



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

FIFTH SECTION

CASE OF DIYA 97 v. UKRAINE

(Application no. 19164/04)

JUDGMENT

STRASBOURG

21 October 2010

FINAL

21/01/2011

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

In the case of Diya 97 v. Ukraine,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 28 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 19164/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian company with foreign capital, 'Diya 97' (“the applicant company”), on 9 March 2004.

2. The applicant company was represented by Mr A. Mamalyga, a lawyer practising in Kyiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The applicant company alleged in particular that its right to a fair trial had not been respected in the course of the first set of proceedings against the State bailiffs.

4. On 4 November 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a legal entity registered under Ukrainian law with its office in Kyiv.

A. The applicant company's claims against the company Yu. and the first set of proceedings

6. On 17 May 2001 a company Yu. (“Yu.”), pledged in favour of the applicant company real estate located in the town of Yevpatoriya (“the real estate”). The pledge was notarised and provided that in the event of default by Yu. under the main agreement the applicant company could request a notary to issue a writ of execution regarding the real estate.

7. On 4 July 2001, following the applicant company's request, the notary issued a writ of execution ordering that the real estate be sold by the State bailiffs at public auction and the applicant company's claims be satisfied from the funds received.

8. On 11 July 2001 the Yevpatoriya Department of the State Bailiffs' Service (“the Bailiffs”) instituted enforcement proceedings in respect of the writ of execution.

9. On 7 May 2002 the Commercial Court of the Autonomous Republic of Crimea ordered that Yu. pay 171,728.86 Ukrainian hryvnias (UAH) to the applicant company. The Bailiffs instituted separate enforcement proceedings in respect of that judgment.

10. On 6 June 2002 the Bailiffs joined the enforcement proceedings in respect of the writ of execution and the judgment.

11. On 12 September 2002 the Bailiffs, having failed to sell the real estate at public auction, transferred its ownership to a company, M. (“M.”), which was one of the other creditors of Yu. The applicant company challenged those acts of the Bailiffs.

12. On 3 December 2002 the Commercial Court of the Autonomous Republic of Crimea declared the applicant company's complaint against the Bailiffs inadmissible. The court noted that the complaint had been time-barred and, in view of Article 121-2 of the Code of Commercial Procedure (“the CCP”), could not be considered by the commercial courts, since it raised the issue of the allegedly inappropriate enforcement of a notary's writ of execution, which was outside the competence of the commercial courts.

13. On 12 February 2003 the Sevastopol Commercial Court of Appeal (“the Commercial Court of Appeal”), considering the applicant company's appeal, decided that the complaint had been lodged in time but endorsed the conclusion of the first-instance court that the commercial courts had no jurisdiction over the complaint. The applicant company appealed in cassation against that resolution.

14. On 13 May 2003 the Higher Commercial Court imposed an interim measure, by which it attached the real estate pending consideration of the case.

15. On 19 May 2003 the Higher Commercial Court quashed the resolution of 12 February 2003 as unsubstantiated and remitted the case to the Commercial Court of Appeal for fresh consideration.

16. On 23 June 2003 the Commercial Court of Appeal found that the commercial courts did have jurisdiction over the applicant company's complaint, since the enforcement proceedings in question also concerned a judgment of a commercial court (namely, the judgment of 7 May 2002). It further declared the decision of the Bailiffs of 12 September 2002 unlawful and obliged them to sell the real estate at public auction at a reduced price.

17. On 27 October 2003 the Higher Commercial Court quashed the resolution of 23 June 2003, for the reason that the parties had not been duly informed of the hearing, and remitted the case to the Commercial Court of Appeal for reconsideration.

18. In the meantime, under the agreements of 11 and 18 September and 2 October 2003 M. sold the real estate to V., a physical person.

19. On 22 January 2004 the Commercial Court of Appeal declared the Bailiffs' decision of 12 September 2002 unlawful and obliged the Bailiffs to sell the real estate at public auction at a reduced price.

20. On 21 April 2004 the Higher Commercial Court upheld the Commercial Court of Appeal resolution of 22 January 2004.

21. On 26 August 2004 the Supreme Court rejected the Bailiffs' cassation appeal against the Higher Commercial Court resolution of 21 April 2004.

22. On 7 October 2004 V. lodged with the Supreme Court a cassation appeal against the Higher Commercial Court resolution of 21 April 2004. He asked for the time-limit for his cassation appeal to be extended for the reason that he had not been aware of the proceedings before 1 October 2004. He further requested that the proceedings be terminated as the commercial courts had no jurisdiction over the case.

23. On 18 November 2004 the Supreme Court gave V. leave to appeal in cassation and instituted fresh cassation proceedings.

