the registration in the title deed registry of his/her right of ownership on the whole, on a part or a share of that immovable.

24. Paragraph three of article 4 of the Cadastral Code dated 21/6/1987 and numbered 3402 amended with the Code numbered 5304 with the side heading of "*Cadastral working area, announcement and objection*" is as follows:

"In the event that there is a forest within the working area and the forestry cadastre has not been initiated according to the Forestry Code numbered 6831, the forestry cadastre and the determination and detection of the common borders with forests of all kinds of immovable property within and beside these forests shall be carried out by the cadastral team. However, it shall be obligatory that, in these works, at least one forestry engineer msc or forestry engineer to be assigned by the provincial organization of the General Directorate of Forestry and one agricultural engineer msc or agricultural engineer to be assigned by the directorates of agriculture be made to participate in the cadastral team within seven days following the date of notification. In the event that mukhtar and experts do not participate in these works, the works shall be continued ex officio. In the examination of the objections filed in relation to forestry, it shall be obligatory that one forestry engineer msc or forestry engineer who will be assigned by the provincial organization of the General Directorate of Forestry and who has not worked in the determinations which are the subject of the objection and one agricultural engineer msc or agricultural engineer who will be assigned by the directorates of agriculture and who has not worked in the determinations which are the subject of the objection be made to participate in the cadastral commission. Forests in the working area shall be demarcated and determined by this team and partial announcement shall be performed for thirty days. In these areas, the forestry cadastre shall be deemed to have been made. In the places where the forestry cadastre becomes final, these boundaries shall be abided by as is."

25. Paragraph four of article 12 of the Code numbered 3402 with the heading of *"Finalization of cadastral minutes and foreclosure period"* is as follows:

"If unfinalized minutes are registered on the title deed by any reason, irrespective of the claim and the quality of the immovable property, those who keep in their possession the immovable property with the status of owner for a period of 20 years following the date of registration and their contractual and legal successors shall make use of the principle of trust in title deed of the civil code in the cases which have been filed and will be filed."

26. Paragraph one of article 1 of the Forestry Code dated 31/8/1956 and numbered 6831 is as follows:

> *"Tree and shrub groups which naturally grow or are grown with labor shall be considered to be a forest together with their places."*

27. Paragraph three of article 442 of the abolished Code of Civil Procedure dated 18/6/1937 and numbered 1086 is as follows:

> *"If the request for correction is not considered to be compliant with the indicated reasons, it shall be decided that the request be dismissed and that a fine up to one hundred liras be received from the petitioner of correction and that, if it is compliant, it be accepted."*

IV. EXAMINATION AND JUSTIFICATION

28. The individual application of the applicant dated 7/11/2012 and numbered 2012/603 was examined during the session held by the court on 20/2/2014 and the following were ordered and adjudged:

A. Claims of the applicant

29. The applicant filed a request for the holding of a retrial and the ruling of compensation by claiming that the evidence that he presented was not evaluated correctly and the immovable property which belonged to him was registered in the name of the Treasury, that the date of hearing was notified to him in a wrong way, that his evaluation of the expert reports and other evidence which were presented in the mentioned decision hearing was prevented and thus his right to claim and defense was restricted, that, in the appeal examination of the Supreme Court of Appeals, unreasoned decision was issued without considering procedural guarantees and fundamental rights, that moreover, the request for correction which he filed before the Supreme Court of Appeals was dismissed and he was sentenced to a fine, that for these reasons, the right to property and the freedom to claim rights stipulated in articles 35 and 36 of the Constitution were violated.

B. Evaluation

1. In Terms of Admissibility

a. In Terms of the Right to Access to Court

30. The applicant asserted that his right was violated due to the fact that he was sentenced to a fine of 203,00 TL upon the dismissal of the request for correction that he filed before the Supreme Court of Appeals.

31. The fine which was imposed by the Supreme Court of Appeals because of the dismissal of the request for correction will be evaluated within the scope of the right to access to court.

32. The right to access to court means the ability to take a dispute before a court and to request the conclusion of the dispute in an effective manner. Restrictions which prevent a person from applying to a court or render a court decision meaningless or in other words, make the court order considerably ineffective can violate the right to access to court (App. No: 2012/791, 7/11/2013, § 52).

