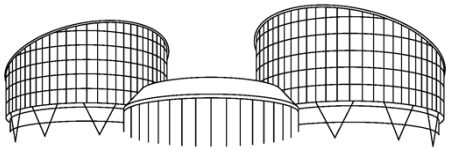

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KÖKSOY v. TURKEY

(Application no. 31885/10)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Alleged procedural shortcomings of domestic proceedings in land register dispute • Adversarial trial • Documentary evidence obtained by the Court of Cassation on its own initiative not communicated to the applicants • Effects of the procedural shortcoming remedied at remittal stage • Specific and explicit reasons provided for dismissing applicants' claim

STRASBOURG

13 October 2020

FINAL

13/01/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Köksoy v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Darian Pavli,
Saadet Yüksel,
Peeter Roosma, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 31885/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Abdurrahman Köksoy and Mr Haydar Köksoy ("the applicants"), on 3 May 2010;

the decision to give notice of the application to the Turkish Government ("the Government");

the parties' observations;

Having deliberated in private on 1 September 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns an alleged breach of the applicants' right to adversarial proceedings on account of the Court of Cassation basing its decision on appeal on certain information and documents not submitted to the parties for their comments.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicants were born in 1953 and 1959 respectively and live in Istanbul. They were represented by Ms A. Turan, a lawyer practising in Istanbul.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties and as can be seen from the documents submitted by them, may be summarised as follows.

A. Background of the dispute

5. The case concerns a plot of land located in Kemerburgaz, Istanbul.

6. In 1939 a boundary-marking exercise pursuant to law no. 3116 was carried out in Kemerburgaz in order to determine the boundaries of Belgrade Forest. The outcome of the exercise and the boundaries of the forest were publicly announced and, as no objection was made, this decision became final in 1940.

7. Following a land cadastral survey subsequently carried out in Kemerburgaz in 1956, the plot of land in question was registered in the names of two individuals, E.A. and H.A.

8. In 1984 a forest cadastral commission conducted a cadastral evaluation (*aplikasyon çalışması*) in the Kemerburgaz area. The purpose of this evaluation was to identify the forests which were not yet included in the cadastral map and to remove the forest status of lands which had lost their characteristics defined in the law and to apply the forest boundary results which had become final (*kesinleşmiş orman sınırlarının araziye aplike işlemi*) to the area in question.

9. In its application of the forest boundary results of the boundary marking exercise of 1939 (see paragraph 6 above), the forest cadastral commission found that the plot of land in question fell inside the boundaries of Belgrade Forest. The commission completed its evaluation in 1985 but announced its results by way of public announcement only on 15 June 1988.

10. On 30 October 1991 the applicants purchased the majority of the shares of the plot of land from H.A.

B. Annotation in the land register and the applicants' action before the civil courts

11. On 17 December 1993, at the request of the Treasury, an annotation (şerh) was made in the land register by the land Registry office, indicating that the applicants' plot of land was part of the forest.

12. On 3 April 2003 the applicants brought an action against the forest administration before the Eyüp Civil Court, requesting the removal of the annotation from the land register.

13. In its examination of the claim the Eyüp Civil Court carried out an on-site examination and subsequently appointed an expert panel comprised of three experts in forest engineering, with a view to determining whether the plot of land fell within the boundaries of the forest. In their report submitted to the court on 8 February 2005, the experts concluded that the boundaries established in the forest cadastral survey in 1939 had not been correctly applied in the subsequent cadastral evaluation carried out in 1985. In their view, as a result of the errors committed in the evaluation of 1985, the applicants' plot of land, which was originally outside the forest boundaries of 1939, had been determined as falling inside the forest.

14. On 10 March 2005 the Eyüp Civil Court granted the applicants' action on the basis of the conclusions of the expert report. It therefore ruled

that the annotation in the land register had been unlawful and should be removed.

15. The forest administration appealed against the decision to the Court of Cassation, arguing that the expert report contained erroneous calculations.

