

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

SECOND SECTION

CASE OF KABAR v. TURKEY

(Application no. 38597/14)

JUDGMENT

This judgment was revised in accordance with Rule 80 of the Rules of Court in a judgment of 12 September 2023

STRASBOURG

28 June 2022

This judgment is final but it may be subject to editorial revision.



In the case of Kabar v. Turkey,

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

Egidijus Kūris, *President,*
Pauliine Koskelo,
Gilberto Felici, *judges,*

and, Hasan Bakırcı *Section Registrar,*

Having regard to:

the application (no. 38597/14) 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") on 12 May 2014 by 3 Turkish nationals, relevant details listed in the appended table, ("the applicants") who were represented by Mr Ö.Y. Biçen, a lawyer practising in Diyarbakır;

the decision to give notice of the complaints concerning Article 6 § 1 of the Convention to the Turkish Government ("the Government"), represented by their Agent to the European Court of Human Rights, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 7 June 2022,

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

SUBJECT MATTER OF THE CASE

1. The application concerns civil proceedings brought by the applicants against other individuals before the Hazro Cadastral Court concerning a cadastral dispute, in which they argued that a plot of land, allegedly owned by them, had been unlawfully registered in the land register under the names of their opponents.

2. The Hazro Cadastral Court, by way of an interim decision, decided to seek the opinion of local experts (*mahalli bilirkişi*) by conducting an on-site inspection (*keşif*). It does not appear that this decision was communicated to the applicants.

3. After the on-site inspection, the Hazro Cadastral Court dismissed the applicants' case by relying, *inter alia*, on the opinions of the local experts and the findings made in the on-site inspection.

4. The applicants appealed against this decision before the Court of Cassation, arguing that the shortcomings in the proceedings, including the failure of the courts to notify them of the on-site inspection and the lack of impartiality of the local experts, one of whom had been related to the opposing party and the other had an ongoing judicial dispute with them, had rendered the proceedings unfair.

5. On 11 April 2012 the Court of Cassation dismissed the case without responding to the applicants' arguments.

6. On 10 June 2013 the Constitutional Court declared the applicants' individual appeal on the basis of Article 6 § 1 of the Convention inadmissible for being of a fourth-instance nature.

THE COURT'S ASSESSMENT

I. LOCUS STANDI OF THE APPLICANT ABDULAZİZ KABAR

7. The applicants' lawyer informed the Court on 2 October 2020 that the applicant Mr Abdulaziz Kabar died and that no heirs or other persons have expressed the wish to pursue the application before the Court on his behalf.

8. The Court finds no special circumstances regarding respect for human rights which require the continued examination of the complaint lodged by Mr Abdulaziz Kabar and considers it appropriate to strike this part of the application out of its list of cases under Article 37 § 1 (c) of the Convention.

II. THE GOVERNMENT'S UNILATERAL DECLARATION

9. The Government submitted a unilateral declaration, in which they acknowledged that the applicants' right to a fair trial under Article 6 § 1 of the Convention had been violated and offered to pay them jointly EUR 1,320 (one thousand three hundred twenty euros) to cover any and all pecuniary and non-pecuniary damage, and EUR 430 (four hundred thirty euros) for costs and expenses. They argued that those amounts would constitute sufficient just satisfaction. The Government invited the Court to strike out the application in accordance with Article 37 of the Convention.

10. The applicants disagreed, arguing in particular that the sum offered by the Government was unacceptably low.

11. The Court finds that the amount proposed in the Government's unilateral declaration does not correspond to its own awards in similar cases, and the Government did not provide any valid reasons why the unilateral declaration should nonetheless be accepted (see *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, § 75, ECHR 2003-VI, and *Prądzyńska-Pozdniakow v. Poland*, no. 20982/07, § 37, 7 July 2009).

