**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of October 24, 2011 to the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of I.Shabanova*

**27 August, 2012 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Fikrat Babayev, Rovshan Ismaylov, Jeyhun Garajayev (reporter judge), Isa Najafov and Kamran Shafiyev,

with participation of the court clerk I.Ismayilov,

applicant – Rasim Huseynov and his representative Irada Shabanova,

representative of respondent party – Elkhan Kazimov, Head of the Secretariat of the Supreme Court of the Republic of Azerbaijan,

in accordance with V part of the Article 130 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the constitutional case on verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of October 24, 2011 to the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of I.Shabanova.

Having considered the report of Judge J.Garajayev, speeches of representatives of the applicant and respondent body, having considered and discussed materials of the case, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By the decision of the of Narimanov District Court of Baku city of February 16, 2010, the claim of I. Shabanova against Regional Department of State Service for Registration of Real Estate of Baku city under the State Property Committee of the Republic of Azerbaijan (hereinafter referred to as the Regional Department of State Service for Registration of Real Estate of Baku city) and third party N.Eyyubova, was sustained and it was decided to consider the letter of exemption No. 03/283/Ş-3 of October 7, 2010 of the Regional Department of State Service for Registration of Real Estate of Baku city as invalid and to register her property rights on the non-residential area with 1010,2 m2 total area in the land are of 0,06 ha at the address of Stansiya street 9, Sabunchu settlement, Sabunchu district, Baku in the state registration of real estate and to assign to the Regional Department of State Service for Registration of Real Estate of Baku city the tasks on the issuance of the relevant extract about that.

The decision of the Narimanov District Court was executed, property rights of I.Shabanova on non-residential area were registered in the state registration of real estate by the Regional Department of State Service for Registration of Real Estate of Baku city and a relevant extract was issued to her in this regard.

After that, "Kamilla" Limited Liability Company (hereinafter referred to as "Kamilla" LLC) lodged an appeal against the decision of Narimanov District Court based on the fact that the mentioned decision affects its legitimate interests.

By the decision of the Civil Board of Court of Appeal of Baku city (hereinafter referred to as CB of Court of Appeal of Baku city) of April 20, 2011, an appeal of "Kamilla" LLC was sustained, the decision of the Narimanov District Court was canceled and withdrawn from execution, the cancellation of registration of property rights of I.Shabanova in the State Registration of Real Estate on non-residential-area and the relevant extract was decided and the execution of the decision was assigned to the Regional Department of State Service for Registration of Real Estate of Baku city.

By the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as CB of the Supreme Court) of October 24, 2011, the cassation appeal of I.Shabanova was dissatisfied and the decision of CB of Baku Court of Appeal was upheld.

By the ruling of the Supreme Court of the Republic of Azerbaijan of January 17, 2012, an additional cassation appeal of I.Shabanova was not examined by Plenum of the Supreme Court.

The applicant I.Shabanova in the appeal to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) requested to verify the conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of October 24, 2011 with the Constitution (hereinafter -Constitution) and laws of the Republic of Azerbaijan.

I.Shabanova justified her appeal by that at involving of "Kamilla" LLC in the case as an interested party, the Articles 357.2, 363.1.1, 366 and 385.2 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) were not applied properly and as a result, provision of her judicial protection enshrined in Article 60 of the Constitution was violated.

The Plenum of the Constitutional Court, it is necessary to note the following in connection with the complaint.

According to Article 60.1 of the Constitution, legal protection of rights and freedoms of every citizen is ensured. According to legal position formed by the Plenum of the Constitutional Court in this regard, the right for legal protection, being in number of basic rights and freedoms of the person and citizen, also acts as a guarantee of other rights and freedoms enshrined in the Constitution. The specified right is not limited only by an appeal to the court, but it also provides the justice capable effectively restore the violated rights and freedoms (decision of Plenum of the Constitutional Court of December 5, 2011 "On verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of October 4, 2010 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of T.Mansurov".)

Plenum of the Constitutional Court also considers that it is important to note that Article 60 of the Constitution provides the rights and freedoms of everyone, as well as includes the proper examination of the rules of procedure of the consideration of appeal (complaint) in the courts. For this purpose, in order to provide fair and legal judicial acts on the legislative civil cases, CPC which is an important and a major source of the legislation on the civil proceedings sets the rights and duties of the participants of the court, persons participating in the case and the other participants of the process and regulates the rules of procedure in the civil proceedings. The Code determines the general rules of civil proceedings, including the principles and the terms and conditions of the proceeding, as well as regulates the implementation of civil proceedings by the courts of general jurisdiction, the adoption of judicial acts by complying with the rules directed to the fair solution of the case eventually and the rules of lodging an appeal against them and the examination of that appeals.

