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

Prishtina, 4 January 2017
Ref. no.: RK 1031/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI67/16

Applicant

Lumturije Voca

Constitutional review of Judgment GSK-KPA-A-041/14 of the Supreme Court Appeals Panel of Kosovo Property Agency Related Matters, of 2 December 2015

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 Lumturije Voca, from Prishtina (hereinafter, the Applicant), represented by lawyer Qazim Qerimi.

Challenged decision

2. The Applicant challenges Judgment GSK-KPA-A-041/14 of 2 December 2015 of the Supreme Court Appeals Panel of Kosovo Property Agency Related Matters (hereinafter, the Appeals Panel).

3. The challenged Judgment was served on the Applicant on 28 January 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which allegedly violated Articles 7 [Values], 31 [Right to Fair and Impartial Trial] 46 [Protection of Property] and 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), as well as Article 6 [Right to a fair trial] in conjunction with Article 13 [Right to an effective remedy] and Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter, the ECHR).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, and Rule 29 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 29 April 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 11 May 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

8. On 2 June 2016, the Court notified the Applicant about the registration of the Referral and requested from her to submit the Decision of Kosovo Property Claim Commission KPCC/D/R/215/2013, of 21 September 2013. The Court sent a copy of the Referral to the Appeals Panel.

9. On 23 June 2016, the Court sent a copy of the Referral to Rifat Çeku, and to other legal heirs of Egjlane Gashi, namely Saide Kelmendi, Bashkim Mulliqi, Safinaz Rudi and Tabe Ivesi, as responding parties, and provided a deadline of 7 (seven) days to submit their comments, if any.

10. On 1 July 2016, Rifat Çeku submitted comments to the Court and a power of attorney authorizing him to represent the other legal heirs of Egjlane Gashi.

11. On 6 July 2016, the Court sent to the Applicant a copy of the comments submitted by the responding parties and provided a deadline of 7 (seven) days to submit her comments, if any.

12. On 21 September 2016, the Court, being aware of pending proceedings C. no. 1268/10 in the Basic Court in Pristina, asked that Court to inform who are the litigants in the proceedings; what is the subject matter of the dispute in the case; and at what stage are the proceedings.

13. On 20 October 2016, the Basic Court informed that the pending case *"started with the claim C. no. 1268/10 of the claimant Lumnije Voca from Prishtina, of 3 June 2010, filed against the respondent Rifat Çeku from Prishtina, Tirana Street, building 52-1/1, with subject of contest being the ownership confirmation"*. In addition, the Basic Court attached *"the claim of the claimant of 3 June 2010 and the response to the claim of 27 March 2015"*.

14. On 06 December 2016, 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 general facts

15. On 23 October 1986, Egjlane Gashi was allocated with an apartment in the former Belgrade street and current Tirana street, in Pristina (hereinafter, the apartment).

16. On 30 September 1987, Egjlane Gashi concluded a contract on use of the apartment with the Public Housing Enterprise (hereinafter, PHE).

17. On 8 November 1994, Egjlane Gashi concluded a contract on purchase of the apartment and payed the contracted price.

18. The Ministry of Finance of the Republic of Serbia did not approve the transfer of property rights as required by the Law on the transfer of immovable property. The contract on purchase was not certified by the Municipal Court due to that lack of that approval.

19. On 2 February 1995, Egjlane Gashi passed away and her legal heirs, namely her sister Saida Kelmendi, continued to live in the apartment. In 1997, Saida Kelmendi was expelled from the apartment.

20. On 12 February 1998, the PHE allocated the apartment for use to Vesela Radović and, on 31 March 1998, PHE concluded a contract on use of the apartment with Vesela Radović.

21. On 13 May 1998, Vesela Radović concluded a contract on purchase of the apartment with PHE. Vesela Radović lived in the apartment until 24 June 1999, when she moved from Kosovo.

22. After that date, Rifat Çeku, an heir of the deceased Egjlane Gashi, moved into the apartment.

23. On 14 December 2001, the Applicant Lumturije Voca signed a contract on the sale-purchase of the apartment with Vesela Radović. That contract was certified (VR. no. 6692/2001) by the Municipal Court in Prishtina.

Summary of facts in the proceedings before the regular courts

24. The Applicant filed a claim with the Municipal Court, alleging that Rifat Çeku is in the apartment and requested to oblige him *"to vacate the apartment from the people and belongings, and freed, and to hand it over to the claimant for further utilization"*.

25. The Respondent Rifat Çeku proposed the Municipal Court to reject the claim as ungrounded, *"due to the fact that the apartment which is subject to the statement of claim, is a property of Egjlane Gashi"*.

26. On 30 May 2002, the Municipal Court (Judgment C. no. 290/2002) approved the statement of claim of the Applicant and obliged Rifat Çeku to vacate the apartment.

