

**DECISION No.737  
of June 24<sup>th</sup> 2008**

**on the objection of unconstitutionality of the provisions  
under Article 302 of the Code of Civil Procedure**

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|                              |                        |
|------------------------------|------------------------|
| Ioan Vida                    | – President            |
| Nicolae Cochinescu           | – Judge                |
| Aspazia Cojocaru             | – Judge                |
| Acsinte Gaspar               | – Judge                |
| Petre Ninosu                 | – Judge                |
| Ion Predescu                 | – Judge                |
| Puskás Valentin Zoltán       | – Judge                |
| Augustin Zegrean             | – Judge                |
| Ion Tiucă                    | – Prosecutor           |
| Claudia-Margareta Krupenschi | – Assistant-Magistrate |

The case at issue is the settlement of the objection of unconstitutionality of the provisions under Article 302 of the Code of Civil Procedure, objection raised by I.F., I.G.F. and V.Ş.N.F. in the File no.921/296/2005 of Oradea Court of Appeal – Joint Civil Division.

Upon the roll call, the parties, against which the summons procedure has been lawfully carried out, are default.

As the case is in motion, the President of the Court gives the floor to the representative of the Public Ministry, the latter pleading for the rejection of the objection for lack of merit.

THE COURT,

taking into account the documents and the acts in the case file, holds as follows:

Through the Interlocutory Order of January 30<sup>th</sup> 2008, rendered in the File no.921/296/2005, **Oradea Court of Appeal – Joint Civil Division referred to the Constitutional Court the objection of unconstitutionality of the provisions under Article 302 of the Code of Civil Procedure.**

The objection was raised by I.F., I.G.F. and V.Ş.N.F. in a civil case concerning an action for judicial partition.

**As grounds for the objection of unconstitutionality**, it is claimed that the challenged legal provisions are unconstitutional because, by penalizing by nullity the erroneous lodging of the second appeal with a different court than with the court which ruling is challenged, they restrict the exercise of the right to defence and the effective access to justice, enshrined by Article 24, respectively Article 21 of the Constitution, as well as by Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. A simple material error, which, most of the times, does not entirely belong to the holder of the right to action, cannot be penalized by nullity of the avenue of appeal, and the declared purpose of this regulation – acceleration of the reform in justice – is contrary, in this case, to the idea of justice, defence and protection of rights and legitimate interests submitted for settlement.

**Oradea Court of Appeal – Joint Civil Division** takes the view that objection of unconstitutionality has no merits.

According to the provisions of Article 30 paragraph (1) of the Law no.47/1992, the Interlocutory Order of reference was forwarded to the Presidents of the two Chambers of Parliament, to the Government and to the Advocate of the People, in order to express their viewpoints on the objection of unconstitutionality.

**The Advocate of the People** forwarded to the Constitutional Court, through Letter no.3,306 dated April 17<sup>th</sup> 2008, its viewpoint in the meaning that the objection of unconstitutionality has no merits, because the challenged legal text does not contravene the Constitution or the Convention for the Protection of Human Rights and Fundamental Freedoms.

**The Presidents of the two Chambers of Parliament and the Government** did not forward their viewpoints.

#### THE COURT,

having examined the Interlocutory Order of reference, the viewpoint forwarded by the Advocate of the People, the report drawn up by the judge-rapporteur, the prosecutor's conclusions, the legal provisions impugned, as against those of the Constitution, as well as the Law no.47/1992, holds as follows:

The Constitutional Court holds that it has been legally referred to, and is competent, according to the provisions of Article 146 subparagraph d) of the Constitution, as well as of Article 1 paragraph (2), of Articles 2, 3, 10 and 29 of Law no.47/1992, to settle the objection of unconstitutionality.

The subject matter of the objection of unconstitutionality is Article 302 of the Code of Civil Procedure, which read as follows: „*The second appeal shall be lodged with the court which ruling is challenged, under penalty of nullity.*”

The objection of unconstitutionality is grounded on the constitutional provisions of Article 21 paragraph (1) which enshrine the free access to justice, those of Article 24 on the right to defence and those of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the right to an effective remedy.

