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

Prishtina, 8 May 2014
Ref.no.:RK 578/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI145/13

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 No. AC-II-12-0120 of 20 June 2013

The Applicant also requests imposition of the interim measure

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 and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Privatization Agency of Kosovo (hereinafter: the PAK), represented by Mr. Gani Ademi.

Challenged decision

2. The Applicant challenges the Decision of the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the SCSC) on Privatization Agency of Kosovo Related Matters of the Republic of Kosovo (hereinafter: the PAK) no. AC-II-12-0120, of 20 June 2013, which was served on the Applicant on 24 June 2013.

Subject matter

3. The subject matter is the request for constitutional review of the Decision of the Appellate Panel of the SCSC no. AC-II-12-0120, of 20 June 2013.

4. The Applicant alleges that the Decision of the SCSC Appellate Panel on Privatization Agency of Kosovo Related Matters has violated its rights, guaranteed by the Constitution, namely Articles 31 [Right to Fair and Impartial Trial], 102 paragraph 3 [General Principles of the Judicial System] of the Constitution as well as Article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

5. The Applicant seeks from the Constitutional Court of Kosovo to grant interim measures of *"the ban of the execution of Judgment AC-II-12-0120 of 20.06.2013 of the Special Chamber of the Supreme Court of Kosovo, until the court decides on the merits, according to the Referral submitted by the Privatisation Agency of Kosovo, pursuant to Article 55, item 4 of the Rules of Procedure of the Constitutional Court of Kosovo."*

Legal basis

6. The Referral is based on Article 113.7 in conjunction with Article 21. 4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure.

Proceedings before the Court

7. On 10 September 2013, the Applicant submitted the Referral to the Court.

8. On 24 September 2013, the President by Decision no. GJR. KI145/13 appointed Judge Ivan Čukalović as Judge Rapporteur. On the same day, the President, by Decision no. KSH. KI145/13 appointed members of the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

9. On 6 November 2013, the Court notified the Applicant and the SCSC on PAK Related Matters of the registration of the Referral under no. KI145/13.

10. On 24 March 2014, after having reviewed the report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

11. At the same time, the Review Panel proposed to the full Court to reject the request of the Applicant for interim measures, reasoning that the Applicant did not provide any convincing evidence that would justify the imposition of the interim measures, necessary to avoid irreparable damage or any evidence that such a measure would have been to the public interest.

Summary of facts

12. Sokol M. Bibaj (hereinafter: S. B.) inherited the cadastral plot no. 1976, of 1.19,00 ha registered in the possession list no. 144 CZ Lladrovc, from his predecessors. Until 1963, the abovementioned plot has been registered in the cadastral books in the ownership of S. B., when the Municipal Assembly of Malisheva, respectively the Administrative Committee, by Decision no. 1721 of 25 December 1963, declared S. B. as arbitrary usurper of the abovementioned parcel and based on that Decision deleted S.B from public cadastral books of the contested property.

13. On an unspecified date, the agricultural enterprise „MIRUSHA", from Malisheva, was registered in the cadastral books as the owner of the challenged parcel.

14. On 15 August 1969, by Decision no. 9835, the Administrative Committee of the Municipal Assembly of Suhareka (the legal successor the Municipal Assembly of Malisheva), deciding upon the appeal of S. B. filed against the Ruling no. 1721 of 25 December 1963, annulled the Ruling no. 1721, by which S. B. was declared as an arbitrary usurper of the abovementioned immovable property, and thereby recognized the property right to S. B. over the contested property.

15. On 28 March 2001, S. B. respectively his legal representative filed a claim with the Municipal Court in Malisheva for confirmation of the ownership against the first respondent, the Municipality of Malisheva and the second respondent, the agricultural enterprise „MIRUSHA" from Malisheva, requesting the confirmation of the ownership over the cadastral plot no. 1976 of 1.19,00 ha, registered in the possession list no. 144 CZ Lladrovc. The Applicant, respectively the PAK alleges that it is the owner of the challenged property, according to the cadastral books of the agricultural enterprise "MIRUSHA" from Malisheva. The Applicant in this claim is announced as a legal representative of the agricultural enterprise „MIRUSHA" from Malisheva.