27. Rifat Çeku, as one of the legal heirs of the deceased Egjlane Gashi, filed an appeal with the District Court in Prishtina, alleging that proceedings regarding the dispute on ownership rights over the same apartment were pending before the Housing and Property Claims Commission (hereinafter, HPCC), in between the legal heirs of Egjlane Gashi and Vesela Radović. The other legal heirs of Egjlane Gashi, namely Saide Kelmendi, Bashkim Mulliqi, Safinaz Rudi and Tabe Ivesi, also filed an appeal, alleging that the apartment was their property and that proceedings regarding the apartment were pending before the HPCC.

28. On 2 July 2003, the District Court (Judgment Ac. no. 521/2002) rejected as ungrounded those appeals of Rifat Çeku and other legal heirs and upheld the Judgment of the Municipal Court.

29. Rifat Çeku filed a revision with the Supreme Court, alleging that the regular courts were incompetent to decide on the matter, as the HPCC had exclusive jurisdiction, and that the apartment is the property of Egjlane Gashi's legal heirs. In addition, Rifat Çeku alleged that the legal heirs of Egjlane Gashi were not allowed to intervene in the proceedings.

30. On 21 January 2004, the Supreme Court (Judgment Rev. no. 142/2003) rejected as ungrounded the revision of Rifat Çeku and upheld the Judgment of the District Court.

31. The Supreme Court considered the allegation on incompetence of the regular courts. In fact, the Supreme Court found ungrounded that allegation, *"because the fact itself* that the claimant has bought the contested apartment from Vesela Radović *on 14 December 2001, means that we have to deal with a legal transaction concluded after 13 October 1995, which transactions, according to Article 1.2 under (C) category of UNMIK Regulation 1999/23, fall under the competency of the Courts and the Directorate for Housing and Property"*.

32. The Supreme Court also found that Vesela Radović could possess the apartment and sell it to the claimant, *"due to the fact that Vesela Radović, in line with the purchase contract determined in the Municipal Court in Prishtina, has been the owner of the apartment in question during the entire*

procedure until the rendering of the challenged Judgment [of the District Court], *it has not been proved that except selling it to the claimant, she could have alienated that".*

33. The Applicant submitted to the Municipal Court a proposal for execution.

34. On 7 August 2003, the Municipal Court (Decision E. no. 469/03) determined the execution.

35. On 21 August 2003, the HPCC informed the Municipal Court that a case on the same legal matter was registered (DS008675) and pending before the HPCC, requesting the suspension of the proceedings related to the execution as the HPCC has exclusive jurisdiction on the matter.

36. On 2 September 2003, the Municipal Court (Conclusion E. no. 469/03) ordered the debtor to *"evict people and things from the apartment (...) and hand it over in free use and disposal of the creditor".*

37. On 14 November 2003, the Municipal Court (E. no. 469/03) requested HPCC to accelerate the proceeding of resolving the registered and pending case.

38. On 11 March 2004, the Municipal Court informed the HPCC that the Supreme Court (Judgment Rev. no. 142/2003 of 21 January 2004) rejected as ungrounded the revision of the respondent Rifat Çeku. The Municipal Court also requested the HPCC to inform *"as to what stage is the proceeding of resolving this case, and what is your stance now after this case – Judgment of the Supreme Court of Kosovo, in this legal case, particularly in regard to the jurisdiction of action".*

39. On 1 July 2016, Rifat Çeku informed the Court that, in 2010, *"the Applicant (...) filed a claim against* [him] *with the Municipal Court in Prishtina (...) in order to confirm ownership"* of the disputed apartment and that the claim *"is pending before the regular court, namely there is a proceeding that is still ongoing".* On 6 July 2016, the Court sent to the Applicant a copy of the comments submitted by Rifat Çeku. No reply was provided by the Applicant in the assigned deadline.

Summary of facts in the proceedings before the HPCC and Appeals Panel

40. On an unspecified date, Saide Kelmendi, one of the legal heirs of Egjlane Gashi, filed with the HPCC a category A claim (DS008675), requesting *"registration of ownership"* over the disputed apartment. In that claim, Saide Kelmedi was the claimant, Vesela Radović was the respondant and Lumturije Voca (the Applicant) was the interested party.

41. On an unspecified date, Vesela Radović filed with the HPCC two claims of C category (DS003476 and DS606736), requesting *"repossession"* of the disputed apartment. In that claim, Vesela Radović was the claimant, Rifat Çeku was the respondant and Lumturije Voca (the Applicant) was the interested party.

42. The Applicant Lumturije Voca intervened as an interested party in the proceedings, alleging that she had purchased the apartment from Vesela Radović.

