



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 30 December 2016
Ref. no.: RK1030/16

RESOLUTION ON INADMISSIBILITY

in

Case no. KI87/16

Applicant

Nafije Bakalli

Constitutional review of Judgment AC-II-12-0189, of the Appellate Panel of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 18 February 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Nafije Bakalli from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment (AC-II-12-0189) of the Appellate Panel of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 18 February 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision which, allegedly violated Articles 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Protection of property] of Protocol 1 of the European Convention of Human Rights (hereinafter: the ECHR)

Legal basis

4. 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 (hereinafter: the Law) 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

5. On 2 June 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 July 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.
7. On 22 July 2016, the Court informed the Applicant about the registration of the Referral, and requested her to submit the challenged decisions and other relevant documents.
8. On 4 August 2016, the Applicant submitted the challenged decisions to the Court.
9. On 23 August 2016, the Court sent a copy of the Referral to the Appellate Panel.
10. On 7 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 facts

11. On 2 October 2000, the Applicant concluded a contract on sale-purchase of e the premise no. 138 with the joint stock company „Agimi“ from Gjakova (hereinafter: JSC „Agimi“). This contract on sale-purchase of e the premise has

never been certified by the court and the transfer of the ownership under this contract was never registered in the cadastral books.

12. On 11 April 2006, the Applicant filed a claim against the respondent JSC „Agimi“ in order to confirm the ownership over the premise, with the Specialized Panel of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel) .
13. On 24 April 2007, the Specialized Panel (Decision SCC-06-0155) transferred the jurisdiction and forwarded the claim in question for review to the Municipal Court in Gjakova.
14. The Applicant requested by the claim the recognition of her ownership rights over the property and the registration of the property in her name (claimant). The Applicant claimed that this is the third case of sale of the premise by JSC „Agimi“ and that the other buyers in the cases of the Municipal Court in cases Gjakova (C. No. 122/06 and C no. 733/06) were recognized the right.
15. Before the Municipal Court the respondent JSC „Agimi“ through its representative stated *“that the aforementioned premise was sold to the buyer based on the proceedings provided for in the statute of the respondent and applicable laws, therefore, it does not challenge the purchase right of the premise in question by the claimant, as it has fulfilled all obligations towards the claiming party.”*
16. In the proceedings before the Municipal Court, in a capacity of an intervener also appeared firstly the Kosovo Trust Agency (hereinafter: KTA), which was later succeeded by the Privatization Agency of Kosovo (hereinafter: PAK).
17. PAK challenged in entirety the statement of claim of the Applicant, alleging that the contract between the Applicant and JSC „Agimi“ is unlawful as of its conclusion on a greater number of legal grounds.
18. On 29 June 2009, the Municipal Court in Gjakova (Judgment C. no. 354/07) rejected as ungrounded the Applicant's claim for recognition of the ownership right over the property and registration of the property in her name.
19. The Municipal Court held that the contract between the Applicant and JSC “Agimi” is not valid on a greater number of legal grounds and that the respondent did not have the right to sell the premise based on the applicable law; that the contract does not have legal value due to the fact that it was not certified by the state authorities; that at the time of sale-purchase (the premise) did not exist; the installments were not paid according to the contract provisioned deadlines.
20. On 10 March 2010, the Applicant filed an appeal with the Appellate Panel against Judgment (C. no 354/07) of the Municipal Court in Gjakova. The Applicant requested in the appeal that the judgment of the Municipal Court be annulled and the case be remanded for retrial, on the grounds of erroneous and incomplete determination of factual situation, erroneous application of the substantive law and violation of the contested procedure provisions.

21. On 30 November 2012, PAK filed a response to the appeal claiming that JSC “Agimi” *“at that time could not sale or purchase without the consent of UNMIK.”*
22. On 18 February 2016, the Appellate Panel (Decision AC-II-12-0189) rejected as ungrounded the Applicant's appeal and upheld the Judgment (C. no. 354/07), of the Municipal Court in Gjakova.