16. On 20 April 2001, by Ruling C. no. 28/01, the Municipal Assembly in Malisheva was declared as incompetent.

17. On 25 November 2005, the SCSC on PAK related matters, deciding upon the claim of S. B., rendered a ruling no. SCC-05-0010, by which the claim is forwarded to the Municipal Court in Malisheva.

18. On 13 April 2006, by Judgment C. no. 20/2006, the Municipal Court in Malisheva, approved the statement of claim of S. B. as grounded and determined that S. B. is the owner of the cadastral plot no. 134 and 797 in total surface area of 1.19,00 ha, registered in the possession list no. 62 CZ Lladrovc, while obliges the Directorate for Cadastre, Geodesy and Property of the MA

Malisheva to register the abovementioned plot in the cadastral books under the name of S. B.

19. On 13 June 2006, the Applicant and the Municipality of Malisheva filed an appeal against the Judgment C. no. 20/2006 of the Municipal Court in Malisheva.

20. On 1 September 2006, by Ruling C. no. 20/2006, the Municipal Court in Malisheva, modified the Judgment C. no. 20/2006, of 13 April 2006, in a manner that it modified the paragraph 2 of the enacting clause so that instead of cadastral plot no. 134 and 797 indicated the plot no. 1976, and instead of the possession list no. 62 indicated no. 144.

21. On 16 May 2007, by Ruling SCA-06-006, the SCSC trial panel, deciding upon the Applicant's appeal and of the Municipality of Malisheva, approved the appeal, quashed the Judgment C. no. 20/2006 of 13 April 2006 of the Municipal Court in Malisheva and remanded the matter to the first instance court for retrial.

22. On 4 December 2009, the Municipal Court in Malisheva rendered the Judgment C. no. 149/2007, by which was approved the S.B statement of claim as grounded and confirmed that S.B is the owner of the cadastral plot no. 1976 registered in the possession list no. 144 CZ Lladrovc. By this Judgment, the Directorate for Cadastre, Geodesy and Property of the MA of Malisheva was obliged to register the abovementioned parcel in the cadastral books under the name of S. B. This Judgment was served on the Applicant on 30 December 2009.

23. On 1 March 2010, the Applicant filed an appeal with the SCSC against the Judgment of the Municipal Court in Malisheva C. no. 149/2007 of 4 December 2009.

24. On 20 June 2013, by Ruling AC-II.-12-0120, the Appellate Panel of the SCSC, rejected the Applicant's appeal against the Judgment of the Municipal Court in Malisheva C. no. 149/2007 as out of time, by reasoning that:

    "The challenged judgement was served on the respondent on 30 December 2009, while an appeal against this judgment was filed on 1 March 2010, which means, 61 days after the challenged judgment was served on the respondent. Pursuant to Article 9.5 of UNMIK Reg. 2008/4, applicable at the time of rendering the challenged judgment and at the time of filing the appeal, "within thirty (30) days from the day of rendering the decision, the party may file an appeal to Appellate Panel for reviewing such a decision."

25. On 25 June 2013, the Applicant submitted to the Appellate Panel SCSC a request for the correction of the calculation of the time limit in the Ruling of the Appellate Panel of the SCSC. PAK states:

    "The Privatization Agency of Kosovo considers that the Appellate Panel has erroneously calculated the time-limit for filing the appeal by PAK against the Judgment of the Municipal Court in Malisheva under number C. no.

149/07 on 04.12.2009, which is contrary to the provision of Article 20.2 of UNMIK Administrative Direction 2008/6, as well as contrary to legal remedy provided in the Judgment C. no. 149/07 of 04.12.2009."