16. In two decisions that were not communicated to the parties, the Court of Cassation returned the case-file to the first-instance court in order for it to complete and send the case-file back by including, *inter alia*, i) land register records of the properties adjacent to the applicants' land, ii) the case-files on similar disputes, if any, lodged by the owner of the adjacent properties or by the forest administration, iii) information relating to the previous owners of the plot of land in question, iv) the case-file of the criminal proceedings lodged against the applicants for the commission of a forest trespassing offence.

17. On 10 October 2007 the Court of Cassation quashed the Eyüp Civil Court's decision of 10 March 2005, holding that the expert reports relied on by the cadastral and civil courts in three other disputes concerning adjacent properties had determined that those properties fell inside the boundaries of the forest. The Court of Cassation also took into account the expert reports obtained in the criminal proceedings – which had been discontinued because of the expiry of the five-year prosecution period – against the applicants for the forest trespassing offence. According to the experts heard by the criminal courts, the applicants' property fell within the boundaries of the forest corresponding to the boundary-marking exercises of 1939 and 1985. In the light of documents produced in those previous proceedings as well as the cadastral maps and application documents, the Court of Cassation held that the 1985 application exercise had not been erroneous. The Court of Cassation therefore concluded that the property in question could not be owned by private individuals in so far as it was classified as a forest and that therefore the annotation had been lawful. It went on to add that the administration always had the possibility to seek the annulment of the applicants' title deed in so far as the land cadastre of 1956 had been null and void.

18. On 26 November 2007 the applicants requested before the Court of Cassation a rectification of its decision of 10 October 2007. They submitted, *inter alia*, that expert reports submitted in other proceedings concerning different properties had been taken into account by the Court of Cassation and that they had not been given an opportunity to comment on them. Furthermore, they argued that the Court of Cassation had not commented at all on the expert report obtained by the Eyüp Civil Court in their own proceedings. In their opinion, there were significant contradictions between the conclusions reached by experts in their case and the ones that had been taken into account by the Court of Cassation in those other proceedings. For that reason, the applicants argued that the Court of Cassation, rather than

quashing the judgment on the merits, should have remitted the case back to the Eyüp Civil Court due to incomplete examination. In that connection, the applicants submitted that there had been errors in the application of the forest boundaries by the cadastral commission in 1985 and that the amendments of 2003 in the cadastre law had called for a special procedure to be followed by forest cadastral commissions to rectify the errors in forest maps. Finally, the applicants considered that the ten-year prescription period had expired in respect of the land cadastre of 1956 and that therefore the forest administration did not have a right to claim that the property could not be owned by private individuals.

19. On 11 March 2008 the Court of Cassation dismissed the applicants' request for the rectification of its decision, holding that the grounds put forward by the applicants were not different from those they had argued in the proceedings.

20. On 25 November 2008 the applicants asked the first-instance court not to comply with the Court of Cassation's decision but to persist in its decision of 10 March 2005.

21. On the same day, after hearing the parties, the Eyüp Civil Court dismissed the case by incorporating the high court's reasoning in its decision.

22. On 1 July 2009 the Court of Cassation upheld the Eyüp Civil Court's decision of 25 November 2008 after an unsuccessful appeal by the applicants.

RELEVANT LEGAL FRAMEWORK

23. A full description of the relevant domestic law may be found in *Şamat v. Turkey*, no. 29115/07, §§ 33-37, 21 January 2020.

24. The former Code of Civil Procedure (Law no. 1086), as in force at the time, described the procedure to be followed by a first-instance court in case its decision is quashed by the Court of Cassation. The relevant section reads as follows:

Section 429

> "If the relevant Chamber of the Court of Cassation quashes the appealed decision, [it] shall remit the case to the [first-instance] court which delivered the decision or to any other court it shall deem appropriate.
>
> That court, by (...), shall decide whether to comply with the Court of Cassation's decision to quash after having invited, on its own motion, the parties for a hearing and having heard them.
>
> If the court persists in its earlier decision, an appeal against the decision to persist shall be made to the Grand Chamber of the Court of Cassation for Civil Law Matters."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicants complained that the Court of Cassation had based its decision on documents and information that had not been communicated to the parties for their comments. They further complained that their right to a reasoned decision had been infringed on account of the failure of the courts to respond to their submissions concerning the recent amendments to the law and the applicable prescription periods which, in their view, had a decisive importance for the outcome of their dispute.