24. On 21 December 2004 the Supreme Court, considering V.'s cassation appeal on the merits, found that the applicant company's complaint referred to the allegedly improper enforcement of the notary's writ of execution, while the commercial courts could deal with complaints concerning the enforcement of judgments, rulings, and resolutions taken exclusively by the commercial courts. It further held that at that moment the real estate was owned by a physical person. The Supreme Court therefore found that the case was outside the competence of the commercial courts, quashed the resolution of the Higher Commercial Court of 21 April 2004, and terminated the proceedings in the case.

B. The second set of proceedings

25. On an unspecified date the applicant company instituted proceedings in the Kyiv Commercial Court against the Bailiffs and the Ministry of Justice, seeking to invalidate the Bailiffs' decision of 12 September 2002 and claiming damages.

26. On 10 March 2005 the court found that the Bailiffs' decision of 12 September 2002 was unlawful. It further dismissed the applicant company's claims for damages for failure to pay the required court fees. The applicant company did not appeal against that judgment. The Bailiffs appealed.

27. On 31 August 2005 the Kyiv Commercial Court of Appeal rejected the Bailiffs' appeal as time-barred.

28. On 29 March 2006 the Higher Commercial Court upheld the Kyiv Commercial Court of Appeal ruling of 31 August 2005.

29. On 18 May 2006 the Supreme Court upheld the Higher Commercial Court resolution of 29 March 2006.

C. The third set of proceedings

30. On 16 August 2006 the applicant company instituted proceedings in the Kyiv Commercial Court against the Bailiffs, the Ministry of Justice, and the State Treasury, seeking damages in compensation for the unlawful decision of the Bailiffs of 12 September 2002.

31. On 30 January 2008 the court rejected the applicant company's claim as time-barred and unsubstantiated.

32. On 10 April 2008 the Kyiv Commercial Court of Appeal upheld the judgment of 30 January 2008. The applicant company failed to state whether it had appealed in cassation against the resolution of 10 April 2008.

II. RELEVANT DOMESTIC LAW

Code of Commercial Procedure of 6 November 1991 (as worded at the material time)

33. Article 1 of the CCP provides, *inter alia*, that legal entities and citizens who have been registered as private entrepreneurs are entitled to apply to commercial courts, in accordance with the relevant jurisdictional rules, for protection of their rights and interests.

34. Under Article 26 and 27 of the CCP, third parties shall be admitted to proceedings before a judgment of the first-instance commercial court has been adopted and shall have the same procedural rights as the other parties.

35. Under Article 107 and 108 of the CCP the parties to a case and a prosecutor have the right to appeal in cassation to the Higher Commercial Court against a judgment of a first-instance commercial court which has come into effect, and against a resolution of a commercial court of appeal. A cassation appeal may also be lodged by persons who have not participated in the proceedings but whose rights and obligations have been affected by the impugned court decisions.

36. Article 111-14 of the CCP states, *inter alia*, that the parties to a case and the General Prosecutor have the right to appeal in cassation to the Supreme Court against a Higher Commercial Court resolution.

37. According to Article 111-16 of the CCP, a Higher Commercial Court resolution may be appealed in cassation to the Supreme Court within one month of the date of its adoption. However, if the grounds for appealing in cassation arose after the expiration of this time-limit, the Supreme Court shall be obliged to accept the cassation appeal for consideration.

38. Article 121-2 of the CCP provides, *inter alia*, that complaints about acts or omissions of the bodies of the State Bailiffs' Service concerning the enforcement of judgments, rulings, or resolutions of the commercial courts can be lodged by the creditor, the debtor, or the prosecutor within ten days of the date of the impugned measure or after the above persons have become aware of it, or after the relevant measure should have been taken.

THE LAW

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

39. The applicant company complained that its right to a fair trial had been violated by the Supreme Court, which had considered V.'s cassation appeal without taking into account domestic procedural rules. The applicant company 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

40. The Government submitted that Article 6 § 1 of the Convention was inapplicable under its civil head. In their opinion the first set of proceedings did not determine any civil rights and obligations on the part of the applicant company but concerned merely the lawfulness of the administrative acts of the State authorities.

41. The applicant company contested these submissions. It stated that the subject matter of the proceedings in question was the Bailiffs' decision of 12 September 2002 by which the real estate pledged in favour of the applicant company was transferred from the debtor company to the other creditor in breach of the applicant company's pre-emptive rights. As a result of this administrative decision, the applicant company's property rights had been violated.

42. The Court notes that in these proceedings the applicant company sought to invalidate the Bailiffs' decision of 12 September 2002 for the reason that that decision violated its pre-emptive rights concerning the real estate. The Court considers that those pre-emptive rights were civil in nature. It follows that Article 6 § 1 of the Convention applies under its civil head and the Government's objection should be dismissed.

43. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

44. The applicant company maintained that the Supreme Court could not consider the cassation appeal lodged by V. They referred to Article 111-14 of the CCP, which provided that a cassation appeal could be submitted to the Supreme Court only by the parties to the proceedings or by the General Prosecutor.

45. The Government did not provide any comments as to the merits of the complaint.

46. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X).

47. The Court has further held that procedural rules are designed to ensure the proper administration of justice and compliance with the principle of legal certainty, and that litigants must be entitled to expect those rules to be applied. This principle applies both ways, not only in respect of litigants but also in respect of the national courts (see, among other authorities, *Cañete de Goñi v. Spain*, no. 55782/00, § 36, ECHR 2002-VIII; *Gorou v. Greece (no. 3)*, no. 21845/03, § 27, 22 June 2006; *Miholapa v. Latvia*, no. 61655/00, § 24, 31 May 2007; and *Andrejeva v. Latvia* [GC], no. 55707/00, § 99, ECHR 2009-...).

48. As to the present case, the Court observes that in accordance with Article 111-14 of the CCP, as worded at the relevant time, the Supreme Court could accept cassation appeals lodged by the parties to the proceedings or by the General Prosecutor. By virtue of Articles 26 and 27 of the CCP, it could also accept cassation appeals by the third parties. Unlike the Higher Commercial Court (see paragraph 35 above), the Supreme Court could not accept cassation appeals by any other persons claiming that their rights had been affected if they had not been admitted to the proceedings earlier. In this regard the Court admits that the conditions for admissibility of cassation appeals to the Supreme Court, which was the fourth level of jurisdiction in commercial proceedings, might have been stricter than for the other appeals (see, *mutatis mutandis*, *Levages Prestations Services v. France*, 23 October 1996, §§ 44-45, *Reports of Judgments and Decisions* 1996-V).

49. It appears therefore that, in considering the cassation appeal lodged by V., who had not been admitted to the proceedings previously in any capacity, the Supreme Court disregarded clear and precise procedural rules governing the administration of justice which the applicant company legitimately expected to be observed.

50. This procedural violation is aggravated by the fact that, as a result of the cassation review, the Supreme Court terminated the entire judicial process and set at naught the court decisions having, at the time of review, the effect of *res judicata*.

51. The Court acknowledges that the interests of V., who allegedly had not been aware of the proceedings earlier, might have necessitated a review of the case. However, the procedural rules did not allow the Supreme Court to act in such a manner. The Government failed to explain procedural grounds which could justify the consideration of V.'s cassation appeal by the Supreme Court. The Court further notes that nothing prevented V. from trying legitimate avenues to protect his interests, either within the existing commercial proceedings (by way of applying to the General Prosecutor for an intervention (a similar course of action has been analysed by the Court in the recent case of *Gorou v. Greece (no. 2)* ([GC], no. 12686/03, §§ 27-42, ECHR 2009-...)), or by means of a separate civil action.

52. In view of the foregoing the Court finds that the Supreme Court's consideration of V.'s cassation appeal was in breach of the principle of legal certainty and the applicant company's right to a fair trial. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. The applicant company complained that the enforcement proceedings in its favour had been conducted incorrectly by the bailiffs and that the procedure for challenging the bailiffs' misconduct was ineffective. It

relied on Article 13 of the Convention. The applicant company further complained under Article 6 § 1 of the Convention that the first set of proceedings had lasted too long.

54. Having considered the applicant company's submissions in the light of all the material in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

55. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

57. The applicant company claimed 256,338.79 euros (EUR) in respect of pecuniary damage.

58. The Government submitted that the claim was unsubstantiated.

59. The Court notes that if the decision in favour of the applicant company had not been quashed by the Supreme Court in the course of the first set of proceedings, the Bailiffs would have to proceed with the public auction trying to sell the real estate in question. However, at the material time the real estate had been sold to V. (see paragraphs 18 – 21 above). Moreover, even assuming there had been no involvement of V.'s property interests, the outcome of the enforcement proceedings would be unknown as it would be dependant on many factors, including the success of the public auction. The Court further notes that the applicant company failed to submit any estimations of the price for which the real estate could be reasonably sold at the relevant time. In view of the above, the Court considers that the claim for pecuniary damage is unsubstantiated. It therefore rejects the claim.

B. Costs and expenses

60. The applicant company did not submit any claim under this head. The Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 of the Convention (concerning lack of fairness in the cassation proceedings instituted by V. in October 2004) admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Dismisses* the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 21 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President