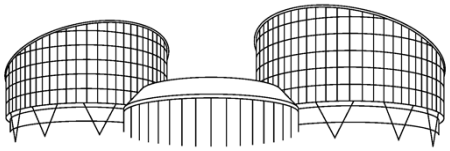

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KLOPSTRA v. SPAIN

(Application no. 65610/16)

JUDGMENT

STRASBOURG

19 January 2021

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

In the case of Klopstra v. Spain,

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

Georgios A. Serghides, *President,*
María Elósegui,
Peeter Roosma, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 65610/16) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr Hans Johannes Klopstra ("the applicant"), on 10 November 2016;

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

the parties' observations;

Having deliberated in private on 8 December 2020,

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

INTRODUCTION

1. The present case concerns the applicant's right of access to a court in the framework of foreclosure proceedings, in which the summons had not been personally served on him and his wife.

THE FACTS

2. The applicant was born in 1947 and lives in Aachen. He was represented by Mr A. De Swart, a lawyer practising in The Hague.

3. The Government were represented by their Agent, Mr R.A. León Cavero, State Attorney.

4. The Netherlands Government, who had been invited to submit written observations on the case, declined to exercise that right (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court).

5. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND OF THE CASE

6. On 13 March 1998 the applicant and his wife Ms CVK bought a plot of land located in Javea (Alicante). The address of the plot was named at the time after its parcel number (hereinafter "the parcel address").

7. On 4 February 2000 the Municipality of Javea issued a building permit for the construction of a house on that plot. On 24 October 2000 the applicant and his wife ordered the construction of the house.

8. On 20 August 2003 the applicant, acting on his own behalf and on behalf of Ms CVK, signed a mortgage loan agreement with Barclays Bank, S.A. (hereinafter "the bank"). The loan was aimed to finance the construction of their house in Javea and to cover the outstanding mortgage loan agreement that they had previously signed with Deutsche Bank on 24 October 2000. The applicant and Ms CVK offered their house in Javea as guarantee for the loan. The amount of the loan obtained was 350,000 euros (EUR) and the house was valued at the time at EUR 517,200. On the header of the agreement the borrower party mentioned their home address in Germany and established that their address for service of any communication in Spain would be the parcel address in Javea.

9. On 19 October 2006 the Municipality of Javea issued a housing permit for the house of the applicant. On that permit, for the first time the Municipality referred to the applicant's property by its house number (hereinafter "the house address"). It was also mentioned on the permit that the house had been constructed on what previously was the parcel address.

10. On 29 February 2012 the bank sent two certified faxes (*burofaxes*) to both the applicant and Ms CVK, stating that, because they had failed to fulfil their obligation to pay the monthly instalments since 20 August 2011, it had decided to terminate the contract. The unpaid instalments amounted at that time to EUR 17,627.21. However, because of the termination of the contract, the bank claimed the full amount due, EUR 190,461.

11. On 1 March 2012 the postal service went to the applicant's address in Javea to deliver the certified faxes. In the absence of the applicant and his wife, a notice was left in the letterbox to collect the certified faxes at the post office. There is no evidence that the applicant or Ms CVK ever collected that correspondence.

II. FORECLOSURE PROCEEDINGS

12. On 30 March 2012 the bank initiated civil foreclosure proceedings against the applicant and his wife for non-payment of the repayment instalments. The proceedings were brought before the Denia Court of First Instance no. 2 (*Juzgado de Primera Instancia nº 2 de Denia*, hereinafter "the first-instance court"). In those proceedings, the bank claimed EUR 190,461 in respect of the main debt, plus EUR 57,138.30 in respect of costs and expenses.

13. On 18 May 2012 the first-instance court sought the collaboration of the Javea Peace Court to summon the applicant and Ms CVK. The address at which the defendants were to be summoned was the parcel address, which was the address designated by the bank. The Javea Peace Court attempted service by means of the regular postal service (*Correos*).

14. On 7 June 2012 the postal service issued a document stating that service had been unsuccessful due to "*insufficient address details*".

15. On 19 July 2012 the first-instance court ordered the notice to be served by means of a public announcement, by attaching the summons to the bulletin board at the court-house. When the period for service expired, the applicant and his wife had not appeared and had not opposed the claim of the bank. As a consequence, the proceedings were pursued without the opposition of the defendants.

