



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 11 June 2018
Ref. No.: RK 1275/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI55/18

Applicant

Jovan Jovanović

**Constitutional review of
Judgment GSK-KPA-A-158/2015 of the Appeals Panel of the Supreme
Court of Kosovo on Kosovo Property Agency Related Matters,
of 8 November 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Jovan Jovanović from Prizren, (hereinafter: the Applicant), who is represented by Žarko Gajić, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment [GSK-KPA-A-158/2015] of the Appeals Panel of the Supreme Court of Kosovo on Kosovo Property Agency Related Matters (hereinafter: the KPA Appeals Panel) of 8 November 2017.
3. The challenged Judgment was served on the Applicant on 11 December 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment of the KPA Appeals Panel, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 (Right to a fair trial) and Article 1 of Protocol 1 (Protection of Property) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).
5. The Applicant requests the Court to impose an interim measure suspending the Judgment [GSK-KPA-A-158/2015] of the KPA Appeals Panel of 8 November 2017.

Legal basis

6. The Referral is based on Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 27 [Interim Measures], Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] and 54 [Request for Interim Measures] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 11 April 2018, the Applicant submitted the Referral to the Court.
8. On 18 April 2018, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.
9. On 10 May 2018, the Court notified the Applicant about the registration of the Referral and forwarded a copy of the Referral to the KPA Appeals Panel.
10. On 28 May 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 19 June 1996, the Applicant drafted a protocol [No. 154/2-96] by which he entered into a business relationship with the Social Enterprise "Stan" (hereinafter: SOE "Stan") from Prizren, for the purpose of joint investment in the construction of a business premise of 20.57 m² in Prizren, Çuljan street 2/12.
12. On the same date, the Applicant and the authorized person of the SOE "Stan" signed a joint investment contract [No. 154/3-96] by which the Applicant is obliged to pay a part of the contract value in the amount of 50% (the amount of 72,632.70 Dinars) to the account of the SOE "Stan", no later than 24 June 1996, while the remaining part of the financial means, according to the contract, had to be paid directly before handover of the premise by the Applicant.
13. On 25 June 1996, the Applicant paid 47.5% of the contracted price, that is 69.006,00 Dinars, in the account of the SOE "Stan".
14. On 20 October 2006, the Applicant filed a claim [KPA 16300] with the Kosovo Property Agency (hereinafter: the KPA), requesting the confirmation of the property rights and the return of the aforementioned business premise.
15. On 14 May 2009, the Applicant filed urgency with the KPA, requesting the acceleration of the proceedings and rendering the decision upon his claim No. KPA 16300.
16. On 14 May 2012, the Applicant submitted a new claim to the KPA, in which he requested information on the status of case No. KPA 16300.
17. On 12 April 2013, the Applicant filed again the claim with the KPA with a request *"to resolve his claim, which he submitted in 2006, to which has not received any reply"*.
18. On 28 May 2013, the Applicant filed a request to view the case and obtain information on the status of case No. KPA 16300.
19. On 21 October 2014, the KPA issued a group decision [KPPCC/D/C/ 264/2014] rejecting the Applicant's request stating that *"the Applicant proved that he paid only 47.5% of the agreed price, although the agreement on merger of works and assets, as well as a receipt for payment of the paid part of the amount were found and positively verified. However, the Applicant failed to submit new evidence and therefore did not acquire the property right..."*
20. The Applicant filed a complaint with the Kosovo Property Claims Commission (hereinafter: the KPCC) against the KPA decision of 21 October 2014.
21. On 9 January 2015, the KPCC rendered a decision rejecting the Applicant's request, pursuant to Article 8.8 of Annex III of UNMIK Administrative Direction 2007/5, amended by Law No. 03/L-079 on the KPA.

22. On 5 February 2015, the Applicant filed an appeal with the KPA Appeals Panel against Decision of the KPCC [KPCC/D/C/264/2014] of 21 October 2014.
23. On 8 November 2017, the KPA Appeals Panel rendered Judgment [GSK-KPA-A-158/2015] which rejected the Applicant's appeal as ungrounded. The reasoning of the Judgment, *inter alia*, reads: "*The Supreme Court considers that the KPCC rendered a fair decision by rejecting the claim, stating that the appellant did not confirm the property right before or during the conflict, despite the fact that he paid 47.50% of the total amount of the purchase price. The only evidence in which the appellant is determined as the alleged owner is a contract, which is not certified in the court, which, as such, does not constitute the property right - which means that a written form, certified by the authorities and registered as a property in public registers is required (Article 20 of the Law on the Basis of Property and Legal Relations)*".

