



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 2 December 2013
Ref.No.:RK511/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI81/13

Applicant

Privatization Agency of Kosovo

**Constitutional Review of the Decision of the Appellate Panel of the
Special Chamber of the Supreme Court of the Republic of Kosovo
DHPGJS. No. AC-II-12-0212 of 7 March 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Privatization Agency of Kosovo (hereinafter: Applicant), represented by Mr. Shefik Kurteshi.

Challenged decision

2. The Applicant challenges the Decision of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo no. AC-II-12-0212, of 7 March 2013 (hereinafter: the SCSC), which was received by the Applicant on 23 March 2013.

Subject matter

3. The subject matter of the Referral is the constitutional review of the Decision of the Appellate Panel of the SCSC no. AC-II-12-0212 of 7 March 2013, regarding the property dispute and the competencies of the Privatization Agency of Kosovo that have to do with socially owned properties.

Legal basis

4. Article 113.7 in conjunction with Article 21 of the Constitution, Article 47 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2008, which entered into force on 15 January 2009 (hereinafter: the Law); and on the Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 7 June 2013, the Applicant submitted the Referral to the Court.
6. On 20 June 2013, the President of the Constitutional Court, by Decision no. GJR.KI81/13, appointed Judge Snezhana Botusharova as Judge Rapporteur. On same date, the President of the Constitutional Court, by Decision no. KSH.KI81/13 appointed the Review Panel composed of judges: Robert Carolan (Presiding), Almiro Rodrigues and Prof. Dr. Enver Hasani.
7. On 9 July 2013, the Court notified the Applicant's representative and the SCSC on the registration of the Referral no. KI 81/13.
8. On 22 October 2013, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the full Court the inadmissibility of the Referral.

Summary of facts

9. The Applicant states that the company Euro Vetfarm L.L.C. from Prishtina (Claimant) filed a claim against the company for medical supply and production "Vetfarm" J.S.C. with seat in Belgrade, in the Municipal Court in Prishtina. The subject of review of this legal matter was the recognition of the property right, based on the contract Ov. No.23887/2009 of 3 September 2009, certified by the Municipal Court in Belgrade, regarding the sale-purchase of real estate (house-building) with area of 0.09,68 hectares and the right of joint use of the yard with area of 0.12,26 hectares.

10. On 19 February 2010, the Municipal Court in Prishtina (Judgment, C. no. 2134/2009) approved as grounded the statement of claim filed by the company Euro Vetfarm L.L.C in Prishtina (Claimant). By this Judgment, it was determined that the company Euro Vetfarm L.L.C. in Prishtina, based on the sale-purchase contract of real estate, gained the property right over the immovable property, which is located in Prishtina, Xhemail Prishtina Street, no. 5, with culture house-building, with area 0.09,68 hectares and the right of joint use of the yard with area 0.12,26 hectares, with total area of the house and the yard of 0.21.94 hectares. The property is registered as cadastral plot no. 4724 and registered according to the possession list no.1590, according to the certificate for the property right over the real estate UL-71914059-1590 CZ Prishtina.
11. The Municipal Court in Prishtina, by Judgment C.no.2134/2009 obliged the respondent, the "Vetfarm" J.S. Company in Belgrade to recognize the property right to the company Euro-Vetfarm L.L.C. in Prishtina and the right of permanent use of the real estate in question. By this judgment the Directorate for Cadastre, Geodesy and Property in Prishtina was obliged to register the abovementioned real estate and to transfer from the respondent "Vetfarm" J.S.C in Belgrade to the claimant Euro Vetfarm L.L.C. in Prishtina, within 15 (fifteen) days from the day the Judgment becomes final.
12. On 26 April 2010, the Municipal Cadastral Office in Prishtina (hereinafter: MCO), based on the request of the company Euro Vetfarm L.L.C., Reference no.: 05-952-1776, of 8 April 2010, according to the Judgment C.no.2134/2009 of 19 February 2010 of the Municipal Court in Prishtina, requested from PAK to give consent for registration of property in the cadastral books in the name of the new owner (Claimant) Euro Vetfarm L.L.C. in Prishtina. MCO in Prishtina also requested for clarifications regarding the property in question, if the latter is an asset of any joint stock company or socially owned enterprise and the accurate name of the company, which in the MCO Prishtina, is registered as "Vetfarm" and "Vetprom".
13. On 8 June 2010, the Applicant (PAK), after being notified by the MCO in Prishtina, regarding the Judgment C.no.2134/2009 of 19 February 2010 of the Municipal Court in Prishtina, filed an appeal in SCSC, requesting the annulment of the execution of Judgment C. no. 2134/2009 of 19 February 2010 and the approval of the proposal for imposition of interim measure regarding the registration of challenged real estate in the name of the new owner Euro Vetfarm L.L.C. in Prishtina by the MCO in Prishtina. The Applicant's appeal (PAK) is based on the fact that according to the Law 03/L-067, the PAK is competent to administer socially owned enterprises in Kosovo.
14. On 1 July 2012, the Trial Panel of the SCSC (Ruling, SCA-10-0043) approved the Applicant's request for imposition of interim measure, by prohibiting the MCO of Prishtina the transfer and registration of property in the cadastral book, according to the order of the Judgment C.no.2134/2009 of 19 February 2010 of the Municipal Court in Prishtina, until rendering a judgment by the SCSC on this matter.

