REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 10 February 2020
Ref. no.:RK 1514/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/19

Applicant

Dobrica Pucar

Constitutional review of Judgment GSK-KPA-A-268/15 of the Supreme Court of the Kosovo Property Agency Related Matters of 30 January 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Dobrica Pucar from Viti, residing in Belgrade, Republic of Serbia (hereinafter: the Applicant), who is represented by Non-Governmental Organization "Justicia" from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment GSK-KPA-A-268/15 of the Supreme Court of Kosovo on the Kosovo Property Agency Related Matters (hereinafter: the Supreme Court of the KPA) of 30 January 2019.

3. The challenged judgment of the Supreme Court was served on the Applicant on 2 May 2019.

Subject matter

4. The subject matter is the constitutional review of the Judgment of the Supreme Court of the KPA, which, according to the Applicant, violates her rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol 1 (Protection of property) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 23 August 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 29 August 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 10 October 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 16 January 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Court notes from the case file that the claim for restitution of the right to the property in question was initiated by Dragan Pucar, now the Applicant's deceased spouse (hereinafter: D.P), and that he was a party before the KPA and

the Supreme Court of the KPA. However, due to his death, his wife appears as a party to the proceedings before the Constitutional Court.

11. On 5 October 2006, D.P., as the property right holder, submitted a claim to the Kosovo Property Agency (hereinafter: the KPA), claiming return of possession of the business premise located in Viti. In the claim to the KPA, now the deceased D.P., stated that he acquired the ownership of the subject property on the basis of an agreement on merging funds he concluded in 1991 with the Kosovo Institute, and that he was in possession of the property in question until 1999, when he lost the right to use as a result of the circumstances that occurred in 1998/1999.

12. At the same time, a third party I. Z. filed a claim with the KPA claiming that he has a legal right over the property in question, that he had acquired the right over the property in question based on an agreement on the merger of funds for the construction of business premise, which he concluded with the Kosovo Institute in April 1991, and that he sold the same business premise to a third party B.Sh in 2005.

13. During the process of verifying and legal processing of the documents and data of both applicants, the KPA Executive Secretariat found "*that both parties claiming ownership of the property in question provided the same documents proving that they were co-investors for the construction of the disputed property*".

14. On 27 August 2014, the Kosovo Property Claims Commission (hereinafter: the KPCC) rendered decision KPC/D/C/256/2014, rejecting the Applicant's claim, reasoning that the KPCC had no jurisdiction to render the decision on merits in this case within the meaning of Article 3 of UNMIK Regulation 2006/50, adopted by Law No. 03/L-079. In its reasoning, the KPCC stated:

> "*The possession of the property in question did not arise as a result of the circumstances of 1998/1999, because from the presented evidence submitted by the Applicant (the deceased spouse of the D.P.), as well as by the responsible party, it can be concluded that the loss of possession of the property in question did not occur due to the events of 1998/1999, but as a consequence of the sale - purchase transaction, however, these facts do not in the first place jeopardize the party who filed a request to seek legal assistance with a competent court*".

15. On 24 February 2015, D.P. appealed to the Supreme Court of the KPA against Decision KPC/D/C/256/2014 of the KPCC, alleging that the KPCC Decision was based on erroneous determination of factual situation and that the allegation in the decision is not true that he did not lose the property in question due to the circumstances of 1998/1999, that he submitted valid documents confirming his ownership of the property in question. Accordingly, he does not agree with the conclusion that the KPCC has no jurisdiction to deal with this case.

16. On 29 December 2015, the person I.Z. replied to the Supreme Court of the KPA on the complaint of the D.P., stating, "*that the allegations that the person D.P.*

is the owner of the disputed property is not correct, but that it is him, because he has valid documents and evidence to support this fact".

17. On 30 January 2019, the Supreme Court of the KPA rendered its judgment GSK-KPA-A-268/15, dismissing the appeal of the D.P. as ungrounded, stating *"that the KPCC was rightly declared incompetent to deal with the case at issue, as it does not have jurisdiction within the meaning of Article 11.4 of UNMIK Regulation 2006/50, because from the evidence submitted by the parties it is proved that the property in question was not lost as a result of the circumstances of 1998/1999 but as a result of the sale of the property in question by a subsequent transaction, and also, the parties to the proceedings provided double evidence confirming that they had title to the property in question.*

The Supreme Court of the KPA, as established above, considers that it is not within the jurisdiction of the KPA and the Supreme Court of the KPA to verify or investigate which party possesses valid or forged documents... [...] The contracts of both parties to the proceedings were concluded in 1991, which proves that the dispute over the right over the property in question between the parties does not date from the events of 1998/1999.

This judgment does not prejudice any property right over the property in question, and therefore does not constitute an obstacle to initiating legal proceedings with the competent authority or the court proceeding if deemed necessary ".

Applicant's allegations

18. The Applicant alleges that the KPCC and the Supreme Court of the KPA violated her constitutional rights and freedoms guaranteed by Articles 31 and 46 of the Constitution, as well as the rights and freedoms guaranteed by Article 6 and Article 1 of Protocol 1 of the ECHR.

19. More specifically, the Applicant alleges that the KPA did not conduct the evidentiary proceedings and acted in accordance with its jurisdiction and competence, that it did not hear the parties, witnesses and experts, thereby violating the right to a fair trial.