Applicant’s allegations

23. Basically all Applicant's allegations can be summarized as it follows:

(i) Alleged violations of Article 24 of the Constitution in conjunction with other Articles of the Constitution and international conventions

24. As regards the alleged violations of Article 24 of the Constitution, the Applicant alleges that she is discriminated against, because *“in the case law in Kosovo [...] in the court cases C. no. 122/06 and C. no. 733/06, in completely identical situations, approved the claims of the parties.”*
25. Furthermore, the Applicant alleges that *“...there are other premises that have been sold by the respondent after the war and the property was transferred to those owners.”*

(ii) Alleged violations of Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR in conjunction with other Articles

26. In addition, the Applicant also cites Article 1 of Protocol 1 of ECHR and Article 46 of the Constitution, claiming that *“... Law no. 03/L-067 on Privatization Agency of Kosovo, which was adopted in the Assembly of Kosovo on 21.05.2008...“while “... Legal relationship between the parties was established much earlier, before KTA and later PAK was formed. “*
27. Based on the foregoing, the Applicant concludes that *“... the provisions on which are based the challenged judgments cannot be applied retroactively to the detriment of the Applicant”.*

(iii) Alleged violations of Article 31 of the Constitution and Article 6 of ECHR in conjunction with Article 22 of the Constitution and other Articles

28. The Applicant considers that PAK intervened in the proceedings contrary to the function of the intervener provided by Article 271 of the Law on Contested Procedure. According to Applicant’s allegations this legal status of PAK *“makes the challenged Judgment entirely unsustainable due to the conflict of the intervener during the procedure with the party to which he joined, which is not what the law provides.”*

29. The Applicant further “considers that this trial contains violations of the provisions of the Constitution of the Republic of Kosovo, Article 31 – Right to Fair and Impartial Trial, namely Article 6 –Right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms..”.
30. Within these allegations, the Applicant cites Article 22 of the Constitution and further states that “*The interest of the constitutional order, of respecting the minimal norms, minimal standards determined by provisions of international conventions which present an obligation also for the Republic of Kosovo, should impose the immediate termination of the process of privatization of enterprises transformed in terms of ownership.*”
31. The Applicant proposes to the Court:
- “... to annul and declare unconstitutional the Judgment of the Special Chamber of the Supreme Court of Kosovo on PAK related matters AC-II-12-0189 of 18.02.2016 and Judgment of the Municipal Court in Gjakova C. no. 354/07 of 29. 06. 2009, because the judgments were not fair ...”*

Admissibility of the Referral

32. The Court shall examine whether the Applicant has met the admissibility requirements laid down in the Constitution, as further specified in the Law and Rules of Procedure.
33. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:
- “1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*
34. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which foresees:
- “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 a public authority is subject to challenge.”*
35. In addition, the Court recalls paragraphs (1) (d) and (2) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which provide:
- “(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.”

36. In this case, the Court notes that the Applicant fulfilled the procedural requirements of Article 113.7 of the Constitution. However, to examine the admissibility of the Referral, the Court needs further to assess whether the Applicant fulfilled the requirements provided by Article 48 of the Law and the admissibility requirements foreseen in Rule 36 of the Rules of Procedure.

(i) Alleged violations Article 24 of the Constitution in conjunction with other Articles of the Constitution and international conventions