33. As a rule, the right to access to court is not an absolute right and is a right which can be restricted. Nevertheless, it is necessary that the restrictions to be imposed do not restrict the essence of the right in a damaging way, pursue a legitimate aim, are clear and

proportionate and do not constitute a severe burden on the applicant (App. No: 2013/1613, 2/10/2013, § 38).

34. Regulations with the quality of a penalty which states introduce in order to prevent the misuse of a right so as to ensure the administration of the judiciary and to reduce its work load in relation to the access of applicants to courts cannot be evaluated as the violation of the right to access to court as long as they are not too strict to prevent the access to court and do not contain any evident discretionary mistake or obvious arbitrariness (for the decision of the ECtHR in the same vein, see *Maillard v. France*, App. No: 35009 /02, 6/12/2005, §§ 35-37).

35. In the concrete incident, the applicants filed a request for correction, their request for correction was dismissed by the 20th Civil Chamber of the Supreme Court of Appeals and a fine of 203,00 TL in total was ruled against the applicants. However, the defenses and claims of the applicant were examined in two instances prior to the phase of correction.

36. Neither do the fines which are imposed in the event of the dismissal of the requests for correction and are not of high amount in order to prevent unnecessary applications and reduce the number of cases and thus, to ensure that courts can conclude disputes without them being kept busy unnecessarily constitute an extreme burden on applicants, nor can they be accepted as the violation of the right to access to court as they do not render it impossible or make it extremely difficult to resort to this remedy.

37. Due to the reasons explained, as it has been understood that the ruling of a fine against the applicants upon the delivery of a decision on the dismissal of the request for correction following the approval of the decision of the Court of instance did not have the quality of an apparent violation, it should be decided that this part of the application is inadmissible as the claims of the applications in this direction have been found to "*be clearly devoid of basis*".

b. In Terms of Other Complaints

38. While the complaints of the applicant as to the effect that the rights to the equality of arms, to adversarial trial, to a reasoned decision and the right to property were violated on the ground that the immovable property which he kept in his possession and he claimed to have purchased with a preliminary sale contract was registered in the name of the treasury with the quality of a forest through the performed forestry cadastral work, that he could not participate in the hearing where the decision was issued because of the mistake of the Court, that he could not present his objections to the expert reports which were read out at this hearing and that this matter which he pointed in his appeal objection was not examined by the Chamber of the Supreme Court of Appeals and that in the event of a fair trial, the case could have been concluded in his favor are not clearly devoid of basis, there are also no other reasons of inadmissibility for these complaints. For this reason, it is necessary to deliver a decision of admissibility as regards this part of the application.

2. Examination in Terms of Merits

a. In Terms of the Right to a Fair Trial

39. The applicant claimed that, in the case which he filed for the registration of the immovable property in his own name, the date of the decision hearing was notified to him in a wrong way, that his evaluation of the expert report and other evidence which were presented in the mentioned hearing was prevented and his right to claim and defense was restricted, that, in the appeal examination of the Supreme Court of Appeals, an unreasoned decision was issued without considering procedural and fundamental rights and that for these reasons, his rights stipulated in article 36 of the Constitution were violated.

40. In the opinion letter of the Ministry of Justice, it was stated that one of the guarantees included in the principle of a fair trial was the principle of the equality of arms, that as per this principle, it was necessary not to put one of the parties to a case at a weaker position against the other one, that in the concrete application, the applicant could not participate in the decision hearing because of the mistake of the Court and that for this reason, he was deprived of the right to examine the expert report which was read out at the hearing in question, that the Supreme Court of Appeals did not discuss the objection of the applicant as to the effect that the expert report was examined at a hearing where he was not present and it was declared that these matters needed to be taken into consideration while examining whether or not the principle of the equality of arms was violated.

41. The claim of the applicant as to the effect that, in the case which is the subject of the application, his evaluation of the expert report was prevented as this report was discussed at a hearing in which he could not participate because of the mistake of the Court will be examined in terms of the rights to the equality of arms and adversarial trial; the claim of the applicant as to the effect that the Supreme Court of Appeals issued a decision without discussing his complaint on this matter will be examined in terms of the right to a reasoned decision.

