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

Pristina, 15 April 2014
Ref.no.:AGJ569/14

JUDGMENT

in

Case No. KI200/13

Applicant

Belkize Kallaq

Constitutional review of
Judgments Rev.Mlc.nr.329/2012 and Rev.nr.356/2009
of the Supreme Court of Kosovo of 24 June 2013 and of 20 January 2012, respectively, and
Judgment Ac.nr.52/2012 of the District Court of Prizren of 11 May 2012

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 Ms. Belkize Kallaq from Peja, who is represented by Mr. Adem Vokshi, a practicing lawyer from Mitrovica.

Challenged decisions

2. The challenged decisions are Judgment Ac. no. 52/2012 of the District Court of Prizren of 11 May 2012 and Judgments Rev. no. 356/2009 and Rev. Mlc. no. 329/2012 of the Supreme Court of Kosovo of 20 January 2012 and of 24 June 2013, respectively. Judgment Rev.Mlc.no.329/2012 was served upon the Applicant on 12 August 2013.

Subject matter

3. The subject matter concerns the Applicant's complaint that the challenged decisions violated her rights under Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 1 [Right to Property] of Protocol 1 to the European Convention on Human Rights (hereinafter: ECHR) as well as Articles 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 ECHR and 53 [Interpretation of Human Rights Provisions] of the Constitution.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 20 of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121, (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

5. On 13 November 2013, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court").

6. By Decision of the President (no. GJR.200/13 dated 3 December 2013), Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same day, by Decision of the President (no.KSH.200/13), the Review Panel was appointed composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Enver Hasani.

7. By letter of 19 December 2013, the Applicant's Attorney was informed of the registration of the Referral under no. KI200/13 and requested to submit copies of Judgment Rev.Mlc.no.329/2012 of the Supreme Court of 24 June 2013; Judgment C.no.850/2005 of the Municipal Court in Vushtri of 19 April 2007; Judgment Ac.no.199/2007 of the District Court in Mitrovica of 18 September 2007; Judgment C.no.406/2006 of the Municipal Court in Prizren of 29 August 2008; Judgment Ac.23/2009 of the District Court in Prizren of 16 March 2009; Judgment of the District Court in Prizren to which the case was returned by Judgment Rev.356/2009 of the Supreme Court of 20 January 2012; Judgment N.no.223/2008 of the Municipal Court in Peja of 15 June 2009; and the

Judgment of the District Court in Prizren to which the case was assigned by Judgment C.no.14/2010 of the Supreme Court of 3 December 2010.

8. A copy of the Referral was forwarded to the Supreme Court of Kosovo for information on 19 February 2014.

9. On 24 March 2014, the Court deliberated and voted on the Case.

Summary of facts

10. On 4 June 2001, the Municipal Court in Peja, by Judgment C. no. 121/01, rejected the Applicant's statement of claim by which she requested the court to determine that the respondents from Peja obstructed her in the possession of her two room apartment located in Peja, by unlawfully settling down in the apartment on 16 February 2001, and to order the respondents to return the apartment to her within 48 hours.

11. The Municipal Court held that it could not offer judicial protection to the Applicant, due to the fact that it was undoubtedly determined that the respondents did not commit the act of obstruction of possession, but that it was done by other persons. It also observed that other evidence, such as the different sales contracts, were irrelevant for deciding differently on the matter, since the grounds for the statement of claim were *obstruction of possession* and not *determination of ownership*. The Applicant appealed the ruling in due time.

12. On 22 April 2002, the District Court in Prizren, by Judgment Ac. no. 234/2001, rejected as ungrounded the appeal filed by the Applicant, for the reason that the challenged ruling was based on the correct and complete determination of the factual situation, whereby the material right was correctly applied and that the reasons provided by the first instance court did not raise any doubt as to the fairness of the decision.

13. The Applicant then seized the Housing and Property Claims Commission (hereinafter: HPCC) seeking an order for the registration of the ownership of the apartment. Her claim was registered under No. DS001477.