26. The applicants relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

27. The Government argued that the applicants lacked victim status. They submitted that the applicants were still owners of the property in question and that the annotation on the land Registry did not affect their right to use, enjoy and dispose of their property.

28. The applicants disagreed with the Government, arguing that their property had fallen in value drastically as a result of the annotation.

29. The Court reiterates that a decision or measure favourable to an applicant is not, in principle, sufficient to deprive him or her of "victim" status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see, among many others, *Cocchiarella v. Italy* [GC], no. 64886/01, § 71, ECHR 2006).

30. The Court observes that the fact that the applicants remained owners of the property is not relevant to the issue of their victim status under the Convention in respect of their complaint about the alleged violation of adversarial proceedings concerning the removal of the annotation in the land register.

31. The Court notes that the applicants' complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. Alleged lack of adversarial proceedings

(a) The parties' submissions

32. The applicants maintained that the Court of Cassation had quashed the Eyüp Civil Court's decision on the basis of information and documents produced in other proceedings to which the applicants were not parties. Moreover, as a result of the Court of Cassation quashing the decision on the merits, rather than remitting the case back to the Eyüp Civil Court due to incomplete examination, they had been deprived of an opportunity to discuss that information and documents in an adversarial manner. The applicants submitted in that connection that because of the manner in which the Court of Cassation quashed the decision, the Eyüp Civil Court, in its first-instance capacity, could either persist in its earlier decision or comply with the Court but could not examine the case anew.

33. The Government submitted that the Court of Cassation had taken into account information and documents in other proceedings which shared the same reference points with the applicants' property. Those cases had already become final and the Court of Cassation, having regard to the principle of procedural economy, had assessed the material facts of the case *proprio motu* rather than remitting it to the first-instance court on the basis of incomplete examination. In the Government's opinion, the Court of Cassation's extensive appellate review ensured that the proceedings would not be unnecessarily prolonged. In any event, the Government considered that the applicants' right to a fair hearing had not been breached because they had had an opportunity to examine the information and documents relied on by the Court of Cassation and to submit their counter-arguments to the first-instance court after the Court of Cassation had quashed and remitted the case.

(b) The Court's assessment

34. The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, in accordance with which the parties must have the opportunity not only to adduce evidence in support of their claims, but also to have knowledge of, and comment on, all evidence or observations filed, with a view to influencing the court's decision (*Nideröst-Huber v. Switzerland*, 18 February 1997, § 24, *Reports of Judgments and Decisions* 1997-I). This principle is valid in respect of submissions made by the parties just as much as it is in respect of submissions made by an independent member of the national legal service (*Kress v. France* [GC], no. 39594/98, § 65, ECHR 2001-VI), by representatives of the national administration (*Krčmář and Others v. the Czech Republic*, no. 35376/97,

§§ 38-46, 3 March 2000), or by the court whose judgment is the subject of appeal (*Nideröst-Huber v. Switzerland*, cited above).

35. In addition, the Court has previously held that judges themselves must respect the principle of adversarial proceedings, in particular when they reject an appeal or decide on a claim on the basis of a matter raised by the court of its own motion (see, among others, *Duraliyski v. Bulgaria*, no. 45519/06, § 31, 4 March 2014, with further references). What is at stake is the litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see *Beer v. Austria*, no. 30428/96, § 18, 6 February 2001).

36. Finally, it is well-established in the Court's case-law that a defect at first instance may be remedied on appeal, as long as the appeal body has full jurisdiction. Where a complaint is made of alleged non-communication of documents, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision or to remit the case for a new decision by an impartial body (see *M.S. v. Finland*, no. 46601/99, § 35, 22 March 2005, and *Bacaksız v. Turkey*, no. 24245/09, § 57, 10 December 2019).

37. Turning to the circumstances of the present case, the fact that the documentary evidence obtained by the Court of Cassation on its own initiative was not communicated to the applicants raises a problem (see *Krčmář and Others*, cited above, § 38).

