



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

Prishtina, on 22 April 2016
Rev. No.:RK927/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI30/15

Applicant

Isa Nuza
Naxharije Polloshka
Naxhije Lleshi-Nuza

Request for Constitutional Review of Judgment AC-II-12-0047, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 11 December 2014.

THE 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 Isa Nuza, Naxharije Polloshka and Naxhie Lleshi-Nuza all with residence in Gjakova (hereinafter: the Applicants) represented by Mr. Avni Q. Vula, a lawyer.

Challenged decision

2. The Applicants request the constitutional review of Judgment [AC-II-12-0047], 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 SCSC), of 11 December 2014.

Subject matter

3. The subject matter is the constitutional review of Judgment [AC-II-12-0047] of the Appellate Panel of SCSC, of 11 December 2014, which allegedly violated the Applicant's constitutionally guaranteed rights and freedoms under Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. At the same time, the Applicants request the Court to impose an Interim Measure by which the liquidation proceedings of the immovable property, which is the subject of this constitutional complaint, would be suspended until the Court has completed its assessment of the constitutionality of the challenged Judgment.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 10 March 2015, the Applicants submitted the Referral to the Court.
7. On 14 April 2015, the President of the Court by Decision no. GJR. KI30/15, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President of the Court by Decision no. KSH. KI30/15, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Ivan Čukalović and Enver Hasani.
8. On 20 April 2015, the Court informed the Applicants and the Appellate Panel of SCSC about the registration of the Referral.
9. On 1 July 2015, by Decision no. GJR. KI30/15, the President appointed Judge Arta Rama-Hajrizi as member of the Review Panel instead of judge Enver Hasani whose mandate ended on 26 June 2015.
10. On 6 July 2015, the Review Panel considered the report of Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 8 September 1958, the legal predecessor of the Applicants, the late N.N. from Gjakova, in the capacity of donor, concluded a contract of gift [Ov. no. 458/58], by which she gave 8 (eight) parcels of land with a total surface area of 9,705 ha, to the Agricultural Cooperative in Gjakova, in the capacity of recipient.
12. On 6 September 2006, the Applicants filed a claim with the Special Chamber of the Supreme Court, for the issues related to the Kosovo Agency on Privatization (hereinafter: KAP), by which they requested that the contract on gift of immovable property [Ov. no. 458/58] of 8 September 1958, concluded between N.N. as the legal predecessor of the Applicants and the Socially Owned Enterprise Erenik (hereinafter: SOE Erenik) as legal successor to the Agricultural Cooperative in Gjakova, is declared null and void in its entirety.
13. On 31 January 2007, the Special Chamber rendered Decision [no. SCC-06-0393] by which the Applicants' claim was forwarded to the Municipal Court in Gjakova for adjudication.
14. On 6 March 2009, the Municipal Court in Gjakova rendered Judgment [C. no. 94/07], by which it rejected the Applicants' statement of claim with the reasoning that:

“[...]

The property right is acquired by adverse possession after expiration of 20 years, pursuant to Article 28 paragraph 4 of the Law on Basic Property Relations. By Article 20 paragraph 1 of the same Law is provided that the property right can be acquired by law itself, based on legal affairs and by inheritance. The respondent's legal successor acquired the property right through valid legal transactions, entered into possession and changes were made in cadastral books...

In addition to this, based on Article 268 of the Law on Associated Labor, according to which it is provided that if the immovable property was placed under social ownership without legal basis, the claim to restate that property can be made within 5 years, starting from that day of becoming aware of it, but no later than 10 years. In this matter, the restitution of immovable property was not requested within the said time limits, and due to expiry of deadlines the ownership right of the claimants (Applicants) cannot be certified.”

15. On 22 June 2009, the Applicants filed an appeal with the Special Chamber, by which they requested the annulment of the Judgment of the Municipal Court in Gjakova [C. no. 94/07], of 6 March 2009, and the approval of the statement claim, of 6 September 2006.
16. On 17 September 2014, the Appellate Panel SCSC after the procedure of determining the legal status of the respondent rendered decision [AC-I-14-0102], by which the Company "Erenik" from Gjakova was recognized the status

of a Socially Owned Enterprise (hereinafter: SOE) and by which it was determined *“that in this procedure the Appellate Panel of the Supreme Court has jurisdiction, since the respondent as SOE can be qualified as a responding party in the proceedings before the Special Chamber of the Supreme Court based on Article 5.2 of the LCP.”*

17. On 2 December 2014, the Applicants filed a claim with the Special Chamber, in which they requested the acceleration of the proceedings and the imposition of an interim measure to suspend the liquidation of the challenged property.
18. On 11 December 2014, the Appellate Panel of SCSC rendered Judgment [AC-II-12-0047], by which it rejected the Applicants' appeal as ungrounded. The Appellate Panel reasoned that: *“[...] Article 8a of the Law on Amendments and Supplements of the Law on transfer of immovable property of 1987 of the Republic of Serbia, which may be referred when claiming annulment of contract alleged to have been entered under threat, violence or fraud, is also inapplicable for this case. Although this law was at some time applicable in Kosovo, pursuant to Article 296 of the Law on Property and other Real Rights, promulgated by the Assembly of Republic of Kosovo, it is no longer applicable because this Article expressively defines that: ‘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’.*
19. In the conclusion of the Judgment, the Appellate Panel of SCSC rejected as ungrounded the Applicant's request for an interim measure, regarding the ban on liquidation of the disputed property, with the reasoning that: *“there is no law on restitution of immovable property to former owners in Kosovo, therefore there is no legal ground to claim the restitution of land to the former owners, or to annul the contracts entered and certified by the courts before 1 October 1978, when the LOR entered into force. For this reason, the first instance court correctly rejected as ungrounded the Applicant's claim”.*

Applicant's allegations

20. The Applicants allege: *„that the courts have erroneously determined the factual situation and applied the wrong Article of the Law, therefore the judgments of the Municipal Court in Gjakova [C-no. 94/07] of 6 March 2009, and of the Appellate Panel of the Supreme Court [AC-II-12-0047], of 11 December 2014 are unconstitutional”.*
21. The Applicants address the Court with a request that the judgments of the Municipal Court, of 6 March 2009 and of the Appellate Panel of SCSC, of 11 December 2014 are declared unconstitutional and invalid.

Assessment of the Admissibility of the Referral

22. In order to be able to adjudicate the Applicants' Referral, it is necessary for the Court to first examine whether the Applicants have fulfilled admissibility requirements laid down in the Constitution and further specified in the Law and Rules of Procedure.

23. In this regard, Article 113. para. 7 of the Constitution provides:

“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.”

24. Article 48 of the Law, 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.”

25. In this case, the Court refers to Rule 36 (1) (d) of the Rules of Procedure, which provides:

(1) *“The Court may consider a referral if:*

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.”

26. The Court notes that the Applicants have built their constitutional complaint exclusively on the allegations of violation of Article 46 (Protection of Property) of the Constitution, which provides:

*“1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.
5. Intellectual property is protected by law.”*

27. The Court notes that the right to property under Article 46 of the Constitution, is subject to protection in the constitutional system of Kosovo and its content corresponds with the right to property under Article 1 of Protocol no. 1 of the European Convention of Human Rights (hereinafter ECHR). This right is protected by the Constitution in such a way that it prohibits the state authorities the restrictions or deprivation of that right, unless that limitation or deprivation is based on the law.

28. The Court notes that the Appellate Panel of SCSC by Decision [AC-I-14-0102], of 17 September 2014, determined the legal status of the respondent, by which was declared competent for this legal dispute, because pursuant to Article 3 item 14 of the Law No. 04/L-033 on the Special Chamber it is provided that:

“The appellate panel shall have final and exclusive appellate jurisdiction over all appeals from Decisions or Judgments of a specialized panel or any court...”

29. Accordingly, the Court further notes that the explanation given by the Appellate Panel of SCSC in Judgment [AC-II-12-0047], of 11 December 2014, as a competent court, is clear and legally substantiated, and that the proceedings before the Municipal Court has not been unfair or arbitrary.
30. Moreover, when it comes to the constitutional complaints that indicate an erroneous determination of the factual situation and the erroneous application of the substantive law, the Court notes that in deciding whether the right guaranteed by Article 46 [Protection of Property] of the Constitution was violated, the Court cannot replace the assessment of the regular courts with its assessment, because it is the role of the regular courts to assess the evidence presented and on the basis of which determine the facts relevant for the application of the substantive law.
31. The Court recalls that Article 53 of the Constitution (Interpretation of Human Rights Provisions) provides that: *“human rights and freedoms guaranteed by the Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*.
32. Based on this, the mere fact that the Applicants were not successful in the legal proceedings for the confirmation of their property right, is not sufficient to establish a violation of the rights guaranteed by Article 46 of the Constitution, unless they substantiate that by the court decision they have been arbitrarily and unjustly deprived of their property (see case: *Mezotur -Tiszazugi Tarsulat v. Hungary*, no. 5503/02, ECHR, Judgment of 26 July 2005).
33. Therefore, the Court considers that the Applicants have not substantiated their allegations, nor they have submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and ECHR (see: case no. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylja*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision of the Court of Appeal of Kosovo, CA. no. 2129/2013, of 5 December 2013 and Decision of the Court of Appeal of Kosovo, CA. no. 1947/2013, of 5 December 2013).

Assessment of the request for Interim Measure

34. The Court notes that the Applicants request the Court to impose an Interim Measure, which would suspend the liquidation process of the immovable property, which is the subject of this constitutional complaint, until the Court concludes its assessment of the constitutionality of the challenged judgment.
35. In order for the Court to grant an Interim Measure, pursuant to Rule 55 (4) of the Rules of Procedure, it is necessary that:

“(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted.

[...]“

36. As stated above, the Referral is inadmissible and for this reason, there is no *prima facie* case for granting an Interim Measure. Therefore, the request for an Interim Measure must be rejected.

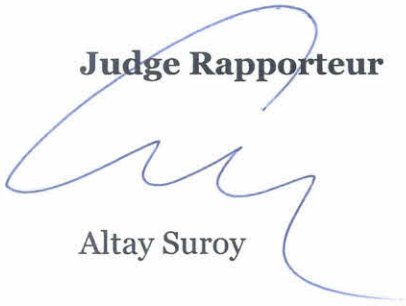
FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 and Article 48 of the Law and Rules 36 (2) (b) and 55 (5) of the Rules of Procedure, on 6 July 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the Request for Interim Measure;
- III. TO NOTIFY the Parties of this Decision;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;
- V. TO DECLARE this Decision effective immediately;

Judge Rapporteur


Altay Suroy



President of the Constitutional Court


Arta Rama-Hajrizi