

DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHITJE 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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6 February 2013

SCC – 11 – 0265

1. N.S., XX
2. M.S., XX
3. E.S., XX
4. B.S., XX

All represented by XX, lawyer from XX

Claimants

vs.

1. **AC XX, XX**, represented by the Privatization Agency of Kosovo, Ilir Konushevci
8, Prishtinë/Priština
2. **Municipality of XX, XX**

Respondents

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 Qerim Fazliji, after deliberation held on 6 February 2013, issues the following

JUDGMENT

The claim is rejected as ungrounded

Procedural and Factual Background

On 6 June 2007 the Claimants, as successors of A.M.S. and B.S., submitted to the Municipal Court Malishevë /Mališevo a claim requesting that they are recognised as owners of certain cadastral parcels registered in Possession List 166, Cadastral Zone Bellanicë/Belanica. The Claimants state that their predecessors were subject to physical and political pressure which resulted in the nationalization of their property. The property is currently registered in the name of the First Respondent, as part of cadastral parcel P-72316002-00024-0, Possession List 124, Cadastral Zone Bellanicë/Belanica. The Claimants state that the property was nationalised without any legal ground in the period 1959-1967 pursuant to Decisions of 27 April 1959 and

28 April 1959 by the Committee of Banja Municipality. They are using the property since 1990 because the First Respondent had abandoned it.

On 21 April 2011 the Municipal Court Malishevë /Mališevo decided the case is not in its competence and forwarded the case file to the Special Chamber.

On 23 November 2011 the Special Chamber decided that the claim against the First Respondent falls under the primary jurisdiction of the Special Chamber and is removed from the Municipal Court to the Special Chamber for adjudication, and for the full and complete adjudication of the case the claim against the Second Respondent will be decided in the same trial.

In defence of 19 June 2012 the Privatization Agency of Kosovo (PAK) on behalf of the First Respondent submitted that the claim should be rejected as ungrounded. The PAK states that the Claimants have failed to present inheritance decision to prove that they are the legal successors entitled to file this claim. The PAK disputes that the property was expropriated illegally. The PAK states that any deficiency in the transaction should have been challenged in accordance with Articles 111 and 117 of the Law on Obligations, which provides for maximum period of 5 years for annulment. On the basis of the above, the PAK argue that the claim is time barred and in the alternative ungrounded.

By order of the Panel of 8 August 2012 PAK was requested to submit an authorization appointing a lawyer who is a member of a bar association or chamber of advocates to represent it before the Special Chamber.

In the hearing of 21 November 2012 the PAK appeared without a registered Lawyer, although it had been warned by court order of 8 August 2012 that it needs to be represented by a registered Lawyer.

Reasons at Law

1.

The allegations of both Respondents are not to be taken into because they were not submitted 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). 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 (Law No03/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. 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, PAKL) because it is issued later and regulates not representation generally, as does the PAKL but specifically representation in front of the SCSC. This also applies to Art29.2 PAKL which regulates the Agency's "Legal standing" to pursue any rights of an enterprise in a competent court on behalf of the enterprise concerned.

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 Annex 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 PAKL) 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 result it may be stated that the Respondents as everybody except for natural persons must be represented before the Special Chamber by a lawyer who is member of a bar association or a chamber of advocates. As both respondents were not represented by a registered Lawyer they have to be regarded as not having appeared in court.

2.

However no default judgement against the Respondents can be issued (Art 52.2 Annex SCL). The facts submitted by the Claimants do not conclusively support the Claim. The Claim is ungrounded.

The challenged two decisions dated 27 April 1959 and 28 April 1959 (only submitted to the Special Chamber at the hearing of 21 November 2012) are rendered by People's Committee of Prizren District pursuant to Law on Authorities and Procedure for Regulation of Occupation of Public Property and the Law on Land Reform and Colonization (DFJ OG 64/1945). The People's Committee decided that certain land occupied by B.B. (relationship with the Claimants not clarified) is public property and therefore he does not have any property rights over such property. The Claimants argue that their predecessors did not "agree" with the nationalisation of their property.

This argument cannot be followed because the property was declared public property by two municipality decisions and not by a contract.

These two decisions became final. According to their legal advice they could have been appealed within 15 days. B.B. did not appeal. The panel considered the allegation of the Claimant, that B.B. in these decisions has been wrongly defined as usurpator, that he felt intimidated and under psychological pressure and that he regarded a claim against these decisions as useless. He may have feared disadvantages and he may have not expected success of an appeal, but that this fear was objectively justified and that it was compelling in a degree which made him unable to form and exert his will is not sufficiently conclusive substantiated in the claimant's allegation. Therefore the decisions of the Municipality remain final. The claim is ungrounded.

Costs

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

Legal Advice

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

[signed]

Internal order

This decision is to be served on the parties (respectively their Lawyers)