43. On 12 December 2003, the HPCC (Decision HPCC/D/06/2003/B&C) found that *"Egjlane Gashi obtained ownership of the claimed apartament. However, as the First Claimant* [Saide Kelmedi] *acknowledges that the inheritance proceedings have not yet been finalized, it is unclear whether the First Claimant is the sole legal heir of Egjlane Gashi. Once the pending inheritance proceedings have been concluded, the rightful heir or heirs, as determined in these proceedings, must be registered in the appropriate public record as the owner of the claimed apartament".*

44. Consequently, the HPCC further ordered:

> *"1. That the property transaction between Egjlane Gashi and the Disposal Right Holder dated 8 November 1994 is valid:*
> *2. That the ownership over the claimed property be registered in the appropriate public record in favor of those individuals who are found to be the legal heirs of Egjlane Gashi in the pending inheritance proceedings; and*
> *3. That Vesela Radovic's claims under Claim Nos DS003476 and DS606736 be rejected."*

45. The HPCC also found that *"the Second Claimant* [Vesela Radović] *had no property right to the claimed apartament"* and, therefore, could not transfer the property right to the Applicant Lumturije Voca.

46. In relation to the interested party Lumturije Voca (the Applicant), the HPCC found that *"the 1994 transaction was valid"*. Thus, it considered that *"it is impossible for it to recognize as valid any subsequent attempt by the Allocation Right Holder to sell (or confer other rights in) the apartment to any other party"*. Therefore, the HPCC also found itself *"precluded from recognizing the validity of this sale"*.

47. On 10 May 2005, Lumturije Voca (the Applicant) filed with the HPCC a request for reconsideration of its decision of 12 December 2003. In that request, the responding party was Saide Kelmendi.

48. On 31 March 2006, the HPCC (Decision no. HPCC/REC/61/2006) rejected the Applicant's request for reconsideration and upheld its Decision, reminding that *"fhe final decisions of the commission are binding and may be imposed and cannot be reviewed by any court or administrative authority in Kosovo"*.

49. On 27 January 2010, the Applicant requested the HPCC to annul its decision on reconsideration and all other previous decisions taken by it and to uphold the Judgment (C. no. 290/2002) of the Municipal Court, because that Judgment became *res judicata* on 2 July 2003.

50. On 21 August 2013, the HPCC (Decision no. KPCC/D/R/215/2013) rejected the Applicant's request as an adjudicated matter (*res judicata)* considering *"that*

her same claim and for the same apartment, registered in HPCC No. DS003476 and DS606736 was reviewed and decided by final Decision HPCC/REC/61/2006 of HPCC, of 31 March 2006".

51. On 16 December 2013, the Applicant filed an appeal with the Appeals Panel against that Decision of HPCC. In that Appeal, the Appellant was Lumturije Voca and the Responding parties were Saide Kelmendi, Bashkim Muliqi, Tabe Ivesi, Safinaz Rudi and Rifat Çeku, who was representing the other Responding parties.

52. On 2 December 2015, the Appeals Panel (Judgment GSK – KPA- A – 041/14) rejected the Applicant's appeal, because *"it was not filed within the time limit of 30 days"*. The Appeals Panel also modified *ex officio* its Decision of 21 August 2013 as follows: *"besides Rifat Çeku, Responding Parties in the Claim in the first instance are also Saide Kelmendi, Bashkim Muliqi, Safinaz Rudi and Tabe Ivesi"*.

Applicant's allegations

53. The Applicant claims that her rights guaranteed by Article 31 of the Constitution and Article 6, in conjunction with Article 13, of the ECHR were violated. She considers that *"it would be illusive if the legal system of Kosovo allows a final and binding court decision to remain ineffective to the detriment of one party"*.

54. The Applicant alleges that the Judgment C. no. 290/2002, of 30 May 2002, of the Municipal Court is *res judicata* and that for 13 (thirteen) years the Judgment has not been executed.

55. The applicant further claims that two different proceedings were conducted on the same legal matter: one before the regular courts and another before the HPCC and Appeals Panel. That situation originated *"two different final and binding decisions on the same subject matter"*.

56. The Applicant further alleges that the HPCC has not given *"any reasoning on decision res judicata of the Municipal Court in Prishtina and what is the status of that decision. This was not done either by the Kosovo Property Agency Appeals Panel of the Supreme Court"*.

57. The Applicant states that *"the Supreme Court by its Judgment of 21 January 2004 (Rev. no. 142/2003) clearly reasoned the question of jurisdiction and found that the regular courts have jurisdiction to adjudicate this matter, because the Applicant purchased the apartment from Vesela Radović on 14 December 2001"*.

