



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

Pristina, 22 May 2014
Ref.no.:RK626/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI160/13

Applicant

Desa Aleksić

**Constitutional Review of the Judgment, AC-II- 12-006, of the
Appellate Panel of the Special Chamber of the Supreme Court of
Kosovo, dated 30 May 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

The Applicant

1. The Referral was submitted by Ms. Desa Aleksić (hereinafter: “the Applicant”), who is represented by Mr. Muhamet Shala, a practicing lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter: “the Appellate Panel of the Special Chamber”), AC-II- 12-006, dated 30 May 2013. The Applicant received this Judgment on 12 June 2013.

Subject matter

3. The Subject matter is the constitutional review of the Judgment of the Appellate Panel of the Special Chamber, AC-II- 12-006, dated 30 May 2013, by which the appeal of the Respondent (AI “Kosova-Export”, SOE “Bujqësia” from Fushë-Kosova/Kosovo Polje) represented by Kosovo Property Agency (KTA) was accepted as grounded. In the same time the Judgment of the Municipal Court in Prishtina, P.nr 550/08 dated 20 April 2010 was annulled.
4. According to the Applicant challenged judgment was adopted in violation of *“constitutionality and legality, as provided by Chapter VII, Article 102, paragraph 3 of the Constitution of the Republic Of Kosovo, which provides that Courts shall adjudicate upon Constitution and Law.”* The Applicant further claims that there has been violation of Article 31 of the Constitution that guarantees the right to fair and impartial trial as well as Article 6 of the European Convention on Human Rights. The Applicant also claims that her property rights guaranteed by Article 46 of the Constitution have been violated.

Legal basis

5. The Referral is based on Art. 113.7 of the Constitution, Article 47 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo (hereinafter: “the Law”), and Rule 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 12 October 2013, the Applicant via registered mail submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: “the Court”). The referral was received on 16 October 2013.
7. On 31 October 2013, the President of the Court with Decision No. GJR. KI160/13 appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same day, the President of the Court by Decision No. KSH. KI160/13 appointed the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 12 November 2013, the Court notified the Applicant and requested her to submit the power of authorization for the lawyer Muhamet Shala from Prishtina.
9. Also on 12 November 2013, the Court notified the Appellate Panel of the Special Chamber and Kosovo Property Agency (KTA) on the registration of the Referral.

10. On 4 December 2013, the lawyer Muhamet Shala submitted the power of authorization given to him by the Applicant.
11. On 27 March 2014, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. The following is the summary of the facts as alleged by the Applicant in her referral and elaborated in the attached challenged judgment.
13. On 20 February 2008, the Applicant filed a claim before the Special Chamber requesting to annul the sales contract of immovable properties OV. BR. 3039/63 dated 21 November 1963, certified with the Municipal Court in Prishtina and concluded between the Applicant's predecessor, her father (now late) Mile Vukmirović and AIC "Kosmet-Export".
14. On 12 March 2008, the Trial Panel of the Special Chamber, by Decision SCC-08-0044, referred the claim of the Applicant to the Municipal Court in Prishtina, instructing the parties that in case of any appeal against the decision or judgment, it should be lodged with the Special Chamber.
15. On 20 April 2010, the Municipal Court in Prishtina by judgement P. nr. 550/08, approved the claim of the Applicant and confirmed that the sales contract of the immovable property is null, OV. Br 3-39 dated 21 November 1963 and obliged the Respondent AIC "Kosmet-Export" to return the ownership and possession to the claimant as the first line of inheritor and to allow the Applicant to register disputed property into her name.
16. On 5 August 2010, the Respondent filed a timely appeal against the Municipal Court in Prishtina judgement P. nr. 550/08 dated 20 April 2010. In the appeal the Respondent alleged, *inter alia*, that the first instance court should have checked whether the claim for annulment of the contract is timely, since the sales contract was concluded on 23 November 1963, whereas the claim for annulment of the contract was filed in 2009, it derives that the claimant did not use legal deadlines, therefore the claim as such should be rejected as ungrounded.
17. On 25 June 2012, the Appellate Panel served the appeal and the supporting documents on the Applicant in order to file a response to the appeal.
18. On 8 August 2012, that Applicant challenged the appeal of the Respondent entirely and proposed the Special Chamber to reject the appeal of the Respondent as ungrounded, to confirm the appealed Judgment, because that judgment is according the Applicant very clear, comprehensible and grounded on the law.
19. On 30 May 2013, the Appellate Panel of the Special Chamber issued judgement no. AC-II- 12-006. According to the legal reasoning of that judgement "*The*