42. Paragraph one of Article 36 of the Constitution with the side heading "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."*

43. Clause 3 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:

> "*All types of verdicts of all courts are written together with their justification.*"

44. The relevant part of article 6 of the Convention with the side heading *"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 code.*"

45. The production and evaluation of evidence including the right to call witness during the trial held are accepted within the scope of the principle of the equality of arms accepted as one of the elements of the right to a fair trial and this right and the right to a reasoned decision are also concrete manifestations of the right to a fair trial just as the right to trial in a reasonable time. In many of its decisions over which it carries out an examination in accordance with article 36 of the Constitution, the Constitutional Court includes principles and rights such as the right to a reasoned decision and the principle of the equality of arms

which are both stipulated in the wording of the Convention and included within the scope of the right to a fair trial through the case law of the ECtHR within the scope of article 36 of the Constitution by way of interpreting the relevant provision in the evidence of article 6 of the Convention and the case law of the ECtHR (App. No: 2012/13, 2/7/2013,§ 38).

46. One of the elements of the right to a fair trial is the principle of the equality of arms. The principle of the equality of arms means the subjection of the parties to a case under the same conditions in terms of procedural rights and the fact that one of the parties has the opportunity of stating its claims and defenses before a court in a reasonable way without it being put at a weaker position than the other one (App. No: 2013/1134, 16/5/2013, § 32). As a rule, applicants are not obliged to prove that an advantage granted to the opposing party of the case has harmed them or that they have been negatively affected by this situation. Although there is no evidence as to the effect that an advantage which is granted to one of the parties, but not granted to the other one has actually borne a negative consequence, the principle of the equality of arms is deemed to be violated. (See, the ECtHR, *Zagorodnikov v. Russia*, App. No: 66941/01, 7/6/2007, § 30).

47. The right to adversarial trial which is complementary to the principle of the equality of arms, as a rule, grants the opportunity for the parties to a civil or criminal case to have knowledge of and comment on all evidence adduced and observations filed (For the decisions of the ECtHR in the same vein, see *J.J. v. the Netherlands*, App. No: 9/1997/793/994, 27/3/1998, § 43; *Vermeulen v. Belgium*, App. No: 19075/91, 20/2/1996, § 33). In this context, the facts that applicants cannot participate in the process of the preparation of an expert report and that the applicants are not granted the opportunity of commenting on the evidence is interpreted as the violation of the right to adversarial trial (See *Mantovanelli v. France*, App. No: 21497/93, 18/3/1997, § 33).

48. While the decisions of the court being reasoned is one of the elements of the right to a fair trial, this right cannot be construed as responding all kinds of claims and defenses asserted in the trial in a detailed way. For this reason, the scope of the obligation of showing a justification can vary depending on the quality of a decision. Nevertheless, the fact that the claims of the applicant as regards procedure or merits which require a separate and clear response have been left unresponded will result in the violation of a right (App. No: 2013/1213, 4/12/2013, § 26).

49. While the fact that the justifications of the decisions delivered by the courts of remedy are not detailed is construed as the fact that the justifications included in the decisions of the court of first instance are accepted in the decisions of approval (see *García Ruiz v. Spain*, App. No: 30544/96, 21/1/1999, § 26), the fact that the concrete complaints of the applicants to the effect that their procedural rights have been violated through the appeal applications as regards the significant issues which were also not discussed by the court of first instance although the applicants have stated them are not discussed in the appeal examination can be considered as the violation of the right to a reasoned decision.

50. In cases which are similar to the incident which is the subject of the application, in relation to the applicants who could not participate at a hearing as the date of hearing was notified to them after the hearing, the ECtHR reached to the conclusion that the right to a fair trial was violated by considering that the guaranteeing of rights in a theoretical way was not sufficient, that they needed to be guaranteed in an effective manner also in practice, that although a trial with hearing was not always necessary, the hearing was not notified in a way that would allow for the participation at a hearing of a party to the case that would decide whether or not it would exercise the right to appear at a hearing prescribed in domestic law

and also that the other party of the case was present in the hearing and made oral statements and by stating that the applicants could not orally respond to the statements of the opposing party with their own statements (See *Yakovlev v. Russia*, App. No: 72701/01, 15/3/2005, §§ 19 and 21; *Groshev v. Russia*, App. No: 69889/01, 20/1/2006, §§ 29-31).

51. In the concrete incident, the counsel of the applicant could not participate in the hearing of the Cadastral Court of Demirci dated 13/10/2011 by way of submitting a petition of excuse, the Court decided that the excuse of the counsel of the applicant be accepted and that he find out the date of hearing via UYAP portal, that the new hearing be held on 23/11/2011, at 10:15.