14. On 15 July 2006, the HPCC, by Decision No. HPCC/D/259/2006/B&C, ruled that:

"[...]

(1) In the Category B Claim No. DS001447 the Commission orders that:

(a) the ownership of the Claimant [Applicant] in respect of the claimed property be registered in the appropriate public record;

(b) the Claimant be given possession of the claimed property;

(c) the Respondent and any other person occupying the property vacate the same within 30 days of the delivery of this order; and

(d) should the Respondent or any other person occupying the property fail to comply with the order to vacate within the time stated, they be evicted from the property.

(2) The above order is without prejudice to the jurisdiction of the competent local court to amend the relevant public record in the event that such court annuls the transaction on which the Commission's order in paragraph 1 is based.

[...]."

15. The HPCC reasoned that:

"A. Category B claim granted

4. The Commission has carefully reviewed the category B Claim No. DS001447 in light of the criteria set out in paragraph I above and the precedents set by the Commission in its earlier decisions. The Claimant bases her claim on an unverified purchase contract purportedly entered into between her, as purchaser, and X., as seller, on 10 May 1996 (the "Claimant's contract"). X.'s ownership of the property was based on a verified purchase contract entered into on 22 December 1992 with the organisation "DP Kombinat Koze I Obuce". It was verified in court and is clearly genuine.

5. The Respondent relies on a purchase contract purportedly entered into between her and the Claimant's former partner, Y., on 20 December 2000, registered at the local court, and an unverified purchase contract purportedly entered into on 20 March 1996 between Y. and X. (the "Y. contract"). The Claimant contends that the Y. contract was fraudulently entered into by her former partner after the NATO air campaign, but backdated. Accordingly, she says, the Respondent could not have derived valid title from her former partner. She also says that as owner she had possession of the property from the time of purchase until the time when she left for Sweden in 2000 to join her now husband. The Respondent has been properly notified of the claim. She asserts that the Y. contract, as well as the registered contract whereby she purportedly purchased the apartment from him, are valid.

6. The Commission, acting in terms of section 19.4 of UNMIKREG/2000/60, appointed one of its members to hear oral evidence pertaining to the claim. The Commissioner interviewed the Claimant and Z., the son of X. Z. is recorded as a witness to the Claimant's sale (along with her former partner, the second witness). It was not possible to interview X.. Y. was traced, and agreed to attend an interview with the Commission on an agreed day. He did not arrive on the agreed day, but asked for a postponement of the interview. Again he did not arrive and rescheduled. Once more he failed to attend. After that he stopped responding to the calls from the Commission's registry staff.

7. *The Commission has concluded that the Claimant's contract was truly entered into on the dates referred to in the contract and that the Y. contract is false. In arriving at its conclusion, the Commission has had regard to the Commissioner's assessment of the credibility of the witnesses, the fact that Z. does not dispute that the Claimant's contract was truly entered into and witnessed by him (although he asserts that the Y. contract is valid, without being able to explain why the Claimant's contract would then have been entered into), the fact that the Claimant has proven that she had exclusive possession of the apartment subsequent to the Claimant's purchase (through utility bills and the testimony of Z.) and the evasive conduct of Y.*

8. *Accordingly, the Claimant has established that she entered into a voluntary transaction to purchase residential property between 23 March 1989 and 13 October 1999. The transaction was unlawful under the provisions of the Law on Special Conditions Applicable to Real Estate Transactions because it lacked the permission of the Ministry of Finance in terms of that law. The transaction would otherwise have been lawful. Consequently, the claim meets the requirements in paragraph I above and stands to be granted. The Commission's decision is without prejudice to the Respondent's right to seek return of the purchase price and damages from the person from whom she had purportedly purchased the claimed property.*

9. *In view of its finding regarding the validity of the Claimant's contract, and pursuant to section 22.7 (b) of UNMIK/REG/2000/60, the Claimant is also entitled to an order for restoration of possession.*

[...]."

16. On 21 July 2006, the HPCC issued a "Certified Decision" regarding Decision No. HPCC/D/259/2006/B&C to the Applicant, whereupon the Respondent submitted a reconsideration request to the HPCC.

17. On 11 December 2006, the HPCC, by Decision HPCC/REC/81/2006, ordered, *inter alia*, that the reconsideration request submitted by the Respondent be rejected.

18. On 26 March 2007, the HPCC issued a "Certified Decision on Reconsideration Request" regarding Decision HPCC/REC/81/2006 of 11 December 2006, whereupon the Respondent submitted a further reconsideration request to the HPCC.

19. On 8 June 2007, the HPCC, by Decision HPCC/REC/99/2007, ordered, *inter alia*, that the reconsideration request be rejected.

20. The HPCC decided that:

"[...]

(A) No new evidence and no material error

7. *In Claim No. DS001447, listed in part B of the attached Schedule, the Requesting Party, who is the Respondent in a category B claim which was granted in the initial decision, avers that she acquired ownership of the claimed property by concluding a purchase contract with the previous owner, A, on 20 December 2000. A., it is alleged, had previously purchased the property from a certain X. The Responding Party (ie the category B Claimant), who was previously the common law wife of A., avers that she, not A, had purchased the property from X. The Responding Party is no longer associated with A., has remarried and moved to Sweden. After their separation, A. purported to enter into a separate purchase contract with X. and then on-sold the property to the Requesting Party. The Requesting Party insists that, although the original purchase was in the name of the Responding Party, A. was the real purchaser and that the funds were provided by A.. According to the Requesting Party, the transaction was concluded in this manner due to "family reasons."*

8. *The Commission notes that the Responding Party was in possession of the claimed property for a long period of time, and that she also avers that she paid most of the purchase price. The documentary evidence supports her allegations that she was the true and not the nominal owner of the property. The Commission also notes that the Requesting Party has not produced any adequate evidence to prove otherwise. Reliance can therefore not be placed on the purchase contract purportedly entered into by A. as the property had already been transferred to the Responding Party* [the Applicant]. *Accordingly the Requesting Party's reconsideration request stands to be rejected.*

   [...]."

21. On 24 July 2007, the HPCC issued a "Certified Decision on Reconsideration Request" regarding Decision No. HPCC/REC/99/2007 of 8 June 2007 to the Applicant.

22. On 5 December 2007, the Applicant received the HPCC Protocol concerned together with the keys of the apartment from the HPCC.

23. On 29 August 2008, the Municipal Court in Prizren, by Judgment C. no. 406/06, rejected as ungrounded the Applicant's statement of claim, by which she had requested the Court "*to confirm that she is the owner of the apartment [...] concerned which the respondents have to admit and to refrain from any type of concern*". The Applicant appealed against this decision to the District Court in Prizren.

24. On 6 March 2009, the District Court in Prizren, by Judgment Ac. no. 23/2009, quashed the decision of the Municipal Court of 29 August 2008, on the ground that the first instance court had committed substantial violations of the law in that, pursuant to Article 2.5 of UNMIK Regulation 1999/23 on the

Establishment of the Directorate and the Property Claims Commission, in conjunction with Article 1.2(c) of the Regulation, as an exception to the competence of the ordinary courts, the Commission was exclusively competent for the categories of cases mentioned in Article 1.2 of Regulation 1999/23.

25. The District Court further argued that the contested matter between the parties had been decided by the HPCC and that the first instance court was obliged, pursuant to Article 2.7 of UNMIK Regulation 1999/23, to accept the decisions of the HPCC as obligatory and mandatory and that the matter could not be subject to review in court proceedings. Thereupon, the Respondent filed a revision with the Supreme Court.

26. On 20 January 2012, the Supreme Court, by Decision Rev. no. 356/2009, admitted the revision filed by the Respondent, by quashing Judgment Ac. no. 23/2009 of the District Court in Prizren, and returned the case to the second instance court for retrial.

27. The Supreme Court held that:

"According to the second instance Court's assessment, this dispute between parties was resolved by the decision of the Housing and Property Commission and the Court is obliged, in terms of Article 2.7 of Regulation 1999/23, to consider the decisions of this Commission as mandatory and obligatory and the same may not be subject of a revision in judicial context.