15. On 15 July 2010, Euro Vetfarm L.L.C. in Prishtina filed an appeal with the Appellate Panel of the SCSC against the Ruling of the Trial Panel of the SCSC, regarding the imposition of interim measure. This company, through the filed appeal has requested modification of the Ruling SCA-10-0043 of 1 July 2010 of SCSC and upholding the Judgment C.no.2134/2009 of the Municipal Court in Prishtina, of 19 February 2010. The authorities of Euro Vetfarm L.L.C. in Prishtina challenged the Ruling of the Trial Panel of the SCSC, by alleging that the SCSC is not competent to adjudicate the cases that have to do with the Joint Stock Companies, but only with socially owned enterprises.
16. On 22 March 2011, the Appellate Panel of SCSC (Ruling: ASC-10-0049) rejected the appeal of the company Euro Vetfarm L.L.C. in Prishtina and upheld the Ruling of the Trial Panel of SCSC SCA-10-0043 of 1 July 2010 regarding the approval of the Applicant's request (PAK) for imposition of interim measure which prohibited the transfer and registration of the property in the cadastral books in the MCO in Prishtina.
17. On 7 March 2013, the SCSC Appellate Panel (Ruling: AC-II-12-0212) after the entire review of the case, rejected as inadmissible the Applicant's appeal filed against the Judgment C.no.2134/2009 of 19 February 2010 of the Municipal Court in Prishtina. The reasoning of the Ruling of the SCSC Appellate Panel states as follows:

"PAK alleges in the appeal that on 26 April 2010 was notified of the Judgment of the Municipal Court. From the case file it is clear that the respondent (SOE for medical supply and production export-import Vetfarm Belgrade) was served the Judgment of the Municipal Court on 25 March 2010, which on 6 April 2010, by submission filed in the Municipal Court in Prishtina stated that waives the appeal. At that time, the PAK was established and was operational. It is an indisputable fact that the appellant has not filed an appeal in the SCSC within the time limit of 60 days, against the judgment of the Municipal Court. The fact whether it was notified on time of the judgment, has not been proved by PAK and the burden of proof falls to it.

[...]

The Appellate Panel, due to belated appeal, assesses that now it is not its opportunity to respond, whether this court had jurisdiction regarding the claim and whether legal title (Contract for the purchase of assets), based on which is required the transfer of the challenged property was based on the law, because the belated appeal of the PAK prevents procedurally the Appellate Panel to go further and review the merits of the appealed judgment.

Therefore, as it is already established by the jurisprudence of the Appellate Panel (ASC 11-0094) in such cases, it cannot be considered to be justifiable the annulment of a judgment which has become final, based on belated appeal filed by PAK after more than two months from the time, when the time limit for the appeal had expired and especially following the waiver of the appeal by the authorized representative appointed by the respondent itself.

One of the fundamental principles of each applicable law is the production of legal certainty for the parties through the law and the court decisions. The final decisions, in which the parties consciously miss legal deadlines to challenge them, or to waive from the appeal, or waiver of appeal, cannot be subject to judicial interventions to modify them later, only because the party after some time has interest to change them, because this causes legal uncertainty for involved parties. In this case, the review of the merits of the belated appeal of the PAK which was not involved in the proceedings before the Municipal Court, the appeal filed against the appealed judgment would prejudice the right of the parties to a fair trial based on Article 6 (1) of the European Convention on Human Rights (there is a similar legal view by the Court of Strasbourg, Case Brumarescu vs. Romania, for violation of Article 6 of the Convention, and the right to a fair trial, in case of interference of a final decision due to filing of legal remedy out of time)."