58. The Applicant alleges that the Appeals Panel had an obligation to *"indicate what final, enforceable and binding Judgment should be into force, the one of the Directorate for Housing and Property of 12 December 2003 and 31 March 2006, of the Kosovo Property Claims Commission dated 21 August 2013 and of the Kosovo Property Agency Appeals Panel of the Supreme Court dated 2 December 2015 or the Decision of the Supreme Court (Rev. No. 142/2003*

dated 21 January 2004) and the Decision of the Municipal Court in Prishtina (C. No. 290/2002 dated 30 May 2002)"."

59. The Applicant considers that legal uncertainty was created in relation to *"the Applicant, the third parties and competent institutions"*. They *"do not know how to act"*, because the HPCC and the Appeals Panel *"decided in contradiction with the decision of the Supreme Court (...) and with the decision of the Municipal Court"*.

60. The Applicant further claims that her right to peaceful enjoyment of the property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, has been violated.

61. The Applicant finally considers that the principles of the rule of law and Articles 7 and 102 of the Constitution were violated, because *"the Supreme Court and Kosovo Property Agency Appeals Panel of the Supreme Court, as a part of the Supreme Court, have the constitutional obligation to correct this legal uncertainty that has been created"*.

62. The Applicant requests the Court *"to hold that the decisions of regular courts (...) be considered as valid decisions that reflect the institute res judicata in the present case"*.

Comments of the responding party

63. The responding party stated that *"the Applicant did not notify at all the Constitutional Court that in 2010, she filed a claim against Rifat Çeku with the Municipal Court in Prishtina - General Department, under number C.1268/2010 in order to confirm ownership, in the amount of 60,000 euro for the same apartment"*.

64. On 11 March 2015, the Basic Court in Prishtina (Decision C. no 1268/2010) set the deadline of 15 days, in which *"the respondent Rifat Çeku, acting upon the decision within legal deadline filed a response to the claim, which is even today pending the decision of the court, to reject the Applicant's claim as inadmissible and without legal basis"*.

65. The responding party further asked *"how is it possible to submit the request for constitutional review, when there is still a claim that is pending before the regular court, namely there is a proceeding that is still ongoing"*.

66. As an evidence of the abovementioned allegations, the responding party submitted to the Court the Decision (C. no. 1268/2010, of 11.03.2015) of the Basic Court in Prishtina.

67. The responding party also submitted to the Court the HPCC Decision, of 21 August 2003, by which the HPCC informed the Basic Court of the following:

> *We respectfully request your attention to paragraph 1.2 of UNMIK Regulation/1999/23 and paragraph 3.1 of UNMIK Regulation/2000/60 which provides to the Housing and Property Directorate exclusive*

jurisdiction over special ownership problems, especially over properties that are the subject of the claim, which was filed according to the rules to the Directorate. The ownership at this stage is a subject of two claims under numbers DS003476 and DS008675, which are pending before the Housing and Property Directorate.
The Housing and Property Directorate has exclusive jurisdiction over these cases, you and your court do not have jurisdiction over these cases. So, if you execute the eviction, you will violate the law and UNMIK regulations. Therefore, we advise you to postpone any further legal or administrative proceedings that await resolution of these claims by the Housing and Property Directorate.
Furthermore, it seems that your order is based on a court case, dealing with an attempt of a sale-purchase property that is certified in the Municipal Court in Prishtina on 13.12.2001. May I draw your attention to UNMIK Regulation 2000/60, paragraph 5.2, which states that such a sale-purchase is invalid and has no legal effect, and to remind you what court tried to certify such an agreement, which is involved in disrespect of the law.

Admissibility of Referral

68. The Court, at the outset and as a preliminary observation, recalls that the Applicant claims that two different proceedings were conducted on the same legal matter: one before the regular courts and another before the HPCC and Appeals Panel and that situation originated *"two different final and binding decisions on the same subject matter"*.

69. In that respect, the Court refers to Section 2.5. of UNMIK/REG/1999/23 on the Establishment of the HPCC, which provides:

> *As an exception to the jurisdiction of local courts, the Commission shall have exclusive jurisdiction to settle the categories of claims listed in section 1.2 of the present regulation. Nevertheless, the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not raise the issues listed in section 1.2. Pending investigation or resolution of a claim, the Commission may issue provisional measures of protection.*

70. The Court recalls that Section 1.2 of that Regulation includes: *"claims by natural persons whose ownership, possession or occupancy rights to residential real property (...)"; "claims by natural persons who entered into informal transactions of residential real property (...)"; and "claims by natural persons who were the owners, possessors or occupancy right holders of residential real property (...)"*.

71. The Court further recalls that this Regulation entered into force on 15 November 1999.

72. In addition, the Court notes that the Applicant's case raises, namely, questions on determining which jurisdiction (regular courts, or HPCC and Appeals Panel) is materially competent, which of two different decisions is final and

binding, and what is the validity and forcibility of a Judgment delivered by a court without exclusive competence.