According to the assessment of the Supreme Court of Kosovo, the Ruling of the second instance Court was rendered in violation of provisions of Article 182 paragraph 1 in conjunction with article 391 paragraph 1, Article 18 paragraph 2 of LCP [Law on Contested Procedure] and Article 1 paragraph 2 (b) of Regulation 1999/23 for Establishing the Directorate and Commission for Reviewing the Housing and Property Claims as well as the explanation of the Special Representative of the Secretary General for UNMIK Regulation nr.2000/60 of date 31.12.2000 on housing and property claims and of Housing and Property Claims Commission (Explanation) of date 12 April 2001, which has been influential on rendering a just and lawful Ruling.

According to article 1 paragraph 2 (b) of Regulation 1999/23 as an exclusion from jurisdiction of domestic Courts, the Directorate receives and records the requests of natural person who performed unofficial transaction of real-estate, only by free will of parties after date 23 March 1989, while point 5 (b) of the Explanation provides that persons that got engaged in unofficial transactions for housing property after date of 23 March 1999 up to 13 October 1999, by free will of parties, but which were unlawful by the existing law (the so-called "Category B" of requests). Considering that the first respondent legalized the sales contract of date 20.03.1996, on date 28.09.2000 before the competent Court, after date 13 October 1999, it results that the resolution of the dispute is competency of Court and not competency of the Directorate for Housing and Property, respectively Housing and Property Commission.

According to the decision of the reviewing commission for requests of housing and property, the claimant's request nr. DS001447 belongs to "category b" and according to paragraph 2 of this decision, item I of the order of this decision doesn't prejudice the jurisdiction of the competent domestic courts to change the public records, if such courts nullify the transaction, in which the Commission's order is based on paragraph 1.

Due to the fact that the first respondent legalized the contract after 13 October 1999 and then concluded a contract on date 20.12.2000 with the second respondent for transaction of the disputed apartment, the Supreme Court of Kosovo assesses that all unofficial transactions of property and housing disputes (as well as the official ones) after date 13 October 1999, are competency of regular Courts and not competency of the Housing and Property Commission.

Due to these reasons, this Court assessed that the allegations of the revision filed by respondents and interventionist are grounded, therefore, the judgment of the appealing Court has to be quashed and the matter has to be reversed to the second instance Court for a merited decision upon request, by providing clear justification for the allegations of the appeal and every part of Judgment of the first instance Court.

The second instance Court is obliged to abolish the above mentioned flaws, having in consideration also the other allegations of the revision and then to render a lawful decision.

[...]."

28. As a result, the District Court in Prizren, by Judgment Ac. no. 52/2012 of 11 May 2012, rejected as unfounded the appeal of the Applicant filed against Judgment C. no. 406/06 of the Municipal Court of Prizren of 29 August 2008 whereby the Applicant's statement of claim that she was the owner of the apartment had been rejected.

29. On 21 June 2012, the Applicant submitted revision against Judgment Ac. no. 52/2012 of the District Court in Prizren to the Supreme Court, stating that the same District Court, which, by Judgment Ac. no. 23/2009 of 16 March 2009, had first quashed Judgment C. no. 406/2006 of the Municipal Court in Prizren of 29 August 2008, had now confirmed that same judgment of the Municipal Court, using a completely different reasoning.

30. The Applicant further argued that, on 13 June 2012, she received Judgment Rev. no. 356/2009 of the Supreme Court of 20 January 2012 by which the revision of the Respondents was admitted, quashing Decision Ac. no. 23/2009 of the District Court in Prizren of 16 March 2009 (N.B. which was in favor of the Applicant) and returning the matter to that Court for retrial. According to the Applicant, neither she nor her legal representative had received any copy of the revision filed by the Respondents against Judgment Ac. no. 23/2009 of the District Court in Prizren of 16 March 2009, although such an obligation was

clearly provided in Article 219(1) of the Law on Contested Procedure (LCP), stipulating that the first instance court delivers a copy of the revision to the responding party within seven days.

