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## REPORT WITH RECOMMENDATIONS

**A.no. 185/2012**

**Mikireme Maliqi**

**against**

**The Court of Appeals**

**To:** Mrs Tonka Berishaj - Acting president  
The Court of Appeal in Prishtinë  
Mr Nehat Idrizi, Chairperson  
The Kosovo Judicial Council

**Subject:** Regarding the judicial case C. no. 3439/15 on the division of the property earned in the joint ownership.

**Legal basis:** The Constitution of the Republic of Kosovo, Article 135, paragraph 3  
The Law on Ombudsperson, Article 16 paragraph 8

Prishtinë, on 5 May 2016

## Scope of the report

1. The scope of this Report is to draw attention of the Court of Appeal in Prishtinë, regarding the need to undertake actions relevant to improving the work of the Judiciary, and efficient and effective functioning of the courts.
2. This report is based on the individual complaint filed by Mrs Mikireme Maliqi, supported on facts and evidences of the party, and case memos which are at the possession of the Ombudsperson Institution (OI), regarding the judicial proceedings to take a decision on the case C. no. 3439/15, dealing with the recognition of the right of ownership based on joint marital contribution.

## Summary of facts

3. Based on information and documentation available with OI, the facts may be summarised as follows:
4. On 22 May 2000, the complainant filed a claim with Municipal Court of Gjilan (MCGj), for recognition of the right of ownership, based on joint marital contribution
5. On 8 December 2000, MCGj, deciding on the issue, issued a judgment C.no.187/2000, according to which the claim of the complainant for recognition of the right of ownership based on joint marital contribution in ½ ideal parts for two apartments in Gjilan, the plot purchased at the city part, movable properties in the clinics and the vehicle was rejected.
6. On 10 April 2001, deciding according to the claim of the complainant, District Court of Gjilan (DCGj), issued a judgment Ac.no. 5/2001, according to which the complaint of the complainant was rejected as unfounded.
7. The complainant filed a revision in time against the judgment of DCGj, due to essential violations of the provisions of the contested procedure and wrong application of the material right, and proposed, and proposed to cancel the second instance judgment and the case to be returned for retrial in the first instance.
8. The Supreme Court of Kosovo (SCK), after revision of the objected judgment, issued a decision Rev. no. 20/2001, dated 31 December 2002, according to which, the revision of the complainant is accepted, and due to the violation of essential provisions of the contested procedure, the judgment of DCGj, Ac.no. 5/2001 dated 10.04.2001 and judgment of MCGJ, C.no.187/2000, dated 08.12.2000 are cancelled, while the case is returned to the first instance court for retrial.
9. On 14 November 2005, MCGj issued the judgment C.no.83/2003, according to the I part of the enacting clause of the judgment, the claim of the complainant is partly approved and it was established that the complainant is entitled to the right of joint ownership, based on joint marital contribution to the 1/3 of the ideal part of the house with two entrances and on the part of the yard. While according to the II part of the enacting clause, the claim of the complainant for the recognition of the right to the ½

part of the apartment in 45 meters square, the plot in the area of 200 meters square and one part of the movable properties is rejected.