37. As to these Applicant's allegations, the Court firstly recalls the case law of ECtHR which states that “*discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations*”. (See, *Willis v. the United Kingdom*, paragraph 48, ECtHR Judgment of 11 September 2002; *Bekos and Koutropoulos v. Greece*, paragraph 63, ECtHR Judgment of 13 March 2006).
38. The Court further recalls that in order that the Applicant's allegations regarding violation of the right to discrimination are successful, they *inter alia* must prove that their position can be considered similar to the position of another person who had a better treatment. (See *Fredin v. Sweden* (no. 1), paragraph 60, the ECtHR Judgment of 18 February 1991)
39. In the present case, the Court notes that the Applicant alleges that she is discriminated against, because “*in the case law in Kosovo [...] in the court cases C. no. 122/06 and C. no. 733/06, in completely identical situations, approved the claims of the parties.*”
40. However, the Applicant does not submit documents of “*cases C. No. 122/06 and C. No. 733/06,*” but further alleges that “*...there are other premises that have been sold by the respondent after the war and the property was transferred to those owners.*”
41. The Court notes that the Municipal Court in Gjakova (Judgment C. no. 354/07) dealt with this issue raised by the Applicant where “*...presented as evidence the case file C. no. 122/06 and C no. 733/06 of final form, however, as they were irrelevant to render a different decision on this matter, it has not carried out any special analysis, since in our legal system is not applied the so-called “legal precedent.”*”
42. Therefore, the Court finds that the Municipal Court in Gjakova gave a reasoned response regarding these Applicant's allegations, and that the Applicant failed to present and substantiate the allegations that the challenged decision violated her constitutional rights and freedoms, guaranteed by Article 24 of the Constitution.

(ii) Alleged violation of Article 46 of the Constitution and Article 1 of Protocol 1 of ECHR, in conjunction with other articles

43. The Court recalls the general principles laid down by the case law of the ECtHR under Article 1 of Protocol No. 1, which are applicable to Article 46 of the Constitution and explain the scope of protection of the right to property (see *Kopecký v. Slovakia*, paragraph 35, ECHR Judgment of 28 September 2004, *MALTZAN (FREIHERR VON) and others v. Germany*, paragraph 74 ECHR decision on admissibility of 2 March 2005 years)
44. In the present case, the Court notes that the Applicant has never become the property right holders on the contrary by statement of claim she tried to acquire the property, meaning that the Applicant had only “*hope for the recognition of the property rights, which was impossible to effectively realize*”; therefore, such a real situation “*cannot be regarded as a possession*” within the meaning of Article 1 of Protocol No. 1.”
45. All her “*legitimate expectation*” that she will acquire the effective enjoyment of a property right were based on a contract, which was not certified by any public authority for which the Municipal Court in Gjakova and the Appellate Panel found that “*it was concluded ultra vires and did not transfer the ownership right to the contracting party.*”
46. Even though the Applicant refers to the “*retroactive application of law*” the Court notes that she has not reasoned that in any way.
47. The Court notes that the main question raised before the regular courts is the question of the “*legal basis for acquisition of the property rights,*” which the Municipal Court in Gjakova (Judgment C. No. 354/07) reasoned that in the present case:

“the respondent did not have the right to sell the shop based on Article 6 of UNMIK Regulation No. 1999/1 [...] which states that “UNMIK shall administer movable or immovable property, including the monies, bank accounts and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo.”
48. Furthermore, the Municipal Court is of the opinion that “*the contract does not have legal value and is unlawful due to the fact that it was not legalized and it could not have been legalized by the competent court authority.*”
49. In addition, the Municipal Court found that “*from the statement of claim is seen (at the time of sale-purchase) that the shop - premise as a result of the last war in Kosovo was completely destroyed. Therefore, in terms of its content: the contract is null and void, not only “if the subject of the obligation is absolutely impossible, impermissible, unspecific or un-specifiable,” Article 47 LOR.*”
50. Finally, the Municipal Court concluded that “*... if the claimant hopes to succeed in this contest, she can file a claim against the respondent for*

returning the paid amount of the contracted price, as in the contract of the sale of the premise in question”.