26. On 27 August 2013, by Ruling AC-II.-12-0120, the Appellate Panel rejected the Applicant's request as inadmissible, by reasoning:

> *"When the appeal was rejected as out of time, the calculation of the period of time was made in compliance with UNMIK Regulation 2008/4, as the highest act in the hierarchy of legal acts, and not in compliance with Administrative Direction 2008/6, which is lower act than the abovementioned Regulation. According to this Regulation, the legal time-limit for filing the appeal is 30 days, whereas the appeal is filed after this time-limit.*
> *It is indisputable fact that this jurisdiction for adjudication in the first instance was transferred from the Special Chamber to the Municipal Court in Malisheva. By transfer of the jurisdiction, the Chamber transfers it within the framework of its competence, and which is provided by Regulation 2008/4. Based on this Regulation, the time-limit for appeal is 30 days and more jurisdictions cannot be transferred to other courts, which means also the time-limit of 30 days. The Administrative Direction 2008/6 in fact provides a time-limit of two months against decisions of municipal courts, but the concrete competence was transferred by the Chamber, and the Chamber cannot transfer more competence that it has itself. Secondly, that time-limit for appeal is contrary to time-limit of 30 days, provided by Regulation, which is according to applicable criteria at the law level, whereas administrative direction is sub-legal act, which cannot be contrary to law, in this case the Regulation."*

Applicant's allegations

27. The Applicant alleges that the court authorities, namely the Appellate Panel of the SCSC (decisions ASC-II-12-0120 of 20 June 2013 and AC-II-12-0120 of 27 August 2013) violated the rights under Article 102.3 [General Principles of the Judicial System] Article 31 [Right to Fair and Impartial Trial] of the Constitution of Kosovo as well as the rights under Article 6 of ECHR.

28. The Applicant alleges that:

> *"The ruling AC-II-12-0120 of 20.06.2013 and the ruling AC-II-12-0120 of 27.08.2013 are rendered by erroneous application of substantive law. The Appellate Panel of the Special Chamber erroneously applied Article 9.5 of UNMIK/REG 2008/4 when rejected the PAK appeal filed against the judgment of the Municipal Court in Malisheva C. no. 149/07 of 04.9.2009 as inadmissible, due to the fact that by this provision is provided time limit of 30 days for filing the appeal to the Appellate Panel against decision rendered by the Trial Panel of the Special Chamber."*

29. The Applicant alleges in particular that:

"Ruling AC-II-12-0120 contains substantial violation of the contested procedure provisions provided by Article 160 in conjunction with Article 169 of LCP, Law no. 03/L-006, due to the fact that in the legal remedy provided in the Judgment C. no. 149/2007 of 04.12.2009, the court determined 60 days time limit for appealing the judgment. Article 169 of the LCP provides that: ***"The court is bound by its judgment from the moment of rendering it,"*** *whereas, the judgment acts on the party from the day it is served on it. Therefore, a party cannot be injured or deprived of right guaranteed by law, due to violation of law or erroneous interpretation by the court. From the case files it is not disputable the fact that the PAK appeal is filed within time limit provided in the legal remedy for appealing and in compliance with applicable law for appealing the judgment."*

30. The Applicant further alleges:

    "Through this referral, the Privatisation Agency of Kosovo requests from the Constitutional Court of Kosovo to render judgment by which would declare this referral as admissible, and annul the judgments AC-II-12-0120 of 20.06.2013 and AC-II-12-0120 of 27.8.2013, which were rendered by Special Chamber of Supreme Court of Kosovo."

31. The Applicant requests from the Court:

    "Granting the interim measure, banning the execution of Judgment AC-II-12-0120 of 20.06.2013 of the Special Chamber of the Supreme Court of Kosovo, until the court decides on merits, according to the Referral submitted by the Privatization Agency of Kosovo, pursuant to Article 55, item 4 of the Rules of Procedure of the Constitutional Court of Kosovo."

Admissibility of the Referral

32. In order to be able to adjudicate the Applicant's Referral, the Court first examines whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of the Procedure.

33. In this case, the Court refers to Article 113.7 in conjunction with Article 21 paragraph 4 of the Constitution, which provides:

    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"

    21.4 „Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

34. The Constitutional Court, after examining all evidence and arguments presented by the Applicant, noted that the Applicant mainly complains against the decision of the Appellate Panel of the SCSC, by which the Applicant's appeal is rejected as out of time. The Applicant in its appeal requested from the

Appellate Panel of the SCSC to correct the calculation in the ruling. The Privatization Agency of Kosovo considers that the Appellate Panel has erroneously calculated the deadline for filing an appeal by the PAK against the judgment of the Municipal Court in Malisheva.

