



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

SECOND SECTION

CASE OF MERTER AND OTHERS v. TURKEY

(Application no. 2249/03)

JUDGMENT

STRASBOURG

23 March 2010

FINAL

23/06/2010

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

In the case of Merter and Others v. Turkey,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 2 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 2249/03) 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 Mr Mehmet Rauf Merter, Mr Ahmet Attila Merter, Mr Nesip Mustafa Merter and Mr Mehmet Berke Merter, who are Turkish nationals, as well as Mrs Karen Ingrid Merter, who is a German national (“the applicants”) on 16 November 2002.

2. The applicants were represented by Mr S. Akdağ, a lawyer practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged that the national authorities had denied them a fair hearing within a reasonable time and had interfered with their right to the peaceful enjoyment of their possessions. They invoked Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

4. On 20 September 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint concerning the length of the proceedings and alleged interference with the applicants' right to the peaceful enjoyment of their possessions. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants were born in 1930 and 1953. The remaining applicants did not inform the Court of their dates of birth. They all live in Istanbul.

6. On 16 May 1951 the owner of the neighbouring plot of land (“the neighbour”) brought an action in the Istanbul Civil Court of First Instance against the applicants' ancestor, Ahmet Muhtar Merter, claiming that the actual area of his land exceeded the amount indicated in the land registry records. He further claimed that, since the actual boundaries were not clear between his and the neighbouring plot of land, the applicants' ancestor was interfering with his use of the property (*men-i müdahale davası*). He therefore requested the court to resolve this dispute by determining the correct boundaries between the plots of land and ordering the accurate registration thereof.

1. The Cadastral Commission's land survey of 10 October 1954

7. On 10 October 1954, as a result of the construction of a road passing through the land in question, the Cadastral Commission carried out a land survey in Bakırköy. The records concerning the plot in question were amended as a result of this exercise. Following this amendment, the plot in question was divided into nine different parts, namely, plots nos. 110, 113, 114, 115, 116, 117, 118, 119 and 168. Plot no. 113 was allocated as meadowland and registered in the name of the Treasury. It was decided that plots nos. 115, 116, 119 and 168 should be entered in the land register in the name of the applicants' ancestor and plots nos. 110, 114, 117 and 118 in the name of the neighbour. No dispute arose with regard to plot no. 168, therefore this allocation became final and the plot in question was registered in the name of the applicants' ancestor.

2. The Istanbul Civil Court of First Instance's decision of non-jurisdiction

8. By a decision of 10 November 1954, following the above registration process and the establishment of the Cadastral Courts, the Istanbul Civil Court of First Instance issued a decision of non-jurisdiction and transferred this lawsuit to the Bakırköy Cadastral Court. This decision was upheld by the Court of Cassation on 15 July 1955.

3. *The death of the applicants' ancestor, Ahmet Muhtar Merter*

9. By a decision of 5 February 1959, the Bakırköy Magistrate's Court designated Mehmet Rauf Merter and Hasan Tahsin as the heirs ("the heirs") of Ahmet Muhtar Merter following his death.

4. *The Bakırköy Cadastral Court's judgment of 23 July 1960*

10. On 23 July 1960 the Bakırköy Cadastral Court decided that plots nos. 115, 116 and 119 should be registered in the names of the heirs, plots nos. 113 and 118 in the name of the Treasury, and plots nos. 110, 114 and 117 in the name of the neighbour. On 13 March 1961 the Court of Cassation quashed this judgment and remitted the case to the Bakırköy Cadastral Court.

11. In 1967 the Treasury, the Municipality of Istanbul and the heirs of four other persons intervened in the proceedings. Relying on the Ottoman land registry records (*temessük kayıtları*), they claimed ownership rights over the plots in question.

12. On 17 July 1970 the second applicant, Ahmet Attila Merter, also intervened in the proceedings before the Bakırköy Cadastral Court as a testamentary heir.

4. *The Bakırköy Cadastral Court's judgment of 9 May 1988*

13. On 9 May 1988 the Bakırköy Cadastral Court decided that plots nos. 115 and 119 should be registered in the names of the applicants (as heirs of Ahmet Muhtar Merter) and plots nos. 113 and 118 in the names of the Municipality of Istanbul and the Treasury respectively. The court also held that plots nos. 110, 114, 116 and 117 should be registered in the names of the heirs of the neighbour. The court further allowed the request to intervene by the heirs of Ahmet Kethüda who stated that their ancestor had partially maintained the last-mentioned plots in his possession before the proceedings had begun. The total number of parties to the proceedings increased to forty-eight.

5. *The Court of Cassation's judgment of 6 March 1990*

14. On 6 March 1990 the Court of Cassation quashed the judgment of 9 May 1988 for non-compliance with the procedure for the announcement of the judgment. It further considered that the examination conducted by the first-instance court was insufficient and that the court should have considered the *de facto* possession of these plots of land.

6. *The Bakırköy Cadastral Court's judgment of 23 December 1992*

15. On 23 December 1992, having conducted a land survey and with reference to an expert report, the Bakırköy Cadastral Court set aside its

decision concerning the registration of plots nos. 115 and 119 in the names of the applicants. Following its examination of the Ottoman land registry records (*temessük kayıtları*), the court ruled that the aforementioned plots should be registered in the names of the heirs of Hacıahmet, son of Mehmet, and that plots nos. 113 and 118 should be registered in the names of the Municipality of Istanbul and the Treasury respectively. The court also held that plots nos. 110, 114 and 117 should be registered in the names of the heirs of the neighbour.

16. It is to be noted that this judgment was not served on the first applicant, Mehmet Rauf Merter, but on his legal representative, who had died in 1989 (see paragraphs 23-26 below).

7. The Court of Cassation's judgment of 8 February 1994

17. In a decision dated 8 February 1994 the Court of Cassation upheld the above judgment in part and quashed the remainder. It reasoned that the examination conducted by the Court of First Instance had been insufficient because it had given judgment despite contradictory expert reports and witness statements. It further reasoned that the court had also failed to verify whether some of the documentary evidence was genuine. The Court of Cassation held in particular that the Court of First Instance had erred in its finding concerning the registration of plots nos. 115 and 119. However, it upheld the judgment of 23 December 1992 with regard to plots nos. 110, 113, 114, 116, 117 and 118. It further dismissed a rectification request by the parties on 26 January 1995. Thus, while the judgment became final in respect of the aforementioned plots, the dispute continued as regards plots nos. 115 and 119.

8. The Bakırköy Cadastral Court's judgment of 7 May 1996

18. On 7 May 1996 the Bakırköy Cadastral Court, relying on the Ottoman land registry records, decided that 50% of plots nos. 115 and 119 should be registered in the names of the heirs of Mehmet Hidayet and the remaining 50% in the name of Mehmet Oral, who had purchased part of the plots from Mehmet Hidayet. The court further noted that the heirs of Ahmet Muhtar Merter (the applicants' ancestor) had failed to prove their possession of the plots for twenty years.

19. It is to be noted that the first applicant, Mehmet Rauf Merter, was not a party to the above proceedings, although the remaining four applicants, as heirs of Ahmet Muhtar Merter, were noted as litigants in the court's above-mentioned judgment.

20. On 4 February 1997 the Court of Cassation dismissed an appeal lodged by the heirs of the neighbour, the Municipality of Istanbul and the Treasury against the above decision. It also rejected a rectification request

by the appellants on 30 September 1997. The judgment of 7 May 1996 thus became final.

9. The Bakırköy Cadastral Court's judgment of 27 May 1998

21. On 30 December 1997 the applicants brought an action in the Bakırköy Cadastral Court asking for the proceedings to be reopened (*iade-i muhakeme*) on the basis of newly discovered documentary evidence. They claimed that plots nos. 115 and 119 should be registered in their names.

22. On 27 May 1998 the Bakırköy Cadastral Court rejected the applicants' request to reopen the proceedings. The Court of Cassation upheld this judgment on 8 May 2000.

10. The Bakırköy Cadastral Court's decision of 2 February 1999

23. On 1 February 1999 the first applicant applied to the Bakırköy Cadastral Court claiming that the judgment of 23 December 1992 had been served on his legal representative who had died in 1989 and that he had not been able to learn of it in time to appeal within the statutory time-limit. He therefore asked the court to serve the said judgment on him and to grant him leave to appeal.

24. On 2 February 1999 the court dismissed the first applicant's requests on the grounds that the judgment in question had been communicated to the parties and had already been enforced. The first applicant appealed.