31. The Applicant also stated that it was only from the Supreme Court's ruling Cn. no. 14/2010 of 3 December 2010 on the Applicant's proposal to assign the District Court in Prizren as the appeal court instead of the District Court in Peja in Case N. no. 223/2008 of 15 June 2009, that she had learned that the Respondent had filed revision with the Supreme Court from Judgment Ac. no. 23/2009 of the District Court in Prizren, by which it was declared that the decision of the HPCC on the Applicant's rights regarding the disputed apartment was obligatory and mandatory and could not be subject to review by the ordinary courts. She, therefore, allegedly, addressed a letter to the Supreme Court, requesting it to forward a copy of the revision of the Respondent to her, but the Supreme Court never replied to her letter. In her opinion, such inaction by the Supreme Court constitutes a violation of human rights and freedoms.

32. On 17 July 2012, the State Prosecutor submitted a request for protection of legality in favor of the Applicant against Judgment Ac. no. 52/2012 rendered by the District Court on 11 May 2012, claiming that the District Court in Prizren had erroneously applied material law and proposing to the Supreme Court to quash the challenged judgment and return the case to the District Court for retrial. The State Prosecutor further stated that the HPCC was competent to decide on the matter, as provided by UNMIK Regulation no. 2000/60 of 31 October 2000, and that, on three occasions, the HPCC had decided in favor of the Applicant.

33. On 24 June 2013, the Supreme Court, by Judgment Rev. Mlc. no. 329/2012, rejected as unfounded the Applicant's revision as well as the request for protection of legality submitted by the State Prosecutor, reasoning that:

"[...]

The Case files show that the claimant, by filing a claim, seeks determination of ownership of the apartment on street "Vlladosav Guriq" nr.100/II, apartment 3, 66,00m2 in surface, based on the sales contract of date 10.05.1996 concluded by respondent Belkize Kallaç [the Applicant], *as buyer and X. (owner of the apartment) as seller, otherwise interventionist party on respondent's side. This contract was not legalized at Court but is signed by the first respondent Y. and Z., the son of the owner X. The claimant, after signing the contract on date 10.05.1996 entered into possession of the apartment, which she possessed until date 16.02.2001.*

When the disputed apartment was bought, claimant Belkize Kallaç and respondent Y. had extramarital relationship. On date 16.02.2011, the claimant was stripped of the possession of the apartment, because the first respondent Y. on date 28.11.2000 concluded another contract with the owner of this apartment X. and the same was certified in Court under reference number Vr.nr.1237/2000. After certifying this Contract before Court, the first

respondent Y. transferred the apartment on his name and sold it to the second respondent B., concluding another sales contract on date 20.12.2000, certified in Court under reference number Vr.nr.2074/2000.

The Respondent, then turned to the Housing and Property Claims Commission, filing the request nr.DS.0011447 and the mentioned commission issued a group decision HPCC/D.259/B$ of date 15.07.2006, with item I(b) the claimant is recognized the right to possession of property – apartment of dispute, while item II says "it is provided that the above order does not contain jurisdiction prejudice of the domestic competent Court to change respective public records in case such Courts dismiss the transaction on which the commission's order of paragraph I is based. Then, the same matter, by the request of Y., filed against claimant Belkize Kallaç, request DS.0011447 was reviewed by the second instance authority and on date 11.12.2006 the request for review filed by Y. was denied. The same matter, upon request of respondent B., against claimant Belkize Kallaç, was reviewed on date 08.06.2007 by the review commission and B. request for review was denied.

The first instance Court, while considering this situation, found that the contract concluded between the first respondent Y. and the second respondent B., which was legalized at Court under reference number Vr.nr.2074/2000 on date 20.12.2012, produces judicial effect and the second respondent B. by this contract earned the right of property on the disputed apartment in accordance with Article 20 and 30 of the ELLPR. According to the assessment of that Court, the internal contract of date 10.05.1996 on which is based the claimant's statement of claim, doesn't meet the necessary legal form of legalization of the apartment, therefore, it was decided as in the enacting clause.