12. Therefore, the Court rejects the Government's request to strike this application out of its list of cases under Article 37 of the Convention and will pursue its examination of the admissibility and merits of the case.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION IN RESPECT OF THE REMAINING APPLICANTS

13. The applicants complained that they could not participate in the on-site inspection as a result of the failure of the Hazro Cadastral Court to notify them of its decision to hold an on-site inspection whereas their

opponents did. Furthermore, they argued that the local experts heard during that inspection could not be considered impartial on objective grounds given their ties to the parties in the proceedings.

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

15. The Court observes that the general principles regarding the right to present one's case effectively before the court and to enjoy equality of arms with the opposing side, as guaranteed by Article 6 of the Convention, have been repeatedly stated in its previous judgments (see, among many others, *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 59-60, ECHR 2005-II). Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights (see ibid.). The Court should establish whether the applicant, a party to the civil proceedings, was given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many others, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274; *Avotiņš v. Latvia* [GC], no. 17502/07, § 119, 23 May 2016; and *Dırama v. Turkey* [Committee], no. 20797/07, § 24, 13 November 2018).

16. The Court further reiterates that Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial "tribunal" and does not expressly require that an expert heard by that tribunal fulfil the same requirements (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007). However, the opinion of an expert who has been appointed by the relevant court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues. In its case-law the Court has recognised that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial (see *Bönisch v. Austria*, 6 May 1985, §§ 30-35, Series A no. 92, and *Letinčić v. Croatia*, no. 7183/11, § 51, 3 May 2016).

17. The Court notes that in the present case, it has not been shown that the applicants were notified of the on-site inspection or that they were apprised beforehand of the commissioning of the local experts who were heard during that inspection. The Court is therefore not persuaded that the Hazro Cadastrol Court discharged its obligation to secure the applicants' presence at the on-site inspection. As a result, the applicants were deprived of an opportunity to participate in the on-site inspection with a view to influencing that court's decision, putting them at a substantial disadvantage *vis-à-vis* their opponents. Furthermore, since they were excluded from the procedure of commissioning of the local experts, they were also deprived of the possibility to challenge their impartiality prior to their views on the case were obtained.

The Court further notes that the above deficiencies have not been remedied at the appeal level. Although the applicants brought the issue to the attention of the Court of Cassation in their appeal, it was rejected without any reasoning in that regard.

18. The Court therefore considers that the principle of equality of arms guaranteed by Article 6 § 1 of the Convention was not respected in the present case. There has accordingly been a violation of that provision.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

19. The applicants claimed 60,000 euros (EUR) in respect of pecuniary damage, representing the value of the property in question. They further claimed EUR 15,000 in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses incurred before the domestic courts and for those incurred before the Court.

20. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

21. However, it awards the applicants jointly 2,000 EUR in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants. The Court further notes that Article 375 § 1 (i) of the Code of Civil Procedure allows for the reopening of domestic proceedings in order to remedy the breaches it has found. Given the nature of the applicants' complaints and the reasons for which it has found a violation of Article 6 § 1 of the Convention, the Court considers the most appropriate form of redress in the present case would be to reopen the proceedings complained of in due course, should the applicants so request.

22. Lastly, the applicants' claims in respect of costs and expenses must be rejected, regard being had to the terms of Rule 60 § 2 of the Rules of Court and the applicants' failure to provide the Court with any documents in support of their claims.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to strike the application out of its list of cases in accordance with Article 37 § 1 (a) of the Convention in so far as it concerns the complaint lodged by Mr Abdulaziz Kabar;

2. *Rejects* the Government's request to strike the application out of its list of cases in so far as it concerns the remaining applicants;

3. *Declares* the application admissible;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle of equality of arms;

5. *Holds*

(a) that the respondent State is to pay the applicants, jointly, within three months, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(a) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Egidijus Kūris President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth/ registration	Nationality	Place of residence
1.	Abdulaziz KABAR	1932	Turkish	Diyarbakır
2.	Abdulkerim KABAR	1953	Turkish	Diyarbakır
3.	Fadli KABAR	1956	Turkish	Diyarbakır