10. On 30 August 2008, deciding on the issue, DCGj issued a judgment Ac.no. 26/2006, according to which partially has the complaint of the complainant and modified the I part of the enacting clause of the MCGJ judgment, C.no.83/2008, and confirmed that the complainant is entitled to joint ownership based on joint marital contribution in the parts of the crafts work of the building of the defendant in  $\frac{1}{4}$  parts, while the judgment of the first instance is confirmed in the II and III part of the enacting clause.
11. The complainant filed a revision in time against the judgment of DCGj, due to essential violations of the provisions of the contested procedure and wrong application of the material right.
12. SCK, after revision of the objected judgment, issued a decision Rev. no. 268/2006, dated 24 December 2008, according to which, the revision of the complainant is accepted, and due to the essential violation of provisions of the contested procedure, the judgment of DCGj, Ac.no. 26/2006 and judgment of MCGj, C.no.83/2003 are cancelled, while the case is returned to the first instance court for retrial.
13. On 20 December 2010, MCGj issued a judgement C.no.46/2009, according to which the claim of complainant is approved as founded, and the defendant is obliged, on behalf of the assets earned in the extramarital and in marital period, which calculated in monetary means is in the amount of €54.864.35, and to recognise her the right of ownership for  $\frac{1}{2}$  of the ideal part in joint ownership on behalf of joint immovable property.
14. DCGj, deciding in conformity with the complaint of the defendant, issued a decision AC.no.85/2011, dated 17 May 2012, according to which, judgment of MCGj C.no.46/2009 dated 20.12.2010 is cancelled, and due to the essential violation of provisions of the contested procedure, the case is returned to the first instance court for reestablishment.
15. On 25 June 2015, BCGj issued a judgment C.no.393/12, according to which the claim of the complainant is partially approved, according to the enacting clause I, it is confirmed that the complainant based on the contribution provided during extra-marital and marital period is a co-owner of joint property by 33.85 %, of the overall area of the house and yard, according to the enacting clause II, the other part of the claim of the complainant is rejected as unfounded by Law, for which she asked more than the part tried, related to confirmation of the right of the ownership of the complainant from  $\frac{1}{2}$  of ideal parts of the house and the yard, and the other part of the claim, through which she requested  $\frac{1}{2}$  e of the ideal part of the apartment in the street “Bojana” and the apartment in the neighbourhood “Kamnik” and  $\frac{1}{2}$  of the cadastre plot which is located on ”M.Tita” street. In conformity with the exacting clause III, the other part of the claim of the complainant is rejected, according to which she requested confirmation that she is the co-owner of the  $\frac{1}{2}$  ideal parts of the household appliances.
16. On 9 July 2015, the complainant filed a complaint with AC against the judgment C.nr.393/12, dated 9 July 2015.

## Legal basis of Ombudsperson actions

17. In conformity with Article 135, par. 3 of the Constitution, *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”* In addition, Law no. 05/L-019 on Ombudsperson, Article 16 paragraph 8, stipulates that *“The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.”*

## Case investigation by Ombudsperson

18. On 18 April 2012, the complainant, addressed to Ombudsperson, against the DCGj, complaining on the delay of court proceedings according to the claim filed on 22 May 2000 in MCGJ, on the division of property earned during marital period.
19. On 19 April 2012, OI representative visited DCGj, talked to the case judge, who claimed that the case will soon be proceeded with by the court.
20. On 17 May 2012, DCGj issued a decision Ac.no.85/2011, according to which the first instance judgement is cancelled and the case is returned for retrial.
21. After the case was returned for retrial at first instance, the case was allocated for review to the first judge; however, according to the complaint of the defending party on the exemption of the judge; the case was allocated to the second judge, who, later, on the suspicion of having committed a criminal act, was imprisoned. Owing to this reason, in March 2013, the case was allocated to the third judge, who proceeded the case and from 21 May 2013 to 25 June 2015, when the first instance judgement was issued, 12 court sessions were held for revision of the case.
22. Also, from 6 May 2014 to 14 January 2015, the third judge of the case, according to the decision reached by the Disciplinary Commission within the Kosovo Judicial Council (KJC) was temporarily suspended from work, on the suspicion of a criminal act, failure to report or false reporting of property.
23. Immediately after the judge returned to work, on 22 January 2015, the OI representative visited BCGj, and talked to the judge, who immediately appointed the session for 27 February 2015. On 21 May 2015, a court session was held and the point in question was announced closed, and on 25 June 2015, BCGj issued a judgement C.no.393/12.
24. Ombudsperson concluded that there were three judges dealing with the case during this period, there were two requests for exemption of the case judges, one judge was exempted from the case, one judge was imprisoned and the third judge, during this period, was suspended from work in duration of more than eight months.