52. However, the Court held the final hearing on 21/11/2011 which was two days prior to the date that was determined at the previous hearing and appeared on UYAP portal although the counsel of the applicant was not present, but the counsel of the defendant Treasury administration was present and at this hearing, the reports of science and forestry experts were submitted to the Court and the opinion of the counsel of the defendant Treasury on the expert reports was asked and his/her objection was recorded in the minutes. As the counsel of the applicant could not participate in this hearing, he could not find the opportunity of examining the expert reports and submitting his comments thereon.

53. Moreover, the counsel of the applicant especially stated in the appeal application he filed that the Cadastral Court held the hearing prior to the date which it determined and that for this reason, they could not participate at the decision hearing and their evaluation of the expert reports and other evidence which were presented to the court at this hearing was prevented. The 20th Civil Chamber of the Supreme Court of Appeals approved the appealed decision on 11/6/2012 without discussing the mentioned complaint of the counsel of the applicant.

54. The complaint of the applicant in the case which is the subject of the application as to the effect that he could not object to the expert reports as he could not participate in the hearing because of the mistake of the court could not be voiced in the first instance as the court issued a decision at the hearing in which the applicant could not participate. The mentioned complaint of the applicant is a concrete complaint and it is proven through UYAP records and the hearing minutes that the hearing was held prior to the determined date. The fact that, although the applicant included in his appeal petition his concrete complaint as to the effect that he could not exercise his procedural rights, this situation was not examined in the phase of appeal at all or that this matter was not responded in the justification aggravates the violation.

55. Due to the aforementioned reasons, it should be decided that the applicant's right to a fair trial guaranteed in Article 36 of the Constitution was violated.

b. In Terms of the Right to Property

56. The applicant asserted that the right to property was violated as the immovable property that he kept in his possession with the quality of a field for thirty years and claimed he purchased with a preliminary sale contract was registered with the quality of a forest in the name of the treasury through the forestry cadastral work performed.

57. In the opinion letter of the Ministry of Justice, it was stated that according to the European Court of Human Rights (ECtHR), the right to property did not grant the right to acquire the property of an entity which was not owned at present, that the applicant was

responsible for proving the ownership that he mentioned, that however, he could not prove his claim before the court and it was declared that these matters needed to be taken into consideration in the examination.

58. It is provided in article 35 of the Constitution that everyone has the right to property, that this right can only be restricted by code for public interest, that the exercise of the right to property cannot be contrary to public interest. (the CC, M.2011/58, D.2012/70, D.D. 17/5/2012). 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 lodged to the Constitutional Court to be examined, the right which is claimed to have been violated by public power must fall within the scope of the European Convention on Human Rights (ECHR) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution (App. No: 2012/1049, 26/3/2013, § 18).

59. While the concept of property stipulated in article 35 of the Constitution is not limited to the concept of property stipulated in the Code numbered 4721 in terms of scope, there is no doubt that the ownership of an immovable property is within the scope of the guarantee in article 35 of the Constitution. An applicant who asserts that his/her right covered by article 35 of the Constitution has been violated has to prove that such a right exists. For this reason, it is primarily necessary to evaluate the legal status of the applicant regarding the point of whether or not he has an interest in relation to property which requires protection in accordance with article 35 of the Constitution (App. No: 2013/539, 16/5/2013, §§ 30,31).

60. It is provided in article 704 of the Code numbered 4721 that land, independent and permanent rights that are recorded on a separate page in the title deed registry and independent sections that are recorded in the property ownership registry are covered by the right to property, in article 705 thereof that the acquisition of the immovable ownership will, as a rule, take place upon registry; that ownership will be acquired before registration in cases of inheritance, court decision, compulsory enforcement, occupancy, expropriation and other cases prescribed in the code, that however, in such cases the owner's ability to carry out disposition transactions depends on the property being registered in the title deed registry.

61. In the decision of the Assembly of Civil Chambers of the Supreme Court of Appeals, it was stated that the right to property was a real right, that it required registration in the title deed registry, that the right to property over immovable property, as a rule, took place upon registration in accordance with the provision of article 705 of the Code numbered 4721, that in this case, with the occurrence of the conditions of acquisitive statue of limitations, possession over the immovable property did not automatically transform into the right to property, but gave rise to the "*right to request for registration*" in favor of the possessor, that for this reason, a new legal situation occurred through the decision of registration of the judge and this decision bore a prospective consequence as of the date on which this decision became final (The decision of the Assembly of Civil Chambers of the Supreme Court of Appeals dated 7/2/2007 and numbered M.2007/8-76, D. 2007/58).

