

DHOMA E POSAÇME E
GJYKATËS SUPREME TË
KOSOVËS PËR ÇËSHITJE QË
LIDHEN ME AGJENCINË
KOSOVARE TË
MIRËBESIMIT

SPECIAL CHAMBER OF THE
SUPREME COURT OF KOSOVO
ON KOSOVO TRUST AGENCY
RELATED MATTERS

POSEBNA KOMORA
VRHOVNOG SUDA
KOSOVA ZA PITANJA
KOJA SE ODMOSE NA
KOSOVSKU
POVERENIÇKU AGENCIJU

SCC-08-0112

[REDACTED]
[REDACTED], Belgrade, Serbia
Represented [REDACTED], Lipjan/Lipljan)

Claimant

vs.

[REDACTED]
SOE, [REDACTED], Fushë Kosovë/Kosovo Polje
Represented by the **Privatization Agency of Kosovo** as the administrator
of the SOE

Respondent

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber), Trial Panel composed of the Presiding Judge Katerina Entcheva, Judge Norbert Koster and Judge Sabri Halili, after deliberation held on 24 February 2011, issues the following

JUDGMENT

1. The claim of [REDACTED] seeking the recognition of ownership rights over cadastral parcels Nr. [REDACTED] in Llapje Sellë/Laplje Selo and the annulment of land purchase contract Cer. No. 2694/6 (dated 28 October 1963) is hereby rejected as ungrounded.
2. [REDACTED] is obliged to pay the sum of € 5 (five Euro) as Court fees to the Special Chamber.

Factual and procedural background:

On 23 April 2008, the Claimant filed a claim with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber) to certify her as owner of cadastral parcels Nr. [REDACTED] in Llapje Sellë/Laplje Selo. The Claimant requested the Special Chamber to annul the purchase agreement between her and the Respondent, as well as to allow that the same parcels be registered in the cadastral records under her name. The Claimant also requested reimbursement of the procedural expenses.

The Claimant stated that on 28 October 1963 she entered into a forced land purchase agreement with the Respondent. She asserted that the contract is in breach with Art. 103 of the Law on Obligations. In

order to prove the illegality of the purchase agreement the claimant proposed the hearing of the parties and summon of witnesses.

With her claim, the Claimant submitted the following documents in Albanian: power of attorney, notification to the Kosovo Trust Agency (KTA) and a contract passed with [REDACTED].

By order, issued on 28 April 2008 and served on 19 May 2008, the Claimant was requested to provide the Special Chamber with written information within a period of two weeks of having been served with the order regarding the following questions:

- The current cadastral records of parcels [REDACTED] in Llapje Sellë/Laplje Selo,
- Precise details of the evidence which she intends to provide during the hearing of the case to prove her allegations,
- what disposition the Claimant proposes with the offset price paid by Respondent,
- Pursuant to Section 22.7 of UNMIK AD 2006/17 the English translation of all the supporting documents of the claim.

The claimant submitted her response in time on 4 June 2008. She explained that the Directorate of Cadastre refused to give to her the data of the parcels since they were not registered under her name and asked the Special Chamber to request the cadastral records *ex officio*. She proposed summoning of two witnesses in order to prove her allegations and also requested the appointment of a financial expert to calculate the offset price.

On 31 July 2008 the proceedings have been suspended pursuant to UNMIK Executive Decision 2008/34. The suspension was lifted on 16 July 2009.

On the same day, the Special Chamber ordered the claimant to provide written information within a period of two weeks of having been served with the order regarding the following questions:

- The cadastral records of parcels [REDACTED] in Llapje Sellë/Laplje Selo, (if the Claimant is not able to obtain the documents as alleged previously, she has to prove that her request was denied by the Cadastral Office)
- The English translation of:
 - 1) the contract Vr. no.2694/63 dated 28 October 1963,
 - 2) the power of attorney and
 - 3) the notification to the KTA.

On 7 September 2009, the Claimant replied to the order and submitted the requested documents but the cadastral records and the translation into English of the disputed contract.

On 17 December 2009, the Special Chamber served the claim on the respondent [REDACTED] which did not file a defense up to this date although it was duly served with it.

On 6 October 2010 the Special Chamber requested *ex officio* the cadastral records of the disputed parcels but hasn't received an answer.

The same day the Privatization Agency of Kosovo (PAK) was served with the claim.

PAK submitted its defense on 25 October 2010. PAK requested the Special Chamber to reject the claim as ungrounded. PAK argued that the claim is late and the contract cannot be reviewed by the court. PAK also contested the allegations of the Claimant that the contract in fact was concluded under pressure.

On 29 October 2010 the Special Chamber served the defense on the Claimant, no reply was filed.

