SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA

KOSOVO PROPERTY AGENCY (KPA) APPEALS PANEL
KOLEGJI I APELIT TË AKP-së
ŽALBENO VEĆE KAI

GSK-KPA-A-095/13

Prishtinë/Priština,
20 July 2015

In the proceedings of:

I Dj
Represented by her mother
S Dj
Hereafter to be referred to as the:

Appellant

vs.

Is-Company/Ismet Bajraktari

Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo composed of Sylejman Nuredini, Presiding Judge, Willem Brouwer and Rolandus Bruin, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/C/168/2012 dated 5 September 2012 (case file registered at the KPA under No. KPA 14510), after deliberation held on 20 July 2015, issues the following

JUDGMENT

1. **The appeal is accepted as grounded.**
2. **The decision of the KPCC no. KPCC/D/C/168/2012 is modified as far as it concerns KPA 14510 as follows:**
3. **The Claim of I D registered under KPA 14510 is unfounded.**

Procedural and factual background:

The Appeals panel takes as facts as established by the KPCC and not contested by parties or otherwise proven wrong the following:

1. On 31 October 2006 the Appellant filed a claim at the Kosovo Property Agency (KPA), seeking confirmation of her property right over a commercial building at the Municipality of Prizren Durmis Aslani street/Culjan (no number) cadastral number unknown, with a surface of 18m2, consisting of two rooms, a ground floor and a first floor (hereafter to be referred to as: the property). This property was built on a rented parcel (hereafter to be referred to as: the parcel) in the area known as: Qylham Market.
2. The appellant and her family build this property in 1997.
3. The property was identified and appeared to be occupied by I B .
4. The claim was contested by Appellee. In a letter dated 8 February 2012, addressed to the Appellant, Appellee presented itself as the organisation that won the tender of the Municipality of Prizren on the exploitation of the Qylhan Market, including the parcel and property in question.
5. The KPCC decided the claim to be dismissed due to the lack of jurisdiction. The KPCC reasoned that: *"the respective property right holder acquired only a temporary us right over the claimed property and was therefore only authorized to build a moveable structure on the claimed property"* (reasoning 25 in the KPCC Decision).
6. The decision was served upon the appellant on 4 March 2013. The decision was served upon the Appellee on 29 January 2013. Appellee did not reply to the appeal and did not join proceedings before the Supreme Court.

7. Appellant filed an appeal against the KPCC decision at the KPA on 29 March 2013 which is within the period of 30 days mentioned in section 12.1 of the UNMIK Regulation 2006/50, as amended by Law No. 03/L-079 on Resolution of Claims Relating to Immovable Property, Including Agricultural and Commercial Property (hereafter to be referred to as: Law No. 03/L-079).
8. The appeal was served on the Appellee on 28 June 2013. He did not respond to the appeal.
9. The Appellant filed a copy of a lease contract with Public Utility Company "Higijena" in Prizren on the lease of the parcel. The contract was concluded on 28 March 1994 and according to the text of the contract it had a validity until 31 December 1994.
10. According to the verification report dated: 14 October 2011, the lease contract could not be found in the archives of the Public Utility Company "Higijena" in Prizren.
11. The contract, among other conditions, mentions the following: "*The lessee shall construct on the rented space mentioned in this contract a business building (object) at his own expense, and shall at the same time be obliged to remove that building at his own expense in case that this is ordered by the competent authorities or the lessor".* The Lessee, being Appellant, constructed the property on her own expense on the rented parcel.
12. Removal of the property was ordered neither by the competent authorities nor by the lessor.
13. After the armed conflict in Kosovo, in 2001, the Appellee won the right from the Municipal Assembly of Prizren on the exploitation the Qylhan Market, which included the property. The property then was leased to a third party.
14. With it's decision of 5 september 2012, KPCC/D/C/168/2012 the KPCC dismissed the claim as not within the jurisdiction of KPCC.
15. The Supreme Court sent an order to Appellant and an order to KPA, dated 22 May 2014. KPA answered by letter, dated 2 June 2014, and by letter, dated 18 August 2014, and submitted with that documents and pictures.

Allegations of the parties:

16. The Appellant seeks confirmation of her ownership right over the property since the possession and use of the property has been taken by third parties.
17. The Appellant states that the property is of an immovable nature and not, as the KPCC decision concluded a movable object. And therefore she states that her claim is within the reach of the UNMIK Regulation and the jurisdiction of the KPCC.
18. The Appellant supports her statement by stating that: "*the property is built of construction material with previous obtained technical documentation, and as such from the moment of its construction has become an integral part of the land on which it was build."*

19. The Appellant further states to be deprived of the possibility of a trial before a common court within a reasonable time since it took the KPCC almost five years to come to the decision that there was a lack of jurisdiction.
20. Appellant further states that she regularly extended her right of use until she lost possession of this property.
21. The Appellant further states to have suffered a considerable loss due to the fact that the property has been used by third parties without paying any compensation to the Appellant.
22. The Appellant therefore requests the KPCC decision to be modified in such a way that she will be re-installed in the possibility to exercise her property rights.

Legal reasoning:

Admissibility of the appeal

23. The appeal is admissible.

Jurisdiction

24. The Supreme Court has jurisdiction.

Merits

25. According to Section 3.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 (here after: Law No. 03/L-079), a claimant is entitled to an order from the Commission for repossession of the property if the claimant not only proves ownership of a private immovable property, but also that he or she is not now able to exercise such property rights by reason of circumstances directly related to or resulting from the armed conflict that occurred in Kosovo between 27 February 1998 and 20 June 1999 (the armed conflict). This also goes for use rights on immovable property.
26. Since the claim was dismissed by the KPCC due to lack of jurisdiction there are two (2) questions that need to be answered:
    1) Did the Appellant prove that the subject matter is an immovable object;
    2) Was there a useright in the period during the armed conflict 1998/1999.

Question 1)

27. The KPCC decision reads that the property is of a movable character. Apparently this decision is based on the copy of the lease contract that was submitted by the Appellant when filing the claim.

28. In fact, the lease contract as quoted here fore in Paragraph 9 mentions that: "*The lessee shall construct on the rented space (…) a business building (object) at his own expense, and shall at the same time be obliged to remove that building at his own expense …)".*
29. The contract does not mention any restriction on the nature of the building. Whatever building the lessee should construct, the only condition was that she was obliged to remove it on her own expense, when: "*this is ordered by the competent authorities or the lessor".* The contract furthermore does not give any clue on how this "removal" should have to take place.
30. The conclusion in the KPCC decision that the property must have been *"of a movable character"* cannot be derived from the contract as such. After all a building of an immovable character can also be removed, simply by demolishing it.
31. Whether the building is or is not of a movable character therefor has to be established by comparing the factual situation with the requirements for the status of a building as such. Article 10 of Law no.03/L-154 on Property and other Real Rights (dated 25 June 2009, hereafter referred to as: Law PRR) and that is applicable in this case according to article 291 of that law, describes immovable property as follows:

    1. Immovable property is a part of the earth's surface that is or can be enclosed. Immovable property includes plants enrooted in the ground and buildings firmly connected to the ground, but do not include natural resources in the subsoil.

    2. Immovable Property includes:

    2.1. a building that belongs to a person other than the owner of the immovable property on which it is built;

    2.2. (…);

    2.3. („);

    2.4. (…).

    3. (…).
32. In the copy of the contract on the lease of the business premises it says that the rented parcel is *"a plot of land"* in Prizren D A street with a surface of 11.08m2. In fact it is a part of earth's *surface that is or can be enclosed.*
33. There is no doubt that whatever the character is, a building was erected on this parcel of land. This is also according to the contract on the lease. Photographs in the process-file show that this building is enclosed between two other buildings.
34. The second requirement would be that the building is "*firmly connected to the ground".*
35. In her appeal the Appellant stated that: "*This particular business premises (…) is inextricably linked to the land where it is built upon".* And: "(…) *moving of the object could not be executed without causing damage to its essence and functionality and (…) it would significally decrease its value".* The photograph in the file,

shows a small building with a shop front, apparently two stores's high and covered with roof-tiles. Situated between similar buildings.

36. On 22 May 2014 the Supreme Court sent and order to the Executive Secretariat of the KPA with the following question: *"The appellant states that the building is inextricably attached to the ground; how is de building attached to the ground?"*
37. The answer by the Executive Secretariat of the KPA was: *"From the pictures taken during the notification on 29/11/2006 the Secretariat finds that the claimed property was constructed with solid material (bricks) affixed to the land of a permanent nature and of such a size that it cannot be removed at a nominal cost and with negligible damage to the land or to the existing structure."* (2 June 2014, KPA 14510)
38. According to the Supreme Court the answer given by the Executive Secretariat confirms the statement of the Appellant here fore mentioned in Paragraph 30.
39. Thus comparing the factual status of the building with the requirements in the Law PRR leads the Supreme Court to the conclusion that the property has to be considered an immovable property as foreseen in the Law PRR.
40. That, as the KPCC decision mentions, the Appellant acquired only a temporary use right to the parcel on which the property is erected, does not change the character of the property as such, it only defines the character of the Appellants use right to the ground.

Question 2)

41. The Appellant filed a copy of a lease contract with Public Utility Company "Higijena" in Prizren on the lease of the parcel. The contract was concluded on 28 March 1994 and according to the text of the contract it had validity until 31 December 1994.
42. This lease contract could not be verified positively neither in the archives of the Public Utility Company "Higijena" in Prizren, nor in the archives of the Municipal Court of Prizren.
43. The contract was, according to the text, of a temporary character and expired on 31 December 1994. No copies of extension of the contract were issued.
44. Since the lease contract could not be positively verified and was of a temporary character the appellant did not prove the right to the immovable property after 1994.

Conclusion

45. All the above mentioned leads the Supreme Court to the conclusion that the KPCC decision regarding KPA 14510 should be modified. The Supreme Court therefore has decided as in the Enacting Clause.

Legal Advice

Pursuant to Section 13.6 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, this judgment is final and enforceable and cannot be challenged through ordinary or extraordinary remedies.

Sylejman Nuridini, Presiding Judge

Willem Brouwer, EULEX Judge

Rolandus Bruin, EULEX Judge

Urs Nufer, EULEX Registrar