62. In the incident which is the subject of the application, the applicant filed a request for the registration in his own name and the acquisition of the immovable properties that he made the subject of the case based on the title register in the name of another person in one of these immovable properties and on possession in the other two. In this case, the request of the applicant in relation to the right to property is not the prevention of intervention made in his current property, but the granting to him of the ownership of the immovable property of which he is not the owner yet.

63. The determination of the existence of the right to property is left to local courts and the burden of proving that the right has a certain quality and that the applicant is authorized to exercise the right in question according to the codes belongs to him/her (For the decision of the ECtHR in the same vein, see, the ECtHR, *Agneessens v. Belgium*, App. No: 12164/86, 12/10/1998). In the incident which is the subject of the application, although the applicant to whom the burden of proof over the right to property belonged asserted that the immovable property which was the subject of dispute did not remain within the boundaries of forest, that he purchased one of the immovable properties from Ali Yıldırım who had the title deed, he could not prove his claim before the Court.

64. Nevertheless, as a conclusion has been reached as to the effect that the applicant's right to a fair trial was violated by considering that the hearing which was notified to be held on 23/11/2011 was held on 21/11/2011, that at this hearing, the expert report was read out and the objections against the report were evaluated, that the applicant could not state his objections as he could not participate in this hearing, that moreover, although the applicant stated this matter in the phase of appeal, it was not evaluated, it is clear that the trial carried out in the case which is the subject of the application is not fair. It is not possible to conclude that the ownership which the applicant claimed is present or not based on the decision of dismissal of the claim of property which was delivered after an unfair trial. In this case, it is necessary that first of all, the claim of property be discussed and concluded in a fair trial in which the applicant is granted the opportunity of objecting against the expert report and that the appeal examination be carried out over this decision and that only then, it be stated before the Constitutional Court.

65. Due to the reasons explained, as the claim of property cannot be discussed in the evidence of the result of an unfair trial, it has not been deemed necessary to decide on the complaint towards the right to property in this phase.

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

66. The applicant requested that a moral compensation of 16,000.00 TL be adjudged in order that the moral damage that he was exposed to due to the fact that his participation in the hearing was prevented because of the mistake made and that he could not find the opportunity of examining the expert reports and commenting thereon be compensated.

67. In the opinion of the Ministry of Justice, no assessment was made as regards the request for compensation of the applicant.

68. Article 50 of the Code numbered 6216 with the side heading "Decisions" is as follows:

> *"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action can be delivered.*
>
> *(2) 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.

…"

69. As the violation determined in the case which is the subject matter of the application arises out of the fact that the court held the hearing on day other than the day which it determined and there is legal benefit in the holding of a retrial in a way which will grant the applicant the opportunity of objecting against the expert reports, it should be decided that the file be sent to the relevant court in order to carry out a retrial for the removal of the violation and its consequences in accordance with paragraphs (1) and (2) of the Code numbered 6216.

70. It should be decided that the trial expenses of 1,672.50 TL in total composed of the fee of 172.50 and the counsel's fee of 1,500.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on 20/2/2014 that;

A. The application

1- is INADMISSIBLE in terms of the complaint with regard to the right to access to court as "*it is clearly devoid of basis*",

2- is ADMISSIBLE in terms of other complaints with regard to the right to a fair trial and the complaints with regard to the right to property,

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

C. THERE IS NO NEED FOR THE DELIVERY OF A DECISION on the complaint with regard to the right to property in this phase,

D. The file be SENT to the relevant court in order to carry out a retrial for the violation and the consequences thereof to be removed in accordance with paragraphs (1) and (2) of article 50 of the Code numbered 6216,

E. The other requests of the applicant be DISMISSED,

F. The trial expenses of 1,672.50 TL in total composed of the fee of 172.50 and the counsel's fee of 1,500.00 TL, which were made by the applicant be PAID TO THE APPLICANT,

G. 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,

President	Member	Member
Serruh KALELİ	Zehra Ayla PERKTAŞ	Burhan ÜSTÜN

Member	Member
Nuri NECİPOĞLU	Hicabi DURSUN