73. However, the Court considers that those questions are matters of legality, falling under the jurisdiction of the regular courts and not under the jurisdiction of the Constitutional Court.

74. In fact, the Court reiterates that it is not its task to deal with establishment of facts, or interpretation or application of laws as adjudicated or decided by the regular courts (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

75. Moreover, the Court also reiterates that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, it cannot act as a "fourth instance court" in relation with the abovementioned questions. (See ECtHR case *Akdivar v. Turkey,* paragraph 65 of Judgment of 16 September 1996; See also *mutatis mutandis* the Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

76. Therefore, the Court confines itself to the assessment of the admissibility of the Referral on alleged constitutional violations as referred by the Applicant.

77. Then the Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

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

> *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.*

79. The Court further 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.*

80. In addition, the Court takes into account paragraphs (1) d) and (2) d) of 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

[...]

d) the Applicant does not sufficiently substantiate his claim.

81. The Court considers that the Applicant's allegations can be summarized as it follows:

(i) violations of Article 31 of the Constitution and Article 6 of ECHR in conjunction with Article 13 of ECHR and other Articles of the Constitution;
(ii) violations of Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR in conjunction with other Articles; and
(iii) violations of Article 7 and Article 102 of the Constitution in conjunction with other Articles.

(i) Alleged violations of Article 31 of the Constitution and Article 6 of ECHR in conjunction with Article 13 of ECHR

82. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations [...] within a reasonable time by an independent and impartial tribunal established by law.

83. The Court also refers to Article 6.1 of the ECHR, which establishes:

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

84. In addition, the Court takes into account article 13 of the ECHR, which establishes:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. General principles of principle *res judicata*

85. The Court reiterates that the right to fair and impartial trial under Article 31 of the Constitution and Article 6 paragraph 1 of the Convention, interpreted in the light of the principles of rule of law and legal certainty, encompasses the requirement that where the courts have finally determined an issue, their ruling should not be called into question. (See ECtHR cases *Brumarescu v. Romania* [GC], no. 28342/95, 1999-VII, § 61 and *Kehaya and others v.*

Bulgaria, no. 47797/99 and 68698/01, Judgment of 12 January 2006, paragraph 61)

86. The principle of *res judicata* requires that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Any review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. (See ECtHR case *Esertas v. Lithuania*, no. 50208/06, Judgment of 31 May 2012, paragraph 21).

87. In that respect, the principle *res judicata* is a fundamental element of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention in civil matters. (See ECtHR case *Kehaya and others v. Bulgaria, ibidem,* paragraph 63*).*

88. Moreover, the Court emphasizes that the *res judicata* effects of judgments have limitations as to *ad personam* (specific person) and as to material scope (specific mater). (See ECtHR cases *Esertas v. Lithuania, ibidem,* paragraph 22, and *Kehaya and others*, *ibidem*, paragraph 66).

B. Applying these principles to the present case

89. The Court recalls that the Applicant started the proceedings before the Municipal Court requesting that Rifat Çeku be obliged to vacate the disputed apartment. Rifat Çeku responded that the apartment was the ownership of Egjlane Gashi and of the other her legal heirs.

90. The Court also recalls that the Applicant claims that the Judgment C. no. 290/2002 of the Municipal Court, of 30 May 2002, is *res judicata* and that for 13 (thirteen) years the Judgment has not been executed.

91. In fact, the Applicant alleges that two different proceedings were conducted on the same legal matter: one before the regular courts and another before the HPCC and Appeals Panel. That situation originated in "*two different final and binding decisions on the same subject matter towards the third persons and institutions*".

92. Thus, the Applicant considers that a legal uncertainty was created because "*the Applicant, the third parties and competent institutions do not know how to act*" and the HPCC and the Appeals Panel "*decided in contradiction with the decision of the Supreme Court (...) and with the decision of the Municipal Court (...)*"

93. Therefore, the Applicant concludes that her rights guaranteed by Article 31 of the Constitution and Article 6, in conjunction with Article 13, of the ECHR were violated, as she considers that "*it would be illusive if the legal system of Kosovo allows a final and binding court decision to remain ineffective*".

94. In that respect, the Court notes that the proceedings conducted before the regular courts, and the HPCC and the Appeals Panel differ *ad personam* (specific person) and material scope (specific matter).

Ad personam (specific person)

95. In fact, the proceedings conducted before the regular courts were conducted between the Applicant and the respondent Rifat Çeku. Those proceedings were completed by the final judgment of the Supreme Court.

