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

Prishtina, on 5 May 2021
Ref. no.:RK 1764/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI41/21

Applicant

Desimir Vučković

Constitutional review of Judgment no.AC-I-20-0005 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 26 November 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, 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 Desimir Vučković, from the Municipality of Prizren, represented by Ymer Koro, a lawyer in Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [no. AC-I-20-0005] of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel), of 26 November 2020, in conjunction with Judgment [C -III-12-1051] of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel), of 24 December 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's fundamental rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of 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

5. On 24 February 2021, the Court received the Applicant's Referral which he had submitted by mail on 22 February 2021.

6. On 26 February 2021, the President of the Court appointed Judge Selvete Gerxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (presiding), Remzije Istrefi Peci and Nexhmi Rexhepi.

7. On 2 March 2021, the Court notified the Applicant and the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC) about the registration of the Referral.

8. On 13 April 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 20 May 1998, M.V. and S.V. as descendants of I.V., had filed a claim with the Municipal Court in Prizren (hereinafter: the Municipal Court) against the Agricultural Combine KBI "Progres", later registered as the Enterprise N.Sh. "Lavërtari-Blegtori" (hereinafter, "SOE Lavërtari Blegtori"), for the annulment of the contract on sale/purchase, Ov.no.1293/96 of 27 November 1965, concerning

the immovable property as per cadastral parcel no. 165, in surface 00.96.96 ha, as well as cadastral parcel no.166, in surface of 00.93.20 ha, recorded according to the possession list no.280, Cadastral Zone Dushanovë, entered between I.V., as the seller and SOE "Lavërtari-Blegtori" as buyer (hereinafter: the disputable contract). M.V. and S.V. claimed that the disputable contract was entered into under pressure and threat and without the will of their predecessor I.V. therefore they requested the registration of the disputable property in their name.

10. On 3 April 2012, the Municipal Court by Decision [C.no.498-98] declared itself incompetent to decide on the claim and referred the case to the SCSC.

11. On 30 August 2013, the Applicant and Z.V., Z.V., M.Ç., J.Ç. as well as S.V. (hereinafter: the other claimants) submitted a new claim to the SCSC with the same request as in the claim of 20 May 1998, but adding as the respondent in the new claim, also the Privatization Agency of Kosovo (hereinafter: PAK).

12. On 3 October 2017, the PAK filed its response to the aforementioned claim.

13. On 11 October 2017, the Applicant and the other claimants submitted to the SCSC a response to the defence against the claim filed by the PAK.

14. On 24 October 2017, the PAK submitted to the SCSC its counter- response to the response of the Applicant and other claimants to the PAK's response to the claim.

15. On 24 December 2019, the Specialized Panel through Judgment [C-II-12-1051] rejected the claim of M.Ç., J.Ç. and S.V. due to active legitimacy, whilst the claim of the Applicant, as well as Z.V. and Z.V. was rejected as ungrounded, with the reasoning that taking into account that the claim sought the annulment of the disputable contract of 1965, the Appellate Panel, for cases relating to the annulment of contracts has decided that Article 8 of the Law on Circulation of Real Property of Serbia, of 1981, has not been applicable in Kosovo as well as the Law on Obligations of 1978, has no retroactive effect. The Specialized Panel also emphasized that the legislation of Kosovo does not include any law on restitution of immovable property which deals with the compensation of lands confiscated by the state authorities after the World War II.

16. On 10 January 2020, the Applicant and the other claimants filed an appeal with the Appellate Panel against the above-mentioned Judgment of the Specialized Panel, challenging the conclusions of the Specialized Panel regarding the active legitimacy of M.Ç., J. Ç and SV as well as the findings of the Specialized Panel regarding the rejection of the claim as ungrounded in relation to the Applicant, as well as Z.V. and Z.V. by claiming, among other things, that the fact that Article 8 of the Law on the Circulation of Real Property is not applicable in Kosovo does not stand since all courts until 2008, have confirmed the nullity of disputable contracts according to the aforementioned above Law.