Having analysed the objection of unconstitutionality, the Constitutional Court finds that the objection of unconstitutionality has merits.

According to the provisions of Article 129 and of Article 126 paragraph (2) of the Constitution of Romania, republished, the use of remedies against court orders and the conduct of trial proceedings are determined by law. Out of these constitutional provisions it results that the legislator is free to determine the circumstances and conditions under which the interested parties and the Public Ministry may exercise the avenues of appeal.

In the same time, the Court finds that the legislator’s freedom to determine the conditions for the use of remedies and the conduct of trial proceedings is not an absolute one, the limits of its freedom of regulation depending also in these cases on the obligatory character of the observance of rules and principles concerning human rights and fundamental freedoms, as well as of the other principles enshrined by the Basic Law and by other international legal covenants to which Romania is party.

In this respect, the Court holds that, according to Article 21 paragraphs (1) and (2) of the Constitution of Romania, republished, everyone shall have access to the courts in order to defend his rights, freedoms and legitimate interests, and no law shall allow restrictions on the exercise of that right.

While setting the rules for the exercise of the right of access to justice, the legislator can impose certain formal conditions, related to the nature and exigencies required for the administration of justice, but such conditionings cannot infringe the essence of the right or render it ineffective.

In light of these arguments, the Constitutional Court finds that **the provision under Article 302 of the Code of Civil Procedure, which penalize by absolute nullity the lodging of the second appeal with a different court than the court which ruling is challenged**, appear as a unacceptably rigid formalism, which could severely affect the effectiveness of the right to use remedies and which could unjustifiably restrict the free access to justice.

The penalty is even more unjustified as, the error in lodging the second appeal with the competent court itself or with a different court than court

which ruling is challenged, is imputable not only to the appellant, but also to the magistrate or clerk who receives the wrongly addressed request for appeal, although the latter has the possibility to inform the appellant on the provisions of the law.

For the reasons mentioned above, the Court holds that **the application of the constitutional principles on free access to justice and use of remedies requires that all wrongly addressed requests be forwarded to the competent courts for settlement.**

On the other hand, in the system of the Code of Civil Procedure, the second appeal is conceived as an extraordinary avenue of appeal, as a last level of jurisdiction in which parties to a litigation may protect their subjective rights, removing the effects of previous rulings in cases of illegality provided under Article 304 of the Code of Civil Procedure. Instituting the penalty of nullity for failure in fulfilling the requirement under the analysed text – most of the times due to error, ignorance or other reasons, not imputable to the appellant – deprives the latter, without a reasonable justification, of his opportunity to have examined, by means of a second appeal, his founded claims concerning the erroneous, possibly abusive way, in which was settled, through the challenged ruling, the litigation in which he is a party.

Therefore, taking into account the said effects of the application of the provisions under Article 302 of the Code of Civil Procedure, the Court finds that, **through the penalty of nullity which it institutes**, the impugned legal text infringes the provisions of Article 21, as well as of Article 129 and of Article 24 paragraph (1) of the Constitution.

For the reasons set forth herein, on the grounds of Article 146 subparagraph d) and of Article 147 paragraph (4) of the Constitution, as well as of Articles 1 to 3, of Article 11 paragraph (1) subparagraph A.d) and of Article 29 of the Law no.47/1992,

## THE CONSTITUTIONAL COURT

In the name of the law

DECIDES:

Allows the objection of unconstitutionality raised by I.F., I.G.F. and V.Ş.N.F. in the File no.921/296/2005 of Oradea Court of Appeal – Joint Civil Division and finds that the provisions of Article 302 of the Code of Civil Procedure are unconstitutional as concerns the collocation „*under penalty of nullity*”.

Final and generally binding.

This decision will be communicated to both Chambers of Parliament, as well as to the Government.

Delivered in public hearing on June 24<sup>th</sup> 2008.

PRESIDENT OF THE  
CONSTITUTIONAL COURT,  
Prof.Dr. **IOAN VIDA**

Assistant-Magistrate,  
**Claudia-Margareta Krupenschi**