Furthermore in this case, the PAK filed the appeal against the Judgment of the Municipal Court in Prishtina, in which proceedings it was not a party. The responding party is an enterprise from the Republic of Serbia, therefore as it was decided now by the jurisprudence of the Appellate Panel (AC-II-12-0058), in such cases, the appeal is inadmissible also for the fact that pursuant to Article 5.2 of the Annex of LSC, the respondent with its seat outside the country (regardless of its unclear legal status and challenged property it has in Prishtina), cannot be a party in the procedures before the SCSC panels.

18. On 27 March 2013, the Applicant, against the Ruling of the Appellate Panel of the SCSC no. AC-II-0212 of 7 March 2013, filed a proposal in the Office of the State Prosecution for initiation of the request for protection of legality. The Applicant in the proposal for the initiation of the request for protection of legality stated that the Ruling of the Appellate Panel of SCSC is unlawful, because it is not based on legal arguments and the reasoning of the ruling is not sufficient and convincing and because of this it challenges the claims of the Appellate Panel of the SCSC, for rejection of the appeal as out of time by the abovementioned instance.
19. On 25 April 2013, the Office of the Chief State Prosecutor (Notification: KML C.no.44/13 of 12 April 2013) notified the Applicant that it did not find legal ground to file request for protection of legality.

Applicant's allegations

20. The Applicant alleges that the court authorities, respectively the Appellate Panel of the SCSC (Ruling, AC-II-12-0212 of 7 March 2013) has violated constitutional rights guaranteed by Article 102 paragraph 3 of the Constitution, as well as the right to "fair and impartial trial" guaranteed by Article 31 of the Constitution and by Article 6 of ECHR.
21. The Applicant alleges that: the Municipal Court in Prishtina, by deciding on the property dispute in question has violated provisions of Article 5.1 (a) (i) and 5.1 (a) (ii) of the Law on PAK (Law no. 03/L-067) which was in force and which provides:

5.1 a) *The Agency shall have the authority to administer:*

(i) *Socially-owned Enterprises, regardless of whether they underwent a Transformation; and*

(ii) *any assets located in the territory of Kosovo, whether organized into an entity or not, which comprised socially-owned property on or after 22 March 1989, regardless of whether they underwent a Transformation though subject to Article 5.1 (b) below; and [...].*

22. The Applicant alleges that: *“despite legal obligation pursuant to Article 102.3 of the Constitution of Kosovo that “the courts shall adjudicate based on the Constitution and the law”, the Municipal Court in Prishtina has violated Articles 5.1 and 29.1 of the Law on PAK (no.03/L-067), the law that was in force at the time when the claim was filed as well as Articles 75.3, 76 and 77.1 of the Law on Contested Procedure (Law no. 03/L-006); Article 4.1, items 4 and 5 of UNMIK Regulation 2008/4 on the SCSC regarding the Privatization Agency of Kosovo related matters, thus the reviewing and rendering Judgment C.no.2134/2009 of 19 February 2010 was unlawful and has violated the Constitution and the laws in force in the Republic of Kosovo.”*
23. In particular, the Applicant alleges that: *“The Appellate Panel of the SCSC, when deciding on the PAK appeal, by not reviewing the subject of the property dispute, regarding the lack of jurisdiction of the Municipal Court in Prishtina, decided contrary to Article 102.3 of the Constitution and contrary to the requirements of Article 6 of ECHR, the right guaranteed by Article 31 of the Constitution by rejecting the Applicant’s appeal as out of time”.*
24. In addition, the Applicant alleges that the appeal in the SCSC was duly filed, since on 26 April 2010 it was notified for the first time of the Judgment C.no.2134/2009 of 19 February 2010 of the Municipal Court in Prishtina, by the MCO in Prishtina.

Admissibility of Referral

25. In order to be able to adjudicate the Applicant’s Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, laid down in the Constitution and further specified by the Law and Rules of Procedure.
26. In this case the Court refers to Article 113.7 of the Constitution which provide:

113.7 “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. And Article 21 paragraph 4 of the Constitution which provide:

22.4”Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”

28. The Constitutional Court, after having examined in their entirety all evidence and arguments presented by the Applicant, notes that the Applicant mainly complains against the decision of the Appellate Panel of the SCSC, by which the Applicant's appeal was rejected as out of time. The Applicant in his appeal had requested from the Appellate Panel to declare null and void the Judgment of the Municipal Court in Prishtina, due to adjudication of the case by the latter even though it lacked the jurisdiction.