17. On 13 February 2020, the PAK filed a response to the appeals of the Applicant and other Claimants.

18. On 26 November 2020, the Appellate Panel by Judgment [Ac-I-20-005], rejected the appeals of the Applicant and other claimants as ungrounded. As regards the

allegations relating to the nullity of the challenged contract, the Appellate Panel stated that these allegations are ungrounded because according to Article 26 paragraph 4 of the Law no.26/1954 on the Circulation of Land and Buildings, as the law applicable in the present case, the contracts entered in the absence of the will of the parties, can be annulled within one year from the day of the contract being concluded, whilst in the case file there is no evidence that within that time period was taken any action to seek the annulment of the disputable contract. The Appellate Panel also reasoned that according to Article 97 of the Law No.04/L-077 on Obligational Relationships (hereinafter: LOR No.04/L-077), the right to request the annulment of such a contract is 3 years. Moreover, the Law on Obligations of 1978 (hereinafter: LoO of 1978), which also had provided for the possibility of annulment of contracts, according to Article 1109, has entered into force in 1978, and as such has no retroactive effect, since the disputable contract was signed in 1965. Whilst, as for the Law on Circulation of Real Property of the Republic of Serbia, of 1987, according to which the annulment of contracts that have been concluded under the threat of violence may be requested, the latter is not applicable in Kosovo. Even if this Law has ever been applicable in Kosovo, according to Article 296 of the Law No.03/L-154 on Property and Other Real Rights is no longer applicable.

Applicant's allegations

19. The Applicant alleges that the challenged Judgment has violated his fundamental rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution and Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the ECHR.

20. The Applicant states that from 1959 to 1965 the Yugoslav authorities of that time by using constant pressure, intimidation against the will of the former owners forced the latter to alienate their immovable property without a legal basis. In this context, and also in the case of the former owner (I.V., the predecessor of the Applicant and other claimants), there has existed no will to enter into the disputable contract. The Applicant alleges that his and the other claimants' predecessor, IV, was the owner of the disputable property but in order to *"avoid threats by communist activists of the former Yugoslav state, he was forced against his will, to sign the contract the disputable contract with the SOE "Lavërtari-Blegtori" on 27.11.1965"* on which occasion the disputable property was sold to the latter. He adds that the SOE "Lavërtari-Blegtori" has not paid any price to the former owner I.V. for the sale/purchase of the disputable property. Therefore, the Applicant alleges that all legal requirements provided for by Article 103 of the LoO of 1978 and Article 8a of the Law on Circulation of Real Property for the nullity of the disputable contract have been fulfilled.

21. In this connection, the Applicant alleges that through the claim he had sought to confirm the nullity of the disputable contract, but the regular courts, have continuously submitted in the reasoning of their decisions, that the Applicant and the other claimants have requested the annulment of the disputable contract. In this regard, he emphasizes that the legal consequences of nullity and annulment are different.

22. The Applicant also maintains that the regular courts have erroneously interpreted the applicability in Kosovo of Article 8a of the Law on Circulation of Real Property, since this law was approved in 1992 by the Republic of Serbia and from 1992 to 2008, pursuant to this article, the regular courts have consistently approved the claims for the nullity of such contracts. Therefore, according to the Applicant, the SCSC cannot conclude that this article has not been applied in Kosovo when *"it is a well-known issue that all judicial instances have accepted the statements of claim of the District Prosecutor's Office for the nullity of the disputable contracts."*

23. He also adds that in the present case there has not existed the will of the former owner in relation to the disputable contract and in order to prove this absence of will, the SCSC had to hear the witnesses proposed in the claim, but the said request was ignored by the SCSC during the main trial.

24. Therefore, the Applicant requests from the Court to: (i) declare the Referral admissible; (ii) find a violation of Article 31 of the Constitution and Article 6 of the ECHR; (iii) declare the Judgment [AC-I-20-0005] of the Appellate Panel invalid; and (iv) remand the case for reconsideration to the SCSC.