The norms of the CPC determine the progress of civil proceedings, and implementation of the relevant acts by each participant of the civil procedure relations and the possibilities of them.

In the Article 357 of the CPC indicated the scope of the subjects that are entitled to lodge and appeal against the resolutions and decisions adopted by the Court of first instance. At the same time the submission of appeal complaint by the persons participating in case (the claimant, the defendant, the third parties, applicants and persons interested in cases of special proceeding), and also other persons not involved in a case but whose rights and duties are affected by the adopted decision is provided.

According to the first sentence of Article 357.2 of the CPC, other persons not involved in a case but whose rights and duties affected by decision are entitled to lodge an appeal.

It should be noted, that the terms and conditions on appeal defined in the Articles 361, 363 and 366 of the CPC (along with the terms and conditions on the legal basis of the claim and the complaint) directed at the investigation of whether the complaint was lodged by the person having the relevant subjective right or not.

According to the legal position formed by the Plenum of the Constitutional Court, the court examining the case for the legal solution of the civil disputes, as well as the Court of appeal as a fully-fledged court should firstly investigate whether the person who filed a claim has a relevant subjective right.

In subjective meaning, the law expresses the external freedom determined by the normative-legal acts. The opportunity to determine the purposes consciously by choosing of methods of the behavior of the individual and to act in accordance with them is the internal aspect of this freedom. This feature is not covered by the legal regulation. The external feature of the freedom which is accepted as the opportunity to express its purpose in public relations is more important.

The second (external) feature is expressed, as demonstration of legal will. Thus, the subjective right can be estimated as set of three elements: legal will to the actions; the right to demand from other persons (debtors); right for protection. The second and third elements of the subjective right are connected with existence of the first element. The first element sometimes arises only at observance of the rule established by the law. Without observance of similar rules concerning emergence and implementation of other elements of the subjective right, that is the right of the demand from others and the right for protection is out of the question (decision of Plenum of the Constitutional Court of July 30, 2008 in connection with the complaint of M.Baghirov)

Along with that, it should be taken into consideration that the person who has such rights should ground the arguments restricting his rights or imposing a responsibility to him by the disputed decision of the court of first instance.

It should be noted, that Chapter 27 of the CPC implies the interested person as the ones participating in relevant cases on special claim proceedings. Thus, the interested person may commence a dispute concerning decisions and action (inaction) of relevant bodies of executive authority and local self-regulating bodies, other bodies and organizations, and their officials and to address to court with petition within 1 month of date then he was informed concerning violation of his rights and freedoms (Articles 296 and 298 of the CPC).

In such cases a legislative body determined the interested person as the one who considers that his/her rights and freedoms have been violated and prevented from realization by the mentioned institutions and organizations by action (inaction) of their officials and such interested person was illegally imposed with responsibility or was brought to responsibility and therefore challenged through legal proceeding. In this case participation of interested person in the case is important.

As can be seen, recognition of "Kamilla" LLC as an interested person and involvement in the case by the CB of the Court of Appeal of Baku city does not match with the provisions regulating the legal status of these persons stipulated in the civil procedure legislation.

Along with it provisions of the Articles 357.2, 361, 363 and 366 of the CPC demand to study whether "Kamilla" LLC before it has been recognized by court of appeal instance as other person that is not involved in case but the right and duties of which are affected by the adopted decision, has the subjective right to set up a relevant claim.

In order to avoid the illegal and unreasonable court decisions remaining in force, civil procedure legislation of the Republic of Azerbaijan, within the judicial system determined the authorities, rights and duties of different court instances by taking into consideration the necessary legal mechanism.

According to Articles 14.2, 217.4, 218.1 and 220.4 of the CPC, during the court examination for the legal and reasonable solution of any disputes, the court after objective, impartial, thorough and complete examination of proofs should assess them based on the legal norms to be applied. The decision of court should be legal and reasonable. At making a decision the judge estimating proofs, defines which circumstances representing the importance for case are revealed, in what legal relations there are parties, which law should be applied on this case and whether the claim has been provided or not. In the reasoning part of the decision, the facts of the case established by court, ground by court the proof based on the circumstances of a matter and arguments of court for a deviation or other proofs, laws and legal acts to which refers the persons participating in a court session and also laws and regulatory legal acts by which the court is guided at making decision shall be specified.