## Legal instruments applicable in the Republic of Kosovo

25. The Constitution of the Republic of Kosovo (CRK), in Article 31, par. 1, stipulates that: *“Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”*
26. While Article 54, stipulates that: *“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”*
27. European Convention on Human rights (ECHR), paragraph 1, Article 6 of ECHR, stipulates that: *“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.”*
28. While Article 13 of ECHR stipulates that: *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*
29. Law no. 03/L-006 on Contested Procedure, in Article 1 stipulates: *“By the law on contested procedure are determined the rules of procedure through which courts examine and settle civil justice disputes of physical and legal persons, unless otherwise provided for by a particular law.”*
30. In conformity with Article 10, paragraph 1 of the same Law *“The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law.”*
31. Article 12 of this Law obliges the court *“The first instance procedure, as a rule, is composed of two court sessions: a) preliminary hearing; b) principle process.”*
32. While in conformity with Article 190, paragraph 3, the same Law, envisions that *“For discussion, the court of second instance will determine a direct examination for the case even if the verdict of the first instance court was twice annulled, and in the case when the college session evaluates that the verdict against which a complaint is raised was based on essential violation of provisions of contestation procedure, or when the factual state was evaluated wrongly or incompletely.”*
33. Article 199 of this Law stipulates that: *“Immediately upon arrival of the case from the second instance, the court of the case should set a preliminary session or trial session for the main hearing, which should take place within thirty (30) days of the decision arriving from the second instance court, the court should also conduct all procedural actions, re-examine all contesting issues offered by the court of the second instance in their verdict.”*
34. While Article 441, paragraph 1, expressly stipulates that: *“The main hearing session cannot be postponed indefinitely.”* Paragraph 2 of the same Article also stipulates that: *“The main hearing session cannot be postponed for more than thirty (30) days, [...]”*

35. **Law no. 03/L-199 on Courts**, Article 7, paragraph 3, stipulates that: *“Every person has the right to address the courts to protect and enforce his or her legal rights. Every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his or her rights or interests, in the manner provided by Law.”*
36. While in conformity with Article 7, paragraph 5, of the same Law, stipulates that *“All courts should function in an expeditious and efficient manner to ensure the prompt resolution of cases.”*

## Legal analysis

37. The complainant complained about the failure of the judiciary, Municipal Court in Gjilan, District Court in Gjilan and Supreme Court of Kosovo, to decide regarding her claim filed on 22 May 2000, since there is no final decision taken yet regarding the case, it has to with violation of her right to a fair process, within a reasonable time foreseen by paragraph 1 of Article 6 of ECHR, which guarantees that: *“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 (...)”*.
38. Ombudsperson concluded that the case in question, ever since its submission on 22 May 2000, when Mrs Maliqi, addressed to Municipal Court of Gjilan with a claim, **procedures lasted for more than 15 years** and until the issuance of this report, there is still no final form decision, which is not in conformity with the right to a fair judicial trial within a reasonable time, guaranteed by paragraph 31 of the Constitution of the Republic of Kosovo and paragraph 1 of Article 6 of ECHR and Article 10.1 of LCP(law on Contentious Procedure).
39. Ombudsperson, regarding the conduct of judicial authorities, has concluded that, since 22 May 2000, the first instance court issued a total of four judgments, three judgments which were cancelled by higher courts, due to the essential violation of legal provisions, while the fourth judgement was issued on 25 June 2015. DCGj, as a second instance court, issued two judgments and one decision; judgments were also cancelled according to the revision of SCK. While SCK issued two decisions, according to which the revision of the claiming party was accepted, and first and second instance courts judgments were cancelled. Therefore, owing to this reason, Ombudsperson concluded that, this decision-making by courts/judges is a reflection of their failure in final determination of the case, to the prejudice of the complainant and presents a failure for judicial protection of human rights guaranteed by Article 54 of the Constitution of the Republic of Kosovo.
40. Ombudsperson reminds that ECHR is an international instrument on human rights, which is directly applicable in the Republic of Kosovo and has priority in case of conflicts, over legal provisions and other public institutions acts. Article 13 of ECHR clearly and expressly stipulates obligation of the state, that in the first place, to protect human rights through a legal system, to provide additional guarantees to an individual that he enjoys these rights in an effective manner. Therefore, Article 13 guarantees the individual, effective remedy of complaint before a national authority for alleged



violations of rights, while Article 6, and foresees the revision of the case within a reasonable time.