96. The proceedings conducted before the HPCC and Appeals Panel were conducted between the claimant Saide Kelmendi, sister and one of the *"legitimate heirs of Egjlane Gashi"*, and the respondent Vesela Radović. The Applicant Lumturije Voca took part in these proceedings due to the alleged purchase of the disputed apartment from Vesela Radović. Those proceedings were completed by the final decision of the Appeals Panel.

97. All subsequent proceedings conducted before the HPCC and Appeals Panel were initiated by the Applicant Lumturije Voca, aiming at the reopening of the case. All subsequent requests were rejected because either the decisions were considered as *res judicata* or they were out of time. (See decision no. HPCC/REC/61/2006, of 31 March 2006; decision no. KPCC/D/R/215/2013, of 21 August 2013; and Judgment GSK-KPA- A-041/14, of 2 December 2015).

98. The Court concludes from the above that the proceedings before the regular courts, and the proceedings before HPCC and Appeals Panel are different *ad personam* (specific person) and then the *res judicata* effects of these judgments have limitations *ad personam* (specific person).

99. That *ad personam* distinction was noted by the Appeals Panel (Judgment GSK – A-KPA-041/14), which modified *ex officio* the decision regarding the parties to the proceedings in order to include as parties, further to Rifat Çeku, all other legal heirs of Egjlane Gashi, *"namely Saide Kelmendi, Bashkim Mulliqi, Safinaz Rudi and Tabe Ives"*. It appears that the Appeals Panel acted in this way in order to prevent further opening of new proceedings with different parties.

The material scope (specific matter)

100. The Court recalls again that the Applicant claimed that two different proceedings were conducted on the same legal matter and that situation originated *"two different final and binding decisions on the same subject matter"*.

101. The Court notes that the proceedings before the regular courts, and the proceedings before the HPCC and Appeals Panel differ also in the material scope (specific mater).

102. The Court recalls that the Applicant started the proceedings before the Municipal Court requesting that Rifat Çeku be obliged to vacate the disputed apartment. Rifat Çeku responded that the apartment was the ownership of Egjlane Gashi and of the other her legal heirs.

103. In fact, in the proceedings before the regular courts, the Applicant Lumturije Voca aimed at obtaining the *"right of possession"* over the disputed apartment. The Applicant requested that people and things are vacated from the disputed apartment, and as such be handed over to the Applicant for further use.

104. The Applicant did not request in the proceedings before the regular courts the confirmation of the "*property rights*", even though the Applicant was aware of the proceedings before the HPCC, regarding the confirmation of the "*property rights*", between the "*legitimate heirs of Egjlane Gashi*", namely her sister Saide Kelmendi, and Vesela Radović.

105. The material scope of the dispute before the HPCC was the *ownership right* over the disputed apartment; not the *right of possession* of the disputed apartment. In this respect, the HPCC concluded that all further attempts to sell the apartment must be considered invalid, because it declared as valid *"the transaction between Egjlane Gashi and the holder of the right to possession, of 18 November 1994"*. (See decision HPCC/D/06/2003/B&C, of 12 December 2003)

106. The difference in the material scope of the dispute was also observed by the Municipal Court which suspended the procedure of execution, because it was notified by the HPCC that there was another proceedings concerning the ownership right and that the HPCC has exclusive jurisdiction in this matter.

107. In that connection, the Court considers that the judgment Rev. no. 142/2003 of the Supreme Court, if *res judicata,* produced effect only in the material scope of "*rights to possession*" and that Judgment would have lost the *res judicata* effect by the Decision (no. HPCC/REC/61/2006) of HPCC that produced, if *res judicata,* effect in terms of the *"property rights"*.

108. In fact, the Court recalls that Section 1.2 of UNMIK/REG/1999/23 on the Establishment of the HPCC includes the following categories of claims: *"claims by natural persons whose ownership, possession or occupancy rights to residential real property (...)"; "claims by natural persons who entered into informal transactions of residential real property (...)"; and "claims by natural persons who were the owners, possessors or occupancy right holders of residential real property (...)"*.

109. The Court also observes that UNMIK/REG/1999/23 refers distinctively to *"ownership, possession or occupancy rights" and "owners, possessors or occupancy right holders"*. The Court further notes, at the outset, that *"these categories of claims"* were referred to HPCC *"as exclusive jurisdiction" and "as an exception to the jurisdiction of local courts"*.

110. In that respect, the Court considers, in conformity with the distinction made by the Regulation, that the property right absorbs and includes the right to possession. Owning and possessing are different components of the right to property. An apartment owned by somebody is the property of somebody; an apartment possessed by somebody does not necessarily means that the apartment is ownership of somebody.