51. This conclusion of the Municipal Court was fully endorsed by the Appellate Panel, which found that *„Management JSC "Agimi" did not have the authority to sell any part of the property without the authority of UNMIK under Article 6. 1. b of UNMIK Regulation Nr. 2000/54, which was applicable at the time of conclusion of the sale-purchase. The contract in question was concluded ultra vires and did not transfer the ownership right to the contracting party. In addition, the contract has never been certified in the court which has territorial jurisdiction.”*
52. Based on the foregoing the Court concludes that Applicant failed to present and substantiate the allegations of *“retroactive application of law”*. The Court considers that the Municipal Court in Gjakova and the Appellate Panel gave a reasoned response to all allegations of the Applicant, regarding the reasons for the application of the relevant rules of the procedural and substantive law.
53. Therefore, the Court considers that the Applicant concluded a contractual relationship that is *void ab initio*, this legal transaction was invalid from the very start, and thus, this legal transaction cannot be subsequently convalidated.
54. From the above, the Court recalls that the *“legitimate expectation”* cannot arise *“if there is a contest over the correct interpretation and application of the national law,”* because from what was presented the Court concludes that the decisions of the regular courts did not violate Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, and that they do not guarantee the right to acquire the property (See: *Kopecký v. Slovakia*, paragraph 50 of ECtHR Judgment of 28 September 2004).

(iii) Alleged violations of Article 31 of the Constitution and Article 6 of ECHR in conjunction with Article 22 of the Constitution and other articles

55. The Applicant claims that PAK intervened in the proceedings contrary to the function of the intervener provided by Article 271 of the Law on Contested Procedure. According to Applicant’s allegations this legal status of PAK *“makes the challenged Judgment entirely unsustainable due to the conflict of the intervener during the procedure with the party to which he joined, which is not what the law provides.”*
56. The Applicant further considers that Article 31 of the Constitution and Article 6 of ECHR were violated in conjunction with Article 22 of the Constitution and further alleges that *“the interest of the constitutional order, of respecting the minimal norms, minimal standards determined by provisions of international conventions which present an obligation also for the Republic of Kosovo...”*
57. The Court reiterates that is not a function of the Constitutional Court to deal with the alleged errors of the application of relevant laws allegedly made by the

regular courts, if such an application does not violate the rights and freedoms protected by the Constitution and the ECHR (see *Garcia Ruiz v. Spain* paragraph 28, Judgment of the ECtHR, of 21 January 1999).

58. In any event, it is for the regular courts to resolve problems of interpretation of legislation. This applies in particular to the application and interpretation by the regular courts of relevant laws of the procedural and substantive nature (See case *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Constitution in general and with the legal certainty principles, in particular those guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
59. The Applicant challenges the application of the relevant laws and the interpretation thereof by the regular courts. This interpretation was reasoned by the regular courts in two instances. This conclusion was reached by the regular courts after a detailed review of all the arguments presented by the Applicant.
60. The Applicant was given an opportunity that in various stages of the proceedings presents arguments and evidence that she considered relevant to her case. At the same time, she had the opportunity to effectively challenge the arguments and evidence presented by the opposing party and to challenge the interpretation of the law before the Municipal Court in Gjakova and the Appellate Panel in the regular court proceedings.
61. The Court considers that the decisions of the Municipal Court in Gjakova and of the Appellate Panel are fair and justified. In fact, they explain in detail why the sale-purchase contract is legally null and void, and that it was concluded *ultra vires*, and therefore did not transfer the ownership right to the contracting party.
62. The Court considers that the admissibility requirements have not been met. The Applicant did not present and substantiate her allegations that the challenged decision violated her constitutional rights and freedoms, guaranteed by Article 31 and Article 6 of the ECHR in conjunction with Article 22 of the Constitution.
63. For the aforementioned reasons, the Court concludes that the Referral is manifestly ill-founded on constitutional basis, and as such inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2) (d) and 56 of the Rules of Procedure, in the session held on 7 December 2016, unanimously

DECIDES

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

Judge Rapporteur


Selvetë Gërxhaliu-Krasniqi



President of the Constitutional Court


Arta Rama-Hajrizi