20. Further, the Applicant states that it was the obligation of the Supreme Court of the KPA to correct the mistakes of the KPA, however, it continued to make the same mistakes, *"stating that it was not its responsibility or the KPA responsibility to determine which party had valid documents, whereby unlawfully send us to seek redress before the competent court".*

21. In this regard, the Applicant considers that the decision on merits falls within the jurisdiction of the KPA, and therefore of the Supreme Court of the KPA, and that they should have applied and acted in accordance with Article 4 of Administrative Instruction 2007/5 on the implementation of UNMIK Regulation 2006/50 on resolving the property claims.

22. The Applicant requests that the property in question be returned to her, however, if it is not possible to pay her fair compensation in the amount of the market value of the property.

Admissibility of the Referral

23. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.

24. 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."*

25. The Court also refers to Article 47.2 of the Law, which provides:

> *„[...]*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

26. In addition, the Court refers to Rule 39 (1) (b) of the Rules of Procedure, which provides:

> *"[...]*
> *(b) The Court may consider a referral as admissible if all effective remedies that are available under the law against the judgment or decision challenged have been exhausted".*

27. The Court, having regard to the case file, the chronology of the Applicant's taken and non-taken procedural actions, as well as the decisions of the competent authorities, may conclude that the Applicant considers that the regular courts violated her rights guaranteed by Articles 31 and 46 of the Constitution and Articles 6 and 1 of the Protocol 1 of the ECHR, because they did not decide upon the claim for return of possession of the property in question, which she considers she is entitled to.

28. More specifically, the KPA and the Supreme Court of the KPA, during the processing of the claim for return of the property in question, have determined that the claim in question does not fall under their jurisdiction in accordance with Article 3 of UNMIK Regulation 2006/50, and that they have no jurisdiction to deal with it and render the decisions.

29. The Court recalls that Article 3 of UNMIK Regulation 2006/50 governs the competencies and jurisdiction of the KPA and the Supreme Court of the KPA,

thereby defining the temporal jurisdiction for their decision, as well as the category and type of claims they may consider.

"Unmik Regulation 2006/50

Section 3. Responsibilities of the Kosovo Property Agency

3.1 The Kosovo Property Agency shall, through the Executive Secretariat, have the competence to receive and register and, through the Property Claims Commission, have the competence to resolve, subject to the right of appeal to the Supreme Court of Kosovo, the following categories of conflict-related claims involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June1999:

a) Ownership claims with respect to private immovable property, including agricultural and commercial property, and

b) Claims involving property use rights in respect of private immovable property, including agricultural and commercial property,

Where the claimant is not now able to exercise such property rights.

3.2 Nothing in this section shall prejudice the rights of claimants to pursue before courts of competent jurisdiction claims that do not involve the claims described in section 3."

30. Based on the above, it can be concluded that the KPA and the Supreme Court of the KPA have decided on the D.P. claim, because they concluded that the claim in question does not fall within the scope of Article 3 of UNMIK Regulation 2006/50, and therefore neither rendered the decisions in which they decided on the issue of the return of property rights, protected by Article 46 of the Constitution. In this regard, the Court notes that in its judgment the Supreme Court of the KPA also concluded that **i)** *„the property in question was not lost as a result of the circumstances of 1998/1999, but as a result of the sale of the property in question by a later transaction"*, **ii)** *"the judgment does not prejudice any property right over the property in question does not, therefore, constitute an obstacle to the initiation of legal proceedings by the competent authority or the court proceedings if the parties consider it necessary".*

31. On this basis, it may be asked whether the Applicant has exhausted all legal remedies provided by law, and therefore whether, in accordance with the rule of exhaustion of legal remedies, the Applicant in the proceedings before the Supreme Court of the KPA has reached a final decision regarding the return of the property rights over the disputed property.

32. The Court recalls that, in accordance with the provisions of the Constitution, the Law and the Rules of Procedure, the final decision is a response to the last legal remedy, which is effective and adequate to examine the lower-instance decision, both in factual and legal aspect.

33. In the present case, it is evident that the Applicant did not take into account the legal reasoning and legal remedies given by the KPA and the Supreme Court of the KPA in its decisions, and therefore did not even initiate proceedings before the competent court to consider the grounds of her "claim" in relation to the subject property. In fact, from the challenged decisions, as well as under Article 3.2 of UNMIK Regulation 2006/50, it can be concluded that the Applicant had to initiate the legal proceedings before the regular courts in which they could act and decide regarding the property rights issue.

34. Therefore, the Court finds that the Applicant has, in fact, put herself in a procedural situation that her statement claim cannot be considered on merits by the regular courts, on the ground that she did not comply with the procedural requirements and legal obligations that make it possible to initiate proceedings before the competent courts.

35. The Court adds that nothing prevents the Applicant from initiating the proceedings before the competent courts at any time, thereby creating a procedural opportunity that the regular courts pursuant to Article 31 of the Constitution take into account and consider all the Applicant's allegations, as well as all the appealing arguments, and therefore decide on the right in accordance with Article 46 of the Constitution, which leads to the creation of a legal situation which opens the possibility for the Applicant to obtain at a certain moment a final decision regarding the property in question, against which, if she is not satisfied, she can, within the legally prescribed period, address the Constitutional Court.

36. Based on all the foregoing, the Court concludes that the Applicant has not exhausted all legal remedies in respect of the property in question prescribed by law (see, *inter alia*, the cases of the Constitutional Court, KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 28-29, KI 178/18, *Bujar Hoti*, Resolution on Inadmissibility of 30 January 2019, paragraph 26).

37. Therefore, the Applicant's Referral is inadmissible for review in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 paragraphs 1 and 7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, in the session held on 16 January 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban Arta Rama-Hajrizi

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