29. The Court must also take into consideration for admissibility purposes whether the Applicant's Referral satisfied the admissibility requirements prescribed in Rule 36 (1) (c) and provisions of Rule 36 (2) of the Rules of Procedure, that provides as follows:

36 (1) "The Court may only deal with Referrals if:

[...]

c) the Referral is not manifestly ill-founded.

36 (2) "The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

a) the Referral is not prima facie satisfied;

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

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim".

30. As to the Applicant's allegation that: "the Appellate Panel of the SCSC, decided in contradiction with the Constitution and applicable laws of the Republic of Kosovo", the Court considers that the Ruling of the Appellate Panel of the SCSC, does not contain in substance violations of the constitutional rights, as the Applicant failed to prove how and why the decision of the Panel was unjustified and arbitrary.

31. The Court recalls that the case should be built on the basis of constitutional arguments for the Court to intervene.

32. The reasoning of the decision of the Appellate Panel of the SCSC is mainly supported by the principle of guaranteeing legal certainty of final court decisions, by supporting the reasoning of the decision in harmony with the law case of ECHR, related to the cases of the analogue nature. Following is the conclusion of the Panel regarding the case:

"One of the fundamental principles of each applicable law is the production of legal certainty for the parties through the law and the court decisions.

The final decisions, in which the parties consciously miss legal deadlines to challenged them, or to waive from the appeal, or waiver of appeal, cannot be subject to judicial interventions to modify them later, only because the party after some time has interest to change them, because this causes legal uncertainty for parties. In this case, the review of the merits of the belated appeal of the PAK which was not involved in the proceedings before the Municipal Court, the appeal filed against the appealed judgment would prejudice the right of the parties to a fair trial based on Article 6 (1) of the European Convention on Human Rights (there is a similar legal view by the Court of Strasbourg, Case Brumarescu vs. Romania, for violation of Article 6 of the Convention, and the right to a fair trial, in case of interference of a final decision due to filing of legal remedy out of time)."

33. As per the Applicant's allegation regarding the fact that: *"the Municipal Court in Prishtina has violated Articles 5.1 and 29.1 of the Law on PAK (no.03/L-067), the law that was in force at the time when the claim was filed as well as articles 75.3, 76 and 77.1 of the Law on Contested Procedure (Law no. 03/L-006); Article 4.1, items 4 and 5 of UNMIK Regulation 2008/4 on the SCSC regarding the Privatization Agency of Kosovo related matters"*, the Court notes that, the ground of the Applicant's appeal contains allegations that have to do with substantial violations of the applied legal provisions and of the contested procedure.
34. Therefore, the Court considers that such allegations may be of the scope of legality.
35. The Court stresses that it is not its task to assess the legality and accuracy of decisions rendered by regular courts, unless there is convincing evidence that such decisions have been rendered in an obviously unfair and unclear manner.
36. It is the task of the Court, concerning the alleged violations of the constitutional rights, to examine and assess whether the proceedings in their entirety were fair and in accordance with the protection, explicitly stipulated by the Constitution. Thus, the Constitutional Court is not a court of fourth instance, when considering the decisions issued by courts of lower instances. It is the role of regular courts to interpret and apply the pertinent rules of procedural and substantive law (*see, mutatis mutandis, Garcia Ruiz v. Spain [GC], no. 30544/96, paragraph 28, the European Court of Human Rights [ECHR] 1999-I*).
37. In the present case, the Applicant has not provided any evidence which indicates that the alleged violations, mentioned in the referral constitute violation of their constitutional rights (*see Vanek vs. Slovak Republic, ECHR Court on admissibility of the application no. 53363/99 of 31 May 2005*).
38. Furthermore, the Court cannot consider that the pertinent proceedings in the Special Chamber of the Supreme Court have been in any way unfair or tainted by arbitrariness (*see, mutatis mutandis, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009*).

39. In sum, the Court concludes that the Applicant's Referral does not meet the admissibility requirements, because the Applicant failed to prove that by the challenged decision were violated his rights and freedoms guaranteed by the Constitution.
40. Therefore, in accordance with Rule 36 (2) b) and d) of the Rules of Procedure, the Applicant's Referral is considered as manifestly ill-founded and as such inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution and Rules 36 (2) b) and d) and 56 (2) of the Rules of Procedure, on 22 October 2013, unanimously

DECIDES

- I. TO REJECT the Referral as 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Prof. Dr. Enver Hasani