Relevant legal provisions

Law no. 04/l-077 on Obligational Relationships of 19 June 2012

"Article 97 A challengeable contract

A contract shall be challengeable if concluded by a party that has limited capacity to contract, if during conclusion there were errors regarding the parties' intention, or if so stipulated in the present Law or any other act of law

Article 102 Expiry of right

1. *The right to request the annulment of a challengeable contract shall expire one year from the day the entitled person learnt of the grounds for challengeability, or one (1) year after the end of duress.*

2. *In any case this right shall expire three (3) years after the day the contract was concluded."*

UNMIK Regulation no. 1999/24 on the Law applicable in Kosovo, amended by Regulation 2000/59

"Section 1
Applicable Law

1.1 The law applicable in Kosovo shall be:

(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and

(b) he law in force in Kosovo on 22 March 1989.

In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

1.2. If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

1.3. n exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards [...]".

Law on Obligations of 1978

"Article 1109
Entry into force of the present Law

This Law shall enter into force on 1 October 1978."

Law no. 03/l-154 On Property and Other Real Rights

"Article 296
By the entering into force of this law, all provisions of the previous laws that have regulated this field shall have no effect, unless the law otherwise provides."

Assessment of the admissibility of Referral

25. The Court first examines whether there have been fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

26. 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".

27. The Court also refers to the admissibility criteria, as specified by Law. In this respect, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

Article 48
[Accuracy of the Referral]

"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".

Article 49
[Deadlines]

"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..."

28. As to the fulfilment of these criteria, the Court first states that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment [no. AC-I-20-0005] of the Appellate Panel, of 26 November 2020 after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which he alleges to have been violated, pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

29. Further, the Court must examine whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph 2 of Rule 39 of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

30. The Court notes that the Applicant alleges a violation of Article 31 [Right to Fair and Impartial Trial], of the Constitution.

31. The Applicant, in essence, alleges that: (i) The Specialized Panel and the Appellate Panel have not assessed the issue of the nullity of the challenged contract under Article 103 of the Law on Obligations of 1978 and Article 8a of the Law on Circulation of Real Property of Serbia and (ii) that witnesses proposed by the Applicant and other claimants have not been summoned to testify.

32. The Court first notes that the case law of the ECtHR states that the fairness of a proceeding is assessed on the basis of the proceeding as a whole (see the case of Court KI185/19, Applicant: *Abdylhadi Petlla*, Resolution on Inadmissibility of 22 July 2020, paragraph 40). Consequently, when assessing the Applicant's allegations, the Court shall adhere also to this principle (see, the cases of the Court KI185/19, cited above, paragraph 40; KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

33. In the following, the Court will address the Applicant's allegations, by applying its case law and that of the ECtHR, in accordance with which, the Constitutional Court, pursuant to Article 53 of the Constitution [Interpretation of Human Rights Provisions, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

34. In the present case, the Court notes that the Appellate Panel, by reasoning the allegations related to the nullity of the challenged contract, stated that these allegations are ungrounded since according to Article 26 paragraph 4 of the Law No. 26/1954 on Circulation of Land and Buildings, which was applicable at the time of the challenged contract being entered, contracts concluded in absence of the will of the parties, can be annulled within one year upon the day of entering into the contract, while in the case file there is no evidence that within that period there has been taken any action to seek the annulment of the challenged Contract.

35. The Appellate Panel also reasoned that even according to Article 97 of the LOR no. 04 / L-077, the contract is challengeable when it has been entered into by a party with a limited capacity to act, when during its conclusion there have been deficiencies in terms of the will of the parties, however, according to article 102.2 of the LOR no.04/L077, the right to request the annulment of such a contract is 3 years. Therefore, the Appellate Panel reasoned that if the contract has deficiencies in terms of the lack of will of the parties to enter into the contract, based on Article 97 of the LOR No.04 / L077, the contract is challengeable, with consequences of relative nullity, but this must be sought within 3 years upon the day of entering into the contract, which has not happened in this case. As regards the LoO of 1978, the Appellate Panel reasoned that according to Article 1109, the latter had entered into force in 1978, and as such has no retroactive effect, since the challenged contract was signed in 1965. Whereas as regards the Law on Circulation of Real Property of the Republic of Serbia, of 1987, according to which the annulment of contracts concluded under the threat of violence may be requested is not applicable in Kosovo. Even if this Law has ever been applicable in Kosovo, according to Article 296 of the Law No.03/L-154 on Property and Other Real Rights is no longer applicable.