111. Even though, the Court concludes that the Applicant's allegations are not accurate while claiming that *"in the case in front of you, you have two different final and binding decisions for the same subject matter towards the third parties and towards the institutions"*. The proceedings before the regular courts and the proceedings before the HPCC and Appeal Panel differ *ad personam (*to specific person) and also in the material scope.

112. Thus, the Court considers that there are differences as to *ad personam* (specific person) and as to the material scope (specific mater) between the Judgment (Rev. no. 142/2003) of the Supreme Court and the Decision (no. HPCC/REC/61/2006) of HPCC as well as differences in terms of *res judicata* effects of these decisions.

113. Therefore, the Court finds that these decisions are not contradictory and that Article 31 of the Constitution and Article 6 in conjunction with Article 13 of the ECHR have not been violated.

(ii) Alleged violations of Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR

114. The Court refers to Article 46 [Protection of Property] of the Constitution, which establishes:

> *1. The right to own property is guaranteed.*
> *[...]*

115. In addition, the Court takes into account Article 1 [Property rights] of Protocol 1 of ECHR, which establishes:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions.*
> *[...]*

A. General principles regarding the right to protection of property

116. The Court recalls the general principles determined by the ECtHR in relation to Article 1 of Protocol No. 1, which are applicable to Article 46 of the Constitution and configure the scope of protection of the right to property. (See ECtHR case *Kopecký v. Slovakia*, Judgment of 28 September 2004, paragraph 35; *Maltizan and others v. Germany*, Decision on admissibility of 2 March 2005, paragraph 74)

117. Those general principles are as it follows hereunder.

> a) Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right". (See ECtHR case *Malhous v. the Czech Republic,* Judgment of 12 July 2001).
>
> b) Article 1 of Protocol No. 1 of the ECHR does not guarantee the right to acquisition of property. (See ECtHR cases *Van der Mussele v. Belgium*, ,

Judgment of 23 November 1983, paragraph 48; and *Slivenko and others v. Lithuania*, Judgment of 9 October 2003, paragraph 121) .

c) The Applicant may allege a violation of Article 1 of Protocol No. 1 of the ECHR only in so far as the challenged decisions related to his "*possessions*"; within the meaning of this provision "possessions" can be "existing possessions", including claims, in respect of which an applicant can argue that he has at least a "*legitimate expectation*" that they will be realised. On the other hand, the hope that a long-extinguished property right may be revived cannot be regarded as a "*possession*" within the meaning of Article 1 of Protocol No. 1 of the ECHR; nor can a conditional claim which has lapsed as a result of the failure to fulfill the condition. (See ECtHR cases *Prince Hans-Adam II of Linhgeštajna v Germany*, Judgment of 12 July 2001, paragraphs 82 - 83; and *Gratzinger and Gratzingerova v. Czech Republic*, Decision on admissibility of 10 July 2002, paragraph 69.

d) No "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (See ECtHR case *Kopecký v. Slovakia*, Judgment of 28 September 2004, paragraph 50).

B. Application of these principles to the present case

118. The Court recalls that the Applicant alleges that the Judgment (C. no. 290/2002 of 30 May 2002) of the Municipal Court is *"final, binding and applicable"*, as it *"constitutes a legitimate expectation for the applicant, and whereby it has been concluded that the same is the legitimate owner of the property in question."*

119. The Court notes that the Applicant did not become the property right holder, she did not even succeed to realize the possession of the property in question; on the contrary she tried to obtain the possession and acquire the ownership, meaning that the Applicant had only "*hope for the recognition of the property rights, which was impossible to effectively realize*". Therefore, such a situation *"cannot be regarded as a "possession"* within the meaning of Article 1 of Protocol No. 1 of the ECHR.

120. The Court is aware of that the Applicant had some expectation on acquiring the effective enjoyment of the property right based on the contract she signed with Vesela Radović who *"was not a property owner"*. In fact, Vesela Radović tried to prove that she was the owner of the property in order to be able to further transfer it. However, as a rule, a contractual relationship that was invalid from the very beginning *(void ab initio)* cannot in no way be subsequently validated and generate a *"legitimate expectation"*.

121. The Court reiterates that a *"legitimate expectation"* cannot arise *"if there is a contest over the correct interpretation and application of the national law"*. In addition, Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR do not guarantee the right to acquire the property.

122. In fact, the Court recalls that Article 1 of Protocol No. 1 of the ECHR "*does not guarantee the right to acquire property*". The Applicant could have known, at the moment of signing the contract on purchase of the apartment, that Vesela Radović could not handover it to a peaceful enjoyment. As Vesela Radović did not hand over the property of the apartment, the Applicant's claim that there was a violation of her *"right to peaceful enjoyment of possessions"* is ungrounded.

123. Therefore, the Court finds that the decisions of the regular courts, and the decisions of HPCC and Appeals Panel have not violated Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.

(iii) Alleged violations of Article 7 and Article 102 of the Constitution

124. The Court refers to Article 7 [Values] of the Constitution, which establishes:

> *1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.*

125. In addition, the Court refers to Article 102 [General Principles of the Judicial System] of the Constitution, which establishes:

> *1. Judicial power in the Republic of Kosovo is exercised by the courts.*
> *2. The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.*
> *3. Courts shall adjudicate based on the Constitution and the law.*

126. The Court recalls that the Applicant claims that her situation is under legal uncertainty and considers that *"the Supreme Court and Kosovo Property Agency Appeals Panel of the Supreme Court, as a part of the Supreme Court, have the constitutional obligation to correct this legal uncertainty that has been created."*

127. The Court notes that Article 7 and 102 of the Constitution are not in direct connection to human rights and freedoms under Chapter II and III of the Constitution, which provide in a direct way for human rights and fundamental freedoms.

128. The Court recalls that it is a general principle that the Articles of the Constitution which do not directly regulate the human rights have no independent effect, since it has effect solely in relation to *"the enjoyment of the rights and freedoms"* safeguarded by the provisions under Chapter II and III of the Constitution. Accordingly, these articles cannot individually be applied if the facts of the case do not fall within the ambit of one or more of those provisions of the Constitution regarding *"the enjoyment of the rights and freedoms"*. (See ECtHR cases, *inter alia*, *E.B. v. France*, Judgment of the 22

January 2008, paragraph 47; and *Vallianatos and others v. Greece,* Judgment of 7 September 2013, paragraph 72).

129. Therefore, the Court does not consider necessary to assess these allegations because the Applicant did not prove a violation of Articles of the Constitution under Chapters II and III, and without these violations, these constitutional provisions do not have independent effect.

Pending Claim filed with the Basic Court in Pristine on 3 June 2010

130. The Court notes that, on 3 June 2010, *"the Applicant (...) filed a claim against Rifat Çeku (...) in order to confirm ownership"* of the disputed apartment.

131. On 24 March 2015, Rifat Çeku responded to the claim, proposing *"to dismiss it as ungrounded and inadmissible because this case has once been adjudicated, therefore, pursuant to Article 391, paragraph 1, item d, of the Law on Contested Procedure, has to be dismissed as inadmissible"*.

132. In accordance with information provided by the Basic Court, the *"proceedings are still ongoing"* and *"the case in question is not in procedure for review"*.

133. In that respect, the Court recalls that, on 10 May 2005, Lumturije Voca (the Applicant) filed with the HPCC a request for reconsideration of its decision of 12 December 2003. That request was rejected on 31 March 2006 because *"the final decisions of the commission are binding and (...) cannot be reviewed by any court or administrative authority in Kosovo"*.

134. The Court further recalls that, on 27 January 2010, the Applicant requested the HPCC to annul its decision on reconsideration and all other previous decisions. That request was rejected on 21 August 2013 because the request had to do with an adjudicated matter (*res judicata)* considering that *"her same claim and for the same apartment (...) was reviewed and decided by final Decision"*.

135. In addition, the Court notes that, on 16 December 2013, the Applicant filed an appeal with the Appeals Panel against that HPCC Decision of 21 August 2013. That appeal was rejected on 2 December 2015, because *"it was not filed within the time limit of 30 days"*.

136. The Court further notes that all proceedings conducted before the HPCC and Appeals Panel after 12 December 2003 (*res judicata* decision) were initiated by the Applicant aiming at the reopening of the case. All subsequent requests were rejected because either the decisions were considered as *res judicata* or they were out of time.

137. The Court considers that the pending claim in the Basic Court, since 3 June 2010, is only one more Applicant's different and parallel procedural initiatives to seek a review of the final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.

138. However, the Court further considers that reviewing, revoking, reconsidering or abrogating a final and binding decision (*res judicata*) would result in a

general climate of legal uncertainty and make the legal order completely ineffective.

139. Therefore, the Court concludes that the pending procedural initiative will not be legally effective and thus it does not assess it from the exhaustion of legal remedies' point of view.

Conclusion

140. In sum, the Court notes that the Applicant have not showed that the relevant proceedings in any way have been unfair or arbitrary.

141. In fact, the Court considers that the Applicant has not substantiated and proved that the challenged decisions violated her constitutional rights and freedoms as guaranteed by the Article 31 of the Constitution, in conjunction with Article 6 of ECHR, by Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR, and by Article 7 and Article 102 of the Constitution.

142. Thus, the Court further considers that the Applicant's Referral has not fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

143. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and, as such, it is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rules 36 (1) d), (2) d) and 56 of the Rules of Procedure, in the session held on 06 December 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues

Arta Rama-Hajrizi