appealed Judgment of the Municipal Court in Prishtinë/Prishtina is not correct in its outcome and in the legal reasoning; therefore, it has to be annulled”.

20. The Appellate Panel of the Special Chamber further stated that *“The first instance Court did not correctly and completely determine the factual situation by the appealed Judgment, and as a consequence it also erroneously applied the substantive law, when it completely approved the claim of the Claimant as grounded and it annulled the sales contract of the immovable property. The Court failed to reject the claim as ungrounded, because it was filed after the legal deadline set forth by the law.”*
21. The Appellate Panel of the Special Chamber further elaborated that the Applicant *“alleged that the contract was concluded under pressure and serious threat, (while it is assumed that there was a lack of will by the predecessor of the Claimant to conclude it) and even if these legal provisions were into force, which in the case at hand were not applicable as stated above, their application is not correct. Therefore, only the provisions of Article 111 of the LO [i.e. Law on Obligation] that regulate refutable contracts (relative nullity) could be applicable for the current case and not Articles 103 and 104 of the LO (that regulate absolute nullity of the contracts) which foresee the nullity of the contracts concluded contrary to the determined constitutional principles of social order, the obligatory provisions and the morale of the society, hereby this contract was not verified by anything that it was contrary to the values mentioned of the then judicial-constitutional system. Therefore, for the above mentioned reasons and based on Article 10.10 of the Law of the Special Chamber, it was decided as in the enacting clause.”*

Applicant’s Allegation

22. The Applicant argues that notwithstanding that the Republic of Kosovo has not adopted the law on restitution of private property that was taken during the socialist regime, in the present case the European Convention on Human Rights (hereinafter “the Convention”) should be applicable directly in particular since the right of the restitution of the private property is according to the Applicant guaranteed by the Convention.
23. Therefore, the Applicant challenges the application of the Law on Obligation that according to her is in contradiction with the Convention. The Applicant further argues the contract on sale signed by the Applicant’s predecessor *“can be recognized as nothing else but contracts of a totalitarian state, and must be considered as absolutely null and void, ... in compliance with the Convention.”*
24. The Applicant further argues *“it is not disputable that since 1990, a large number of citizens have obtained this right in an institutional manner, in administrative or judicial proceedings, on the basis of annulment of immovable property sale contracts. Therefore, now we have the category of citizens such as Desa Aleksić, which in comparison with other citizens, has been discriminated against in terms of enjoying her property rights and restitution.”*

25. The Applicant also argues that the Special Chamber in the similar cases decided differently than in the Applicant case, and in this respect attached the copy of the Decision in the case SCA-08-0042 whereby the KTA complaint was rejected as inadmissible.

Assessment of the admissibility of the Referral

26. In order to be able to adjudicate the Applicant's Referral, the Court has to first examine whether the Applicant has met the admissibility requirements that are foreseen by the Constitution and further specified in the Law and the Rules of Procedure.
27. In connection with this, the Court notes that the substance of the Applicant's complaints relate to the alleged violation of her right to fair trial and right to property both guaranteed by the Constitution and the Convention.

- As regards the Applicant's complaint related to the alleged violation of her right to fair trial:

28. The Court notes that the Applicant disagree with the findings of the Appellate Panel of the Special Chamber and argues that the Appellate Panel of the Special Chamber wrongly applied the Law on Obligation.