16. On 18 October 2012 the first-instance court announced a public auction to sell the house, which was going to take place on 24 January 2013. For the public auction, the house was valued at EUR 517,200. In order to inform the applicant and Ms CVK of the announcement of public auction, the first-instance court again ordered to serve notice by means of a public announcement on the bulletin board of the court office.

17. On 24 January 2013 the public auction took place. Only one bidder attended apart from the bank. That external bidder, which was a company, offered the highest bid, amounting to EUR 219,400. The applicant and Ms CVK were awarded ten days to submit a higher bid.

18. On 27 February 2013, as the applicant or Ms CVK had not submitted a higher bid, the first-instance court awarded the house to the external bidder for the price of EUR 219,400.

19. On 29 April 2013 the external bidder sold the house to another company.

20. On an undetermined date of April 2013, the applicant and his wife became aware of the foreclosure proceedings. On 2 May 2013 they went to the court, where the court order of 24 January 2013 was served on them.

III. APPLICATION FOR THE ANNULMENT OF THE PROCEEDINGS

21. On 3 May 2013 the applicant and Ms CVK lodged an action for the annulment of proceedings. They claimed that neither the initial summons nor the public auction announcement had been personally served on them, and that the court order awarding the house to the external bidder could not have been declared final because they had not been informed of it, with the right to submit a higher bid.

22. On 27 May 2013 the first-instance court dismissed the applicant's and Ms CVK's action. In very broad terms it stated that the requirements to proceed to the annulment of the proceedings had not been met.

23. On 18 June 2013 the applicant and his wife lodged an *amparo* appeal with the Constitutional Court. The applicants relied on Article 24 of the Spanish Constitution, concerning the right to a fair trial.

24. On 2 February 2015 the Constitutional Court declared the *amparo* appeal inadmissible owing to the lack of special constitutional significance.

25. On 4 March 2015 the public prosecutor attached to the Constitutional Court lodged a *súplica* appeal, stating that the *amparo* appeal of the

applicants had indeed a special constitutional significance and that it should not have been declared inadmissible for that reason.

26. On 12 May 2016 the Constitutional Court dismissed the *súplica* appeal, reiterating its decision that the *amparo* appeal lacked special constitutional significance. In particular, it stated that the Constitutional Court had had several opportunities to establish its doctrine concerning issues of summoning by means of a public announcement and that the particular circumstances of the case did not justify the need for a decision concerning the substance.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

27. Under Spanish legislation, the summons procedure is regulated in Chapter V, on court notices, of the Law 1/2000 of 7 January 2000 on civil procedure (*Ley de Enjuiciamiento Civil*, hereinafter "LEC"). For the relevant sections of the LEC concerning the summons procedure, see *Immoterra International Denia S.L. v. Spain* ((dec.) [Committee], no. 60484/16, § 18, 26 May 2020).

In addition, concerning the summoning of the debtor in foreclosure proceedings, section 686 of the LEC, as in force at the relevant time, read as follows:

Section 686
Payment order.

"1. The order authorising and dispatching the enforcement will include an order for payment from the debtor and, if appropriate, the non-debtor mortgagor or third party owner against whom the claim addressed, at the address recorded at the Registry.

...

3. Having attempted to serve the summons at the address recorded at the Registry without success and being unable to serve them on the persons referred to in the preceding paragraph, the publication of a public announcement will be ordered in the form provided for in article 164 of this Law."

28. The Spanish Constitutional Court, in its judgments no. 122/2013 of 20 May 2013, no. 150/2016 of 19 September 2016 and no. 6/2017 of 16 January 2017, interpreted the content of the above-mentioned sections of the LEC, to clarify their meaning in the light of the amendments introduced by Law 13/2009 of 3 November 2009. In them, the Constitutional Court concluded that in foreclosure proceedings, the fact that section 686.3 LEC does not expressly require further efforts from the courts after an unsuccessful attempt to serve the summons does not release the courts from their obligation of exhausting all reasonable means of personal communication before resorting to a public announcement.

THE LAW

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

29. The applicant complained of the fact that the domestic courts had failed to ensure that he and his wife were informed of the foreclosure proceedings against them. He relied on Article 8 of the Convention.

30. Being the master of the characterisation to be given in law to the facts of a case, the Court is not bound by the characterisation given by an applicant or a Government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/10, §§ 123-26, 20 March 2018, and *Molla Sali v. Greece* [GC], no. 20452/14, § 85, 19 December 2018, with further references). Therefore, in the present case the Court considers that the applicant's complaint is to be examined under Article 6 § 1 of the Convention, whose relevant part reads as follows:

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

A. Admissibility

1. Objection on grounds of lack of "victim status" and "abuse of the right of application"

31. The Government submitted that the applicant lacked victim status, because the applicant himself was responsible for the situation of which he complained. In particular, the Government stated that the applicant had caused that situation by not fulfilling his obligation to pay the monthly instalments and by not ensuring receipt of his mail on the address that he had expressly designated in the mortgage loan agreement. Based on the same reason, the Government argued that the complaint should also be declared in abuse of the right of application.

32. The applicant contested the Government's arguments, maintaining that he could not be held responsible for the situation and that the fact that he had failed to fulfil his payment obligations did not entail waiving his right to a fair trial.

33. In the present case, the applicant was the unsuccessful party in the civil proceedings before the national courts. For that reason, he is entitled to claim to be the victim of an alleged violation of Article 6 § 1, his responsibility for the situation being irrelevant to this end (see, as an example of similar reasoning, *Immoterra International Denia S.L. v. Spain* (dec.) [Committee], no. 60484/16, § 22, 26 May 2020). Moreover, the applicant's complaint is not in abuse of the right of application, because the

Government's objection is based on matters of fact that will be further decided when examining the merits.

34. Consequently, the Government's objections regarding the lack of victim status and abuse of the right of application must be rejected.

2. Objection on grounds of "non-exhaustion"

35. The Government also alleged in their first observations that the applicant had failed to exhaust the available domestic remedies, because he had failed to lodge an *amparo* appeal with the Constitutional Court. However, in their second observations they admitted that the applicant had lodged an *amparo* appeal, but they kept the objection based on the fact that the Constitutional Court had declared it inadmissible owing to the lack of special constitutional significance.

36. As the Court has previously stated (see *Arribas Antón v. Spain*, no. 16563/11, § 51, 20 January 2015, and *Saber and Boughassal v. Spain*, nos. 76550/13 and 45938/14, § 30, 18 December 2018), the fact that the Constitutional Court declared an *amparo* appeal inadmissible owing to the lack of special constitutional significance, or when applicable, for not demonstrating such significance, does not prevent the Court from examining the admissibility and the merits of an application lodged before it. The same applies in the present case.

3. Objection on grounds of incompatibility "ratione materiae"

37. The Government raised a further objection arguing that the applicant's complaint under Article 6 § 1 of the Convention should be rejected as incompatible *ratione materiae*, because the applicant had raised his complaint based on Article 8 and not on Article 6 § 1.

38. As previously stated in paragraph § 30 above, the Court is not bound by the characterisation given by the applicant to the facts alleged. For that reason, the Court, of its own motion, categorised the complaint under Article 6 § 1 of the Convention, and the Government was duly informed thereof. Therefore, the objection must be rejected.

4. Conclusion

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

B. Merits

1. The parties' arguments

40. The applicant submitted that the Denia Court of First Instance no. 2 did not observe the procedural rules concerning the summoning of the applicant. In particular, he complained that the first-instance court only attempted service on one address, where it had been unsuccessful due to "*insufficient address details*", and not even a notice was left in the applicant's letterbox. He argued that the address at which service had been attempted was the parcel address before constructing the house, but that once it had been constructed and obtained the hosing permit the correct address was the house address. He claimed that he could not be blamed for not indicating that new address on the mortgage loan agreement with the bank, since the agreement had been signed several years before the housing permit had been granted. He further stated that, in spite of the unsuccessful attempt to serve personal notice, the first-instance court had not carried out a search to find the correct address of the house in Javea or any alternative addresses of the applicant. In this regard, he also argued that his address in Germany was indicated on the header of the agreement, where the bank had previously sent several letters to him, and that such address could have been used to serve the summons. Finally, he complained that due to the failure of the first-instance court to inform him of the foreclosure proceedings and of the public auction, he had been unable to defend himself and, once the auction had taken place, to submit a higher bid.