Applicant's allegations

24. The Applicant alleges that the Judgment of the KPA Appeals Panel violated the rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 46 [Protection of Property] of the Constitution as well as Article 6 (Right to a fair trial) and Article 1 of Protocol 1 (Protection of Property) of the ECHR.
25. The Applicant alleges that it is an indisputable fact that he failed to fulfill his full obligation to the SOE "Stan", but nevertheless he acquired a certain right over the disputed property, in a certain ideal part, by paying the amount of 47.50% of the contract price in the business premise, and became a co-owner based on the contract.
26. The Applicant considers that his rights under Article 31 of the Constitution, in conjunction with Article 6 of the ECHR have been violated because "*the KPA Appeals Panel ignored the fact that the contract on joint investment [No. 154/3-96] of 19.06.1996, concluded between the Applicant and the authorized person of the SOE "Stan", in accordance with the then applicable law; and this constitutes a valid contract whereby the Applicant has acquired the right over an ideal part of 47.5% at the premise in question, namely by concluding a contract, he became a co-owner of the disputed premise*".
27. The Applicant further alleges a violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1, because "*the KPA Appeals Panel did not take into account or enter into the substance of a joint investment contract which, in all respects, has the character of a pre-contract, which, after fulfilling his obligations, would be certified in the court and legally would become final*."
28. The Applicant requests the Court to declare the Referral admissible, to approve the interim measure suspending the Judgment of the KPA Appeals Panel [GSK-KPA-A-158/2015], and to remand the case for retrial.

Admissibility of Referral

29. The Court first examines whether the Referral has fulfilled the admissibility requirements, established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

30. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

*1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]*

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

31. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision.

32. In this respect, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies and filed the Referral within the prescribed time limit.

33. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

34. In addition, the Court refers to Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees:

(1) The Court may consider a referral if:

(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

35. In the present case, the Court notes that the Applicant challenges the decisions and judgments of the regular courts, alleging violation of their rights under Articles 24, 31, 32 and 46 of the Constitution as well as Article 6 and Article 1 of Protocol 1 to the ECHR, because during the court proceedings he could not

exercise his property rights over the business premise which he considers he was entitled to, in accordance with the contract on a joint construction concluded with the SOE "Stan" in 2006.

36. The Court notes that the proceedings initiated by the Applicant before the regular courts concerned the confirmation of the ownership rights, which constitutes a private right and, as such, a civil right to which the standards of a fair trial under Article 6 paragraph 1 of the ECHR apply.
37. The Court further notes that the Applicant brings an alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in connection with the fact that the courts ignored that the joint investment agreement [No. 154/3-96] of 19 June 1996, was concluded in accordance with the then applicable law, between the Applicant and the authorized person of the SOE "Stan", and, accordingly, it represents a valid contract that granted him the right to an ideal part of 47.5% of the ownership over the business premise, and accordingly, the regular courts should have applied the law that was applicable at that time.
38. In this respect, the Court first emphasizes that in accordance with the case law of the European Court of Human Rights (hereinafter: the ECtHR), it is not the role of the Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law (see ECtHR, *Pronina v. Russia*, Decision on admissibility of 30 June 2005, application no. 65167/01).
39. In this respect, the Court reiterates that the complete determination of factual situation and the interpretation and application of law is within the full jurisdiction of the regular courts and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as a "fourth instance court" (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, of 16 September 1996, paragraph 65, see also: *mutatis mutandis*, the Constitutional Court: case KI86/11, Applicant: *Milaim Berisha*, of 5 April 2012).
40. Having in mind the Applicant's main allegations of the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court finds that the KPA in Decision KPPCC/D/C/264/2014 found as an undisputed fact that the Applicant and SOE "Stan" signed a contract on joint construction of the business premise, which was the subject of the dispute, and that the contract contained the prescribed conditions as well as the modality of payment of the agreed price for the business premise in question.
41. However, the Court also notes that the KPA found that this contract was signed exclusively between the Applicant and the competent person, as a representative of SOE "Stan", in a form that is not prescribed by law.
42. In this regard, the Court notes, based on the case file and the KPA Decision, that the regular courts found the contract on the joint construction of the business premise was not concluded in the prescribed form before the court,

for which reason it cannot acquire the legal final form, as regulated by law, and such an action cannot, in itself, be considered a valid legal transaction by which he could have acquired the ownership or co-ownership right over the property, namely the business premise.