The second instance Court, on the proceedings of the appeal, entirely acknowledged the factual determination and legal stand of the first instance, denied as unfounded the claimant's appeal and confirmed the Judgment of the second instance Court.

The Supreme Court of Kosovo, given such situation of the matter, found that the lower instance Courts, due to the correct and complete determination of the factual situation, correctly applied the provisions of contested procedures and material rights by denying the claimant's statement of claim, closely described in the enacting clause of the judgment.

[...]."

Applicant's allegations

34. The Applicant claims that Decision Ac.no.23/2009 of the District Court in Prizren of 16 March 2009 which quashed Judgment C.no.406/06 of the Municipal Court in Prizren of 29 August 2008 and denied the claim of the Responding Party as inadmissible for the reasons that that the first instance court had committed substantial violations of the law in that, pursuant to Article 2.5 of UNMIK Regulation 1999/23 on the Establishment of the Directorate and the Property Claims Commission, in conjunction with Article 1.2(c) of the Regulation, as an exception to the competence of the ordinary

courts, the Commission was exclusively competent for the categories of cases mentioned in Article 1.2 of Regulation 1999/23.

35. In the Applicant's opinion, pursuant to Article 2.7 of UNMIK Regulation no.1999/23, a decision rendered by the HPCC is final and applicable and cannot be reviewed by any other judicial or administrative authority in Kosovo. Moreover, since the final HPCC decision recognized her right to property, ordered the registration of the property in the respective public records and granted the possession of the property, any other decisions related to the property constitutes a violation of the Applicant's property rights.

36. The Applicant further alleges that, after the District Court in Prizren rendered Judgment Ac. no. 23/2009 on 16 March 2009, she had not received any copy of the revision that had been filed by the respondents, although such an obligation is clearly provided in Article 219(1) LCP, stipulating that one copy of the revision, filed on time and if it is complete and admissible, will be delivered by the first instance Court, within 7 days, to the responding party. In her opinion, this omission constitutes a violation of her rights under Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 [Right to Fair Trial] ECHR.

37. Moreover, the Applicant states that Judgment Rev. no. 356/2009 of the Supreme Court dated 20 January 2012 as well as Judgment Ac. no. 52/2012 of the District Court dated 11 May 2012 and Judgment Rev. Mlc. no. 329/2012 of the Supreme Court dated 24 June 2013, in the repeated procedure ordered by Judgment Rev. no. 356/2009, violated her rights under Articles 46 [Protection of Property], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution in conjunction with Article 6(1) ECHR. The Applicant fears that, after these judicial decisions, she will be forced out of the apartment, although the HPCC decisions are final and binding.

Applicable law

38. The provisions referred to by the HPCC in its decisions are defined in the following legal instruments:

UNMIK Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission:

"Housing and Property Directorate

[...]

Section 1.2: "*As an exception to the jurisdiction of the local courts, the Directorate shall receive and register the following categories of claims concerning residential property including associated property*:

Claims by natural persons whose ownership, possession or occupancy rights to residential real property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or intent;

Claims by natural persons who entered into transactions of residential real property on the basis of the free will of the parties subsequent to 23 Mrch 1989;

Claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred."

The Directorate shall refer these claims to the Housing and Property Claims Commission for resolution or, if appropriate, seek to mediate such disputes and, if successful, refer them to the HPCC for resolution.

[...]".

Section 2:

Housing and Property Claims Commission

Section 2.1. *The Housing and Property Claims Commission (the "Commission") is an independent organ of the Directorate which shall settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.*

[...]

Section 2.7. *Final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo."*

[...].

UNMIK Regulation No. 2000/60 of 31 October 2000

"[...]