29. In this regard, the Court takes into account Rule 36 of the Rules of Procedure, which provides:

"(1) The Court may review referrals only if: (c) The referral is not manifestly ill-founded."

30. 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).

31. In this connection, the Constitutional Court reiterates that it is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *Garcia Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I, see also Resolution on Inadmissibility in case no 70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, *Constitutional review of the Judgment of the Supreme Court, A. No 983/08 dated 7 February 2011*).

32. The Constitutional Court notes that the Applicant has used all legal remedies prescribed by the Law on Contentious Procedure, by submitting the appeal against the Municipal Court in Prishtina and that the Appellate Panel of the Special Chamber took this into account and indeed answered his appeals on the points of law.

33. The Court, therefore, considers that there is nothing in the Referral which indicates that the case lacked impartiality or that proceedings were otherwise

unfair (see, *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

34. As regards to the Applicant complaint that a large number of citizens have obtained this right in an institutional manner, in administrative or judicial proceedings, on the basis of annulment of immovable property sale contracts. And that she has been discriminated against terms of enjoying her property rights and restitution. The Court notes that the Applicant did not substantiate her allegations. The only evidence in support of the claims that Applicant attached to her referral, i.e. Decision of the Special Chamber in the case SCA-08-0042 is irrelevant since in that case the KTA complaint was rejected as out of time.

- As regards the Applicant's complaint related to the alleged violation of her property rights

35. The Applicant further requested the Court to declare the challenged judgement of the Appellate Panel of the Special Chamber null and avoid since the contract her deceased father signed in 1963 is "*... nothing else but contract[s] of a totalitarian state, and must be considered as absolutely null and void, ...in compliance with the Convention*".
36. The Court notes that the Applicant referees to the events that happened in 1963.
37. In this respect the Court's has to determine its temporal jurisdiction.
38. The Court recalls that pursuant to Rule 36 of the Court's Rules of the Procedure: "*Referral may also be deemed inadmissible in any of the following cases: h) the Referral is incompatible ratione temporis with the Constitution*".
39. Similar admissibility criterion is applied by the European Court on Human Rights.
40. In accordance with the case-law of the European Court on Human Rights "*Deprivation of ownership or of another right in rem is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right"* (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, with further references).
41. In this respect the Court recalls that it cannot deal with a Referral relating to events that occurred before the entry into force of the Constitution, i.e. before 15 June 2008 (see, the Court's Resolution on Inadmissibility in Case No 18/10, *Denic et al*, of 17 August 2011).
42. Based on all above Applicant's referral with regard to the alleged violation of his property rights related to the events that occurred prior 15 June 2008, is incompatible *ratione temporis* with the provisions of the Constitution..
43. Moreover, the Court would like to reiterate that according to the jurisprudence of the European Court on Human Rights "*Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to*

restore property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners" (see Jantner v. Slovakia, no. 39050/97 § 34, 4 March 2003).

44. Taking all above mentioned into account, the Court finds that the Referral does not meet the criteria for admissibility, pursuant to Article 113.7 of the Constitution, and Rule 36 (1) c) and h) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 .7 of the Constitution, Article 48 of the Law and Rule 36 (1) c) and h) of the Rules of the Procedure, in its session held on 27 March 2014, unanimously

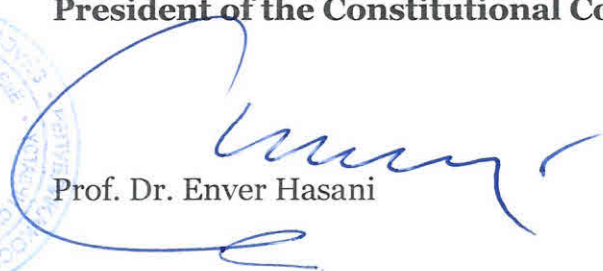
DECIDES

- I. TO REJECT the Referral as 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. TO DECLARE this Decision immediately effective.

Judge Rapporteur

President of the Constitutional Court


Dr. Sc. Kadri Kryeziu


Prof. Dr. Enver Hasani