41. The Government submitted that service of the summons had been correctly attempted at the address that the applicant had expressly designated in the mortgage loan agreement and that the personal service attempt and the subsequent service by means of a public announcement had been in accordance with the relevant procedural law. They further argued that the foreclosure proceedings were only a consequence of the behaviour of the applicant, who had stopped complying with his obligation to pay the monthly instalments. The Government lastly stated that it was solely the lack of diligence of the applicant that resulted in the proceedings being followed without his involvement, since he had not been reachable at the address he had designated and he did not appear in the proceedings following the public announcements.

2. The Court's assessment

42. The relevant general principles of the Court's case-law concerning 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, are summarised in *Gankin and Others v. Russia* (nos. 2430/06, 1454/08,

11670/10 and 12938/12, §§ 25-28 and 35-39, 31 May 2016), and *Bartaia v. Georgia* (no. 10978/06, §§ 26-29, 26 July 2018).

43. From these general principles it follows that the questions to be addressed in the present case are: (i) whether or not the authorities were diligent in informing the applicant of the proceedings, and whether or not the applicant can be considered to have waived his right to appear before the court and to defend himself; and, if the response is negative, (ii) whether or not the domestic law provided the applicant with the appropriate means to secure a fresh adversarial hearing, once he had learned of the default decisions (see *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, § 80, 4 March 2014; *Aždajić v. Slovenia*, no. 71872/12, § 53, 8 October 2015; and *Immoterra International Denia S.L.*, cited above, § 29).

44. In the present case, the Court observes that the Denia Court of First Instance no. 2 made one single attempt to personally serve the summons to the applicant and Ms CVK. This attempt was made at the parcel address in Javea, which was the address established in the mortgage loan agreement and the one that the bank had designated in the proceedings to summon the applicant and Ms CVK. The first-instance court had asked the Javea Peace Court to serve the summons, which in turn had used the regular postal service (*Correos*). The service attempt had been unsuccessful because according to the postal service, the first-instance court had provided "*insufficient address details*", which implies that the postman had not even found the applicant's house. In spite of the fact that no notice had been served at the applicant's address, the first-instance court did not consider the possibility of trying to find the correct address of the applicant's house in Javea and did not search on the courts' internal information system for any alternative addresses; instead, it directly ordered the notice to be served by means of a public announcement.

45. The Court is of the view that a search could have been useful to either find the correct house address or to obtain an alternative address. Indeed, sections 155 and 156 LEC, as interpreted by the Spanish Constitutional Court, provide that the courts are required to perform such a search before resorting to a public announcement. Furthermore, as the applicant pointed out, even without resorting to that search, the first-instance court was in possession of his address in Germany, which could be found on the header of the agreement.

46. In such circumstances, the Court does not consider that by resorting to a public announcement without any additional attempts to serve the summons, the national authorities had taken the action that could legitimately and reasonably have been expected of them. This appears to be not in compliance with the first-instance court's obligations under sections 155 and 156 of the LEC.

47. The present case thus differs from the case of *Immoterra International Denia S.L.* (cited above, §§ 30-31), where the Court recently concluded that

the first-instance court had searched for alternative addresses of the applicant company and had tried to serve the summons at more than one address.

48. Accordingly, the Court concludes that the authorities were not diligent in informing the applicant of the foreclosure proceedings and he was not given a reasonable opportunity to participate in the proceedings against him.

49. Moreover, the Court considers that there is nothing to suggest that the applicant had waived his right to a fair trial. The main precondition for waiving a right is that the person concerned must know of the existence of the right in question and, therefore, of the related proceedings (see *Dilipak and Karakaya v. Turkey,* cited above, § 87). In this case, there is no element in the case-file to prove that the applicant had been apprised of the proceedings against him and his wife, even if the outcome of the proceedings might have had undesirable consequences for them (see *Díaz Ochoa v. Spain*, no. 423/03, § 47, 22 June 2006; and *Lacárcel Menéndez v. Spain*, no. 41745/02, § 33, 15 June 2006). The Government did not contest the fact that the applicant only became aware of the proceedings in April 2013, when the bank's claim had been accepted and the house had been awarded to the external bidder who had offered the highest bid.