According to Articles 77 and 88 of the CPC, each party should prove circumstances used as grounds for its claims and objections and the court should evaluate evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence.

In the decision of Plenum of the Constitutional Court of May 20, 2011 on the limits of the verification of the legality and validity of the court acts it was stated that the Constitution of the Republic of Azerbaijan fixed the principles reflecting nature and essence of democratic state and providing guarantee of human and civil rights and freedoms. On the basis of principles fixed in the Constitution basic rights of participants of the civil procedure were reflected in basic principles of civil justice which have decisive importance for the whole civil justice including appeal justice and provide effective exercise of these rights.

The European Court of Human Rights (hereinafter referred to as the European Court) accepts the failure to comply with the substantiality requirement set forth for the court acts by the courts as the violation of the right to a fair trial and expressed its legal positions on this in its numerous decisions.

In the decision of the European Court it was stated that, failure to comply with the requirements to justify their decisions by national courts results in the failure to prove the hearing of the positions of the parties with observance of the principle of equality during the fair trial (decision of January 21, 2007 on the case *Kuznetsov and others vs. Russian Federation*).

As can be seen from the materials of civil case, I.Shabanova sent her protest on appeal to the court and in the claim it was stated that the disputes between her and "Kamilla" LLC were already settled by courts, and there is the decision of the Administrative Economic Board of the Supreme Court of the Republic of Azerbaijan of September, 2010 entered into legal force. Thus, that decision determined that "Kamilla" LLC does not have rights on the disputable land area that is the basis of its involvement as an interested party on the current case.

Plenum of the Constitutional Court notes that, the doctrine of a constitutional right recognizes the principle of legal certainty as one of the basic elements of rule of law that found the reflection in a preamble of the Constitution of the Republic of Azerbaijan. The principle of legal certainty, along with other requirements, provides clarity and definiteness concerning existing legal situation in the most general sense. From this point of view, all necessary issues on the case resolved in the decisions adopted by courts it has to be cleared up, the contradictory moments have to be eliminated. In the judicial acts adopted on behalf of the Republic of Azerbaijan there should not be provisions calling into question the fair solution of case, making a contradiction and influencing the right of constitutional and legal protection of participants on dispute (decision of Plenum of Constitutional Court dated June 13, 2008 in connection with the complaint of N.Abilov)

The court of appeal instance did not give a legal treatment to protest submitted by I.Shabanova and the arguments on the impossibility of involvement of "Kamilla" LLC in the case as an interested party and by that did not comply with the provisions of Articles 14.1, 88, 217.1 and 218.1 of the CPC.

According to civil procedural legislation, the court of cassation verifies correct application by court of appeal instance of material and procedural norms of law. At examination of case, the court of cassation may partially or completely reverse a decision or ruling of court of appeal instance and send case to court of appeal instance for reconsideration. Violation or incorrect application of material and procedural norms of law is a ground for nullification and/or change of decision or ruling of court of appeal instance (Articles 416, 417.1.3 and 418.1 of the CPC).

However, the CB of the Supreme Court by not following the requirements of Articles 416, 417 and 418 of the CPC did not sufficiently investigate the violation of the above-mentioned procedural legal regulations by the court of appeal instance and by upholding of the decision of the court of April 20, 2011 by the decision of October 24, 2011, violated the rights to effectively restoration of rights on the basis of fair trial by the independent court which is one of the important elements of the judicial guarantee for human rights and freedoms of I.Shabanova fixed in Article 60.1 of the Constitution.

According to the above, the Plenum of the Constitutional Court comes to conclusion that the decision of CB of the Supreme Court of October 24, 2011 should be considered as invalid because of contradiction with the Article 60.1 of the Constitution and Articles 416, 417.1.3, 418.1 of the CPC and according to given Decision the case should be reconsidered in the order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize as null and void the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of October 24, 2011 on the civil case of Irada Shabanova (claimant) against Regional Department of State Service for Registration of Real Estate of Baku city under the State Committee for Property Affairs of the Republic of Azerbaijan and N.Eyyubova (third party) for illegal actions of officials, due to its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan and the Articles 416, 417.1.3, 418.1 of the Civil Procedure Code of the Republic of Azerbaijan. To reconsider the case according to this Decision, in order and terms established by civil procedure legislation of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.