36. Finally , in relation to the nullity of the challenged contract, the Appellate Panel reasoned that *"The Claimants have filed their lawsuit initially with the Municipal Court in Prizren on 20 May 19 [9] 8, and thereafter with the SCSC, on 30 August 2013, which is too late, and it is an out of time claim in the sense of Article 26 paragraph 4 of the Law on the Circulation of Land and Buildings (Official Gazette of the FRY no. 26/1954), which law as stated above, was the law applicable at the time of entering into the [disputable] contract."*

37. In view of the above, the Court notes that the Applicant has been enabled to have the proceedings conducted based on the principle of adversarial proceedings; that he has been able to adduce arguments and evidence that he considers relevant to his case during the various stages of the proceedings; that he has been given the opportunity to effectively challenge the arguments and evidence presented by the opposing party; and that all the arguments, viewed objectively, relevant to the resolution of his case have been duly heard and reviewed by the courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in their entirety, were fair (see, inter alia, the case of Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility, of 16 February 2018, paragraph 35; see also, *mutatis mutandis*, the case *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

38. The Court states that Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, does not guarantee anyone a favourable outcome in the course of a judicial process, nor provide for the Court to challenge the application of substantive law by the regular courts in a civil dispute (see the case of Court KI185 / 19, cited above, paragraph 46).

39. In this respect, it should be borne in mind that the "fairness" required by Article 31 of the Constitution is not "substantive" fairness, but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (see, the case of Court KI42/16, Applicant *Valdet Sutaj*, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references therein).

40. In this regard, the Court states that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms of protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would act as a court of "fourth instance", which would result in exceeding the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, the case of Court KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility, of 16 December 2011).

41. As regards the allegation that the Specialized Panel and the Appellate Panel did not summon the witnesses proposed by him and the other claimants to prove the lack of will of the former owner to enter into a challenged contract on the property, the Court notes that the Applicant, in addition to not having proved that he has raised this allegation before the Appellate Panel, also did not clarify who

these witnesses were, nor did he argue before the Court as to how and why the absence of their testimony would result in a different decision on his case and how have his constitutional rights been violated as a result of this action .

42. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings before the regular courts cannot of itself raise an arguable claim for a constitutional violation of the right to a fair and impartial trial (see, the cases Court KI185/19, cited above, paragraph 49; and KI56 17, Applicant Lumturije Murtezaj, Resolution on Inadmissibility, of 18 December 2017, paragraph 42; see also, *mutatis mutandis*, the ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECHR, Judgment of 26 July 2005, paragraph 21).

43. Consequently, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged decision has violated his rights and freedoms guaranteed by the Constitution and the ECHR, namely the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

44. Moreover, the Applicant alleges that the regular courts in his case have also violated Article 13 (Right to an effective remedy) of the ECHR. In this respect, the Court notes that he does not further elaborate on how and why has there been a violation of Article 13 of the ECHR. The Court recalls that it has consistently emphasized that the mere reference to Articles of the Constitution and the ECHR is not sufficient to build a substantiated allegation for a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and compelling arguments (see, in this context, the cases of the Constitutional Court KI136/14, Applicant: *Abdullah Bajqinca*, Resolution on Inadmissibility, paragraph 33; KI187/ 18 and KI 11/19, Applicant: *Muhamet Idrizi* Resolution on Inadmissibility, of 29 July 2019, paragraph 73, and most recently the case KI125/19 Applicant: *Ismajl Bajgora*, Resolution on Inadmissibility, of 11 March 2020, paragraph 63).

45. Therefore, the Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 13 April 2021, unanimously

DECIDES

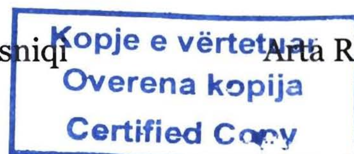
I. TO DECLARE the Referral inadmissible;

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**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi



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