The Special Chamber held public hearings on 26 January, 10 February and 24 February 2011. The first two hearings had to be postponed due to the lack of proper representation of the Claimant. In the meantime – after several attempts – the Special Chamber managed to acquire the cadastral records of the contested parcels. The Special Chamber concluded that cadastral parcels [REDACTED] and [REDACTED] are in fact in private ownership and only [REDACTED] are still registered under the name of the Respondent.

At the final hearing on 24 February 2011 the Parties upheld their previous statements. New evidence was not submitted to the Court. Claimant slightly amended her claim, now requesting substitute land parcels for those which are in private ownership. The representative of the PAK also stood by his previous submissions and further argued that Art. 8/a of the Law on Transfer of Real Property was adopted in 1992, hence is not applicable pursuant to UNMIK Reg. 1999/24. PAK also pointed out that since Claimant based her claim on the allegation that she was forced to sign the contested contract Art. 103 of the Law on Obligations shall not be applied either. PAK argued that a clear distinction has to be made whether a contract is null and void or nullity can be invoked. As pointed out by PAK in this particular case nullity could have been invoked within one year from the contract pursuant to Art. 117 of the Law on Obligations; conclusively the claim and the right to invoke nullity prescribed.

Legal reasoning:

After the individual and combined evaluation of the presented fact and arguments of the Parties the Special Chamber found the claim of Jorgovanka Tomić-Milosavljević ungrounded.

1.) applicability of the Law on Obligations

Claimant based her claim solely on Art 103 of the Law on Obligations (Official Gazette of SFRY 29/78). Pursuant to Art 532.1 of the Law on Contested Procedure (Law. No. 03/L-006, hereafter LCP) in the ongoing first instance proceedings this present law shall apply. Although Art. 253.1 of the LCP obliges the claimant to indicate the legal basis of the claim Art. 253.2 of the same law declares that the Court is not bound by the legal basis of the claim. Regardless, the Special Chamber clarifies this issue mainly because in this particular case and in several other cases claimants are quoting the jurisdiction of the local courts from the 1990s where property was returned based on Art. 103 of the Law on Obligations. Most of these cases and particularly the one at hand originate from the 1960s. The Law on Obligations, however, entered into force on 1 October 1978. Art. 1106 of this law explicitly states that the provisions will not be applied to obligations created prior to the time when the law entered into force which is 1 October 1978 (Article 1109 of the Law on Obligations). Conclusively there is no legal possibility to return property and/or annul a contract based on the Law on Obligations when such contract is dated prior to 1 October 1978.

As a consequence the claim is ungrounded for this reason.

2.) Invalidating a contract

The panel underlines that even in the event of the Law on Obligations being applicable the claim would not be grounded either. Based upon the reasoning of the claim Article 103 of the Law on Obligations would not be applicable. Article 103 requires that a contract was made contrary to coercive regulations, public order or good business practices. This, however, is not what the Claimant alleges. According to her claim she was threatened and entered into the contract under the influence of this threat. Such situation falls under the provision of Article 60 of the Law on Obligations which reads:

Threat

- (1) *If a contracting or a third party caused justified fear to the other party by an illicit threat so that he/she concluded the contract out of fear,*
- (2) *Fear is considered justified if it is obvious from the circumstances that life, body or other significant assets of the contracting party or third entity is in serious danger.*

The distinction between these two provisions – Article 103 on the one hand and Article 60 on the other hand – is of crucial importance, because the legal consequences of these two provisions are fundamentally different. Hence the structure, the legal grounds and the terminology regarding the invalidation of a contract have to be made clear.

First of all, invalidation is the general term which is a procedural act; it defines the claims whereby claimants are seeking the possibility to get out of a contractual obligation claiming that the contract is deficient. The aim is to get the contract declared invalid and hence without legal effect.

In this context “invalid” is a general term. Within that category the material law, namely the Law on Obligations, distinguishes between two different legal concepts: *nullity* and *contestability* (in the English translation of the Law on Obligations called “relatively void contracts”). The dogmatic difference between these categories is that in case of nullity the state (legislator) directly intervenes in the contractual autonomy of the parties, whereas in case of contestability this intervention is only conditional and dependent on the will of a contracting party to contest the validity of the contract.

Nullity is an objective category, meaning that it is not depending on the discretion of the parties and/or the court. Nullity is unconditional – *ipso iure* – and the examination of the circumstances is not necessary (it is indifferent what was the aim of the contracting parties). The Court *ex officio* considers the possibility of nullity; there is no statutory limitation as the right to invoke nullity cannot be terminated (Articles 109 and 110 of the Law on Obligations). In case of nullity the contract seems as if it has never existed (*ex tunc*). In order to avoid confusion regarding the nullity of a contract/obligation the legislator regulates it by explicitly stating that if a contract is in breach of certain principles it is “null and void”. The most common cases of nullity are the following: impossible, illicit or undetermined object; incapacity of the contracting party (e.g. mentally ill, can be invoked only in the interest of such person); contracts made under physical coercion (only promulgated by Art. 8/a of the Law on Transfer of Real Property in 1992).

