



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

Prishtina, 21 December 2015
Ref. No.:RK872/15

RESOLUTION ON INADMISSIBILITY

in

Case no. KI173/14

Applicant

Staja Savić

**Constitutional review of Decision KPCC/D/C/264/2014 of the Kosovo
Property Claims Commission of 21 October 2014**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Bekim Sejdiu, Judge

Applicant

1. The Referral is submitted by Mr. Staja Savić from Ferizaj/Uroševac currently residing in Kraljevo, Republic of Serbia (hereinafter, the Applicant).

Challenged decisions

2. The Applicant challenges the Decision KPCC/D/C/264/2014 of the Kosovo Property Claims Commission (hereinafter, the KPCC) of 21 October 2014.

Subject matter

3. The subject matter is the constitutional review of the Decision KPCC/D/C/264/2014 of the KPCC of 21 October 2014 in relation to the Applicant's private property claim KPA 15121 of 1 September 2006.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

5. On 1 December 2014, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 17 December 2014, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.
7. On 22 May 2014, the Applicant was notified about the registration of the Referral and was asked to fill in the referral form and submit additional documents relevant to his allegations.
8. On 16 January 2015, the Applicant filled in the referral form and submitted additional documents.
9. On 19 February 2015, the Applicant submitted additional documents including the KPCC decision pertinent to his private property claim.
10. On 15 September 2015, the Court sent a copy of the referral to the KPA and asked to be informed about the status of the Applicant's claim.
11. On 18 September 2015, the KPA submitted additional documents and information about the status of the Applicant's claim.
12. On 25 September 2015, a copy of the Referral was sent to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: the Special Chamber).
13. On 30 September 2015, the Special Chamber notified the Court that the Applicant did not file a complaint with them.
14. On 10 November 2015, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

15. On 20 March 1992, the Applicant as manager of the enterprise "ENIGMA" from Ferizaj/Uroševac struck an agreement with the enterprise DPT "TRGOPROMET" also from Ferizaj/Uroševac. The agreement was validated by the Municipal Court in Ferizaj/Uroševac and stipulated that the Applicant lends a certain amount of money to the DPT "TRGOPROMET" which must be paid back to the Applicant by 10 April 1992, that as a guarantee that the loan will be paid back on the stipulated date the DPT "TRGOPROMET" invests a mortgage of unused warehouse premise area of 52 m² in Prishtina, that in case the DPT "TRGOPROMET" does not pay back the loan on the stipulated date the Applicant is entitled to sell the mortgaged warehouse premise, and that, the Commercial Court in Prishtina is the competent authority in case of any dispute between the parties to that agreement.
16. It appears that DPT "TRGOPROMET" did not pay back the loan to the Applicant as per the terms stipulated in the agreement. On an unspecified date the Applicant filed a statement of claim with the Commercial Court in Prishtina thereby claiming to be recognized as the owner of the mortgaged warehouse premise in Prishtina.
17. On 28 July 1992, the Commercial Court in Prishtina by Decision VI. P. no. 3851/92 approved the Applicant's statement of claim, confirmed that the Applicant is the owner of the mortgaged warehouse, that the DPT "TRGOPROMET" is obliged to transfer ownership and unhindered use of the mortgaged warehouse premise within eight (8) days under threat of forced execution, and that, the DPT "TRGOPROMET" must compensate to the Applicant the costs of the court proceedings. The Commercial Court reasoned, inter alia, that based on evidence adduced, it is beyond doubt, that the warehouse premise was mortgaged, that DPT "TRGOPROMET" did not pay back the loan to the Applicant, and that, pursuant to the - agreement struck between the parties - the Applicant has acquired the right to transfer the disputed warehouse premise under his ownership.
18. It appears from the documents contained in the referral that the Applicant between years 1992 until 1999 made use and refurbished the warehouse premise which was conferred to him as per terms of the agreement and the above-stated decision of the Commercial Court. In years 1998-1999 war broke out in Kosovo and the Applicant together with his family fled to the Republic of Serbia.
19. On 1 September 2006, the Applicant filed a claim for private property KPA15121 with the KPA stating that his private property was lost as the result of the circumstances arising during 98/99 in Kosovo, that he lost his property on 12 June 1999, that he is the owner of the warehouse premise in Prishtina pursuant to agreement of 20 March 1992, that his property is currently usurped by a third party, and that, he must be compensated because his property was used from 1999 without his consent. The Applicant also enclosed a ruling of the Commercial Court in Prishtina of 22 August 1996 on the registration of property.