Section 2.4: *"Any person who acquired the ownership of a property through an informal transaction based on the free will of the parties between 23 March 1989 and 13 October 1999 is entitled to an order from the Directorate or Commission for the registration of his/her ownership in the appropriate public record. Such an order does not affect any obligation to pay tax or charge in connection with the property or the property transaction."*

Section 2.5: *"Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation."*

Section 2.6: *"Any person with a property right on 24 March 1999, who has lost possession of that property and has not voluntarily disposed of the property right, is entitled to an order from the Commission for repossession of the property. The Commission shall not receive claims for compensation for damage to or destruction of property."*

[...]."

Admissibility of the Referral

39. In order to be able to adjudicate the Applicant's Referral, the Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules.

40. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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".

41. The Court also refers to Article 49 of the Law, stipulating:

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision (...)".

42. In the instant case, the Court notes that the Applicant has sought recourse before the Municipal and District Courts and, finally, before the Supreme Court of Kosovo to protect her rights attributed to her by three subsequent decisions of the HPCC. The Court also notes that the Applicant was served, on 12 August 2013, with Judgment Rev. Mlc. no. 329/2012 of the Supreme Court of 24 June 2013, and filed her Referral with the Court on 13 November 2013.

43. Thus, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies available to her under applicable law and has submitted the Referral within the four months time limit.

Merits of the Referral

As to the HPCC's findings

44. As to the assessment of the merits of the Referral, the Court notes that the HPCC, by Decision No. HPCC/D/259/2006/B&C of 15 July 2006, ruled, *inter alia*, that the ownership of the Applicant in respect of the disputed property be

registered in the appropriate public record and that she be given possession of that property.

45. The Court also notes that the repeated requests for reconsideration of that Decision filed by the Responding Party were rejected by the HPCC on 11 December 2006 and 8 June 2007, respectively, no new evidence and no material error having been found. Under the heading: "Finality of Decision" the HPCC Decisions made reference to UNMIK/REG/1999/23 providing that: "*2.7 Final decisions of the Commission are binding and enforceable, and are not subject to the review by any other judicial or administrative authority in Kosovo.*"

46. In the Court's opinion, this can only mean that, since the last HPCC's finding No. HPCC/REC/99/2007 of 8 June 2007 in the case became *res judicata* after having been certified by the Registrar of the HPCC on 24 July 2007, the Applicant was entitled to enjoy the rights to ownership and possession, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR and that any interference of these rights by any judicial or administrative authority would have to be considered as a violation of these rights (see also, Case KI104/10, *Applicant:* Arsic Draza, Judgment of 23 April 2012).

47. In this respect, the Court finds that, so far, the Applicant's attempts to have HPCC Decision No. HPCC/D/259/2006/B&C implemented through registration in the appropriate public record have remained unsuccessful and have created a situation of legal uncertainty for the Applicant, even while she is presently occupying the property.

48. The Court, therefore, concludes that there has been a violation of the Applicant's rights guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR.

As to the complaint that the Applicant did not receive a copy of the revision filed by the Respondent

49. In this respect, the Court notes that the Applicant complains that, contrary to Article 219(1) LCP, she never received a copy of the revision filed by the Responding Party against Judgment Ac. no. 23/2009 of the District Court in Prizren dated 16 March 2009 and that, when she found out about the revision proceedings, her request to the Supreme Court to provide her with a copy of the revision remained unanswered. She complains that, as a consequence, she could not participate in the hearing before the Supreme Court, which, by Judgment Rev. no. 356/2009 of 20 January 2012, admitted the revision of the Responding Party and sent the case back to the District Court in Prizren for retrial.

50. It further appears from the Applicant's submissions that the District Court in Prizren, when retrying the case on 11 May 2012, reversed its previous opinion by

following the Supreme Court's ruling and upholding the judgment of the Municipal Court of 29 August 2008, by which her statement of claim that she was the owner of the disputed apartment was denied.

51. The Court notes that, thereupon, the Applicant filed a revision against the District Court's judgment of 11 May 2012 with the Supreme Court, challenging at the same time Judgment Rev. no. 356/2009 of the Supreme Court of 20 January 2012 and expressly invoking violations of Article 31 of the Constitution and Article 6 ECHR for the reasons that "*a contested procedure cannot be initiated between two parties, one of which* [the Applicant] *didn't participate in the hearing, respectively, it was not notified of the allegations of the responding party.*"

52. Article 31 [Right to Fair and Impartial Trial] of the Constitution provides, *inter alia*:

> "Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
>
> Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
>
> [...]."

