

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU
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29 November 2012

SCA-09-0042

SOE XX, XX

Represented by

Kosovo Trust Agency, Office of Legal Affairs, TSS Compound,

Prishtinë/ Priština

Privatisation Agency of Kosovo, Ilir Konushevci 8, Prishtinë/Priština

Appellant

Vs.

A.A., XX

Represented by lawyer XX

Claimant

The first Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after deliberation held on 29.11.2012, issues the following

Decision

The Appeal against Judgment C.no.801/04 of the Municipal Court of Prishtinë/ Priština

is dismissed as inadmissible.

Factual and Procedural background

On 21 May 2004 the Claimant filed a claim at the Municipal Court of Prishtinë/ Priština (the “Municipal Court”) for verification that he is the owner of a business premise (located in Prishtinë/Priština, Business Centre Dardania, no.53) on the basis of purchase contract he signed with the Respondent SOE in 2001. The Claimant states that he paid the full purchase price to the Respondent and entered into possession of the property, however, he could not certify the contract at the Municipal Court because the Respondent did not provide him with the necessary documents as stipulated in the contract.

On 4 August 2005 the Municipal Court rendered a judgment confirming the claim as grounded (C.no.801/04). In the procedure before the Municipal Court of Pristina the Kosovo Trust Agency (KTA) has not been served the Claim neither has it been summoned to the hearing neither has the Judgement been served to KTA. In the hearing in which the Respondent has been represented by the director of the Respondent E.D. both parties waived their right to appeal and the court declared the judgement for final.

On 21 August 2009 the KTA on behalf of the Respondent filed with the Special Chamber an appeal against four Municipal Court Judgments C.no.801/04, C.no.802/04, C.no.811/04 and 812/04 initially registered under SCA-09-0042. Subsequently the case was split as follows:

SCA-09-0042 appeal against C.no.801/04, SCA-09-0078 appeal against C.no.802/04, SCA-09-0079 appeal against C.no.811/04, SCA-09-0080 appeal against C.no.812/04.

The KTA requests that the judgment is overturned because the matter is under the primary jurisdiction of the Special Chamber pursuant to Section 4.1(d) of the Special Chamber Regulation UNMIK REG 2002/13. The KTA submits that the case had not been referred by the Special Chamber to the Municipal Court and therefore the Municipal Court had no jurisdiction to adjudicate the case. The KTA states that the Municipal Court should have announced that it is not the competent court and should have submitted the case to the Special Chamber (pursuant to Articles 17 and 18 of the Law on Contested Procedure).

By submission of 14 June 2012 the Privatization Agency of Kosovo (PAK) on behalf of the Respondent stated that the appealed judgment should be annulled on the basis of lack of jurisdiction as argued by the KTA. The PAK further submits that the Municipal Court Judgment is ungrounded because it is in violation of article 6 of the UNMIK REG 1999/1 and article 9 of the Law on Transfer of Immovable Property regarding transfer of SOE property.

On 26 June 2012 the claimant stated that the arguments raised by the KTA against the Municipal Court judgment are ungrounded. According to his opinion the sales contract between the parties is valid because it was concluded on 26 February 2001, which is before the UNMIK REG 2002/12 on the Establishment of the KTA entered into force. The claimant states at the time of the proceedings he was not aware that the dispute is under the jurisdiction of the Special Chamber.

By order of the Panel of 8 August 2012 the KTA and the PAK were requested to appoint a lawyer who is a member of a bar association or chamber of advocates to represent it before the Special Chamber.

Regarding further allegations of the parties' reference is made to the case file and to the declarations of the parties in the hearing.

Legal Reasoning

The Appeal had to be dismissed as inadmissible.

The Appellant was not duly represented in the hearing of 30.8.2012.

Representation of the Appellant by the PAK

The PAK did not validly represent the Appellant because PAK itself was not represented by a lawyer.