43. The Court also notes that the KPA Appeals Panel also took into account all allegations of the Applicant in respect of the property in question, and concluded that *"The only evidence in which the Appellant is mentioned as the alleged owner is the contract, which is not certified by the court, which does not constitute the alleged property right as such."*
44. Accordingly, the Court does not see arbitrariness in the given reasoning, and moreover, the Court notes that the Appeals Panel of the KPA examined all the allegations raised by the Applicant during the course of the regular proceedings, and provided clear conclusions as to why these allegations are ungrounded.
45. Based on the foregoing, the Court considers that the Applicant's allegations regarding violation of Article 31 of the Constitution and Article 6 of the ECHR are ungrounded.
46. The Court further notes that the Applicant considers that the Judgment of the KPA Appeals Panel has also violated Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR because *"the Supreme Court has not considered or entered into the substance of the joint investment agreement which, in all its aspects, would have a character of a pre-contract, which after fulfilling obligations, would constitute a new contract, which would be certified before the court and obtain a legally final form"*.
47. However, the Court notes that the courts in their decisions and the KPA Appeals Panel, found in the judgment that the Applicant could not acquire the right to the property in question as he failed to meet any of the specified conditions that would enable him to claim that he had acquired an ownership or co-ownership right over the business premise.
48. In addition, the Court finds that the Applicant in his Referral also stated that he was aware of the fact that he had only concluded the pre- contract and that in some future period, after complying with the contractual obligations, *"[...] he would compile a new contract that would be certified before the court, legally would become final"*.
49. In this regard, the Court emphasizes that a right may be deemed to be the property right only when there is a legal basis for that, namely, if the subject immovable property is acquired in accordance with legal rules through inheritance or lawful legal transaction.
50. Accordingly, the Court notes that the Applicant did not acquire the property within the meaning of Article 1 of Protocol 1 to the ECHR, as the right to property does not exist until the moment when a person has not established the right to a certain property in question. In other words, the right to property

does not imply the right to acquire property (see ECtHR Judgment *Marckx v. Belgium*, Judgment of 13 June 1979 application No.6833/74).

51. Based on the foregoing, the Court views the Applicant's Referral as an expression of dissatisfaction with the fact that his request seeking the exercise of his property rights was rejected as ungrounded in all instances, which, in the present case, is not directly or indirectly the result of the absence of a fair trial.
52. Furthermore, as regards other Applicant's allegations that the challenged decisions violated the right guaranteed by Article 24 [Equality Before the Law], and Article 32 [Right to Legal Remedies], of the Constitution, the Court notes that the Applicant did not specifically reasoned what constitutes the alleged violation of these rights. Namely, the Court points out that the Applicant, apart from general allegations, he did not provide any arguments or evidence to support these allegations, namely which would indicate that the violation of these rights was possible in the case in question. Based on this, it follows that there are no elements that indicate *prima facie* that their examination on merits would be necessary.
53. The Court considers that it is the Applicant's obligation to substantiate his allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That assessment is in compliance with the jurisdiction of the Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylá*, of 5 December 2013).
54. In sum, the Court considers that that the Applicant did not substantiate his allegations nor did he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.
55. Therefore, the Court concludes that the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

Request for interim measure

56. The Court recalls that the Applicant also requested the Court to impose an interim measure, by which the Judgment [GSK-KPA-A-158/2015] of the KPA Appeals Panel would be annulled. However, in the reasoning of his Referral, the Applicant did not explain in a single sentence why such an action of the Court would be necessary.
57. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

1. "The Constitutional Court *ex-officio* or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."

58. The Court also refers to Rule 55 (4) of the Rules of Procedure, which specifies:

“Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

*“(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;
(...)”*

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.”

59. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible, as manifestly ill-founded, because the Applicant has not provided any *prima facie* evidence on the admissibility of the Referral.
60. Therefore, in accordance with Article 116.2 of the Constitution, Article 27.1 of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 27.1 of the Law, and Rules 36 (1) (c) (d) and 36 (2) (b), 55 (4) of the Rules of Procedure, at its session held on 28 May 2018, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measures;
- III. TO NOTIFY this Decision to the parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Selvetë Gërxhalli-Krasniqi



President of the Constitutional Court

Arta Rama-Hajrizi