Contestability on the other hand is a subjective category, meaning that the allegations of the parties have to be proven (contractual circumstances). Contestability is conditional; only those whose rights are directly affected can invoke it within the time limit prescribed by law. When the court invalidates a contract based on the contestability it terminates the contract only, meaning that it has no further effects (*ex nunc*), and parties have to explicitly claim *in integrum restitutio*. The statutory time limit is usually

one year from the date of the contract and/or from the time when the contestability was or should have reasonably been realized (Article 117 of the Law on Obligations). The most common cases of contestability are threat (Article 60) and significant mistake (Article 61).

In the case at hand the Claimant referred to the principle of nullity of a contract. She asserted that she was threatened by the administration and the Respondent; consequently the contract shall in her opinion be null and void. From the above, however, it is evident that the Claimant mistakenly used the argument of nullity. Throughout the whole proceedings she never alleged that she was physically coerced. Her allegations only refer to threats which results in the application of Article 60.1 rather than Article 103. Hence based upon the above the contract is not null and void. The rights of the Claimant are limited to requesting the annulment of the contract which might be relatively void.

This request, however, would not be grounded for two reasons.

Firstly, her description of facts regarding the alleged threat is neither concrete nor specified and does not allow the Court an assessment whether this threat was serious enough to fulfil the requirements of Article 60 of the Law on Obligations.

Secondly, even if the description of facts was to be seen as sufficient, the Claimant is legally not allowed to request the annulment of the contract due to the elapse of time.

As indicated above, contestability is subject to statutory limitation. The general statutory time limit is 10 years pursuant to Article 379.1 of the Law on Obligations, meaning that after ten years any claim is ungrounded due to the elapse of time. A more specific time limit for contestability is stipulated in Article 117 of the Law on Obligations. According to Paragraph 1 of this Article the right to request invalidation of a relatively void contract shall cease within one year from the disclosure of the reason for the relative invalidation and pursuant to Paragraph 2 in any event after three years from the day of concluding the contract. It is evident that all these periods of time have elapsed long time ago. Conclusively the Claimant has lost her right to challenge the land purchase contract Cer. No. 2694/6 (dated 28 October 1963) even if the court would have considered the argument – which was not raised by the Claimant – that during the oppressive regime of Yugoslavia her access to court was limited if not denied.

3.) restitution and/or compensation

Concluding the above there is currently no option for the Court or any other authority in the territory of Kosovo allowing a decision sought by the Claimant. Without contesting the validity of the allegations of the Claimant (and people in similar situations) it needs to be pointed out that the courts and other authorities would require a legal basis to enter into these arguments on a general or individual level. Such law does currently not exist. To that regard it is up to the legislator to follow Martti Ahtisaari's Comprehensive Proposal for Kosovo Status Settlement - according to Article 143 of the Constitution of Kosovo directly applicable and even superseding the Constitution itself - which explicitly names the requirement that the property restitution shall be addressed. Until a general law governing the issues of property restitution is passed there is no legal ground to grant claims such as the Claimant's.

Court fees:

In accordance with Section 11 of UNMIK Regulation 2008/4 and Section 56.2 of UNMIK Administrative Direction 2008/6 costs of the proceedings shall be borne by the unsuccessful party, here the Claimant.

Pursuant to Section 10 of Kosovo Judicial Council Administrative Direction No. 2008/02 read with Additional Procedural Rules regarding court fees established by the President of the Special Chamber, the Chamber's fees are on the following basis:

- For claims not exceeding the amount of € 1,000 (Article 10.1): a fee of € 15;
- For the issuance of the Judgment (Article 10.12): is the same; a fee of € 15.

Therefore, the amount of the Court fees is 30 €. The Claimant has already paid the sum of 25 €; thus the Claimant shall pay the Special Chamber an additional the sum of 5 €.

The Respondent did not present any request for reimbursement of its own costs of the proceedings and since the Respondent is represented by its own lawyer the Respondent is not entitled to receive reimbursement for reasonable attorney's fees.

Legal advice

Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this judgment can be submitted in writing to the Appellate Panel of the Special Chamber within thirty (30) days from the receipt of this judgment.

Katerina Entcheva, Presiding Judge
EULEX

Norbert Koster, Judge
EULEX

Sabri Halili, Judge

Tobias Lapke, Registrar
EULEX