Before the Special Chamber every party, except for natural persons, must be represented by a lawyer (Annex Art 24 SCL 04/L-033, SCL). This also applies to SOEs represented by PAK. The wording of this provision lacks any indication why it should not apply. Art 73, 74, 85 and 86 Code of Contested Procedure (LawNo03/L-006, CCP), regulating who can be party, which actions can a party take and who can represent a party allows that parties and representatives who are not registered lawyers act in court but in relation to these provisions Annex Art 24 SCL is Lex Posterior and Lex Specialis, which supersedes the CCP provisions. The Legislator issued Annex Art 24 SCL when the CCP already existed and he regulated by the Annex Art 24 SCL a special procedure in a special court, different from other Kosovo

courts. The Annex Art 24 SCL supersedes also Art 29 Law on the PAK (04/L-034, PAK Law) because it is issued later and regulates not representation generally, as does the PAK Law but specifically representation in front of the SCSC. This also applies to Art29.2 PAK Law which regulates the Agency's "Legal standing" to pursue any rights of an enterprise in a competent court on behalf of the enterprise concerned. Also this provision is superseded by the later enacted special provision of Annex Art 24 SCL.

The Legal regulation that natural persons do not need a lawyer but all others need a lawyer does not violate Art 73 and 74 CCP. This is not possible because Art 73 and 74 do not apply. They are superseded by Art 24 SCL.

The requirement to be represented by a lawyer is not a violation of the constitutional right of Equality before the Law. It may remain open whether PAK as a "public body" (Art1.1 PAK Law) can plead for the fundamental right of equality, which is historically and in its constitutional context a right of natural persons and private legal entities against the state, not a right for a state organ against the state. The Respondent has a right to be treated equal, but constitutional Equality does not mean that everybody is treated equally regardless if they are reasonably and non-discriminatory aspects of differentiation. It is neither unreasonably nor discriminatory to privilege natural persons in front of the court in relation to legal entities (or a public state authority). Often, if not even regularly natural persons do not have the financial means to afford a lawyer. This under constitutional aspects is a sufficient reason for their privilege to appear before the SCSC without a lawyer.

As a result it may be stated that the Respondent as everybody except natural persons must be represented before the Special Chamber by a lawyer who is member of a bar association or a chamber of advocates the representation by PAK which appeared without registered Lawyer is not valid.

Representation of the Appellant by KTA

KTA did not validly represent the Respondent because KTA has no right and mandate anymore to represent a Kosovo SOE.

Kosovo Law

Article 1 of the PAK Law (No.03/L-067 as amended by the law No.04/L-034) reads:

The Privatization Agency of Kosovo (hereafter the "Agency") is established as an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full juridical personality and in particular the capacity to enter into contracts, acquire, hold and dispose of property and have all implied powers to discharge fully the tasks and powers conferred upon it by the present law; and to sue and be sued in its own name. The Agency is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12 "On the establishment of the Kosovo Trust Agency", as amended, and all assets and liabilities of the latter shall be assets and liabilities of the Agency.

This issue is clarified by article 31 PAK Law, which reads:

31.1 The present law shall supersede any provisions in the Applicable Law which are inconsistent therewith.

31.2 UNMIK Regulation 2002/12, as amended, will cease to have legal effect on the date the present law enters into force.

31.3 The Agency takes over all liabilities that it or its predecessor may have incurred under UNMIK Regulation 2002/12, as amended. The Board and management of the Agency shall fulfill all responsibilities of any predecessor Board or management appointed under UNMIK Regulation 2002/12, as amended.

The PAK Law replacing KTA by PAK is valid Kosovo Law (Judgment of the Constitutional Court of Kosovo Case No. KL 25/10 of 4 February 2010, Paragraph 55) The Panel as a Kosovar Court holds itself bound by this decision (Art 112.1 Kosovo Constitution).

Law established under authority of the United Nations

Such Law validly vested KTA with the power to represent Kosovo SOE's.