11. The Court of Cassation's judgment of 13 June 2000

25. On 13 June 2000 the Court of Cassation quashed the Bakırköy Cadastral Court's judgment of 2 February 1999 on the ground that the case file did not contain any information or document indicating that the judgment in question had been duly served on the first applicant. It therefore granted the first applicant leave to appeal but, after re-examining the case, dismissed his appeal.

26. On 31 May 2002 the Court of Cassation dismissed the first applicant's request for rectification of its decision of 13 June 2000.

12. Recent developments

27. According to the information given by the Government, on 30 September 2002 the applicants brought a new action in the Bakırköy Cadastral Court asking for the proceedings to be reopened. The applicants' action was communicated to the parties (forty-eight persons) and the proceedings are still pending.

28. Meanwhile, on an unspecified date, the applicants filed another action with the Bakırköy Court of First Instance claiming compensation from the Bakırköy Land Registry Office (*tapu sicil müdürlüğü*). The applicants alleged that they had sustained damage on account of the

negligence and mistakes made by the defendant in keeping the land registry records. These proceedings were suspended pending the outcome of the proceedings before the Bakırköy Cadastral Court.

29. It is to be noted that the applicants did not provide any information or raise any complaints about the proceedings pending before the Bakırköy Cadastral Court and the Bakırköy Court of First Instance.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

30. The Government submitted that the applicants had failed to exhaust all domestic remedies, within the meaning of Article 35 § 1 of the Convention, since the domestic proceedings (action for damages and the reopening of the proceedings) were still pending before the national courts (see paragraphs 27 and 28 above).

31. The applicants claimed that the subject matter of the present application was the decisions given by the Cadastral Commission and the Bakırköy Cadastral Court which had deprived them of their right to the peaceful enjoyment of their property. Accordingly, the proceedings which they had brought for damages and the reopening of the proceedings were different from the proceedings that had ended with the decision of 31 May 2002 of the Court of Cassation.

32. The Court reiterates that the obligation to exhaust domestic remedies only requires that an applicant make normal use of effective and sufficient remedies; that is, those capable of remedying the situation at issue and affording redress for the breaches alleged.

33. In the instant case, the applicants complained about the national authorities' finding that they had no rights over plots nos. 115 and 119 (see paragraph 18 and 20 above). Thus, the proceedings referred to by the Government do not pertain to the dispute in issue, namely, the action for damages pending before the Bakırköy Court of First Instance aimed at obtaining compensation from the authorities for their alleged negligence in the keeping of land registry records. In addition, the action brought in the Bakırköy Cadastral Court, namely the request for the reopening of the proceedings, is an extraordinary remedy which need not have been exhausted by the applicants.

34. In view of the foregoing, the Court considers that the applicants can be considered to have exhausted all remedies in domestic law. It therefore rejects this aspect of the Government's preliminary objections.

B. Alleged failure to observe the six-month rule

35. The Government further contended that the applicants had failed to comply with the six-month rule, laid down in Article 35 § 1 of the Convention, in respect of their complaints. They asserted that the applicants had not filed their application within six months of the Court of Cassation's decision of 30 September 1997. This was the date on which the judgment had become final in respect of the disputed plots and the application had been introduced on 16 November 2002, which was more than six months later.

36. The applicants claimed that the six-month time-limit had started to run from the Court of Cassation's decision of 31 May 2002, when the appellate court had re-examined their case on its merits and dismissed their appeal.

37. The Court notes that on 7 May 1996 the Bakırköy Cadastral Court dismissed the applicants' claim concerning the disputed plots nos. 115 and 119. Although the applicants did not appeal against this judgment, the Court of Cassation examined the case following an appeal lodged by the other parties and confirmed the judgment of the Court of First Instance on 30 September 1997 (see paragraphs 18-20 above). Thus, for the purposes of Article 35 § 1 of the Convention, the six-month period started to run on 30 September 1997 with regard to the second to fifth applicants. This does not apply to the first applicant, who was not a party to the proceedings (see paragraph 19 above).

38. As regards the first applicant, the Court observes that the final domestic decision must be taken to have been given by the Court of Cassation on 31 May 2002, when the first applicant's rectification request was dismissed after the re-examination of his claims to the disputed plots (see paragraphs 25 and 26 above).

39. In view of the above and bearing in mind that the applicants introduced their application on 16 November 2002, the Court dismisses the Government's objection concerning the alleged failure to observe the six-month time-limit in regard to the first applicant, but allows it in respect of the second to fifth applicants.