35. The Court recalls that one of the admissibility requirements of Referral is that the Referral is not manifestly ill-founded, in order that the Court to consider the merits of the Referral.

36. Regarding this, the provisions of Rule 36 (1) c) and Rule 36 (2) b) and (d) of the Rules of Procedure, provide:

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

[...]

c) the Referral is not manifestly ill-founded.

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

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

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

37. As for the Applicant's allegation that "the SCSC Appellate Panel decided contrary to the Constitution and the applicable laws of the Republic of Kosovo," the Court finds that the Decision of the Appellate Panel of the Special Chamber does not contain substantial violations of the constitutional rights because the Applicant failed to explain why and how the decision of the Appellate Panel was contrary to the constitutional provisions.

38. The reasoning of the decision of the Appellate Panel of the SCSC quoted in paragraph 24 of this report is mainly based on general principles of the judicial system, where courts adjudicate based on the Constitution and laws, supporting the reasoning of the decision in accordance with the case law in relation to cases of analogous nature.

39. The Court recalls that the case should be built on the basis of the constitutional argument in order that the Court could intervene.

40. The Court notes that the ground of the Applicant's appeal contains allegations which are related to the substantial violations of the applicable legal provisions and the violations of the contested procedure.

41. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality).

42. The Court reiterates that it is not its task to assess the legality and accuracy of the decisions rendered by regular courts, unless there is convincing evidence that such decisions have been rendered in manifestly unfair and unclear manner.

43. The duty of the Court, with regards to the alleged violations of the constitutional rights, is to analyze and assess whether the proceedings in general, viewed in their entirety, have been fair and consistent with the protection explicitly provided by the Constitution. Hence, the Constitutional Court is not a court of the fourth instance, in respect of the decisions taken by the lower instance courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, § 28, European Court on Human Rights [ECtHR] 1999-I).

44. Moreover, the Applicant has not submitted any *prima facie* evidence indicating violation of its constitutional rights (see Vanek v. Slovak Republic, ECtHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does not specify how Articles 31 and 102. 3 of the Constitution as well as Article 6 of ECHR support its claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

45. Furthermore, the Court cannot consider that the respective proceedings, conducted by the Municipal Court as well as by the Special Chamber of the Supreme Court were in any way unfair or arbitrary (see, *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009). The reliance by the Applicant on an advice by the Municipal Court on the length of the time limit within which a possible appeal should be filed cannot function as a substitute for compliance with an unambiguous legal provision. Such a provision has been provided by the legislator for the sake of legal certainty, enabling parties to know their rights to appeal and the duration of the time limit for the submission of such an appeal.

46. The Court further determines that it was the Applicant's duty to ascertain the correct deadline for the filing of the appeal. By relying on the incorrect advice of the Municipal Court, it failed to exercise reasonable care and cannot show reasonable arguments to justify the failure to respect the correct deadline laid down in the appropriate legal provision.

47. In these circumstances, the Court considers that the Applicant's referral does not meet admissibility requirements, because the Applicant has failed to show that the challenged decision has violated its rights and freedoms, guaranteed by the Constitution.

48. In sum, the Court considers that the Applicant's referral, pursuant to Rule 36 (2) b) and d) of the Rules of Procedure, is manifestly ill-founded and, consequently, inadmissible.

Request for interim measures

49. Article 27 of the Law, and in particular Rule 54 (1) of the Rules of Procedure, provide that "*at any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.*"

50. However, taking into account that the Referral has been declared inadmissible, the Applicant, pursuant to Rule 54 (1) of the Rules of Procedure, is not entitled to request interim measures.

51. In addition, the Applicant has only requested from the Court to grant interim measures and has failed to provide additional arguments or relevant documents in its Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and in compliance with Rule 36 (2) b) and d) and Rule 56 (2) of Rules of Procedure, on 24 March 2014, unanimously

DECIDES

I. **TO DECLARE** the Referral inadmissible;

II. **TO REJECT** the request for interim measures;

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani