**THE COURT OF APPEALS**
**Case: AC.nr.5147/2012**
**Date: 30th May 2013**

**THE COURT OF APPEALS** in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, the Kosovo Judge MEDIHA JUSUFI and the Kosovo Judge KUJTIM PASULI, as panel members;

In the civil case of the claimant BZ from Prishtinë/Priština, represented by Lawyer XM and Lawyer EA from Prishtinë/Priština, and the claimant GZ formerly from Prishtinë/Priština, currently residing in Poland, represented by Lawyer XM from Prishtinë/Priština, against the respondent RZ from Prishtinë/Priština, represented by Lawyer AV from Prishtinë/Priština, for the confirmation of co-ownership right over immovable property with revendication of the co-owned ideal parts;

Having received the appeal of RZ, respondent in the first instance and appellant in the second instance proceedings, filed against judgment C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011;

After deliberation and voting in a panel session held in accordance with Article 190, paragraph 1, first hypothesis in conjunction with Article 4, paragraph 3 of the Law No 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No 38/08), amended and supplemented by Law No 04/L-118 (Official Gazette of the Republic of Kosovo No. 28/12) (hereinafter "LCP") on 30th May 2013;

Hereby pursuant to Article 195, paragraph 1, item c) LCP issues the following

# RULING

The appeal of the respondent RZ from Prishtinë/Priština, filed on 6th April 2011, is hereby **APPROVED** as **GROUNDED** and judgment C.nr.82/2009 of the Municipal Court of LIPJAN/LIPLJAN, dated 10th February 2011 is **ANULLED** with remittal of the case to the first instance court for retrial.

# REASONING

## I. PROCEDURAL BACKGROUND

**1.** By judgment C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 it was approved the claim of the claimants BZ and GZ against the respondent RZ - it was confirmed that the claimants are co-owners of 1/3 ideal part each of a building: hotel administration premises, called "Galla Centre" P+2, built under construction permit issued by Decision Nr. 9-351-204 of the Municipality of Lipjan/Lipljan, dated 26th September 2005, situated in cadastral parcel nr.P-71409016 -00003-4, with a surface of 4 051 $m^2$, and cadastral parcel nr.P-71409016-00078-2, with a surface of 1 569 $m^2$, both located at the place called "Gllozhnje", registered in Possession List nr.251, Cadastral Zone (CZ) Vrellë e Goleshit, and the respondent was obliged to hand over to the claimants as co-owners the possession over this building according to their ideal parts within 15 days after the service of the judgment. The respondent was also ordered to reimburse to each one of the claimants procedural costs in the amount of 390 Euros, as well as to pay court fee in the amount of 500 Euros to the Municipal Court of Lipjan/Lipljan.

**2.** On 23rd March 2011, the judgment above was notified to all parties pursuant to Article 110, paragraph 1, first sentence LCP through service of its copies personally to each one of the litigants and/or to their respective authorized representatives.

**3.** On 24th March 2011, Lawyer AV filed pursuant to Article 165, paragraph 2 LCP on behalf of the respondent RZ a request for correction of the enacting clause of the judgment as per the 15-days time period after its service prescribed to him for handing over to the claimants BZ and GZ the possession of the respective ideal parts, considering that its initial moment should run from the date when the judgment would become final. This motion was rejected by ruling C.nr.82/09 of the Municipal Court of Lipjan/Lipljan, dated 24th March 2011, with reference to the initial moment of the time period for voluntary fulfillment set by Article 146, paragraphs 2 and 3 LCP, and hence, for the lack of error in the judgment that could be corrected pursuant to Article

165, paragraph 1 LCP. This ruling, being notified to the parties, was not appealed and entered into force.

**4.** On 6th April 2011, Lawyer AV filed on behalf of the respondent RZ an appeal against judgment C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 challenging it entirely on the grounds of: 1) substantial violations of the provisions of the contested procedure - Article 181, paragraph 1, item a) LCP; 2) incomplete and erroneous determination of the factual state - Article 181, paragraph 1, item b) LCP; 3) erroneous application of the substantive law - Article 181, paragraph 1, item c) LCP. The concrete grounds will be presented on their systematic place in the appellate review. The request to the second instance court is to annul the judgment as unlawfully rendered with rejection of the statement of the claim as unfounded or with remittal of the case to the first instance court for re-adjudication.

**5.** As required by Article 187, paragraph 1 LCP, copies of this appeal were served for reply within 7 days to the appellates - on 12th April 2011 to GZ, and on 18th April 2011 to BZ through Lawyer XM.

**6.** On 15th May 2011, within the legal deadline under Article 187, paragraph 1 LCP, a reply to the appeal was filed on behalf of BZ, claimant in the first instance and now appellate in the second instance, by Lawyer EA from Prishtinë/Priština, acting as his newly authorized representative based on a power of attorney issued on 12th April 2011. The position expressed is that the judgment under appeal does not contain essential procedural violations, correctly determines the facts relevant in the dispute and applies non-erroneously the substantive law provisions. Copy of this reply to the appeal was served to the appellant as required by Article 187, paragraph 2 LCP, who opposed to it by a submission of Lawyer AV, dated 14th June 2011.

**7.** Till the expiry of the legal deadline under Article 187, paragraph 1 LCP on 19th April 2011, no reply to the appeal was submitted by GZ as claimant in the first instance and appellate in the second instance.

**8.** Pursuant to Article 188, paragraph 1 LCP on 24th May 2011 the appeal, the reply to it with the case file were sent by the Municipal Court of Lipjan/Lipljan to the District Court of Prishtinë/Priština and registered for adjudication as AC.nr.434/11.

**9.** By Decision ref.nr.JC/EJU/OPEJ/0159/ff/12 of the President of the Assembly of EULEX Judges pursuant to Article 5, paragraph 1 of the Law No.03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Official Gazette of the Republic of Kosovo No.27/08) this second instance civil case was taken over in the EULEX executive mandate and initially assigned to a mixed panel of the District Court of Prishtinë/Priština, composed according to Article 5, paragraphs 2 and 4 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of two EULEX Judges, one of them Presiding, and one Kosovo Judge as a member of the panel.

**10.** AC.nr.434/11 of the District Court of District Court of Prishtinë/Priština as non-completed on 31st December 2012, pursuant to the transitional rule of Article 39, paragraph 1 of the Law No. 03/L-199 on Courts (Official Gazette of the Republic of Kosovo No 49/11) on 1st January 2013 became *ex lege* a case of the Court of Appeals and was accordingly re-registered under a new file number – AC.nr.5147/12.

**11.** By Decision ref.nr.2013.OPEJ.0166-001 of the President of the Assembly of EULEX Judges, dated 4th April 2013 the majority under Article 5, paragraph 2 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of two EULEX Judge was derogated pursuant to Article 5, paragraph 5 of the same law with re-assignment of the case according to Article 4, paragraph 6 of the Guidelines for Case Selection and Case Allocation for EULEX Judges in Civil Cases, as last amended on 11th December 2012, to the current Presiding EULEX Civil Judge and two local judges – members to be appointed by the President of the Court of Appeals (letter AGJ. I.nr.115/13, dated 10th April 2013).

**12.** Being legally composed in conformity with the specific requirements of Article 5, paragraphs 1, 4, and 5 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, this panel of the

Court of Appeals is empowered to decide AC.nr.5147/12 based on its general second instance competence in civil cases under Article 15, paragraph 2 LCP and Article 18, paragraph 1, sub-paragraph 1 of the Law No.03/L-199 on Courts.

## II. ADMISSIBILITY OF THE APPEAL AND THE SECOND INSTANCE PROCEDURE

**13.** No procedural impediments exist for adjudication of the appeal. *At first place*, its submission is not prohibited but explicitly foreseen by Article 176, paragraph 1, first sentence LCP. *At second place*, the appeal is not belated according to Article 186, paragraph 2 LCP. Judgment C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 was served to RZ on 23rd March 2011. His appeal against it was submitted on 6th April 2011, before the expiry of 15-days time period, prescribed by Article 176, paragraph 1, first sentence LCP on 7th April 2011. *At third place,* the appeal is not impermissible under Article 186, paragraph 3 LCP – it is filed by Lawyer AV duly authorized by RZ by power of attorney, dated 11th May 2009. The appellant being a party in the first instance has the procedural right and also the legal interest to lodge this appeal. No renouncement or withdrawal has been declared by him. *At fourth place*, the appeal has the requisites demanded by Article 178, items a) – d) LCP; its content is not incomplete as per Article 179, paragraph 1 LCP. There are no legal grounds excluding the admissibility of the appeal and/or of the second instance procedure under Article 176 - 205 LCP.

## III. APPELLATE REWIEW ACCORDING TO ARTICLE 194 LCP

**14.** According to Article 194 LCP the court of second instance shall examine the challenged judgment on the grounds indicated in the appeal, as well as *ex officio* for violation(s) of the substantive law and/or the provisions of contested procedure under Article 182 paragraph 2, items b), g), j), k) and m) LCP.

### *Substantial violations of the provisions of the contested procedure - Article 182 LCP*

**15.** The first procedural ground invoked in the appeal is related to *infringements of Article 7, paragraph 3, Article 426, Article 433, paragraph 5, Article 182, paragraph 2, item i) LCP.* The appellant avers that the trial sessions were held by the Municipal

Court of Lipjan/Lipljan in a heavy and tense environment with unseen anarchy - the claimants behaved aggressively, interrupted systematically his own statements and the ones of his authorized representative with accusations, insults and threats, which were tolerated by the first instance judge instead of being prevented or sanctioned. Quoted in the appeal are concrete intimidating phrases, allegedly pronounced by the claimants in the last session. In general, the appellant complains that the main hearing was not conducted in the proper order required by Article 426, paragraph 1 LCP, as the first instance court failed to maintain it, contrary to Article 426, paragraph 2 LCP and did not take the actions necessary against the persons disturbing it according to Article 426, paragraph 3 LCP, as prescribed by the provisions of Chapter XX "Disrespect of the Court" LCP. In particular, the claimants were not warned not to obstruct the judicial work pursuant to Article 289, paragraph 2, first instance LCP, nor were they fined pursuant to Article 289, paragraph 2, second instance LCP. Consequent to this, there were no normal conditions to hold the sessions and in their course lacked the free working atmosphere, requisite for a proper judicial process. It is the stance of the appellant that this procedural disorder affected his free expression, and hindered the statements of his authorized representative – thus, contrary to Article 7, paragraph 3 LCP, he was not given in real the opportunity to declare on the facts and evidence presented by the opposing parties in these sessions.

**16.** C.nr.82/09 of the Municipal Court of Lipjan/Lipljan was initiated by a claim of the claimants BZ and GZ filed with documentary evidence in its support on 12th March 2009. After being served to the respondent RZ on 18th April 2009, he filed his reply on 8th May 2009 with addendum on 14th May 2009 and attached documentary evidence. All parties and their representatives were present in the six public hearings held in the first instance trial on 28th May 2009, 10th July 2009 and 30th July 2009, 11th January 2011, 26th January 2011, and 10th February 2011. All of them participated in these sessions, recorded in minutes amounting to 103 pages in total. The minutes are duly signed according to Article 139, paragraph 1 LCP without any objections made for irregularities in their content pursuant to Article 138, paragraph 3, second sentence LCP, *inter alia,* related to non-recorded intrusions or interruptions by

the claimants in statements of the respondent and/or his authorized representative. All parties were heard according to Article 373 LCP; all of them filed numerous written submissions to the court. Their closing statements apart from being pronounced as final speeches in the last session on 10th February 2011 were presented also in writing to the case. It is true that in the hearings on 26th January 2011, and 10th February 2011 there were conflict episodes recorded, mirroring the worsened relations of the brothers – litigants in the case. However, the first instance court had managed to overcome these critical moments with neutrality, choosing to gradually normalize the trial instead of imposing procedural sanctions that would escalate additionally the atmosphere in the courtroom. Even if the proper order during these parts of the last two sessions was not maintained, *this procedural violation* of Article 426, Article 433, paragraph 5 and Article 289, paragraph 2 LCP is not *substantial* in the terms of Article 182, paragraph 1 LCP as it did not affect the judgment. *Firstly,* these conflict moments were isolated and did not at all characterize the overall first instance trial; *secondly,* this temporary disorder had been overcome and the sessions were further conducted and finalized; *thirdly,* all parties were given in the first instance unlimited opportunity to present in writing their positions on all factual and legal aspects of the dispute. As for Article 182, paragraph 2, item i) LCP – RZ was regularly notified as respondent for the hearings on 28th May 2009, 10th July 2009 and 30th July 2009, 11th January 2011, 26th January 2011, and 10th February 2011 and was present at all of them with Lawyer AV. Thus as litigant, he was *granted*, not *denied* the opportunity to attend all these hearings, which makes Article 182, paragraph 2, item i) LCP non-applicable.

**17.** The second procedural ground invoked in the appeal is for violations *of Article 2, paragraph 1, Article 257, paragraph 1, Article 258, paragraph 1 and Article 143, paragraph 1 LCP.* Here the appellant points out that up to date with no actions of the claimants and no documents of theirs, starting from the claim and its *petitum* to the closing statements of their representatives, through a word or letter was mentioned Article 25 of the Law on Basic Property Relations (Official Gazette of the SFRY No. 6/80 with amendments and supplements in Official Gazette of the SFRY No. 29/90

and Official Gazette of the SRY No.26/96) ("LBPR") and the request for confirmation of ownership based on *construction on somebody else's land*. The first instance court *ex officio* on its initiative has tacitly changed the claim directly with the judgment for its approval. In this regard recalled in the appeal are the requirements for *amendment of the claim* under Article 257, paragraph 1 LCP, as being admissible upon *request* of the claimants made in the deadline under Article 258, paragraph 1 LCP, *consented* by the respondent after its expiry according to Article 258, paragraph 2 LCP, and *allowed* by the court according to Article 258, paragraphs 4 or 5 LCP. Recalled in the appeal is also Article 2, paragraph 1 LCP which states that the court adjudicating in contested procedure *shall decide within the scope of the claims submitted by the parties to the litigation*. The appellant's stance is that in violation of these procedural provisions by the appealed judgment the first instance court has changed *ex officio* the claim in the case and has decided this changed claim, fully granting it, though the claimants had never submitted it and had not even mentioned it in the course of the proceedings.

**18.** This ground of the appeal is sustained. *At first place*, the claim in C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan of the claimants BZ and GZ against the respondent RZ, as initially filed on 12th March 2009 in the written form prescribed by Article 252 LCP in its title self-identifies its subject – matter as "*confirmation of the co-ownership over the immovable property (building built by joint contribution, co-possession and joint use in ideal parts of 1/3 each)*". The main facts on which the claim is based as per Article 253, paragraph 1, item b) LCP as alleged in its text are the following: the parties are family related – brothers who economized together in their household and business. In 1990 they separated from the rest of their brothers, but continued to live in one household during their education; afterwards the three of them moved from Pejë/Peć to Prishtinë/Priština and established joint family business by registering as their private firms "RGB" (1989), "STX" (1989) and "R-G" (1993). Based on a purchase contract Vr.nr.2959/03 and a compensation agreement reached with UNMIK and the Kosovo Trust Agency in 2005, the three brothers became co-owners of the cadastral parcels, registered in Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo. Following their *verbal agreement, with their joint*

*contribution they started as joint investment* to build the administrative–business complex AC "R-G" on two of these cadastral parcels - nr.3/4 and nr.78/2. The construction and urban permits were issued in the name of RZ as he requested them in 2005. Otherwise, BZ, GZ and RZ by *joint construction and investment* in 4 years managed *to build* this business complex on their joint land. To realize the project, BZ and RZ took a joint loan from "ProCredit Bank" in the amount of 707 766.69 Euros, against mortgage on the land. Summarized, the facts reiterated several times in the claim are that: *the building was constructed on co-owned land based on mutual agreement of the brothers through joint construction and joint investment of the three of them.* This is the *factual basis* of the claim as per Article 253, paragraph 1, item b) LCP which determines the subject-matter of the case and *binds* the court to resolve the dispute within its limits. As per the statement of the claim under Article 253, paragraph 1, item a) LCP, it literally requests the court based on Articles 13 and 14 LBPR to: 1) to confirm that the claimants are co-owners of the building and the immovable property in ideal parts of 1/3 each (or surface to be exactly determined by expertise); 2) the respondent to be obliged to recognize these rights of the claimants by handing over their ideal parts or the parts to be determined by an expertise in unobstructed possession and use. As the claim is integrity, formed of *its ground as facts alleged by the claimants* - Article 253, paragraph 1, item b) LCP, and *its petitum as their request to the court for the legal protection sought* - Article 253, paragraph 1, item b) LCP, the dispute here is *revendication of co-owned ideal parts in immovable property*. It has two elements: 1) *confirmation* of the co-ownership of the claimants over 1/3 ideal part in the building as *joint immovable property acquired in their family community with the respondent through participation in its joint construction* - Article 326 of the Law on Marriage and Family Relations (Official Gazette of SAPK No. 10/84) (applied from 1st September 1984 till 16th February 2007) and Article 272 of the Family Law of Kosovo (Law No. 2004/32) (applicable after its promulgation by UNMIK/REG/2006/7 on 6th February 2007); 2) *handing over the possession* of these ideal parts. As per the *construction on somebody else's land* under Article 25 LBPR as one of the grounds for acquiring ownership *by law itself*, it is not included in the

claim with direct numerical reference to Article 25 LBPR, nor textually by the legal name of this acquisitive mode and/or the facts, essential for its application. *At second place*, Article 25 LBPR was not introduced as a ground of the claim at any moment *during the proceeding* through its amendment under Article 257, paragraph 1 LCP, modification under Article 257, paragraph 2 LCP or precision under Article 102 LCP. At the session on 28th May 2009, Lawyer XM and Lawyer XR declared on behalf of BZ and GZ, respectively, *that they stand by the claim as submitted in writing to the court.* At the sessions on 10th July 2009, 30th July 2009 and 11th January 2011 the representatives of the claimants reiterated that *they stand by the claim in its entirety.* At the last session on 10th February 2011, in the final speech pronounced by Lawyer XM the court was requested to confirm that *based on contribution and joint construction* the claimants are co-owners of 1/3 ideal part each of the business facility "G Centre" according to *Article 272 of the Family Law of Kosovo (Law No. 2004/32) and Article 37 LBPR.* Or, during the whole first instance proceedings from its initiation on 12th March 2009 by the claim till the completion of the main hearing on 10th February 2011, the claimants invoked only *one ground for acquiring the pretended co-ownership* as *joint wealth of family community with the respondent, gained through joint contributions of the three brothers in the construction of the building as per Article 272 of the Family Law of Kosovo (Law No. 2004/32).* It was neither substituted by a new different ground, nor preserved with addendum of additional different ground. There is no *precision* of the claim under Article 102 LCP, its *modification* under Article 257, paragraph 2 LCP or *amendment* under Article 257, paragraph 1 LCP, requested by claimants in any form at any moment and/or ruled by the court. *At third place,* though the facts alleged in the claim and unchanged in the first instance trial are for *construction based on the mutual consent of all litigants as co-owners of the land, realized by joint contribution and joint investment* within their family community, by judgment C.nr.82/09 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 this claim was granted based on *the diametrically opposite facts* under Article 25 LBPR – *construction of the building, realized by a single investor-builder, on somebody else's land, against the will of the land owners, despite*

*of their objections.* Thus the claim was resolved on a factual ground, never introduced by the claimants in the case, *fully incompatible with the facts averred in their submitted written claim.* The impermissible result was that co-ownership pretended as acquired *by the litigants through joint construction of the building on co-owned land upon their consent within their family community* pursuant to Article 272 of the Family Law of Kosovo was confirmed as if acquired through *construction realized only by the respondent on somebody else's land - the ideal parts of the claimants, regardless of their immediate objections against such construction* pursuant to Article 25 LBPR. According to Article 253, paragraph 2 LCP the court *is not bound by the legal basis* indicated in the claim as per Article 253, paragraph 1, item e) LCP, but *is bound by its factual basis* under Article 253, paragraph 1, item b) LCP. The court may qualify the claim only by subsuming the facts alleged in it under legal provisions, *corresponding* to these facts. Any deviation means that the court has decided on a subject-matter, different from the one defined by the claim, in breach of the party disposition principle (*non ultra petita*). Being fundamental for resolution of disputes arising out of legal–civil relationships under Article 1 LCP it is imperatively foreseen by Article 2, paragraph 1 LCP requiring the court in contested proceeding to decide *within the scope of the claims as submitted by the parties.* In C.nr.82/2009 the claim though being based on facts for *agreement* of BZ, GZ and RZ to construct the building, and facts for its *joint construction* by the three of them through *joint contributions and investment* was granted by the appealed judgment with reasoning that RZ constructed the building *on his own as a single investor-builder, against the will of BZ and GZ, despite of their objections.* The juxtaposition clearly shows that the claim, fully granted by judgment C.nr.82/09 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011, is with factual basis, *opposite* to the one of the claim, submitted by the claimants in this case, contrary to Article 2, paragraph 1 and Article 143, paragraph 1 LCP. This violation is substantial under Article 182, paragraph 1 in conjunction with Article 2, paragraph 1 and Article 143, paragraph 1 LCP–it affected the issuance of a lawful judgment as the ground of the claim submitted by the claimants is *incompatible* with the ground of the decided claim chosen *ex officio* by

the court. As a result of this substitution, the case was finished without a main hearing held on the dispute under Article 25 LBPR–the respondent was not served such claim for reply, and was not given the opportunity to object it, to adduce evidence against it, and/or to formulate his legal arguments on this subject-matter contrary to Article 5, paragraph 1, Article 324, paragraph 1, Article 428, paragraph 1 and Article 429 LCP. Judgment C.nr.82/09 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 thus confirmed the co-ownership shares of the claimants in the building based on Article 25 LBPR *without conducting main hearing* on dispute for construction on somebody else's land, and *exceeding the scope of adjudication* in the instant case - absolute procedural violations under Article 182, paragraph 2, item h) and o) LCP.

**19.** The *third* procedural ground in the appeal is for violations of the provisions governing the *collection of evidence and their assessment* by the first instance court - Article 182, paragraph 1 read in conjunction with Article 8, Article 160, paragraph 4, Article 428, paragraph 2, and Article 436, paragraph 3 LCP.

**20.** The appellant finds impermissible the judgment on contest of such high value to be based only hearing of the parties, and challenges procedurally the assessment of the first instance court of the evidence on the conscientiousness of the claimants as land owners and his own unconscientiousness as builder. No breach is found in this regard. LCP does not establish normative catalogue of mandatory evidence depending on the subject-matter or value of the contest, not exhausted in this case. In C.nr.82/09, apart from hearing of the parties, two witnesses were heard, as well as documents were submitted by the parties according to Article 331, paragraph 1 LCP and received from the Municipality of Lipjan/Lipljan upon request of the court according to Article 332 LCP. The factual findings, considered proven, are reflected in the reasoning of the judgment. The evidence used for the conclusion that *"the claimants did not know that the respondent was constructing in his name"* are assessed in the last paragraph of page 13 and in the first paragraph 1 of page 14 of the judgment in conformity with Article 160, paragraph 4 LCP. This formal requirement is also met for the conclusion that *"the respondent knew he was building on land owned by him and his other two*

*brothers"* – it is justified in paragraph 5 of page 13 of the judgment with the statement of RZ heard in the session on 30th July 2009. Within the overall final examination of the evidence collected, the court is free to weigh them, *inter alia*, to credit some of them or not to credit others, guided by its inner conviction and under the duty to justify the positive or negative assessment made in the rendered judgment. There are no procedural restrictions prescribed by law in this regard breached in the first instance. *At third place,* the irregularity here is different. While assessing the *conscientiousness of the claimants* as land owners, the first instance court disregarded without reasoning their admission in the claim that *they have known ever since 2005 for the issuance of the construction permit in the name of RZ*, as well as that the construction itself was realized based on their *verbal agreement* with their joint participation, contribution and investment. This acknowledgement being explicit, moreover, officially incorporated in their written claim to the court is *direct evidence with probative value prevailing over any other proves, excluding the necessity for their collection pursuant to Article 321, paragraph 2 LCP*. However, this admission of the claimants, though permissible and relevant as evidence, independent from all the others, was not taken into account by the first instance court in breach of Article 8, paragraph 2 LCP which mandatorily requires examination of each and every piece of evidence, *separately and as a whole*. This procedural violation is substantial under the criterion of Article 182, paragraph 1 LCP – the judgment is founded on Article 25 LBPR, applied out of the assumption that the claimants were unaware that the 2005 construction permit for the building was issued *only* to the respondent as investor and put objection to this construction on 9th February 2009, *immediately after learning for it* in January 2009. The assumption for conscientiousness of the claimants associated with their immediate objection to the construction and the outcome of the case pre-determined by it could not stand if the admission of BZ and GZ in the claim had been examined in line with Article 8, paragraph 2 LCP. *At fourth place,* the conclusion in the judgment for unconscientiousness of the respondent as builder understood as *knowledge that the land was not his exclusive ownership but co-ownership of the three brothers* is based on his own statement that the building was constructed without

the consent of BZ and GZ. Clearly this evidence *does not prove the fact found established by it* for respondent's unconscientiousness as builder under Article 25 LBPR since legally it is associated with the *knowledge of the real property status of the land - construction plot only*, and *not with the dissent of the other co-owners with the building on it.* This testimonial evidence under Article 373 LCP was thus used in the appealed judgment to verify a fact, it actually does not contain and is not eligible to prove, contrary to Article 319, paragraph 2 LCP.

**21.** *Non-examination of RHZ and IZ as witnesses in the case. At first place,* by the claim itself the claimants proposed to the court to summon as witnesses their brothers BXZ, RHZ and IZ to prove the contributions of BZ, GZ and RZ to the family business exercised by their private firms. *At second place,* at the preliminary hearing held on 28th May 2009 Lawyer XM for the first claimant proposed the examination of these witnesses. Lawyer XR on behalf of the second claimant concurred. In the same session Lawyer AV for the respondent proposed to be summoned as witnesses NP and HA, present at the Dukagjini Kanun meetings in January 2009. By ruling of the Municipal Court of Lipjan/Lipljan rendered in this session, the claimants' proposals for evidence were approved, *inter alia*, as per the witnesses of BKZ, RHZ and IZ. *At third place,* following the sequence for collection of evidence set by Article 425, paragraph 1, items c) – d) LCP, the first instance court commenced the probative procedure with hearing of the parties – the claimants in the session on 10th July 2009, and the respondent in the session on 30th July 2009. At the session on 11th January 2011, it re-affirmed its previous decision to hear as witnesses of the claimants BKZ, RHZ and IZ, and as witnesses of the respondent NP and HA. *At fourth place,* as verified by the respective post receipts, BKZ was served his witness summon on 15th January 2011, while the witness summons for RHZ and IZ were returned non-delivered to the case with note for being "*unclaimed*" by the addressees. At the session held on 26th January 2011 present was only the duly summoned witness BKZ. Lawyer XM explained the absence of RHZ by an accident with electricity suffered by him; for IZ it was said that he had been threatened by the respondent not to testify. RZ objected this stating that he had only called RHZ to ask him if coming to the court to

tell the truth, and requested his summoning to confirm this conversation. At the end of the same session Lawyer XM *withdrew* of the witnesses RHZ and IZ as *it was not necessary to collect testimonies similar to the heard ones.* Lawyer AV expressly objected this withdrawal and requested these two witnesses to be summoned in order to clarify contradictory moments in the heard testimonies of BKZ. The first instance court finalized the session without deciding the request of Lawyer XM for withdrawal of the witnesses RHZ and IZ, and/or the request of Lawyer AV for their summoning for examination. *At fifth place,* at the session on 10th February 2011, without being formally notified, RHZ and IZ appeared and insisted to be heard by the court, refuting the reasons given by Lawyer XM for their absence on 26th January 2011. RHZ denied to have been threatened by the respondent to testify and affirmed that he had only asked him to tell the truth; IZ said that he was not burnt, but he did not get summon. Their examination, however, was not admitted – both were allowed to stay in the courtroom for a while and soon afterwards left it, being dismissed by the court as per Article 289, paragraph 2 LCP.

**22.** There are several procedural omissions related to the non-examination of the witnesses and RHZ and IZ. *At first place,* even the summons under Article 346, paragraph 1 LCP *were not served* to them, opening the session on 26th January 2011 the court found them *regularly* summoned. In these circumstances no inquiry had to be made for the reasons for their absence - pursuant to Article 423, paragraph 2 LCP as it premised regular summoning of these witnesses while RHZ and IZ were unduly summoned. The first instance court though obliged did not order repetition of their summoning under Article 348, paragraph 1 LCP for the next session. *At second place,* as these two witnesses were formally admitted on 28th May 2009, the claimants could not *unilaterally withdraw* them on 26th January 2011. According to the explicit rule of Article 351, second sentence LCP such request could not be granted provided that *the other party gives its consent.* Here, on behalf of the respondent Lawyer AV explicitly objected it. In view of this opposition, the court, notwithstanding its own evaluation for the necessity of their testimonies, according to Article 351, second sentence LCP was obliged to reject the claimants' request for withdrawal of these two witnesses and

to summon them for examination. The provision of Article 351, second sentence LCP being imperatively formulated had to be non-discretionally complied with. This is why the subsequent non-summoning of the two witnesses and their non-examination only based on the claimants' request, notwithstanding the express disagreement of the respondent, directly violates Article 351, second sentence LCP. *At third place,* as the non-examination of RHZ and IZ was never formalized, it could not be considered decided pursuant to Article 352 LCP to avoid duplication with evidence on facts already clarified in the trial. *At fourth place,* in the session on 26th January 2011, Lawyer AV after opposing the withdrawal of RHZ and IZ as witnesses of the claimants *requested* their examination as his own witnesses with justifiable reasons for his proposal at that stage of the trial. This motion, permissible according to Article 428, paragraph 2 LCP, was not decided by the first instance court contrary to Article 319, paragraph 3 LCP. *At fifth place,* though at the session on 10th February 2011 both RHZ and IZ were present and were not formally obliterated as witnesses, their examination being still due according to Article 347, paragraph 1, Article 352, second sentence, Article 425, paragraph 1, item f) and Article 428 LCP was not held. Based on their declarations in the beginning of the session, the court had to assume that their testimonies apart from formally mandatory would not duplicate collected evidence as per Article 352 LCP but would clarify facts crucial in this dispute - Article 319, paragraph 3 LCP. *At sixth place,* without duly withdrawn examination of the witnesses RHZ and IZ, and non-withdrawn examination of the witnesses NP and HA of the respondent, the first instance court concluded the main hearing on 10th February 2011 though all its stages had not been completed according to Article 436, paragraph 1 LCP, without providing reasons for non-necessity of further probative actions in the trial according to Article 436, paragraph 2 LCP. Consequent to these infringements the dispute was resolved on evidentiary basis, not completed with all testimonial evidence adduced by the parties, with non-clarified substantial conflicts in the proofs collected, affecting the rendering of a lawful and right judgment as per Article 182, paragraph 1 LCP.

**23.** *Evaluation of the testimonies of the witness BKZ.* According to the appellant in the challenged first instance judgment contrary to Article 8, paragraph 1 LCP these testimonies have not considered conscientiously and carefully. As a result of this failure, they were fully credited in the resolution of the dispute, regardless of their deficiencies. *At first place,* the appellant points out that in their prevailing part the statements of the witness BKZ were not founded on direct and personal knowledge of the respective facts, but on information received by third persons. No substantial procedural violation is revealed. The examination of this witness on 26th January 2011 was long and extensive – the questions posed to him and his answers are recorded on 17 pages. Only on a very few occasions in the interrogation BKZ noted that he did not witness the respective facts, but heard for them from family members. This pursuant to Article 319, paragraph 1 and Article 339, paragraph 2 LCP does not make the testimonies inadmissible, nor deprives them from probative value as long as they still provide information, *direct or indirect*, on facts relevant to the dispute. The *procedural admissibility* of the testimonies of BKZ is not to be equalized with *their trustworthiness* – as a witness he was examined for numerous events in the Z family occurred over more than two decades, particularly for the relations of BZ, GZ and RZ over which this brother of theirs after the 1990 separation of the Z family community had general, not detailed, distant, not firsthand observations. *At second place,* BKZ said in the most generic manner that what he knew and the family knew was that BZ, GZ and RZ "*decided to work together*", without further concretization. In particular, the witness did not testify for the existence of any written joint business agreement concluded officially or non-officially by BZ, GZ and RZ for establishment of any private firm, enterprise, company or other legal entity, nor did the witness comment at all the company "R-G" L.L.C. (Sh.p.k.). Here the appeal imputes to the testimonies concreteness they neither contain, nor have been attributed within the evidentiary analysis under Article 8 LCP. *At third place,* on the contrary his testimonies should not have been trusted in the part that *at the cast of the foundations in October 2005, BZ told to BKZ that they had ready 700 000 €* (pages 11 and 19 of the minutes for the session held on 26th January 2011). These statements directly contradict the bank

agreement for this credit, which being signed on 31st January 2006, could not be known by the first claimant and discussed by him with the witness at the cast of the foundations in October 2005, prior to the conclusion of this bank credit agreement. These testimonies were fully trusted in the first instance, however, *without verifying their trustworthiness/untrustworthiness* thus omitting their obvious controversies with the other evidence in the case.

**24.** C*redit/mortgage agreements.* According to the claim with the aim to realize the construction of the contested building BZ and RZ took a joint loan from "ProCredit Bank - Kosovo" JSC – Prishtinë/Priština in the amount of 707 766.69 Euros, against which the co-owned land was mortgaged. Attached to the claim were: 1) credit agreement Nr. A-20119 and mortgage agreement, dated 30th January 2006; 2) credit agreement Nr. A-34530 and mortgage agreement, dated 23rd April 2007. On this basis the first instance court factually established (page 7 of the judgment) that on *30th January 2006 RZ and BZ signed with "ProCredit Bank" credit contract Nr.4-20119 and received a credit of 700 000 Euros for the business purposes of NPSH "R-G", while on 23rd April 2007 they signed second contract Nr. A-34530 with this bank and received a credit of 708 734 Euros for the same business purposes.* The legal conclusion drawn (page 11 of the judgment) was that BZ *received as co-borrower two credits together with RZ and the money was invested in the construction of the building and their common business*. In the appellant's view these documents were not read and interpreted carefully, contrary to Article 8 LCP. Indeed, there are over-sights. *At first place,* the credit agreement Nr. A-20119, dated 30th January 2006 and the credit agreement Nr. A-34530, dated 23rd April 2007 with "ProCredit Bank-Kosovo" JSC – Prishtinë/Priština were signed by RZ and BZ in *different capacity* – the first as *Borrower*, and the second as *Co-borrower,* with explicit differentiation of their right and obligations in the standardized clauses. It was only RZ as *Borrower* that applied for the credit (point (a) of the preamble), and the bank as *Lender* awarded the credit only to him as *Borrower* (point (b) of the preamble, Article 1, paragraph 1, first sentence) with the purpose of expedient management of the business named "R-G" (Article 1, paragraph 2, first sentence). RZ as *Borrower* was obliged to pay the

administrative fee over the amount of the credit - 2 % (Article 1, paragraph 2, second sentence), its principal with interest rate - 1.15 % per month according to the annexed payment plan (Article 2 and Article 3, paragraph 1), and additional penalty interest rate - 0.50 % per day over the delayed installments (Article 3, paragraph 2); RZ as *Borrower* was assigned with the obligations under Article 5 (a) – (c) and the negative commitments under Article 6 (a) – (b); all expenses related to the credit had to be born by him (Article 9, paragraph 1). On the other hand, signing these credit agreements as *Co-borrower,* BZ assumed to be personally and jointly responsible for the obligations of the *Borrower* (Article 8, paragraph 1), however, accepting only *the right of the bank as Lender to ask him for payment in case the Borrower has violated his obligations* (Article 8, paragraph 2). This sequence of their responsibilities was concretized in Article 3, paragraph 3 (a) stating that only if the *Borrower* has failed to pay or has delayed due installments, the bank as *Lender can* ask from the *Co-borrower* to pay the outstanding amount and take the other measures listed in Article 3, paragraph 3 (b) – (c). The payment plans for Loan Nr. A-20119 and Loan Nr. A-34530 indicate as *Client "R-G" N.P.SH.,* and *RZ-"R-G" N.P.SH.,* respectively, without mentioning the name of BZ at all. The analysis of all these contractual elements leads to conclusions that are missing in the appealed judgment. *Firstly,* being *Borrower* to these credit agreements, RZ is the *principal debtor* – titular of all obligations and negative commitments, primarily liable for their fulfillment. In distinction to this, having signed these credit agreements as *Co-borrower,* BZ assumed by their Article 3, paragraph 3 (a) and Article 8, paragraph 2 the obligation towards "ProCredit Bank-Kosovo" JSC as *Lender* to fulfill the obligations of RZ as *Borrower* should the latter has *violated* them, in particular by non-payment/delay of exigible credit installments. This *contractual status* of BZ approximates *the normative status* of a *warrantor (guarantor)* under Article 997 of the Law on Contracts and Tort (Official Gazette of the SFRY № 29/78, with amendments № 39/85, 45/89, 57/89 and Official Gazette of the FRY № 31/93) (hereinafter "LCT"). According to this legal definition by the warranty (guarantee) the *guarantee (warrantor)* shall assume an obligation to a *creditor* to fulfill a valid and due obligation of a *debtor,* should the

latter *fail to do so.* Article 8, paragraph 2 of the credit agreement Nr. A-20119, dated 30th January 2006 and Article 8, paragraph 2 of the credit agreement Nr. A-34530, dated 23rd April 2007 almost literally reproduce the wording of Article 997 LCT – signing them, BZ as *Co-borrower* has assumed not the *obligations - their subject matter for fulfillment* as per Article 307, paragraph 1 LCT, but only the *liability for their non-fulfillment* by RZ as *Borrower* as per Article 121, paragraph 1 LCT. This contractual clause in its essence is a *warranty (guarantee) statement* of BZ which having the *written form for validity* prescribed by Article 998 LCT has produced its legal effect as of the date of signing of the credit agreement, incorporating it. Further in conformity with the rules on the *warrantor's (guarantee's) liability*, the obligation of BZ has been restricted by Article 8, paragraph 1 of the credit agreement Nr. A-20119, dated 30th January 2006 and Article 8, paragraph 1 of the credit agreement Nr. A-34530, dated 23rd April 2007 to the principal debtor's obligation of RZ without exceeding its scope - Article 1002, paragraph 1 LCT and being equalized to its elements - Article 1002, paragraphs 2, 4 and 5 LCT. *Secondly,* the payment plans annexed to the credit agreements Nr. A-20119, dated 30th January 2006 and Nr. A-34530, dated 23rd April 2007 set forth the maturity dates of all installments due as written notice under Article 1004, paragraph 1 LCT of the "Pro Credit Bank - Kosovo" JSC as *Lender* to RZ as *Borrower* for fulfillment within the time limits specified therein. As long as according to Article 3, paragraph 3 (a) of the credit agreements Nr. A-20119, dated 30th January 2006 and Nr. A-34530, dated 23rd April 2007 "ProCredit Bank-Kosovo" JSC Bank as *Lender* can ask BZ as *Co-borrower* to pay the *outstanding* credit amount only *after* non-payment by RZ as *Borrower* of installment(s) due within the time limit(s) set by the respective payment plan, the *warranty (guarantee)* so provided is *subsidiary* in its form according to Article 1004, paragraph 1 LCT. Being such, it is *not joint warranty (guarantee)* under Article 1004, paragraph 3 LCT – "ProCredit Bank-Kosovo" JSC Bank as *Lender* is not entitled by none of the clauses of the credit agreements Nr.A-20119, dated 30th January 2006 and Nr. A-34530, dated 23rd April 2007 to demand fulfillment alternatively by RZ as *Borrower* or BZ as *Co-borrower,* or simultaneously *from both of them at the same*

*time*. All this manifests the status of RZ as *principle debtor* liable to "ProCredit Bank-Kosovo" JSC Bank as creditor for fulfillment of the obligation *versus* the status of BZ as *guarantee (warrantor)* liable only for *failure* of the principle debtor *to fulfill*. While the responsibility of RZ for the payment of the credit is *primary*, that is to be *directly* engaged by the bank, the one of BZ being *secondary* can only be *subsidiarily* realized for due amounts unpaid by his brother. In view of this sequence, BZ as an *accessorial debtor* is entitled with the *benefetio discusssionis* objection to postpone his own fulfillment till the unsuccessful execution against RZ as a *principle debtor*. Or, the credit agreement Nr.A-20119, dated 30th January 2006 and the credit agreement Nr.A-34530, dater 23rd April 2007 were signed by REXHEP and BZ, but *not as joint and several debtors* – contrary to the explicit requirement of Article 414, paragraph 1 LCT there is not a single clause authorizing "ProCredit Bank - Kosovo" JSC to *unilaterally choose the order in which to seek fulfillment from any of them*, whereas in line with Article 414, paragraph 2 LCT the parties agreed RZ as *Borrower* and BZ as *Co-borrower* to owe the credit under different time terms and the bank was obliged to follow the set sequence claiming the credit installments first from RZ, and only afterwards, *upon his non-payment*, to claim the outstanding amounts from BZ. Summarizing, the credit was awarded by "ProCredit Bank-Kosovo" JSC as *Lender* to RZ as *Borrower* for the expedient management of "R-G" being obliged to fully pay it back, while BZ as *Co-borrower* agreed to guarantee the bank against the consequences of eventual non-fulfillment by assuming only the liability to pay the outstanding credit amounts in case his brother should fail to do so. This is a *subsidiary warranty (guarantee)* under Article 997 and Article 1004, paragraph 1 LCT–personal security granted by BZ as a *warrantor (guarantor)* of the credit awarded to RZ as *principal debtor*. While the liability of RZ being *primary* is *directly* realized for payment of the credit in the *first sequence order*, the liability of BZ as *accessorial* can only be *indirectly* engaged upon non-fulfillment (non-payment), always in the *second sequence order*. This differentiation entitles BZ, *inter alia,* with the regress under Article 1013, paragraph 1 LCT to demand from RZ compensation for everything that would be paid by him to the bank. The first instance court noted the credit agreements

Nr. A-20119, dated 30th January 2006 and Nr. A-34530, dated 23rd April 2007 as being signed by RZ and BZ, but did not distinct at all their status, did not particularize and/or grade their liabilities and at the end fully equalized their role in the receipt and the payment of the credit. The judgment does not contain any interpretation of these contracts under Article 99 LCT which is a failure in their proper evidentiary examination as per Article 182, paragraph 1 in conjunction with Article 8, paragraph 2 LCP. *At second place,* the first instance court did not esteem on the aggregate all the proofs for this financing, as required by Article 8 LCP. Hence, it was erroneously found that BZ was co-borrower of *two credits* with RZ (page 11 of the judgment). Actually it was not disputed in the proceeding being admitted in the claim and its reply, as well as by the heard statements of the litigants that there was only *one loan*, received based on the credit agreement Nr. A-20119, dated 30th January 2006 in the amount of 700 000 Euros, that was later re-programmed by the credit agreement Nr. A-34530, dated 23rd April 2007 into the amount of 708 734 Euros. By their consecutive conclusion the clause of Article 1, paragraph 1 was substituted to increase the principal with 8 734 Euros, and the payment plan was replaced to set new time limits for the installments as per Article 348, paragraph 2 LCT. Given the identity of the parties, and the lack of a different subject and/or legal ground of the obligation, *there was no substitution (innovation)* under Article 348, paragraph 1 LCT. Hence, the assumption of the first instance court for existence of two credits received by "ProCredit Bank-Kosovo" JSC could not be justified with non-expressed intent for substitution - Article 349 LCT, deficiencies in its effect - Article 352 LCT, invalidity or termination of the previous obligation - Article 353 LCT and/or nullity of the substitution contract - Article 354 LCT. The conclusion of the first instance court for *two bank credits*, invested in the project, stems out of improper evidentiary analysis which is another procedural violation as per Article 182, paragraph 1 in conjunction with Article 8 LCP.

**25.** *Lack of sufficient, reliable and valid evidence.* The appellant considers the first instance judgment rendered without a proper evidentiary basis which determines with full certainty the facts of relevance in this dispute, contrary to Article 322, paragraph

1 LCP. Indeed, according to Article 7, paragraph 1, and Article 428, paragraph 1 LCP in each contested procedure it is the exclusive duty of the parties to prove their factual allegations, while the court is not allowed to administer *ex officio* evidence, except to verify if the parties are not disposing of claims they cannot dispose of freely as per Article 7, paragraph 2 in conjunction with Article 3, paragraph 3 LCP. This exception was not applicable in C.nr.82/09 and the Municipal Court of Lipjan/Lipljan – there was no withdrawal of the claim by the claimants, its admission by the respondent or a reached judicial settlement as per Article 3, paragraphs 1 and 2 LCP. While not being allowed to collect *ex officio* evidence in this case, the first instance court *had the duty* to administer all admitted permissible and relevant evidence adduced by the parties in compliance with the procedural rules for their collection. There are several lapses in this regard. *At first place,* at the end of the preliminary hearing on 28th May 2009, rendering the ruling for convoking the main hearing under Article 420, paragraph 1, item c) LCP, the Municipal Court of Lipjan/Lipljan approved all proposals of the claimants for evidence, *inter alia,* the appointment of experts in the field of geodesy, construction and finance. However, these expert analyses were not later concretized by respective rulings under Article 361 LCP in order to personally designate experts, to define the object/scope of their assignment and to prescribe performance deadline. Thus no expert analyses were performed as per Article 359, paragraph 1 LCP, they were not submitted to the case as per Article 364 LCP and/or clarified in the main hearing as per Article 368, second sentence LCP. The case was finalized without any expert analyses, event though permissible and directly relevant for *identification of the contested building* (destination, components, dimensions, surface, floors, location, etc.), its *construction* (designs, other technical documentation, executors, performed construction works, utilization permission(s), etc.) and *financing* of the investment (types, sources and amounts of assets invested; value of the building and the land, etc.). *At second place,* the documents attached to the claim according to Article 253, paragraph 1, item c) LCP, approved in the preliminary hearing on 28th May 2005 for collection in the main hearing as per Article 420, paragraph 1, item c) LCP, were not administered in none of the subsequent sessions contrary to Article 425, paragraph 1,

item e) LCP. *At third place,* the documents presented by the respondent with the reply to the claim in conformity with Article 396, paragraph 2 LCP, were proposed by his authorized representative in the preliminary hearing on 28th May 2009, but no court decision was taken for their collection contrary to Article 319, paragraph 3 and Article 420, paragraph 1, item c) LCP, nor they were administered in any moment of the trial contrary to Article 425, paragraph 1, item e) LCP. *At fourth place,* upon a request of the Municipal Court of Lipjan/Lipljan, dated 22nd November 2011, the Directorate for Urbanism, Cadastre and Environmental Protection - Lipjan/Lipljan provided full copy of the administrative file on the construction permit for Centre "R-G". Though received in the case, the documents contained in it were not administered by the court through their reading in the main hearing contrary to Article 425, paragraph 1, item e) LCP. *At fifth place,* the witnesses NP and HA, admitted to the respondent in the session on 26th January 2011, were not later summoned as per Article 346, paragraph 1 LCP and were not examined as per Articles 347 – 348 LCP. Without valid withdrawal under Article 351 LCP, as reasoned above, the witnesses RHZ and IZ were not interrogated contrary to Articles 347 – 348 LCP. *At sixth place*, since the parties were heard for collection of evidence according to Article 373 LCP in the sessions on 10th July and 30th July 2009, their minutes should have been read in the last session on 10th February 2011 as per Article 425, paragraph 1, item e) LCP. Nevertheless, the parties had to be confronted as per Article 349 in conjunction with Article 378 LCP since their given statements substantially conflicted with one another on crucial facts. *At seventh place*, though there were such proposals of the parties under Article 428, paragraph 1 LCP, no exhibits were collected for the concrete terms of construction of the building as *organization* (designs (blueprints), executors/sub-executors, performed construction works, subsequently finished parts, etc.), its *financing* (funds invested as amounts and sources) and its *finalization* with utilization permission(s). *At eighth place*, though not all evidence had been collected as demanded by Article 425, paragraph 1, items c) – e) LCP, and the conditions under Article 325 LCP for their non-collection were not fulfilled, the first instance court proceeded with the final speeches of the parties contrary to Article 425, paragraph 1,

items f) LCP. Hence, the trial was finished *before* all its stages were completed and not *after* contrary to Article 436, paragraph 1 LCP, *without withdrawal* of the non-collected evidence declared by the *parties* or *cancellation* of their further examination as unnecessary by *the court* contrary to Article 436, paragraph 2 LCP. The dispute was hence decided on a probative basis, not formed by collection of all permissible evidence adduced by the parties, which consisted mainly of contradictory statements, and was not completed with solid, trustworthy, corroborating evidence for all the facts of factual or legal relevance. Therefore, these violations in the first instance probative procedure bear the *substantiality* required by Article 182, paragraph 1 LCP.

**26.** *Article 319, Article 321, and Article 322 LCP.* Enumerated in the appeal are *facts considered established in the challenged judgment without valid evidence.* Thus violated according to the appellant are the procedural rules requiring the court to base its findings on the facts proven with certainty by the parties - Article 319, paragraph 1 LCP within their respective burden of proof in the litigation – Article 322, paragraphs and 3 LCP, through permissible, duly collected corroborating evidence – Article 319, paragraphs 2 and 3 LCP. This mandatory evidentiary requirement is derogated only for the four exhaustively provided exceptions under Article 321, paragraphs 1, 2 and 4 LCP - there is no need to prove facts that are *publicly known*, already *established in previous court proceedings*, *admitted* by the parties or *presumed by law*. If based on the evidence collected the court is not able to establish a fact alleged by a party *with certainty*, according to Article 322, paragraph 1 LCP it is obliged applying *the burden of proof rules* to declare this fact inexistent. These rules have not been consistently complied with. *At first place,* the fist instance court found that in 1999 BZ, GZ and RZ started running business together with initial investment made by GZ who brought from Poland 120 000 DM (page 8 of the judgment). This factual finding is not duly proven. It is based only on the *allegation* of BZ pronounced in the main hearing on 11$^{h}$ January 2011 which is not *evidence. Firstly*, this is *not admission under Article 321, paragraph 2 LCP* as the said fact is favourable, not unfavourable for the party. *Secondly,* this is *not statement* of BZ under Article 425, paragraph 1, item c) LCP as it was not collected as evidence through his hearing as a party under Article 373 – 378

LCP. The latter was held in the session on 10th July 2009, without such statement recorded, while in the session on 11th January 2011 *no re-examination of this party was requested or ordered* by the court as previewed by Article 350, second sentence in conjunction with Article 378 LCP. Actually, declaring that GZ imported 120 000 DM from Poland in 1999, BZ presented fact as per Article 428 LCP in the course of the main hearing without proposing any evidence in its support. *Thirdly,* the same fact, though disputed, remained non-verified by any of the proofs collected in the case. It does not appear even in the statements of the claimants, heard according to Article 373 LCP in the session on 10th July 2009. The respective factual finding in the judgment for the 1999 investment of GZ in the amount of 120 000 DM has been derived from a non-proven allegation of a party in violation of Article 319, paragraph 1 and Article 322, paragraph 1 LCP. *At second place,* identical procedural mistakes have been slipped by the first instance court when finding that *in 2004 they (BZ, GZ and RZ) had already 300 000 Euros from revenues of the joint business developed (page 8 of the judgment*). This factual conclusion again literally reproduces an *allegation* pronounced by BZ in the main hearing on 11th January 2011, lacking itself any probative value – this is neither *admission* of a party under Article 322, paragraph 2 LCP for an unfavourable fact, nor a *statement*, heard as collection of evidence – Article 425, paragraph 1, item c) LCP through examination conducted in compliance Articles 373 – 378 LCP. Further, this allegation has not been proven by any of the collected evidence – it is not verified by none of the submitted documents, it does not appear in the statements of the parties heard in the sessions on 10th July and 30th July 2009, including those of BZ himself, or in the testimonies of none of the witnesses examined in the session on 26th January 2011. Again this is just a *fact presented* by a litigant in the course of the proceedings as per Article 428 LCP, which being *contested* and *not proven*, should have been declared as inexistent according to Article 322, paragraph 1 in conjunction with paragraph 2 and Article 319, paragraph 1 LCP and *vice versa* not presented *as an ascertained fact* in the appealed judgment. Thus impermissibly the first instance court allowed a *factual allegation of a party to self-prove itself,* without falling in none of the exceptions of Article 320, paragraphs 1 – 4

LCP. *At third place,* on pages 8 and 11 of the challenged judgment is established the existence of a *common bank account* of BZ, GZ and RZ. This finding apart from being non-proven directly contradicts the evidence available in the case. *Firstly,* the statement of GZ, heard in the session on 10th July 2009, the bank card issued in his name by "BRK" SH.A. – "New Bank of Kosovo" JSC – Prishtinë/Priština presented in the preliminary hearing on 28th May 2009, as well as the customer's data sheet Nr.227 179 of "BRK" SH.A. – "New Bank of Kosovo" JSC - Prishtinë/Priština submitted in the main hearing on 26th January 2011, prove beyond any doubt that in the end of 2001 GZ opened *in his name* a bank account Nr. 27110-01-011341 with funds initially deposited in Deutsche Marks, converted on 1st January 2002 into 51129.19 Euros, and as its *exclusive holder* authorized RZ to act as his *legal representative* in its operation. *Secondly*, the existence of *joint bank account* was expressly denied by GZ in the main hearing on 11th January 2011 (page 10 of the minutes). *Thirdly,* the transaction history of this bank account Nr. 27110-01-011341 shows 5 withdrawals for 51 123 Euros in total, all of them in 2002, and last balance of 6.19 Euros. Given the distance in time from the construction of Airport Centre "R-G" which started in the end of 2005 and was finalized in 2007, as well as the operations effected through this bank account, clearly it could not be the one *de facto* used for financing this investment project, realized 3 – 5 years later and at much higher overall value. *Fourthly*, documented in the case is the existence in the period 2001 – 2010 of six bank accounts of RZ and/or "R-G" Sh.p.k. with 419 bank operations carried out through them with several millions turnover *without any access of BZ or GZ to them as holders and/or representatives and without any appearance of their names in the bank statements as transferors and/or transferees of amounts*. Thus, the conclusion of the first instance court for financing of the construction of the contested building through a *joint bank account* of BZ, GZ and RZ, as noted in the appeal, is made though this fact was not proven in the case contrary to Article 319, paragraph 1 and Article 322, paragraph 1 LCP. *At fourth place,* similarly the finding that BZ *paid part of the credit* from "ProCredit Bank - Kosovo" JSC on pages 8 and 11 of the judgment is not based on any bank document verifying any loan installment ever paid by BZ.

Contrariwise, disregarded though proven by the bank statement issued by "ProCredit Bank - Kosovo" JSC are the *52 loan installments* paid in the period 31st January 2006 – 1st January 2011 by funds transferred by RZ from bank account Nr. 1110208251000104 of N "R-G" Sh.p.k. (LLC). *At fifth place,* the first instance court found established that BZ at the time after the purchase of the land in 2003, during the construction and till his dismissal in the end of 2008 was the *managing director of all companies the brothers owned* (page 8 of the judgment). Thus fully trusted is the statement of BZ, heard in the session on 10th July 2009, *that he was the managing director of the three enterprises and responsible for all affairs* (page 7 of minutes). However, this fact was not established at all with the certainty required by Article 319, paragraph 1 LCP – *firstly*, it appeared only in the statement of BZ which being related to a contested and not confessed fact was without probative value; *secondly*, as long as RZ expressly *denied* the appointment of BZ as a managing director of any enterprise or company at any time, these litigants should have been *confronted* according to Article 349 in conjunction with Article 378 LCP on this circumstance on which their statements substantially conflict with one another; *thirdly*, the capacity of BZ as a managing director has not been proven by an employment or other written contract, a certificate for business registration, a pay-roll sheet and/or any other document submitted to the case. In these circumstances, the first instance court should have considered this fact as *non-established with certainty* and *should have applied the burden of proof rule* under Article 322, paragraph 1 LCP, declaring it as inexistent, instead of incorporating it in the judgment as existent. *At sixth place,* the presence of GZ at the casting of the building foundations in 2005 was reflected as *proven* in the first instance judgment (pages 9 and 11) contrary to Article 8 and Article 319, paragraph 1 LCP as it *had not been proven* by any piece of evidence in the case. Worth to note, the presence or absence of anyone at any kind of inauguration ceremony could not affect the acquisition, existence or termination of any property right and is therefore fully irrelevant in the dispute, factually and legally. *At seventh place*, the testimonies of the witnesses examined in the first instance were fully trusted in the appealed judgment as non-contradictory with the written evidence

collected, with one another and the given statements of the parties (page 10). Actually there is no such corroboration – in their prevailing part the circumstances testified by the witnesses are not verified by any documents, the testimonies on crucial facts differ substantially and do not reciprocally affirm each other, while being controversial with the statements of at least one of the opposing parties in the litigation. The procedural infringements above summarily lead to: 1) factual findings in the appealed judgment *based allegations of parties non-proven* as per Article 319, paragraph 1 LCP and *not exempted from the need to be proven* as per Article 320, paragraphs 1 – 4 LCP; 2) factual findings *discrepant to evidence* available in the case contrary Article 160 LCP; 3) factual conclusions *not substantiated with any bank, business or public documents* though related to circumstances for which such documents exist and should prevail in the evidentiary analysis; 4) over-weighing of the testimonial evidence *versus* down-weighing of the documentary evidence; 5) examination of *facts fully irrelevant* for the acquisition of the claimed co-ownership contrary to Article 319, paragraph 2 LCP; 6 ) *non-application of the burden of proof rules* for facts non-established with certainty in the case contrary to Article 322, paragraphs 1 – 3 LCP.

**27.** The challenged judgment C.nr.82/09 of the Municipal Court of Lipjan/Lipljan, dated 10th February contains errors that cannot be examined - *Article 182, paragraph 2, item n) LCP,* invoked in the appeal and also identified *ex officio* by this second instance court within the appellate review under Article 194 LCP. *At first place,* the enacting clause does not regularly specify the principal and/or the ancillary claim(s) decided as per Article 143, paragraph 1 LCP – there is no reference in the dispositive to any legal provision, numerical and/or textual, nor concretization of any ground(s) for acquisition of the confirmed co-ownership of the ones exhaustively determined by Articles 20 – 36 LBPR. *At second place,* the enacting clause does not contain proper *individualization of the building* – provided are only the data in construction permit Nr. 9-351-204 of the Municipality of Lipjan/Lipljan, dated 26th September 2005 (*hotel administration premises "G C", P+2 in cadastral parcels nr.P-71409016 -00003-4 and nr.P-71409016-00078-2*). Since this permit was issued to determine the parameters of the building *before* its construction, *it is illegible to specify the actual*

*characteristics of the finished object as destination, location, floor(s), surface(s), etc.* To guarantee executability of the judgment, the claimants requested geodesy and also construction expert analyses to identify the contested building *not as permitted, but as existing.* Though approved, these exhibits were not produced in the case. Hence, the enacting clause was formulated without the *minimum data* needed for identification of this building, *inter alia,* its surface is not mentioned anywhere in the judgment. Here it contradicts point II of the petitum of the claim where revendication was pretended for the building *with surface to be determined by a court expertise.* As admitted by the representatives of the claimants in the preliminary hearing on 28th May 2009, *without this minimal individualization of the building the judgment is not executable. At third place,* there is other discrepancy between the *petitum* of the claim and the enacting clause of the judgment as per their scope. The claimants pretended revendication of the building *and* the immovable property, registered in Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo (cadastral parcels nr.P-71409016-00003-1, nr.P-71409016-00003-4, nr.P-71409016-00078-2, nr.P-71409016 -00099-2, nr.P-71409016-00100-0, nr.P-71409016-00102-0) in ideal parts of 1/3 for each or in real surfaces to be determined by expertise. However, the judgment in its enacting clause approved *only the revendication of ideal parts in the building* and did not provide decision on the *cumulative revendication of the land in 1/3 ideal parts* for each of the claimants, and on the *alternative sought revendication of real parts of the land and the building after physical partition. At fourth place,* the reasoning of the judgment contains grounds that exclude each other - conclusions for *joint construction of the building based on the mutual agreement, joint participation and funds of BZ, GZ and RZ* (pages 11 and 13) are mixed with *diametrically opposite* conclusions for the *individual realization of the project by RZ only, as a sole builder, without the consent of his brothers, in defiance of their objections* (pages 13 and 14). These are antitheses, logically incompatible. Including such antimonies, the judgment is contradictory in its reasoning - Article 182, paragraph 2, item n) LCP. *At fifth place,* no grounds were stated in relation to all material facts related to the construction of the disputed building, *inter alia,* the preparatory activities performed as contracted designer,

blueprints, other technical documentation; its realization as engaged executor(s), type of works carried out, stages, products and techniques used; the utilization permission issued for the separate parts or for the whole completed construction; the financing of the investment. The reasoning does not provide grounds on these facts, though they are material to decide who the *builder* is or who the *co-builders* are as prerequisite for the property status of this *newly constructed building.* Similarly, no grounds are included for the concrete *material and financial individual contribution of each of the litigants in the construction* under litigation. *At sixth place,* for the facts in paragraph 26 there are inconsistencies between what is stated in the reasoning on the content of the documents and records of the statements given in the proceedings and their actual content, as concretized above on a fact-by-fact basis.

**28.** *Article 182, paragraph 1 in conjunction with Article 278, paragraph 1, item a) LCP.* On 23th January 2009 RZ as claimant filed a claim against BZ and GZ as respondents a claim for confirmation of his *exclusive ownership right over the contested building and the immovable properties (land),* registered in Certificate Nr.UL-710409016-0251, CZ Vrellë e Goleshit/Goleško Vrelo as cadastral parcels nr.3/1, nr.3/4, nr.99/2, nr.100 and nr.102. The claim is based on allegations for the purchase of the land and construction of the building with the financial means of RZ without contributions of BZ and GZ. This claim was registered as C.nr.78/2009 of the Municipal Court of Prishtinë/Priština. In the course of the case the proposal for security measure made by RZ was decided by rulings C.nr.78/09 of the Municipal Court of Prishtinë/Priština, dated 3rd February and 13th February 2009, which were appealed and quashed by ruling AC.nr.579/09 of the District Court of Prishtinë/ Priština, dated 6th October 2009 with return of the case to the first instance court for retrial. In the interim, by ruling C.nr.78/09 of the Municipal Court of Prishtinë/ Priština, dated 27th February 2009 pursuant to Article 22, paragraph 3, Article 41 and Article 392, item a) LCP for the lack of territorial jurisdiction in view of the location of the contested properties in CZ Vrellë e Goleshit/Goleško Vrelo – the Municipality of Lipjan/Lipljan, this first instance court declared itself without competence to decide the civil matter and referred the case to the Municipal Court of Lipjan/Lipljan.

Though this ruling was not appealed and entered into force, due to the appeal proceedings on the security measure, the referral ordered by it had not been yet fulfilled. Currently the case is still registered as C.nr.2292/09 of the Basic Court of Prishtinë/Priština, not referred to its Branch in Lipjan/Lipljan. The appellant considers that C.nr.82/09 of the Municipal Court of Lipjan/Lipljan should have been *suspended* according to Article 278, paragraph 1, item a) LCP until the property status of the land would be finally decided as *prejudicial matter* under Article 13, paragraph 1 LCP in C.nr.2292/09 of the Municipal Court of Prishtinë/Priština. However, the comparison of the claims in the two cases reveals *identity* of their scope as both are filed for one and the same building and the land, registered in Certificate Nr.UL-710409016-0251, CZ Vrellë e Goleshit/Goleško Vrelo, *similarity* in their factual and legal basis, and *difference* in the petitum in the part for confirmation of co-ownership of the litigants in equal 1/3 ideal parts in C.nr.82/09 of the Municipal Court of Lipjan/Lipljan *versus* confirmation of exclusive ownership right of RZ in C.nr.2292/09 of the Municipal Court of Prishtinë/Priština. As the *land* was subject-matter of the two cases the Municipal Court of Lipjan/Lipljan had the power to decide directly in C.nr.82/09 the property rights over the land as an element of the dispute under its adjudication, without waiting for their determination as *prejudicial (preliminary) issue* by any other court in any other case as per Article 13 LCP. The non-suspension of the proceedings C.nr.82/09 of the Municipal Court of Lipjan/Lipljan did not violate the provision of Article 278, paragraph 2, item a) LCP – its outcome was not *prejudicially dependant* on the outcome of C.nr.2292/09 of the Municipal Court of Prishtinë/Priština.

**29.** Summarizing, the *first ground* in the appeal under Article 181, paragraph 1, item a) LCP is sustained as per the aforementioned substantial procedural violations under Article 182, paragraph 1 LCP and Article 182, paragraph 2, item h), n) and o) LCP. Primary is the absolute procedural infringement under Article 182, paragraph 2, item o) LCP - the *exceeded scope of the claim* consequent to the *ex officio* substitution of its *ground,* restricted according to Article 2, paragraph 1 LCP by the submitted and non-amended written claim in C.nr.82/09 of the Municipal Court of Lipjan/Lipljan to revendication of ideal parts of the property right over the building as being acquired in

*joint family wealth (common ownership).* Primary is also the absolute procedural infringement under Article 182, paragraph 2, item h) LCP - the *non-conduct of a main hearing* on the dispute, directly resolved by the judgment as revendication of ideal parts of the property right over the same building as acquired *through construction on somebody else's land,* without held trial on it and given opportunity to the parties to present facts, evidence, and legal arguments on this non-filed as per Articles 252 – 253 LCP and non-adjudicated as per Articles 394 – 436 LCP claim.

***Erroneous and incomplete determination of the factual situation - Article 183 LCP***

**30.** The *second* ground in the appeal under Article 181, paragraph 1, item b) LCP for *erroneous and incomplete determination of the factual situation* is founded as per the criteria of Article 183 LCP - the first instance court has failed to establish material facts of relevance, while others were established incorrectly. *At first place,* it is not determined at all in the case the legal ground for acquisition of property right(s) over cadastral parcel nr.P-71409016-00003-4, culture – agricultural land, with a surface of 4 051 $m^2$, located at the place called registered in Possession List nr.251, CZ Vrellë e Goleshit/Goleško Vrelo. It is not bought by the purchase contract concluded between AO, BO, DO, LO, MO, RO, VO, and SV, as sellers, and RZ, GZ and BZ, as buyers, attested as Vr.nr.2529/03 by the Municipal Court of Lipjan/Lipljan on 3rd November 2003. As indicated in Article 1 of the said contract, its subject matter are: *cadastral parcel nr.3/1* at the place called "Gllozhnje", culture – field 4th class, 29 442 $m^2$, *cadastral parcel nr.99/2* at the place called "Gllozhnje", culture – field 4th class, 826 $m^2$, *cadastral parcel nr.100* at the place called "Gllozhnje", culture – field 4th class, 958 $m^2$, and *cadastral parcel nr.102* at the place called "Gllozhnje", culture–pasture 4th class, 17 844 $m^2$. Cadastral parcel nr.3/4 was not sold and bought by this purchase contract. It does not also fall within the scope of the Agreement concluded on 24th May 2005 between UNMIK and the Kosovo Trust Agency (KTA). As indicated in its Article 2, the only property UNMIK and KTA transferred and conveyed to RZ, GZ and BZ as real compensation for the allocation of their land consisting of 1 862 $m^2$ for civil aviation purposes as per UNMIK/ED/2004/13 and UNMIK/ED/2005/2 is the

*part of cadastral parcel nr.78,* registered in Possession List nr.221, CZ Vrellë e Goleshit/Goleško Vrelo in the name of the Publicly - owned Enterprise Airport - Prishtinë/Priština, consisting of 1 569 $m^2$, as delineated in Annex 1. After sub-division of cadastral parcel nr.78, out of this part was formed and registered cadastral parcel nr.78/2. Cadastral parcel nr.3/4, Cadastral Zone Vrellë e Goleshit/Goleško Vrelo was not subject of the agreement, dated 24th May 2005 and was not exchanged by it as real compensation for any land allocated for civil aviation purposes. Therefore the legal ground for acquisition of the ownership over cadastral parcel nr.3/4 by the litigants was not at all established in the case. Certificate Nr.UL-710409016-0251, CZ Vrellë e Goleshit/Goleško Vrelo, presented in the file, verifies only the *cadastral registration* of this land in their name as per Article 33 LBPR, but *not the acquisition* of its property by RZ, GZ and BZ as per Article 20 LBPR. *At second place,* as pointed out in paragraph 26, the facts related to the *concrete parameters of the construction* of the contested building and the *concrete individual contributions* of RZ, GZ and BZ as material, financial and labour assets are not determined in this case. The dispute was resolved after detailed clarifications of numerous events within the Z family in the period 1990 – 2009 and with almost no facts verified as per the contested building, *inter alia,* which were the companies engaged in its construction as executors, who contracted and paid them, what works were performed by natural persons, who employed and paid them, what materials and technique were used, who supplied and paid them, which were the stages in the project, when and how they were finalized, what are the characteristics of the complex as functions, internal distribution, floors, entrances, surfaces, parking and other accessorial compounds. *At third place,* the conscientiousness or the non-conscientiousness of the builder and the land owner(s) according to the legal criteria of Article 25 LBPR also remained non-affirmed in the trial, as analyzed in paragraph 39. *At fourth place*, there are *incorrectly determined facts*, as detailed in paragraph 26 above. In general, verified in the proceedings were numerous facts irrelevant for the property status of the contested properties, while facts of direct relevance for the litigious real rights were not ascertained or were incorrectly established as per Article 183 LCP.

***Erroneous application of the substantive law - Article 184 LCP***

**31.** According to Article 181, paragraph 1, item c) in conjunction with Article 184 LCP *erroneous application of substantive law shall exist where the court has failed to apply the correct substantive law provision, or has failed to apply such provision in a proper manner.* This ground, as invoked in the appeal, and examined by the second instance court *ex officio* according to Article 194 LCP, is founded.

**32.** Pursuant to Article 13, paragraph 1 LBPR more persons can hold *the right of co-ownership* over an undivided object when a part of each of them is determined in proportion to the whole (ideal part). Article 13, paragraph 2 LBPR presumes equality of the co-ownership parts, unless otherwise defined. Article 14 LBPR regulates the content of the co-ownership right; Article 15 LBPR governs the use, management and maintenance of the object; Article 16 LBPR deals with its division. Since these norms regulate *the existence, content, exercise and termination of the right of co-ownership,* and *not its acquisition*, applicable *mutatis mutandi* are the provisions for acquiring the *property right* under Articles 20 – 36 LBPR. Therefore the pretended co-ownership in ideal parts in the contested building and the cadastral parcels, registered in Certificate Nr. UL-710409016-0251, CZ Vrellë e Goleshit/Goleško Vrelo, should have been duly proven as acquired by the litigants according to Article 20, paragraph 1 LBPR *by law itself (Article 21 – 32)*, a *legal transaction (Article 33 - 35)* and *inheritance* (Article 36); or according to Article 20, paragraph 2 LBPR by *decision of a competent public body*. It was the duty of the claimants to specify according to Article 253, paragraph 1, item b) and e) LCP the *ground for acquisition of the pretended co-ownership* within the exhaustive normative catalogue under Articles 20 – 36 LBPR and to prove with certainty its existence according to Article 322, paragraph 2 LCP. However, the *family relationship* of the Z brothers, their *personal, business and proprietary relations* in the period 1990 – 2008 described in the claim and extensively explored in the first instance, *do not constitute* neither separately, nor aggregately a legal ground necessary according to Article 20 – 36 LBPR for acquiring the "R-G" Airport Centre by the litigants in their *co-ownership* with determined equal shares as per Article 13 LBPR.

**33.** The claim, as submitted in C.nr.82/09 of the Municipal Court of Lipjan/Lipljan and as restricting the scope of adjudication according to Article 2, paragraph 1 LCP, is based on the acquisition of the contested building by BZ, GZ and RZ as brothers - *members of one family community* who economized together in their household and business (page 1, paragraph 1 of the claim) and *who participated in the creation of this immovable property* based on their verbal agreement by its joint construction with joint investment of financial funds and contributions of the three of them (page 2, paragraphs 6 and 7; page 3, paragraphs 3 and 4 of the claim). Having this *factual basis,* the claim in its declaratory part should have been legally qualified as filed for *confirmation of joint family property* (*joint wealth*) acquired pursuant to *Article 326 of the Law on Marriage and Family Relations* (Official Gazette of SAPK № 10/1984) for the parts of the complex built in the period 28th September 2005 - 15th February 2006 and pursuant to *Article 272 of the Family Law of Kosovo* (Law No. 2004/32, promulgated by UNMIK Regulation No. 2006/7) for the parts built after 16th February 2006. This legal basis of the claim is confirmed by the representative of the claimants Lawyer XM in his final speech under Article 425, paragraph 1, item f) LCP pronounced in the last main hearing on 10th February 2011 (page 13 of the minutes), expressly stating in the end of the trial that *all requests of BZ and GZ with respect to the building are based on Article 272 of the Family Law of Kosovo as contribution to family business*. This norm is reiterated as *exclusive legal basis* of the claim also in the written final explanation of Lawyers XM and XR, submitted on behalf of the claimants in this last session on 10th February 2011. Therefore throughout the first instance trial, the claim in its declaratory part was filed for confirmation of co-ownership rights of the claimants in the contested building and land, acquired in *joint family property*. Hence, the dispute for their legitimacy of co-owners should have been resolved by applying the norms regulating *the property relations of the members of the family community* - Articles 326 – 333 of the Law on Marriage and Family Relations till 15th February 2006 and Article 271–277 of the Family Law of Kosovo (Law No. 2004/32) after 16th February 2006. The first instance court scrutinized this ground, however, *firstly*, it was decided as *secondary* ground for acquisition of the

contested properties, though being *the only one* invoked by the claimants; *secondly*, non-applied were Articles 326 – 333 of the Law on Marriage and Family Relations which regulated the family property relations till 16th February 2006; *thirdly*, non-addressed were the arguments that after the 1990 separation within the Z family, the litigants continued to live with their parents in family union in the yearly 90-ies and thus managed to accumulate *new joint wealth not separated and subsequently transformed into newly acquired assets*, including the contested building and land; *fourthly*, non-applied was also Article 18 LBPR though applicable according to Article 331 of the Law on Marriage and Family Relations, and Article 277 of the Family Law of Kosovo (Law No. 2004/32) to the family property as form of *common ownership* of more persons over undivided object *with shares which while being determinable are not determined in advance*. Hence, the revendication of the pretended *ideal parts* in the properties under contest as family joint wealth should have been decided by applying Article 43, first hypothesis in conjunction with Article 37 LBPR in view of the *non-existence in this common ownership under Article 18 LBPR of any individual shares under Article 13 LBPR, determined in proportion to the whole*, as it was not otherwise proven by a contract regulating them under Article 312 in conjunction with Article 329 of the Law on Marriage and Family Relations, or Article 51 in conjunction with Article 275 of the Family Law of Kosovo (Law No. 2004/32). In this part, the judgment is rendered without application of *all provisions governing the family property regime* as per Article 184, first hypothesis LCP.

**34.** The claim was granted based on *construction on somebody else's land under Article 25 LBPR*, though this ground *was not introduced* in the *subject–matter of the case*, and hence could not be *subject–matter of the judgment* deciding it according to Article 143, paragraph 1 and Article 160, paragraph 5, first sentence LCP. As the *applicable law in the dispute has to be determined within the ground and the petitum of the filed claim*, so that its *legal qualification* under Article 253, paragraph 1, item e) LCP corresponds to its *factual basis* under Article 253, paragraph 1, item a) LCP, the application of Article 25 LBPR in this case is *erroneous* as per Article 184 LCP since it does not comply with the claim – actually the conditions set forth by Article 25

LBPR for individual construction of the building by one builder on somebody else's land despite the immediate opposition of the land owners are *exactly contrary* to all factual allegations in the claim for joint construction of the building by all litigants, realized upon their mutual agreement with their joint contributions. The claim was erroneously granted pursuant to Article 25 LBPR, *though it was not chosen by the claimants as its ground* and could not serve as its *legal basis*, being *antipode* of *its factual basis*. The numerous considerations of the appellant in this regard are justified. Apart from being impermissibly applied, Article 25 LBPR was not properly applied as per Article 184, second sentence LCP in its separate elements.

**35.** Article 21 LBPR enumerates the grounds for acquisition of the property rights by law itself envisaged in Article 20, paragraph 1, first hypothesis LBPR, including explicitly in this list the *"construction on somebody else's land"*, whereas Articles 24 – 26 LBPR regulate further in details its concrete hypotheses, differentiated according to conscientiousness – non-conscientiousness of the builder *versus* the land owner, the value of the building *versus* the value of the land, etc. Some of these hypotheses – Article 25 and Article 26, paragraph 2 LBPR are regulated following the Roman rule "*superficies solo cedit*" according to which the building shares the legal destiny of the land, though modified. This universally recognized rule is overturned in Article 24 and Article 26, paragraph 1 LBPR into its opposite *"solum cedit superficiei"*, thus allowing the land to be "*absorbed*" by the building object constructed on it. Each of these norms has to be interpreted and applied in strict compliance with its conditions.

**36.** Article 25, paragraph 1 LBPR states that if the *builder has known that he/she builds on somebody else's land or if he/she has not known for that and the owner of the land has put his/her objections immediately, the land owner can request: 1) to be allocated the property right over such building object; 2) its demolition with return of the land into its previous state; 3) reimbursement of the market value of the land.* The application of the dissected elements of the norm will be now separately reviewed.

**37.** ***Builder/Co-builders as per Article 25, paragraph 1 LBPR***. The legal mistakes in the implementation of this first premise are as follows. *At first place*, the judgment

contains mutually incompatible conclusions - on one side, that *the three brothers were involved in the construction of the contested building* (page 10, last row), and, on the other side, that it was constructed by RZ only as its *builder* (e.g., page 13, row 21). The latter contradicts the claimants' stance in their granted claim, their statements heard in the trial and the testimonies of their witness that the complex was realized through *joint construction of the three brothers.* Thus Article 25, paragraph 1 LBPR was applied in the judgment with *prima facie* controversial reasoning for the status of RZ as an *exclusive builder* of "R-Galla", impossibly combined with the status of BZ, GZ and RZ as *co-builders of all parts of the same object. At second place*, as pointed out above, the case was decided without direct evidence for the construction itself, *inter alia,* who contracted the executors of the works and who supplied the building products (materials, prefabricated structures and assembled components) and other as the only criteria relevant as per Article 22 LBPR to *determine the builder of a new object.* No construction contracts, invoices, bank statements or other commercial, technical, or financial documents in this regard are submitted to the case file; no construction expertise has been performed. Thus Article 25, paragraph 1 LBPR was applied without the status of "*builder*" being evidenced in the case with the criteria relevant for its recognition. *At third place,* the first instance court erroneously has equalized the capacity of RZ as "*investor*" under Article 19, paragraph 1 of the Law No 2004/15 on Construction as per Decision 9 Nr. 351-2004 of the Department for Planning and Urbanism-Lipjan/Lipljan on construction permit, dated 25th September 2009 with "*builder*" under Article 25 LBPR (page 11, row 1). *Firstly*, according to Article 19, paragraph 2, second sentence of the Law No 2004/15 on Construction the investor is *responsible for fulfillment of all requirements, based on this law and other laws, for obtaining the construction permit, notice and/or certificates related to such activities.* To design, build and supervise the construction professionally, the investor should hire persons qualified for such activities–designer, executor and supervising engineer - Article 19, paragraph 2, first second sentence in conjunction with Articles 20 - 22 of the Law No 2004/15 on Construction. During the construction the investor might be changed with notification to the building control authority - Article 19,

paragraph 4 of the Law No 2004/15 on Construction. Or, the investor is a *participant in the construction process* under Article 18, paragraph 1 in conjunction with Article 19, paragraph 1 of the Law No 2004/15 on Construction, *responsible for fulfillment all regulations and public law requirements* applicable in it, *inter alia*, compliance with the basic construction standards under Articles 5 – 8 for mechanical resistance and stability, fire protection, protection of sanitation, health and environment, heat and sound insulation, protection against vibration, distance spaces, etc. Therefore, the status of *"investor"* is *administrative one of the participant in the construction process bearing the primary overall responsibility for its proper conduct.* It is instituted and evidenced by the permit under Article 33 of the Law No 2004/15 on Construction which being an *administrative act of a competent building control authority*, is *not a legal act of the disposal right holder* and hence does not produce any real rights for the investor, *inter alia*, building right over the land, or ownership right over the finished object. For these reasons, erroneously the judgment identified "*builder*" under Article 25 LBPR with "*investor*" under Article 19, paragraph 1 of the Law No 2004/15 on Construction. *Secondly,* in the course of the proceedings point I of the enacting clause if Decision 9 Nr. 351-2004 of the Department for Planning and Urbanism-Lipjan/Lipljan, dated 26th September 2005 was amended by Decision 9 Nr. 351-128 of DUCEP-Lipjan/Lipljan, dated 4th November 2009 so that the construction of the contested building to be permitted to BZ, GZ and RZ as *investors*. The first instance court applied Article 25 LBPR with respect to RZ as an *"investor"* only based on the initial Decision 9 Nr. 351-2004, dated 26th September 2005 *disregarding its amendment* by Decision 9 Nr.351-128, dated 4th November 2009, though the latter, being issued and not annulled till the completion of the main hearing on 10th February 2011, legitimated BZ, GZ and RZ as *"co-investors"*. *At third place*, on page 16, paragraph 2 of the judgment the first instance court stated that who funded *the construction is of no relevance to the property right* over the building in contradiction with its own conclusion on page 14, paragraph 1 extracting the co-ownership of BZ out of *paid some part of the credit, invested in the construction, by his own property* (without bank documents verifying any loan installments deposited). Similarly, the

recognized co-ownership ideal part of GZ was justified on page 11, paragraph 1 of the judgment with his *bank account shared with RZ, who withdrew money from it, with his involvement in the common business financially, and with personal efforts, and even with his non-confirmed presence at the cast of the foundations of the building.* Apart from the clear internal controversies of the inferences on *relevance* or *irrelevance* of the financial contributions of the different litigants, here the judgment misapplies the law as it is *exactly* the investment of assets (material, financial, labour), amalgamated in the construction works contracted and carried out and the products used according to Article 22, paragraph 2 LBPR that legitimates *the builder* and differentiates him from the executors, workers, suppliers, other participants in the construction process, and third persons. *At forth place*, the role of N "R-G" LLC (Sh.p.k) in the construction of the business complex "R-G" has not been factually determined and legally analyzed though there are numerous allegations for *realization of the project through it,* while it is proven that the 2006/2007 credit was received for this business organization, and so far it had been paying to "ProCredit Bank-Kosovo" JSC the loan installments due through its bank account Nr. 1110208251000104. Verified by the Certificate for registration Nr. 70379329 issued by the Kosovo Business Registry on 5th September 2006 is that during the construction period N "R-G" L.L.C (Sh.p.k) - Prishtinë/Priština was *limited liability company* – a corporation with capital, divided into specified number of the shares of the same value, allocated to determined share-holder(s) - Sections 23.1 and 24.5 of UNMIK/REG/2001/6 on Business Organizations and Articles 78 – 125 of the Law No. 02/L-123 on Business Organizations, amended and supplemented by Law No. 04/L-006. Having this status, N "R-G" L.L.C (Sh.p.k) was and still is *a legal person that can own property in its own name, legally separate and distinct from RZ as its owner who is not co-owner and has no transferable interest in the property owned by this company* - Sections 23.2 and 23.3 of UNMIK/REG/2001/6, Article 78, paragraph 1 of the Law No. 02/L-123, amended and supplemented by Law No. 04/L-006. However, this distinction was not made in the first instance neither in procedural, not in substantive law terms. In

sum, Article 25, paragraph 1 LPBR was applied on factually and legally controversial basis as per the *builder/co-builders* of the business complex Airport "R-G" Centre.

**38.** ***Land owner(s) as per Article 25, paragraph 1 LBPR***. Allocation of property rights over the building object constructed on somebody's land pursuant to Article 25, paragraph 1 LBPR is permissible only with the respect to the *land owner(s)* who are the only ones explicitly entitled by the same provision to request it. This legitimacy has not been duly proven in the case with respect to BZ and GZ. There is no geodesy expertise heard in the proceedings, but it is not disputed that the contested building has been constructed on cadastral parcel nr.P-71409016-00003-4 (nr.3/4), with a surface of 4 051 $m^2$, and on cadastral parcel nr.P-71409016-00078-2 (nr.78/2) with a surface of 1 569 $m^2$, CZ Vrellë e Goleshit/Goleško Vrelo. *At first place*, cadastral parcel nr.3/4 had not been acquired by BZ, GZ and RZ based on the purchase contact Vr.nr.2959/03, attested by the Municipal Court of Lipjan/Lipljan on 3rd November 2003 - it was not subject of this transaction as the properties transferred by it were cadastral parcels nr.3/1, nr.99/2, nr.100 and nr.102, CZ Vrellë e Goleshit/Goleško Vrelo. Hence, the acquisition of cadastral parcel nr.3/4 by the litigants could not be legally based as per Article 20, paragraph 1 LBPR on this purchase contact Vr.nr.2959/2003, attested by the Municipal Court of Lipjan/Lipljan on 3rd November 2003, as erroneously accepted in the appealed judgment (page 10, paragraph 3). No other property title was produced in the case; no *ex lege* acquisitive ground was evidenced as per Article 21 LBPR. As BZ and GZ failed to legitimate themselves as *land owners* of cadastral parcel nr.3/4, this automatically had disqualified them from the allocation of property rights based on Article 25, paragraph 1 LBPR over the building in the constituent parts situated on it. *At second place*, the agreement concluded on 24th May 2005 in its Article 2 previews that UNMIK and the KTA will ensure *part of cadastral parcel nr.78,* registered in Possession List nr.221, CZ Vrellë e Goleshit/Goleško Vrelo in the name of the Publicly-owned Enterprise - Airport Prishtinë/Priština, consisting of 1569 $m^2$, as delineated in Annex 1, to be transferred and conveyed to Z family as compensation of their land allocated for civil aviation purposes. However, *this written agreement was not attested by the court which in*

*2005 was the specific form, statutorily prescribed for validity of all legal transactions with immovable properties* as per Article 67, paragraph 1 *in fine* and paragraph 2 LCT, without any exceptions. Not concluded in this prescribed form, the agreement of 24th May 2005 pursuant to Article 70, paragraph 1 LCT did not produce legal effect, *inter alia,* with respect to the transfer/conveyance of property rights to Z family over the part of cadastral parcel nr.78 with a surface of 1 569 $m^2$, later subdivided into cadastral parcel nr.78/2. *At third place*, according to Article 33 LBPR the cadastral registration as per Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo only *verifies* property rights if *based on a legal transaction* and *vice versa* does not separately represent a legal ground for acquisition of cadastral parcels nr.3/4 and nr.78/2 by BZ, GZ and RZ as per Article 20 LBPR. The legitimacy of the claimants as *land owners* of the construction plot of the contested building could not be therefore considered duly proven as prerequisite under Article 25, paragraph 1 LBPR for allocation of property rights in their name over the complex co-located on cadastral parcel nr.3/4 and cadastral parcel nr.78/2.

**39.** ***Unconscientiousness of the builder under Article 25, paragraph 1 LBPR.*** This is a legally technical term (*terminus technicus)* to designate a category which is not ethical, but legal, and hence depends only on the formal characteristics established by law. The unconscientiousness under Article 25, paragraph 1 LBPR is regulated as *subjective* element - *knowledge of the builder for constructing on land, not belonging to him/her.* The misapplication of this requirement is in several aspects. *At first place,* while under Article 24, paragraph 1 LBPR the builder is *conscientious* if *has not known nor could have not known that he/she has built on somebody else's land,* under Article 25, paragraph 1 LBPR the builder is unconscientious when *has known that he/she builds on somebody else's land* and *vice versa* not if he/she *should have known that fact.* The comparison shows that Article 25, paragraph 1 LCP is applicable if the builder has acted *intentionally* - being conscious of the alien ownership over the land, he/she wished the construction and realized it, regardless of any legal negatives. The norm is contrariwise non-applicable if the builder carried out the construction on alien land out of *negligence* without foreseeing the occurrence of legal negatives, but being

obliged to and able to foresee them. No such differentiation is found in the judgment. *At second place*, event though the knowledge of the builder about the alien ownership over the land is *subjective element*, it has to be positively proven in the case, without being mixed with or substituted by the *objective element* related to it – the property status of the construction plot itself. Neither in the factual, nor in the legal part of the judgment are mentioned any evidence, facts or motives in this regard – instead on page 13, paragraph 3 the first instance court directly concluded that *RZ knew that he was building on land owned by him and his two other brothers.* Thus his *unconsciousness* was assumed without such legal presumption under Article 321, paragraph 4, first hypothesis LCP, whereas the legal presumption set forth by Article 72, paragraph 3 in conjunction with paragraph 2 LBPR for *conscientiousness* of the builder as *possessor of the whole construction plot* was disregarded and non-applied, without being disproved and confuted in the trial as per Article 321, paragraph 4, second hypothesis LCP. Contrariwise, enumerated in the appeal are numerous factual and legal arguments, non-assessed in the judgment, for *builder's conscientiousness in conformity with the legal presumption* of Article 72, paragraph 3 in conjunction with paragraph 2 LBPR, systemized as follows. *Firstly*, the estimation for the knowledge or non-knowledge for the property over the land in this case is complicated by: 1) *the co-ownership* of the litigants, formally registered over all the properties in Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo; 2) *the lack of valid property titles* in the name of the litigants for cadastral parcels nr.3/4 and nr.78/2 - where the location of the complex is concentrated; 3) their litigious pretences over the contributions in the purchase of the land and the payment of its price in 2003. Clear manifestation for the firm subjective perception of RZ for the land as his exclusive ownership is his claim filed for its confirmation against BZ and GZ in C.nr.2292/2009 of the Municipal Court of Prishtinë/Priština on 23rd January 2009, almost 2 months before the initiation of C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan. This parallel legal proceeding regularly instituted by him before this case and clearly not to be utilized in it, demonstrates *his conviction that the land plot of the building actually belongs to him and non-knowledge for its sharing with his brothers.* No one will

initiate judicial proceeding and make procedural expenses in its course if not persuaded that he/she is the real holder of the pretended right. *Secondly,* according to the Federal Court of Yugoslavia Gzz.nr.10/1982 upon construction on somebody else's land the court has to evaluate the exact level of conscientiousness of the builder, but also the *builder's and land owner's behaviour* so that the right on use of the land as an element of its ownership is not abused, *inter alia,* by *occupation of a minor portion of the land.* The land registered by Certificate Nr. UL-71409016-00251 in the name of BZ, GZ and RZ is with total surface of 48 777 $m^2$ or the 1/3 ideal part of each corresponds to a real share of 16 529 $m^2$. There is no expertise, but according to the construction permit, the project approved by it and the statements of the opposing parties, the general space of the built business premises is 2 000 $m^2$. Calculated *ad valorem,* the building covers 4 % of the total surface of land, registered Certificate Nr.UL-71409016-00251, which does not exceed the 33.33 % share of RZ, and does not violate the 33.33 % share of BZ, and/or GZ. As far as the plot is not divided, expressed in surface the 1/3 of each of the brothers in it corresponds to 666.67 $m^2$, which is 4 % of the individual ideal share of everyone in the land, registered in Certificate Nr.UL-71409016-00251. Hence, according to the statements of RZ he has always been convinced that the proportion of the space of the complex *versus* the total surface of the land registered in Certificate Nr. UL-71409016-00251 in this area as neigbouring parcels, allows him to construct the complex on his share, without compromising the shares of his brothers, in full compliance with the customary law. *Secondly*, cited further in the appeal is jurisprudence of the Supreme Court of Serbia (Rev.nr.1532/07), according to *which the fact that the builder had serious grounds to believe that he was building on his land while the land owner did not dispute the construction although without doubt knew about it, represents a legal ground to get the right on the land based on Article 24 LBPR, excluding the application of Article 25 LBPR.* The factual circumstances in this case are similar. The project by itself manifests the full conviction of the investor that he was building on his land otherwise he would not jeopardize investment of such scale realizing it on terrain with non-regulated, contested, unstable property status. His conviction in this regard was

strengthened by the fact that the very idea for this centre near the airport, and all activities related to it has always been known within the Z family and also widely publicized in the society, without any contest, non-officially or through any legal actions, against its construction, the existence of the complex and/or the business realized in it. *Thirdly,* the conceptualization of the idea for the centre, the decision to build it near the airport, the presentation of the project to the authorities and its popularization/advertisement as investment of RZ, the issuance of blue-prints, permits and other technical documentation in his name, all available during the construction works on the plot, summarily the whole process was characterized with publicity, accessibility and transparence without any concealing, secrecy or deceit of any information. This manifests *overall conscientiousness of the builder and his subjective perception for stable legal status of the building with its terrain.* Nevertheless, even if the first instance court did not take all these aspects into account, fortifying the legal presumption under Article 72, paragraph 3 in conjunction with paragraph 2 LBPR, it was obliged to apply the non-rebutted legal presumption itself according to Article 321, paragraph 4, first hypothesis LCP, assuming based on it *conscientiousness of the builder* as a possessor of the land - construction plot of the complex. Irrelevant is whether this non-knowledge was due to mistake in the facts or in the law. As neither Article 25, paragraph 2, nor Article 72, paragraph 2 LBPR make this differentiation; the rule *"error juris nocet, error facti prodest"* (*the mistake in the law harms, the mistake in the fact benefits*) is derogated. *At third place*, as explicitly formulated in Article 25, paragraph 1 LBPR, the lack of consent of the land owner(s) with the construction *is not a separate legal criterion* for *unconscientiousness* of the builder, which is normatively associated exclusively and only with the *knowledge of the alien ownership over the land.* The preliminary *permission of the land owner(s)* is required for the builder to become owner apart from the building also over the land on which it is constructed and the land necessary for its regular use pursuant to Article 24, paragraph 1 LBPR. While the *lack of such permission* of the owner of the land may block its acquisition by the builder pursuant to Article 24, paragraph 1 LBPR, *such tacit dissen*t does not suffice the *overturned acquisition of the building by the land*

*owner(s)* as Article 25, paragraph 1 LBPR demands not mere disagreement with the construction, but *express active opposition against it.* In general, the conclusion of the first instance court for *unconscientiousness* of RZ as a builder was drawn out of the factual presumption that he *should have known* that the land belongs to him and his two brothers, without being positively proven that *he has known* that, *non-applying the applicable and not rebutted legal presumption* under Article 321, paragraph 4, first hypothesis LCP in conjunction with Article 72, paragraph 3 LBPR for his *conscientiousness*, mixing this *subjective element* for knowledge for the alien property over the land with *objective element* for such ownership, and *extending it to the lack of consent of all land co-owners*, which is not a normatively established criterion to differentiate the conscientious from unconscientious builder in Article 25, paragraph 1 LBPR.

**40.** ***Immediate objections of the land owner(s).*** Legitimated to request allocation of the property right over the building according to Article 25, paragraph 1 LBPR is the *land owner that has put his/her objections immediately.* This statutory requirement is mandatory integral part of the provision as it is exactly the compliance with it that qualifies *the land owner as conscientious* and thus entitled to acquire the ownership over the building. The submission of such clear, concrete and decisive requests to the builder to cease all construction works on the land plot is an essential prerequisite, imperatively demanded by Article 25 paragraph 1 LBPR for the objecting owner of the land to become later owner of the building finalized contrary to his/her protests. *At first place*, the jurisprudence is consistent and uniform in its understanding that the position of the land owner should be *disapproval of the construction, its unconditional denial and categorical opposition against its realization.* There is no form prescribed or regulated procedure how the objections might be exposed – thus, they are equally valid in written or verbal form, officially or non-officially made. In any case, the objections of the land owner should be *explicitly expressed* in non-ambiguous manner and stated in unequivocal terms directly to the builder or otherwise communicated to him. Usually, they are materialized in legal remedies used by the land owner against the builder to block the construction works on the plot ensuring their discontinuation.

The *tacit disagreement with the construction or its parameters, physical or juridical, does not suffice at all.* Further, to produce the legal effect under Article 25, paragraph 1 LBPR, the objections must be put *immediately.* Grammatically, it means *at once, instantly, without delay, promptly*. Hence, the jurisprudence unanimously holds in the last four decades in numerous court decisions that the objections of the land owner should be made at *the moment the preparation for the construction starts* or *at very beginning of the construction itself* and only in certain cases when he/she lives abroad *during the construction*. Because these objections are normatively provided as legal redress of the land owner *to prevent the prepared yet not undertaken construction* or *to suspend the started yet not finished construction.* Given this *differentia specifica* of theirs as *legal instrument/act against the prepared or ongoing construction*, they may produce the consequences envisaged in Article 25, paragraph 1 LBPR only if timely raised *before or after the commencement of the construction* or *during its course.* Contrariwise, even if *de facto* made, they will have no legal effect if are belated, being exposed *post factum*, after *the completion of the construction. At second place*, in this case it is not disputed and it is proven with certainty in the first instance that BZ and GZ have been informed in details for the whole construction process of the Airport Centre "R-G" – each one of them have been provided with a copy of its project, the realization of its subsequent stages was discussed numerous times in the Zeka family, both had unrestricted access to the technical documentation, both of them were numerous times at the construction plot, as well as at the business complex itself after its finalization in the end of 2007 during its functioning in the whole 2008. BZ and GZ had admitted in the claim that the construction was done based on the consent of the three brothers–litigants in the case in their full agreement. Being well informed about the *preparation* of construction in the second half of 2005, its start in the end of 2005 and its *realization* in all constituent parts of this business complex built by the end of 2007, the claimants contrary to Article 25, paragraph 1 LBPR *did not put at any moment in any form any objections against this construction and/or the building itself.* There were no legal remedies used by BZ and GZ to terminate the construction works, there are even no their verbal unofficial requests for such suspension, ever

stated. This suffices for non-application of Article 25, paragraph 1 LBPR and non-existence of all alternative rights foreseen by this provision. *At third place,* the first instance court erroneously qualified as objection under Article 25, paragraph 1 LBPR the submission ref. nr.P-351-128 filed by GZ to the Directorate for Urban Planning - Lipjan/Lipljan on 9th February 2009. *Firstly*, as this document has not been administered as evidence in the case, no legal conclusions could be made based on it. *Secondly*, carefully read, this is a only request of GZ the Decision 9 Nr.351-204 for construction permit, dated 26th September 2005 to be *amended* so that the "*INVESTORS Rexhep, Gani and BZ are allowed"* to construct, while *the rest of the decision remains as it is*. This is in its essence *second application for issuance of construction permit* under Articles 37, paragraph 1 and Article 38, paragraph 1 of the Law No. 2004/15 on Construction, filed by GZ after the *first application* submitted by RZ to the Department for Planning and Urbanism Lipjan/Lipljan with ref.nr.9-351-20 on 23rd August 2005. Since this is only a *request to permit the construction*, it could not simultaneously represent also an *objection against the same construction*. This submission of GZ *does not express opposition, dissent or denial*; it *incorporates explicit consent, approval and acceptance of the building activities and premises permitted*. The submission does not contain any word, expression, idiom, that could be directly or indirectly connected with "*objections against the construction*" or associated with any synonymous term. *Thirdly*, the said submission, regardless of its content, could not produce the legal effect under Article 25, paragraph 1 LBPR being filed on 9th February 2009 – 3 years and 4 months after the issuance of the construction permit in the name of RZ, for which as admitted in the claim BZ and GZ had always known, 3 years after the restaurant in the complex was finished in January 2006 and 1 year and 1 month after *the completion of the construction in the end of 2007*. Expressed with such excessive delay (from 13 up to 36 months after the different constituent parts of the centre were f inished), the request of GZ of 9th February 2009, whatever is its precise qualification, is *belated* to an extent which goes far beyond any "*immediate*" standard. *With the end of all construction works in the end of 2007, any objections under Article 25, paragraph 1 LBPR of the land owners*

*for their termination had become factually and legally impossible as being already realized, they could not be any more discontinued or otherwise suspended.* The first instance court attributed to the submission ref. nr.P-351-128 filed by GZ to the Directorate for Urban Planning - Lipjan/Lipljan on 9th February 2009 *meaning it does not objectively have* and without basis erroneously converted *this building application* into its antipode of *anti-building objection*, while disregarding its *non-immediateness* as filed long after the end of all works on all business premises. Contrary to Article 25, paragraph 1 LBPR, it was applied *without objections against the construction put immediately after its preparation or commencement and before its finalization,* even though upon non-compliance with this independent requirement the provision was non-applicable. Without such timely explicit objections against the building, the owner(s) of the land – its plot are considered *unconscientious* and thus not entitled to acquire the property over it based on Article 25, paragraph 1 LBPR. In this case the claimants could not be allocated co-ownership shares in the "R-G" Centre on this ex *lege ground* apart from the non-proven property titles for cadastral parcels nr.3/4 and 78/2, but also for *unconscientiousness*, expressed in *knowledge for the building and endurance of its whole construction process without any objections put in its course.* This passive tolerance of the claimants corresponds to Article 24, paragraph *in fine* LBPR and *vice versa* not to the active opposition of land owners demanded by Article 25, paragraph 1 LBPR, as erroneously subsumed in the appealed judgment.

**41.** ***Request for allocation of the property right over building with payment of its market value.*** Article 25, paragraph 4 LBPR, renumbered into Article 25, paragraph 3 LBPR by Article 15, paragraph 2 of the Law for amendments and supplements of the LBPR (Official Gazette of the SRY № 29/1996) states that if the land owner requests to be allocated the ownership right over the building object *he/she shall be obliged to reimburse the builder the value of the objec*t in the amount of the average construction price of the object in the place where the object is located in the time of issuance of the court decision. The legislative purpose underlying Article 25, paragraph 3 LBPR is to prevent the non-equivalent conveyance of property from the builder to the land owner if non-balanced with reimbursement of the market value of the building object.

Article 25, paragraph 3 LBPR clearly *guarantees the bilateral proportionality in this transposition of assets* and *brings into equilibrium the rights and interests of the land owner versus the ones of the builder.* Hence, this acquisitive mode is applicable only if there is a *request of the owner of the land for allocation of the property right over the building object constructed on it, against reimbursement of its value to the builder pursuant to Article 25, paragraph 1 and 3 LBPR.* These two elements – the allocation of the ownership over the building and the payment of its value – being genetically and functionally linked have to be decided by *one and the same judgment*, as stated explicitly in Article 25, paragraph 3 LBPR. This is absolutely necessary to ensure a *fair balance* by equalizing the *transfer of the property right over the building* to the land owner with award of *full compensation equal to its market value* to the builder and thus to prevent legal or economic disequilibrium in favour of the land owner or in favour of the builder. Without any cogent reason, this normative approach was not taken in the appealed judgment. *At first place,* there was no request ever filed in the first instance proceedings by BZ and GZ, seeking allocation of shares in the building under the conditions set forth by Article 25, paragraphs 1 and 3 LBPR, *inter alia, against reimbursement of an amount of money equal to their market value or otherwise related to it.* Without this element in the *petitum*, though mandatory as per Article 25, paragraph 3 LBPR, the claim could not be at all qualified and granted as per Article 25, paragraph 1 LBPR. Consequently, to the detriment of the claimants, they were recognized ideal parts in the building as if it was constructed without their investments and hence encumbered with *future payment of their millions market value* under Article 25, paragraph 3 LBPR, though the claimants themselves had pretended the same ideal parts based on their *past contributions*, already invested in the object, which being materialized in it, fully exempted them from any additional payments. Thus as a result of the *ex officio* substitution of the ground of the claim, the judgment disregarded the claimant's thesis for acquisition of shares in the building by joint new contributions and join investment of transformed common family assets and indirectly has produced unsought financial burden for the each one of claimants which given the most approximate estimations of the business complex will be in the million(s) scale.

*At second place,* contrary to Article 25, paragraph 3 LBPR no expertise was appointed to evaluate the average construction price of the object in the first instance, and no compensation equal to its thus esteemed market value was awarded to the respondent by the appealed judgment. The stance taken here that the compensation issue should be *separately* decided in another contest, if initiated by RZ, contradicts the requirement of Article 25, paragraph 3 LBPR the allocation of the property right over the building and the reimbursement of its market value given their conic relation to be *simultaneously non-separately* decided in one and the same proceedings and by one and the same court decision. Apart from the formal non-compliance with Article 25, paragraph 3 LBPR, the approach taken strikes *the fair balance principle* embodied in the same norm - it leads to unjust enrichment, as the allocation of the ideal parts in the building has not been equalized at all with any compensation of their values at any level, and thus the proprietary rights/interests of the parties have been left in *prima facie* disequilibrium. Though, not deciding the compensation, the first instance court gave instructions it to be determined *considering the participation of the parties in the construction, following the movement of funds and accumulation of profits* – however, none of these criteria has reliance in the valuation method under Article 25, paragraph 3 LCP. The stance is also erroneous for mixing without legal basis the co-ownership of the *contested building as a physical structure* with the *shareholders interests in the capital of "R-G" LLC (Sh.p.k)–Prishtinë/Priština,* which are not subject-matter of the case. The judgment was rendered without any request under Article 25, paragraph 1 in conjunction with paragraph 3 LBPR for *allocation of ideal parts in the building with reimbursement of their market value*, though demanded by the same provisions. The judgment was delivered without award of any compensation to the respondent for the bereft ideal parts determined in any level, thus allowing *disproportionate and non-equivalent transposition of proprietary rights,* again in contradiction with Article 25, paragraph 1 read in conjunction with paragraph 3 LBPR.

**42.** ***Preclusive deadline under Article 25, paragraph 4 LBPR.*** The right of choice under Article 25, paragraph 1 LBPR should be exercised within the time limit of three years from the day when the construction of the building object is finished; after its

expiration the land owner can only request the market value of the land – Article 25, paragraph 5, renumbered into Article 25, paragraph 4 LBPR by Article 15, paragraph 2 of the Law for amendments and supplements of the LBPR (Official Gazette of the SRY № 29/1996). It has been proven in the case that the restaurant as a constituent part of "R-G" Centre was finished in January 2006. Therefore, the 3-years time limit under Article 25, paragraph 4, first sentence LBPR with respect to this concrete component, physically independent from the other premises in the complex, expired in January 2009 – the claim being filed on 12th March 2009, after the expiration of this deadline, *could not pretend allocation of shares over this part of the building,* as this right has been already *ex lege* precluded pursuant to Article 25, paragraph 4, second sentence LBPR.

**43.** The conditions for acquisition of the pretended co-ownership in the building *by law itself* through construction on somebody else's land, *cumulatively established* by Article 25, paragraphs 1, 3 and 4 LBPR *have not been cumulatively fulfilled* in this case. The construction lead to merging of the contested complex with the land into *a single immovable property* that could not exist in horizontal co-ownership of the land co-owners with the builder(s), and thus required vertical consolidation of the two parts into one and the same titular(s) on other acquisitive grounds. *At first place,* the co-ownership over cadastral parcels nr.3/4 and nr.78/2 – location of the land plot of "R-G" Centre could not be considered automatically reproduced in identical as titulars and/or shares co-ownership of this building. Because the Roman law rule "*superficies solo cedit*", traditional for the continental legal systems, w*as not regulated* in the Law on Basic Property Relations (Official Gazette of the SFRY No. 6/80 with amendments and supplements in Official Gazette of the SFRY No. 29/90 and Official Gazette of SRY No.26/96), *and is not regulated* by the Law No. 03/L-154 on Property and Other Real Rights (Official Gazette of the Republic of Kosovo No. 57/09) (LPORR) after its entry into force on 20th August 2009. Neither in the past, nor at present the applicable law in Kosovo has presumed *that the owner of the land is the owner of all building on it, unless otherwise proven.* No such acquisitive ground is particularly foreseen in Articles 20 – 36 LBPR or Articles 36 – 43 LPORR, which regulate the acquisition of

the property right. Without such legal basis, *the building once constructed could not be considered automatically incorporated in the land, as non-independent part of this immovable property,* and *it is not sufficient to prove ownership over the land in order to assume that its holder is also the titular of the ownership right over the building(s) located on this land.* Therefore the ideal parts in the contested business facility could not be considered recognized by the appealed judgment consequent to extension of the co-ownership of the litigants over the land – its plot, following the "*superficies solo cedit*" as this doctrinal principle is not normatively unconditionally formulated. *At second place*, the outcome could not be explained with an exercised *building right.* It was not legally defined as one of the *limited real rights over private properties* exhaustively listed in Article 6 LBPR in *numerus clausus* terms; hence pursuant to Article 7 LBPR no building right could be in principle acquired over private land till 20th August 2009 and exercised through its transformation into ownership or into co-ownership over the building erected within its limits. The contested business facility was finished in the end of 2007, prior to the entry into force on Articles 271 – 281 LPOOR, regulating the *building right* after 20th August 2009 onwards, without any retroactive effect. Article 291, paragraph 2, sub-paragraph 1 LPORR is a transitional rule for *continuation in the possession* over buildings by the natural persons or legal entities that have built them with the required permission of the public authorities – therefore it is *not applicable for the ownership or co-ownership over such facilities.* Article 292 LPORR again as a transitional provision requires for the acquisition of *independent ownership over the building its registration as encumbrance of the land - immovable property unit* – it is not alleged or proven of such registration of any co-ownership rights of the claimants over the contested business facility after 20th August 2009 and their legitimacy as co-owners could not be based on Article 292 LPORR. There is no contract signed by the litigants for mutual establishment of building right over cadastral parcels nr.3/4 and nr.78/2, attested and registered as per Articles 272 – 273 LPORR – moreover, since building right is established for the *future construction* of a building on alien immovable property pursuant to Article 271, paragraphs 2 and 3 LPOOR, the contract which encumbers the land with such limited real right will be

void according to Article 47 LCT for having *impossible subject* if the building has been already constructed, as it is in the case. *At third place,* neither the initial issuance of the construction permit by Decision 9 Nr.351-204, dated 26th September 2009 of the Department for Planning and Urbanism - Lipjan/Lipljan in the name of RZ as "*investor*", nor its later amendment by Decision 9 Nr. 351-128, dated 4th November 2009 of the DUCEP - Lipjan/Lipljan in the name of RZ, GZ and BZ as *"investors"* has instituted property rights over the building. Each of these *administrative acts* under Article 33 and Article 39, paragraph 1 of the Law No. 2004/15 on Construction, according to Article 39, paragraphs 5 and 6 only allows the construction operations to start after being so permitted, *without prejudice to the private titles of third parties.* Since they are not *legal acts of disposal* of the holder of this right, Decision 9 Nr.351-204, dated 26th September 2005 and Decision 9 Nr.351-128, dated 4th November 2009 *did not produce ownership or co-ownership* over the permitted building as per Article 20, paragraph 2 LBPR. Similarly, the *written consent* of all co-owners for construction on co-owned land is one of the documents that have to be attached to the application for construction permit in order to verify possibility of the investor to realize it according to Article 37, paragraph 2, sub-paragraph 2 in conjunction with Article 36, item a) of the Law No. 2004/15 on Construction – this is one of the requirements and conditions set forth in this law that has to be met for the construction permit to be issued according to its Article 33 and Article 33, paragraph 1, first instance. This is only *consent the land to be used for the proposed construction* – Article 38, paragraph 4, relevant for the validity/invalidity of the issued permit as an administrative act; on the opposite, its *availability does not by itself make the investor owner of the building,* and *vice versa,* its *non-availability does not grant by itself to the owner of the land the ownership over the building.* The *written consent* under Article 37, paragraph 2, sub-paragraph 2 of the Law No. 2004/15 on Construction or *its lack* at the end are not separate element in none of the *hypotheses for construction on somebody else's land* – if the land owner agrees with the building *its passive non-objecting* suffices Article 24 LBPR; if the land owner disagrees, this negativism has to be expressed by *explicit immediate objections* as per Article 25 LBPR. Therefore, it is

arguable the position in the appealed judgment that the permission of all co-owners enables the builder *who constructs on somebody else's land to become owner of the building and to use the land necessary for the regular use of this building. Firstly*, such thesis is thinkable only upon a validly established building right which is the only able to separate legally the building from the land by allowing the ownership over the building as a component part of the exercised building right *on the surface of the immovable property, encumbered by it* – Article 271, paragraphs 1 – 3 LPORR. The consent of the co-owners under Article 15, paragraph 4 LBPR could not have this effect, without being normatively foreseen as an alleviated form for establishment of building right on co-owned immovable property. *Secondly*, this consent does not at all suffice for the acquisition of the ownership over the building by its constructor in the hypothesis of Article 24 LBPR as there are other legal conditions demanded, while Articles 25 – 26 LBPR could not be applied – the fist provision premises *objections* of the co-owners of the land, while the second provision requires their *non-knowledge for the construction*, not explicit consent. *Thirdly*, upon construction on somebody else's land under Article 24, Article 25, paragraph 1, second hypothesis and Article 26, paragraph 1 LBPR the builder is entitled to acquire as accessorial to the building *the right of ownership, not the right on use* over the land. *At fourth place,* as long as in the title of the claim as basis for the co-ownership rights of the claimants over the building is also invoked its *co-possession and co-usage*, their confirmation could not be justified with acquisition based on *adverse possession* - the building was finished in its separate constituent parts in the period January 2006 - December 2007; counted from these initial moments neither the long 20-years adverse possession under Article 28, paragraph 4 LBPR and Article 40, paragraph 1 LPORR, nor the short 10-years adverse possession under Article 28, paragraph 1 LBPR and Article 40, paragraph 2 LPORR, applicable for immovable properties, have expired till the submission of the ownership claim of RZ against BZ and GZ in C.nr.78/09 of the Municipal Court of Prishtinë/Priština (now C.nr.2292/09 of the Basic Court of Prishtinë/Priština) on 23rd January 2009, when all acquisitive prescription time periods were *interrupted* in their running consequent to the institution of this legal proceeding pursuant to Article 30,

paragraph 3 LCT read in conjunction with Article 388 LCT. Without their *expiration*, the recognized co-ownership shares of BZ and GZ in the building *could not be considered acquired based on adverse possession. At fifth place,* as it has not been proven with certainty in the first instance case neither the participation of all litigants in the construction of "R-G" Centre, nor the concrete contributions of each of them in this construction, no conclusions can be validly drawn whether BZ, GZ and RZ have simultaneously *co-built* this business facility in shares, equal in their values and thus corresponding to the registered in their names 1/3 ideal parts in cadastral parcels nr.3/4 and nr.78/2 as location of the land plot pursuant to Article 24, paragraph 1 LBPR, with the diagonal compensation requests of BZ, GZ and RZ for the values of the portions of the land used beyond the individual 1/3 of each one of them under Article 24, paragraph 2 LBPR being not filed as renounced or set off. The first instance case, however, does not provide sufficient and solid evidentiary and factual basis for such affirmative legal conclusions of the second instance, while the appealed judgment has no legal reasoning in this regard. *At sixth place*, the dispute could not be considered lawfully resolved according to the rules on the beneficial expenses (*impensae utiles*) made by the possessor(s) of cadastral parcels nr.3/4 and nr.78/2 by increasing their value by constructing the contested complex in this location – regardless of the (non)conscientiousness of such possession, Article 38, paragraph 4 and Article 39, paragraph 5 LBPR provide only monetary compensation entitlement for the beneficial expenses made, *not the right of (co)ownership over the building, materializing them*. Therefore, no valid ground under Article 20 – 36 LBPR or Article 36 – 43 LPOOR is found in the judgment for the confirmed co-ownership over the contested building *mirroring* the registered co-ownership of the litigants over the land – its location, either as being acquired *horizontally* – the building separately (*on the surface*) of the land, encumbered by it, or *vertically* – the building being incorporated in the land (*in its surface*), and absorbed as a non-independent part of this property. The resolution of the dispute in the declaratory part of the judgment under appeal is influenced by the "*superficies solo cedit*" rule, however, being applied though the

conditions laid down by Article 25, paragraphs 1, 3 and 4 LBPR have not been met in this case.

**44.** In the part for *handing over the possession of the determined ideal parts in the building*, the judgment should have not been based on Article 37, paragraph 1 LBPR which regulate the *revendication of individually determined property,* but on Article 43 in conjunction with Article 37, paragraph 2 LBPR governing the *legal protection sought by the claimants for the co-ownership right of each one of them in the building under litigation through revendication of ideal parts in this individually determined property as undivided object.* Further, non-analyzed and non-applied was Article 38, paragraph 7 LBPR as a *legal modality for postponement of the revendication* of the building till the respondent, if qualified as a *conscientious holder* as per Article 72, paragraph 2 LBPR, is reimbursed the *necessary* and *beneficial expenses* under Article 38, paragraphs 2 and 3 LBPR made for the maintenance of the whole property.

## IV. CONCLUSIONS

**45.** Based on all these considerations, the second instance court shall approve the appeal – judgment C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan, dated 10th February 2011 is unlawfully rendered with the grounds for its challenging invoked in the appeal and identified *ex officio* within the appellate review according to Article 194 LCP for substantial violations of the provisions of the contested procedure as per Article 181, paragraph 1, item a) in conjunction with Article 182, paragraph 1 and paragraph 2, items h), n) and o) LCP, erroneous and incomplete determination of the factual situation as per Article 181, paragraph 1, item b) in conjunction with Article 183 LCP and erroneous application of substantive law provisions as per Article 181, paragraph 1, item c) in conjunction with Article 184 LCP. The appealed judgment shall therefore be annulled with return of the case to the first instance court for retrial pursuant to Article 195, item c) LCP.

**46.** According to Article 198, paragraph 2 LCP, during the re-adjudication of the dispute the following provisions of the contested procedure should be complied with. *At first place, correction and completion of the claim* as per Article 102, paragraph 1

LCP is to be requested so that the claimants precisely determine *its factual and legal basis* as ground(s) invoked for the acquisition of the pretended co-ownership rights and precisely formulate the *petitum* as per the claimed immovable property, *inter alia*, individualizing the building and stating whether the cadastral parcels in Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo are included or not in the scope of its statement. The claimants should be given also the opportunity to *amend* the claim as per Article 257, paragraph 1 LCP in compliance with Article 258 LCP or to *modify* it as per Article 257, paragraph 2 LCP. The *real value of the contest*, which is much higher than 5 000 Euros, should be determined according to Article 36 LCP and the difference to the full amount of the corresponding court fee due has to be paid accordingly. *At second place*, the respondent must be given opportunity to express his position on the admissibility/inadmissibility of all changes of the claim prior to their admission by the court and to reply the finally formulated claim with facts, evidence and legal arguments. *At third place*, depending if the subject–matter of the case after the regularization of the claim *includes or not the land plot* of the building, the first instance court has to decide if the proceeding should be *suspended* pursuant to Article 278, paragraph 1, item a) in conjunction with Article 13 LCP or not till the *ownership status of the immovable properties,* registered in Certificate Nr. UL-71409016-00251, CZ Vrellë e Goleshit/Goleško Vrelo, is decided as *prejudicial matter* in C.nr.2292/09 of the Basic Court of Prishtinë/Priština by a final judgment. If no suspension is ruled, the first instance court has to decide whether to *join* the two cases after the referral as per territorial competence of C.nr.2292/2009 of the Basic Court of Prishtinë/Priština to Branch Lipjan/Lipljan according to Article 408 LCP with the consent of all parties for adjudication in one and the same proceeding and for issuance of a single judgment on them. *At fourth place*, the probative procedure should be duly repeated. The expert analyses proposed by the claim should be assigned, performed and submitted to the case. All documents related to the acquisition of cadastral parcel nr.3/4 and attestation of the compensation agreement with UNMIK and KTA as per cadastral parcel nr.78/2 are to be submitted to the case, as well as all public, bank and business documentation for the construction of the building. The parties should update all their proposals for

testimonial evidence – the witnesses that are not validly withdrawn and not examined in C.nr.82/2009 of the Municipal Court of Lipjan/Lipljan should be interrogated. The statements of the parties if not changed might be administered by reading the minutes of the sessions on 10th and 30th July 2009, 11th and 26th January 2011 in the parts with the recording of their hearing. The overall probative procedure should be focused only on the facts of relevance, *inter alia,* on proving with certainty the *concrete individual material contributions of the litigants in the construction of the concrete building* in the period 2005 – 2007 without overview of the personal, labour or business relations of the parties in the period 1990 – 2009 that could not be transformed into common family property over this building without determined shares - Article 18 LBPR, co-ownership in ideal parts – Article 13 LBPR or property right - Article 3 LBPR. *At fifth place*, all conditions required for application of the invoked acquisitive ground(s) should be duly established, whereas any uncertainty in this regard has to be resolved in compliance with the burden of proof rules of Article 322 LCP. *At sixth place,* if the construction on somebody else's land is regularly introduced in the subject-matter of the case by the litigants, it should be carefully examined according to Article 8 LCP as per: 1) the capacity of *builder(s)* of the facility and *land owner(s)* of the land plot; 2) the *individual contributions* to the construction of one party as *a single builder* or the *collective participation* by joint assets by *co-builders*; 3) the *conscientiousness* or *unconscientiousness* according to the legally defined criteria for such differentiation – knowledge for the *alien ownership over the land* or parts thereof for the builder(s) and *knowledge and/or non-immediate objecting the construction prior to its finalization* for the land owner(s); 4) the existence of timely filed requests, prior to the expiry of the respective *preclusive deadlines* prescribed by Article 24, paragraph 2 or Article 25, paragraph 4 LBPR; 5) *the market value of the building* determined as per Article 24, paragraph 2 LBPR and *the market value* of the land determined as per Article 25, paragraph 3 LBPR; 6) the *proportion* between these two values as basis for resolution of the dispute if the same one could not be solved based on the *subjective* element in the provisions in favour of the conscientious builder(s) as per Article 24 LBPR or the conscientious land owner(s) as per Article 25 LBPR, so that it remains to be decided

according to this *ratio* as *objective* criterion by applying the rules of Article 26 LBPR in case of *bilateral conscientiousness* of the builder(s) and the land owner(s) or by *analogy* in case of their *bilateral unconscientiousness*; 7) the *compensation* that has to be awarded for any allocation of property rights over the building object or the land, equivalent to the full market value at the time of rendering the judgment in the retrial. The jurisprudence relies on such *mutatis mutandis* application of the *construction on somebody else's land rules adapted to the co-ownership regime* when one or more co-owners built on common land exceeding their ideal parts - the decision whether the co-ownership shares in the land will belong to the builder(s) or the object will belong to the co-owner(s) who did not construct it, depends on their overall conscientiousness *and* the relation between the construction value of the building *versus* the market price of the ideal parts of land of the co-owner(s) – non-builders. Finally, during the re-adjudication, parties have to be reminded for the possibility to reach amicable judicial settlement on the dispute at any time of the first instance proceedings according to Articles 412 – 416 LCP.

In view of the aforementioned reasoning it is decided as in the enacting clause.

**LEGAL REMEDY:** No appeal is permitted against this ruling according to Article 206, paragraph 1 *in fine* in conjunction with Article 208 and Article 176, paragraph 1, first sentence LCP.

**THE COURT OF APPEALS – PRISHTINË/PRIŠTINA**

**AC.nr.5147/2012 on 30.05.2013**

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**PRESIDING JUDGE ROSITZA BUZOVA**

*Prepared in English as an official language according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.*

# NOTE OF DELIBERATION AND VOTING

**THE COURT OF APPEALS** in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, the Kosovo Judge MEDIHA JUSUFI and the Kosovo Judge KUJTIM PASULI, as panel members, in close session on 30th May 2013 deliberated and voted unanimously as in enacting clause.

The present note is added to ruling AC.nr.5197/12 of the Court of Appeals, dated 30th May 2013 pursuant to Article 140, paragraph 1, second sentence LCP.

**THE COURT OF APPEALS - PRISHTINË/PRIŠTINA**

**AC.nr.5197/2012 on 30.05.2013**

**PRESIDING EULEX JUDGE**
**ROSITZA BUZOVA**

**JUDGE MEDIHA USUFI**
**PANEL MEMBER**

**JUDGE KUJTIM PASULI**
**PANEL MEMBER**

**ANDRES MORENO**
**EULEX LEGAL OFFICER**

**XHANGYLE ILIJAZI**
**EULEX INTERPRETER/TRANSLATOR (ENGLISH/ALBANIAN)**

**JELENA JANJIC**
**EULEX INTERPRETER/TRANSLATOR (ENGLISH/SERBIAN)**

*Prepared in English as an official language according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and signed by the Kosovo Judges after translation by the above referred interpreters/translators.*