38. The Court notes that after the Court of Cassation quashed the first-instance court's decision on appeal, it remitted the case to the latter for re-examination. The applicants did not claim that the documents and information in question relied on by the Court of Cassation were unavailable to them after they learned about their contents in the Court of Cassation's decision of 10 October 2007. Their complaint in that respect is limited to the fact that their views had not been sought by the Court of Cassation prior to its decision on appeal.

That being so, in the remittal proceedings, the applicants had the opportunity to raise their objections to the Court of Cassation's decision. The first-instance court, after hearing the applicants' submissions, decided to comply with the Court of Cassation's decision and incorporated the high court's reasoning in its judgment. The Court accordingly finds that the effects of the procedural shortcoming in the appeal proceedings were remedied in the remittal stage in so far as the applicants were able to acquaint themselves with the documents and information in question after the case was remitted to the trial court for reconsideration and further by the fact that they were able to respond to them before the trial court during a hearing. The Court also notes that the trial court had the competence to insist on its earlier decision had it considered the objections raised by the

applicants against the Court of Cassation's conclusions to be warranted (see paragraph 24 above). The fact that it did not insist on its earlier decision cannot in itself be criticised. The Court has consistently held in that connection that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation and assess the facts. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts or to give a ruling as to whether certain elements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which the evidence was taken, were fair (see *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII).

39. Having regard to the foregoing, the Court concludes that the procedural shortcoming during the Court of Cassation's appeal review did not affect the adversarial principle to such an extent as to render the proceedings as a whole unfair. Accordingly, it finds that there has been no violation of Article 6 § 1 in this respect.

2. Alleged insufficiency of the domestic courts' reasoning

40. The applicants complained that the domestic courts had failed to give reasons concerning their submissions on the expiry of the prescription periods and recent amendments to the cadastre law concerning the rectification of errors committed by the forest cadastral commission in the application of boundaries.

41. The Government considered that the reasoning given by the Court of Cassation clearly implied that it had considered that there had not been any errors in the 1985 boundary application exercise and that therefore the applicants' arguments concerning the recent amendments in law had not been relevant. As regards the applicants' submissions concerning the expiry of the prescription period, the Court of Cassation held that the title deed established in 1953 had no legal validity and therefore the administration could seek to declare it null and void at any time. Thus, the Government argued that the Court of Cassation had fully complied with the requirement to give reasons.

42. The relevant principles concerning the provision of reasons by courts are set out in detail in *Perez v. France* [GC] (no. 47287/99, §§ 80-83, ECHR 2004-I). In particular, the Court reiterates that Article 6 obliges the courts to give reasons for their judgments but cannot be understood as requiring a detailed answer to every argument (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288). The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory

provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6, can only be determined in the light of the circumstances of the case. If, however, a submission would, if accepted, be decisive for the outcome of the case, it may require a specific and express reply by the court in its judgment (see *Petrović and Others v. Montenegro*, no. 18116/15, § 41 17 July 2018 with further references).

43. Turning to the circumstances of the present case, the Court notes that the Court of Cassation explained in detail in its decision of 10 October 2007 why it considered the annotation made in the land register concerning the applicants' land to be lawful and factually accurate. Relying on the information in similar proceedings regarding adjacent properties concerning the boundaries of the same forest, the Court of Cassation found it established that the area which included the applicants' land had been a forest and that there had been no errors in the subsequent application of the forest boundaries. The high court further noted that the land could not have been subject to private property on account of its forest status (see paragraph 17 above). That conclusion was also accepted by the trial court when the case was remitted to it. In view of the above, in particular in light of the reasoning adopted by the Court of Cassation, explaining that the applicants' property was within the boundaries of the forest, the Court considers that it was not necessary for the domestic courts to examine in further detail the applicants' argument based on the recent amendments to the cadastre law providing for the correction of errors committed by forest cadastral commissions. Finally, the Court notes that the Court of Cassation gave a specific reason why it dismissed the applicants' argument concerning the applicability of the prescription period (compare and contrast, *Deryan v. Turkey*, no. 41721/04, § 36, 21 July 2015).

44. In the circumstances of the present case, the Court considers that the domestic courts provided in their decisions specific and explicit reasons for the dismissal of the applicants' claim. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 13 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Jon Fridrik Kjølbro
Deputy Registrar	President