40. The Court will therefore confine its examination of the case to the allegations made by the first applicant.

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

41. The first applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement of Article 6 § 1 of the Convention, which insofar as relevant reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal...”

42. The Government contested that claim.

43. The Court notes that the proceedings in question began in 1959 for the first applicant, the date on which he was designated as one of the heirs of Ahmet Muhtar Merter, and ended on 31 May 2002. They thus lasted forty-three years for two levels of jurisdiction, dealing with the case several times. The Court's jurisdiction *ratione temporis*, however, only permits it to consider the period of fifteen years and four months which elapsed after 28 January 1987, the date of deposit of Turkey's declaration recognising the right of individual petition under the Convention. It must nevertheless take account of the state of the proceedings at that time (see *Şahiner v. Turkey*, no. 29279/95, § 21, ECHR 2001-IX). It notes that by that date the case had already been pending for almost twenty-eight years.

A. Admissibility

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

B. Merits

45. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

46. The Court accepts that the case was complex, given the large number of parties claiming rights over the disputed plots and the difficulties faced by the domestic courts in examining land registry records dating back to Ottoman times.

47. As regards the conduct of the parties, the Court notes that the first applicant contributed to the delay in the proceedings. In particular, it does not appear that the first applicant regularly followed up the progress made in the proceedings until 2 February 1999, the date on which he made an

application to the Bakırköy Cadastral Court asking for leave to appeal against the judgment of 23 December 1992. Although the Court of Cassation accepted the applicant's request and granted him leave to appeal because the aforementioned judgment had not been duly served on him (see paragraph 25 above), the Court observes that the applicant must be considered to have been negligent by not appointing a new legal representative to replace the former one who had died in 1989, or by not contacting his co-litigants for a substantial period of time. In these circumstances, the delay during the period between 23 December 1992 and 2 February 1999 cannot be wholly attributed to the national authorities.

48. Turning to the conduct of the authorities, the Court finds that the overall length of the proceedings is excessive and cannot be justified by the complexity of the case alone. In the Court's opinion, the length of the proceedings is explained by the failure of the domestic courts to act with sufficient diligence. Furthermore, the Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

49. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion here. Having regard to its case-law on the subject, the Court finds that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

50. There has accordingly been a breach of Article 6 § 1 in respect of the first applicant's claim.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

51. Relying on Article 1 of Protocol No. 1 to the Convention, the first applicant alleged that the domestic courts' decisions constituted an unjustified interference with his right to the peaceful enjoyment of his property.

52. The Government maintained that the applicant's complaint had been thoroughly examined by the domestic courts and that it had been established that he had no property rights over the disputed plots.

53. The Court notes that the applicant's complaint under Article 1 of Protocol No. 1 essentially arises out of the national courts' assessment of the evidence before them and their interpretation of the domestic law. Accordingly, this complaint should be examined under Article 6 § 1 of the Convention (see *Namlı and Others v. Turkey* (dec.), no. 51963/99, 8 March 2005).

54. In this connection, the Court reiterates that, according to its established case-law, it is not its function to deal with errors of fact or law

allegedly committed by a national court unless and in so far as they may have infringed the rights and freedoms protected by the Convention (see, among other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The establishment of the facts and the assessment of the evidence are primarily matters for the domestic courts, the Court's supervisory jurisdiction being limited to ensuring that the applicant's Convention rights have not been breached.

55. The Court further observes that it is not for the Court to settle issues of ownership of disputed land (see *Nalbant v. Turkey* (dec.), no. 61914/00, 12 May 2005).

56. In the present case, the domestic proceedings concerned the determination of ownership of a number of plots and, after a lengthy examination, the domestic courts found that the first applicant, together with other heirs of Ahmet Muhtar Merter, had no property rights over plots nos. 115 and 119. Having regard to the documents in its possession, the Court finds no indication that the taking and assessment of the evidence by the domestic courts were arbitrary or that the proceedings were otherwise unfair so as to raise an issue under Article 6.

57. In view of the above, the Court concludes that this complaint under Article 1 of Protocol No. 1 should be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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.”

59. The first applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the first applicant's complaint concerning the length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as a result of the excessive length of the proceedings.

Done in English, and notified in writing on 23 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President