20. The Kosovo Property Claims Commission (hereinafter, the KPCC) a body within the KPA did not rule on the Applicant's claim until 21 October 2014. During that time span the Applicant complained about excessive length of proceedings before the UNHCR, EULEX, the Government of Kosovo, made fresh complaints before the KPA and eventually filed a referral with the Court on 1 December 2014. The KPA had replied to the Applicant that they cannot rule on his claim due to large backlog of cases, some 43,000 claims, and that, his claim will be dealt with in accordance with the precedence of claims filed with the KPA.
21. On 21 October 2014, the KPCC by Decision KPCC/D/C/264/2014 held that the Applicant did not lose his ability to exercise his property right as a result of the 1998-99 conflict, but as a result of the subsequent privatization process, and that therefore, the claim of the Applicant falls outside the KPCC jurisdiction and stands to be dismissed. The KPCC Decision also held that within thirty (30) days of the notification to the parties by the KPA of a decision of the KPCC on a claim, a party may submit through the Executive Secretariat of the KPA to the Supreme Court of Kosovo an appeal against such decision. The appeal may be filed on the grounds of misapplication of the material and procedural law - as well as - the incomplete or erroneous determination of the factual situation.
22. The above-sated decision of the KPCC in its relevant part reads:

Claim Nos. 10676, 11322 and 15121, referred to in part D of the attached schedule, have been filed by the respective claimants in their capacity as the alleged property right holder. In all of these claims, the Claimants claim that they or their families lost the claimed properties as a result of the 1998-99 conflict. The Executive Secretariat has obtained information that the claimed properties belonged prior to the 1998-99 conflict to various socially owned enterprises ("SOEs") and as such had been placed under the administration of the Kosovo Trust Agency after the conflict, and subsequently, in 2002, under the administration of its successor, the Privatization Agency of Kosovo ("PAK"). According to the representative of PAK, the commercial properties belonged to SOEs which had already been privatized or are currently under liquidation. The Executive Secretariat has further established that the properties at issue in Claim Nos. 10676 and 15121 have been sold to a third party in the course of privatization process".

The Relevant Legal Provisions

UNMIK REGULATION NO 2006/50 ON THE RESOLUTION OF CLAIMS RELATING TO PRIVATE IMMOVABLE PROPERTY, INCLUDING AGRICULTURAL AND COMMERCIAL PROPERTY

Chapter IV The Right of Appeal Section 12

Appeals

12.1 Within thirty (30) days of the notification to the parties by the Kosovo Property Agency of a decision of the Commission on a claim, a party may submit through the Executive Secretariat of the Kosovo Property Agency to the Supreme Court of Kosovo an appeal against such decision.

12.2 Except otherwise provided in the present Regulation or in an Administrative Direction implementing the present Regulation, the provisions of the Law on Civil Procedures shall be applicable mutatis mutandis to the appellate proceedings before the Supreme Court.

12.3 The appeal may be filed on the grounds that:

(a) The decision involves a fundamental error or serious misapplication of the applicable material or procedural law; or

(b) The decision rests upon an erroneous or incomplete determination of the facts.

Comments by the KPA

The relevant part of the KPA reply (see paragraph 12 above) in relation to the status of the Applicant's claim reads: *"The KPCC, after assessment of the case-file, by Decision KPCC/D/C/264/2014 dated 21/10/2014, ruled that the claim filed by Mr. Savič was dismissed on the grounds of being outside the jurisdiction of the KPCC. Parties to this proceeding were notified of the KPCC decision whereas the claimant Mr. Staja Savič has filed an appeal against the KPCC decision. Please be informed that the appeal of Mr. Savič according to the standard procedure is in translation process and afterwards will be sent to the Supreme Court of Kosovo, Appeals Panel of the Kosovo Property Agency in order to be decided upon".*

Applicant's allegations

23. The Applicant alleges that: *"The Privatization Agency of Kosovo (hereinafter: PAK), claim for private property KPA 15121 of date 1.9.2006, Dardanija Kicma 5/9 warehouse area of 52 m2 ruined, after reconstruction acquired an area of 104 m2 business premise, ground floor premise and Gallery floor to this day my claim has not been solved for 15 years. The usurper incorrectly uses my business premise, which he rents out thanks to the stalling from the PAK to solve the property relationship pertaining to which there is nothing contentious except their good will".*
24. In relation to allegation for excessive length of proceedings the Applicant stated: *"Pursuant to the European Convention for the Protection of Human Rights and Freedoms (hereinafter: ECHR) and the Constitution of Kosovo (hereinafter: the Constitution), Article 22, paragraph 1, Article 6 of the ECHR my property and human rights have been endangered, as well as my right to a hearing within a reasonable time limit".*
25. Furthermore, the Applicant asks the Court: *"I seek that my business premise located in Prishtina in Dardania, Kicma 5/9 is returned in my property. This*

is my only property from which I supported my family of five members and the same is under ownership since 1992. For its reconstruction I have invested huge amounts, whereas now I live with my family of five live on assistance as displaced persons. I am a citizen of Kosovo and I wish to return to Kosovo, but my property is used by MS from Prishtina”.

26. In relation to exhaustion of legal remedies the Applicant stated: *“There is no other claim, except the one submitted to the PAK, claim for private property KPA 15121 of date 1.9.2006. I considered that the KPA is the only state institution that is competent to solve the property relationships. I am a simple man and I could not use other legal remedies because I did not have the means”.*
27. Finally, the Applicant asks the Court *“to find that the KPCC decision is unconstitutional”.*

Admissibility of the Referral

28. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
29. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

“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.”

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

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

31. The Court further takes into account Rule 36 1 (b) which foresees:

(1) The Court may consider a referral if:

*...
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted ...*

32. In the concrete case, the Court notes that the Applicant’s private property claim – as evidenced by the replies of the KPA and of the Special Chamber - is sent to the Appeal Panel of the KPA within the Supreme Court for further review.
33. It results that the Referral is prematurely filed with this Court. Nevertheless, the Applicant asks the Court *“to declare the KPCC decision as unconstitutional”.*

34. By such a request the Applicant is in a way asking the Court to absolve him from exhausting all legal remedies provided for by the Constitution and the Law.
35. In this respect, the Court considers that in order for the Applicant to be absolved from the requirement to exhaust all legal remedies it is incumbent on him to show that: i) the legal remedy was in fact used, ii) the legal remedy was inadequate and ineffective in relation to his case, and iii) there existed special circumstances absolving the Applicant from the requirement to exhaust all legal remedies. From the documents contained in the Referral there is nothing that suggests that the Applicant meets the criteria to be absolved from exhaustion of all legal remedies to his avail (see, for example, case no. KI116/14, Applicant *Fadil Selmanaj*, Resolution on Inadmissibility of 19 January 2015).
36. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see case KI41/09, Applicant *AAB-RIINVEST University L.L.C., Prishtina*, Resolution on Inadmissibility of 21 January 2010, and *mutatis mutandis*, see case ECHR, *Selmouni vs. France*, No. 25803/94, ECtHR, Decision of 28 July 1999).
37. The Court reiterates that it cannot substitute its own findings for the findings of the regular court or other public authorities in the Republic of Kosovo; the principle of subsidiarity is a very important one because it provides an opportunity for the Applicant to raise questions of fact and of law before the regular courts; and in fact and in law, the regular courts are bound by the Constitution and the law to determine such questions (legality and facts) which however are not within the province of this Court.
38. Therefore, the Court considers that it cannot delve into the substance of the Applicant's referral without prejudice as to the outcome of the proceedings before the Supreme Court.
39. Bearing in mind all the foregoing, the Court considers that the Applicant's referral is premature.
40. It results that the referral must be declared inadmissible on the grounds of non-exhaustion of all legal remedies as provided for by Article 113(7) of the Constitution, Article 47.2 of Law and Rule 36 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

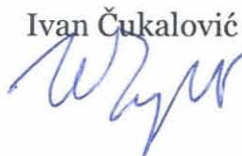
The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure, on 10 November 2015, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties and to publish this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- III. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of constitutional Court

Arta Rama-Hajrizi