50. The Court cannot accept the Government's argument that the applicant had been solely responsible for creating the situation of which he complains. The fact that he had failed to fulfil his obligation to repay the debt does not mean that he is no longer entitled to benefit from the rights protected under Article 6 § 1 of the Convention. Equally, he cannot be blamed for not being aware of the proceedings when no notice concerning the proceedings had ever been left at any of his addresses. The service by means of a public announcement alone, which is of a subsidiary nature under Spanish legislation, cannot be taken as sufficient proof of apprisal of the proceedings if it is not accompanied by a diligent and reasonable attempt of personal service. To sum up, the Court does not consider that there is any indication of such a waiver on behalf of the applicant.

51. It remains to be determined whether domestic law afforded the applicant, with sufficient certainty, an opportunity to appear at a new trial.

52. In the instant case, the Court observes that, once the applicant learned of the foreclosure proceedings, he and Ms CVK firstly lodged an action for the annulment of proceedings, which was the only remedy available for challenging the validity of the notification in the proceedings. The first-instance court dismissed their claim, by stating in very broad terms that the requirements for annulment had not been met. Then, they lodged an *amparo* appeal with the Constitutional Court, which was declared inadmissible owing to the lack of special constitutional significance, despite the fact that the public prosecutor attached to the Constitutional Court had lodged a *súplica* appeal. It follows that the applicant's attempts to obtain a fresh examination of the case did not result in any real opportunity to have a new trial.

53. The foregoing considerations are sufficient to enable the Court to conclude that the requisite steps were not taken to inform the applicant of the proceedings against him and that he was not given an opportunity to appear at a new trial, despite the fact that he had not waived his right to be present (see *Dilipak and Karakaya v. Turkey,* cited above, § 94).

54. There has accordingly been a violation of Article 6 § 1 of the Convention.

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

55. The applicant complained that the foreclosure proceedings pursued before the Denia Court of First Instance no. 2 without his intervention resulted in the deprivation of his property rights contrary to Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

56. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

57. The Court observes that, even if the foreclosure proceedings eventually resulted in the sale of the applicant's house at a public auction, the substance of his complaint under Article 1 of Protocol No. 1 concerns the domestic courts' failure to ensure that he and his wife were informed of the proceedings against them. The Court considers that this issue has already been examined above and that, in view of the finding of a violation under Article 6 § 1 of the Convention, it is unnecessary to examine separately the complaint raised under Article 1 of Protocol No. 1 to the Convention.

III. 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."

A. Damage

59. The applicant claimed EUR 1,275,000 in respect of pecuniary damage arising from the loss of his house. Alternatively, he claimed EUR 820,000, based on an estimation of the value of the house when it was auctioned in 2013.

60. The Government argued that no pecuniary damage should be granted to the applicant, given that he is solely responsible for the loss of his property including his house. Subsidiarily, they considered that the value of the lost property should be based on the proven market value in 2013, which was the price that the highest bidder had been ready to pay at the auction. Given that the price paid equalled the applicant's debt with the bank, they argued that no remaining balance would be left for the applicant.

61. The Court notes that in the present case an award for pecuniary damage can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6 § 1 of the Convention. The Court cannot speculate as to the outcome of the proceedings had the situation been otherwise. Accordingly, the Court dismisses the applicant's claim for pecuniary damage.

62. At the same time, the Court has consistently held that where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the most appropriate form of redress would, in principle, be a retrial or the reopening of the case, at the request of the interested person (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003). In this connection, it notes that articles 510 and 511 of the Law on civil procedure provide for the possibility of revision of a final decision where it has been determined in a ruling of the Court that there has been a violation of the Convention or one of the Protocols thereto.

63. The Court, noting that the applicant did not submit any claim in respect of non-pecuniary damage, does not award any sum under this head.

B. Costs and expenses

64. The applicant also claimed EUR 27,225 for the costs and expenses incurred before the domestic courts and EUR 39,336.08 for those incurred before the Court.

65. The Government submitted that no costs should be awarded to the applicant because only he is responsible for creating the situation of which he complains. They also argued that it was unsupported that the amounts claimed have actually been incurred by the applicant.

66. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case, the Court notes that the applicant did not submit any receipt showing payment of the amounts he claims in respect of lawyer fees or any enforceable obligation to pay them. Consequently, the Court dismisses the applicant's claim in this regard.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1 to the Convention;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova	Georgios A. Serghides
Deputy Registrar	President