41. Ombudsperson reminds that the case-law of European Court on Human Rights (ECtHR) confirmed that in cases when the determination of the civil right is involved, the delay of the procedure is normally calculated from the time of initiation of court proceedings (see judgment *Girolomi vs. Italy*, on 19 February 1991 and judgement *Boddaert vs. Belgium*, on 12 October 1995). For the case in question, the court proceedings were initiated in the Municipal Court in Gjilan, on 22 May 2000, while on 25 June 2015, BCGJ issued the final judgment C.no.393/12, and now the case is according to the complaint with the Court of Appeal in Prishtinë, as a second judicial instance, and a decision has still not been taken.
42. Regarding the applicability area of Article 13 of ECHR, Ombudsperson reminds that ECtHR, has in some cases expressly highlighted that huge delays in administration of justice constitute a serious threat to the rule of law in the country. The limitations highlighted in Article 13 of ECHR, are commented by ECtHR, as follows: *“Regarding the alleged failure to organise a session within a reasonable time, no such qualification can be highlighted in the area of Article 13. On the contrary, Article 13 in the scheme of the protection of human rights foreseen by Convention, is favouring keeping the limitations at a minimum implied by Article 13”*.
43. In addition, Ombudsperson reminds that Article 6 (1) of ECHR does not prescribe any absolute time for determining the rationale of the duration of procedures. Such determination depends on special case circumstances, particularly on the complexity of the case, the conduct of the parties and authorities involved, and depending on what is the complainant’s interest.
44. Ombudsperson found that, notwithstanding the fact that on 16 April 2007, KJC adopted the Strategic Plan for the Kosovo Judiciary for 2007-2012, according to which old cases accumulated were to be resolved in order to ensure timely resolution of all cases submitted with the Courts, while from June 2014 to June 2019, the second Strategic Plan was approved for elimination of the accumulation of cases. Notwithstanding these strategic plans, the complainant has never benefited from the strategies in question.

## Ascertainment of Ombudsperson

45. Ombudsperson noted that there was no special method or legal way and none were placed at the availability of the complainant; which she could use to complain on the delay of procedure, forecasting or hoping to achieve whatever facilitation as a form of prevention of injustice or compensation for the injustice experienced. The way how judiciary acted proves denial of justice for the judicial protection of rights.
46. Ombudsperson ascertained that time period of over 15 years without a final decision occurred without the fault of the claiming party. In no time can she be considered to have contributed to the delays on determining on the case.
47. Considering the analysis of above-mentioned legal provisions, information and facts available with the OI, Ombudsperson ascertained that **there were violations of the**

**right to a fair judicial trial within a reasonable time**, guaranteed under above-mentioned legal acts, there were violations of the right to effective legal remedies, by the failure of the judicial system in deciding on the complainant's case. Delays and inefficiency of procedures bring to situations which are in conflict with the principle of rule of law, a principle which Kosovo authorities are under the obligation to respect.

48. Therefore, Ombudsperson, in conformity with Article 135, paragraph 3 of the Constitution of the Republic of Kosovo, “[...] *is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed*,” and Article 6, paragraph 8 of the Law on Ombudsperson, according to which “*The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures*”, based on above-mentioned legal analysis, as a recommendation, with reference to above-mentioned arguments, and in order to improve the work of the Kosovo judicial system.

## **Recommendations**

### **The Court of Appeal in Prishtinë**

1. *Considering the fact that the complainant has initiated the judicial procedure since 2000 and regarding the case there are a number of court decisions issued and still there is no final form decision, the Court should consider the possibility to take actions to decide on the case, within a reasonable time, despite the fact that the case has been with this Court since 9.07.2015.*

### **Kosovo Judicial Council**

2. *To initiate compiling a legal instrument which would constitute an effective remedy within the meaning of Article 13 of European Convention on Human Rights, which provides facilitation in the form of prevention or compensation related to complaints for the delay of judicial procedure.*

In conformity with Article 132, paragraph 3 of the Constitution of the Republic of Kosovo and Article 28 of the Law on Ombudsperson no. 05/L-019, I would like to be informed on actions planned to be taken, regarding this issue, in response to the preceding recommendations

Expressing our gratitude for the cooperation, please be informed that we would like to have your response regarding this issue within a reasonable legal time, but no later than **30 (thirty) days** from the day of the receipt of this report.

Sincerely,

Hilmi Jashari

Ombudsperson