Chapter VII of the United Nations Charter empowers the Security Council of the United Nations to take measures for securing peace. Such measures are valid and enforceable for everybody regardless whether he is member of the United Nations or not, so also for Kosovo. Under the power of Chapter VII the Security Council on 10 June 1999 adopted Resolution 1244 which put Kosovo under the United Nations Interim Administration (UNMIK). UNMIK then started to administer Kosovo by numerous regulations, between others Regulation 2002/12 of 13 June 2002 "On the Establishment of the Kosovo Trust Agency" which invests the KTA with the power and responsibility to administer Kosovo's publicly owned and socially owned enterprises. This implies the power to represent such enterprises.

On 17.02.2008 Kosovo Assembly declared the Independence of Kosovo. This act had not any influence on the validity and applicability of Law based on the power of the United Nations. Such law does not depend on the acceptance of the addressee. All countries, also countries whose independence never was disputed, are subject of United Nations Law. Therefore, the Opinion of the Kosovo Constitutional Court that applying UN Law is conflicting with the alleged independence of Kosovo (Nr 53 of the reasoning of the decision of 4.2.2010 in Case No. KI 25/10 is misunderstanding that UN law under Chapter VII does not depend on acceptance. This Trial panel insofar is not bound by the Constitutional Court's reasoning because the Kosovo Constitutional Court is the final authority only for the interpretation of Kosovo Law, not of the UN Law.

However the applicability of the Regulation 2002/12 of 13 June 2002 has ended although the Regulation and also United Nations Resolution 1244 have no time limit.

Resolution 1244 is not fixing the final Status of Kosovo but only a preliminary status. It is just designed as step in the direction of the final status. The preliminary regulation now lasts since 13 years.

But also on the level of UNMIK the interim administration ended. Instead of continuing to administer Kosovo SOE's there remained just occasional expression of concern and occasional appearance in SCSC.

The last regulatory act of UNMIK was Regulation No. 2008/34 on the promulgation of the Law on the Supplementation and Amendment of the Labor Inspectorate Law Adopted by the Assembly of Kosovo on 14 June 2008.

The Kosovo population needed a secured status of the country and a current administration and legislation. In view of the inability of the Security Council to resolve the provisional status of Kosovo and the omission of UNMIK to administer Kosovo (which would require more than expressing concern and protesting) the acts of Kosovo legislature are now valid even if they conflict with UN Regulations formerly issued by UNMIK.

Therefore the panel holds that the KTA is replaced by the PAK (Article 1 PAK Law)

Although the Appellant in the hearing of 30.8.2012 was not duly represented there cannot be issued a Default Judgment because the Claimant did not apply for a default judgment against the Appellant (Article 52 paragraphs 1 and 2 Annex of the Law No.04/L-033 of the Special Chamber of the Supreme Court of Kosovo an Privatization Agency Matters, in the following: Annex SCL). But there was no reason to postpone the hearing. The court must not extend the procedure if one party is not duly represented and the other party does not request a default Judgment. The court had to issue a Judgment as if there was no default. The appeal had to be dismissed as inadmissible.

Court fees

The court does not assign costs to the Claimant as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph 2 SCL). This means that till now there is no sufficient legal base to impose costs.

Legal Remedy

Against this decision within 21 days an Appeal can be submitted to the Appellate Panel of the Special Chamber. The Appeal shall also be served to the other party and submitted to the Trial Panel **by the Appellant**, all within 21 days. The Appellant shall submit to the Appeals Panel a proof that he has served the Appeal also to the other party.

The prescribed time limit begins at midnight of the day, when the Appellant has been served with the decision in writing.

The Appellate Panel shall reject the Appeal as inadmissible if the Appellant has failed to file it within the prescribed period.

The Respondent may file a response with the Appellate panel within 21 days from the date he was served with the appeal, submitting the response also to the appellant and the other party.

The appellant then has 21 days after being served with the response to its appeal, to submit to the Appellate panel and to serve the other party its own response. The other party then has 21 days after being served with the appellant's response to submit to the Appellant and to the Appellate panel its counter-response.

Alfred Graf von Keyserlingk
Presiding Judge