53. Article 6 [Right to Fair Trial], paragraph 1 ECHR provides, *inter alia*:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
>
> *[...]."*

54. The Court reiterates that, pursuant to Article 53 of the Constitution, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".

55. As to the Applicant's complaints that she was not notified of the revision proceedings, initiated by the Responding Party before the Supreme Court, and that a copy of the revision, despite her request, was never sent to her, the Court refers to the approach of the ECtHR in similar cases. For instance, in the Grozdanoski Case (see *Grozdanoski v. The Former Yugoslav Republic of Macedonia*, no. 21510/03, of 31 May 2007), the ECtHR concluded that, in civil proceedings, the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case -including evidence

-under conditions that do not place him/her at a substantial disadvantage vis-a-vis his/her opponent. According to the ECtHR, the concept of a fair trial, of which equality of arms is one aspect, implies the right for the parties to have knowledge of and to comment on all evidence adduced or observations filed. The ECtHR was also of the opinion that Article 6 (1) ECHR is intended, above all, to secure the interests of the parties and those of the proper administration of justice, while respect for the right to a fair trial, guaranteed by Article 6 (1) ECHR, required that the applicant be given an opportunity to have knowledge of and to comment upon the public prosecutor's request. Consequently, by failing to notify the applicant of the public prosecutor's request for protection of legality filed with the Supreme Court of Macedonia, the ECtHR found that there had been a violation of Article 6 (1) ECHR.

56. The Court further refers to the Gusak case, (See Gusak v. Russia, 7 June 2011, Application no. 28956/05, para 27.), where the ECtHR considered that "a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing."

57. The Court also refers to its own case law, in particular, to Case KI 108/10, *Applicant* Fadil Selmanaj - Constitutional Review of Judgment of the Supreme Court of Kosovo, A. no. 170/2009 of 25 September 2009, where it ruled that "the Applicant should have been summoned to the court proceedings in such a way as not only to have knowledge of its existence, but also to present arguments and evidence during the course of the proceedings."

58. As to the present case, the Court finds that the Applicant could not have exercised her right to a fair trial without having been notified of the revision of the respondent and without having been able to participate in the proceedings before the Supreme Court on 20 January 2012 to make her case.

59. Moreover, although the Applicant raised the issue in detail before the Supreme Court in her revision of 21 June 2012, the Supreme Court, in its Judgment Rev. Mlc. no. 329/2012 of 24 June 2013, did not, in any way, refer to the Applicant's complaint and her submissions in that respect.

60. In these circumstances, the Court concludes that, by neglecting to properly assess the Applicant's arguments regarding her not having received a copy of the respondent's revision and her not having been able to participate in the hearing before the Supreme Court on 20 January 2012 to make her case, the Supreme Court has not respected the rights claimed by the Applicant. It follows that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56(1) of the Rules of Procedure, at its session held on 24 March 2014,

DECIDES

I. TO DECLARE the Referral admissible, by unanimous vote;

II. TO HOLD that there has been a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR, by unanimous vote;

III. TO HOLD that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 ECHR, by unanimous vote;

IV. Declares null and void the Judgment Rev.Mlc.nr.329/2012 of the Supreme Court of Kosovo of 24 June 2013, by unanimous vote;

V. TO ORDER the execution of HPCC Decision No. HPCC/D/259/2006/B&C through the registration of the Applicant's right to the contested property in the appropriate public records, by majority vote;

VI. Pursuant to Rule 63 (5) of the Rules of Procedure, the public authorities responsible for the execution of HPCC Decision No. HPCC/D/259/2006/B&C shall submit information about the measures taken to enforce the decision of the Court;

VII. TO REMAIN seized of the matter pending compliance with that Order;

VIII. TO ORDER this Judgment to be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IX. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani