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-088/12 **Prishtinë/Priština,**
12 April 2013

In the proceedings of:

J. V.

And

V. V.

Appellant s/Claimants

vs.

S. B.

Appellee/Respondent

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Anne Kerber, Presiding Judge, Elka Filcheva-Ermenkova and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/139/2011 (case files registered at the KPA under the numbers KPA44636 and KPA44637), dated 7 December 2011, after deliberation held on 12 April 2013, issues the following

JUDGMENT

1- **The appeal of J. V. and V. V. against the decision of the Kosovo Property Claims Commission KPCC/D/A/139/2011 (case files registered at the KPA under the numbers KPA44636 and KPA44637), dated 7 December 2011, is rejected as ungrounded.**

2- **The decision of the Kosovo Property Claims Commission KPCC/D/A/139/2011 (case files registered at the KPA under the numbers KPA44636 and KPA44637), dated 7 December 2011, is confirmed.**

3- **The appellants have to pay the costs of the proceedings which are determined in the amount of € 80 (€ eighty) within 90 (ninety) days from the day the judgment is delivered or otherwise through compulsory execution.**

Procedural and factual background:

On 26 July 2007, J. V. (as a family household member of the property right holder M.V.) and V.V., as a property right holder, filed claims with the Kosovo Property Agency (KPA), seeking repossession of two properties – commercial establishments – shops, numbers 19 and 20 each with a surface of of 22, 88 m², both situated in parcel 1667/1 in Shtime/Štimlje. The claimants stated that the late father of the first claimant – M. V. and the second claimant himself were the owners of the shops prior to the armed conflict of 1998/1999.

To support their claims they provided the KPA with the following documents:

- Joint venture contract for construction of business premises – No 19, concluded on 15 November 1996 by a Socially owned company named "Gradjevinar", further on in the contract "The Contractor" and M. V. in his capacity of Investor;
- Joint venture contract for construction of business premises – No 20, concluded on 15 November 1996 by Socially owned company named "Gradjevinar ", further on in the contract "The Contractor", and V. V. in his capacity of Investor;
- Death certificate of M. V., certifying that he passed away on 1 September 1997 in Pristina.

The KPA informed the potential interested parties about the claims by placing notifications on the premises on 28 July 2008.

On 4 August 2008 the interested party S. F. B. filed a response claiming that he has purchased the premises.

To support his assertions he provided the KPA with the following documents:

- A contract for the purchase of a business premise, noted as No 14, from Construction enterprise named "Gradjevinar" to F.B., dated 20 February 2005. The contract is certified by the Municipal Court in Ferizaj/Uroševac.
- A contract for the purchase of a business premise, noted as No 15, from Construction enterprise named "Gradjevinar" to F. B., dated 20 February 2005. The contract is certified by the Municipal Court in Ferizaj/Uroševac.
- A document, issued by the Construction enterprise named "Gradjevinar", certifying that F.B. has paid the price for the business premises Nos 14, 15 and 16, dated 5 August 2004.

With Decision KPCC/D/A/139/2011 (case files registered at the KPA under the numbers KPA44636 and KPA44637), dated 7 December 2011, the KPCC has decided that the claims are ungrounded. The KPCC has argued that the contracts on joining of means (joint venture contracts) were not certified at the municipal court and accordingly could not be verified by the Executive secretariat. The Claimants were asked to present further evidence in support of their claims, but they did not do so. In conclusion the Commission accepted that in the absence of any verifiable evidence, the Claimants have failed to establish ownership rights over the claimed properties.

The decision was served to the claimants on 25 May 2012.

On 22 June 2012 they filed appeals, based on assertions for serious violations of substantive law and erroneous and incomplete establishment of facts.
They claimed the business premises were built on the basis of "contracts for pooling resources" on 15 November 1996. The contracts were preceded by a "contract on settlement" which the brother M. (father of claimant J.), V. (claimant V. V.) and R. (not party in the current proceedings) concluded with "Gradjevinar". With this contract (which the claimants have not presented, neither to the KPCC nor to the Court) "Gradjevinar" took over the responsibility towards the three V. brothers to pay them 180 000 DM as a compensation for the land on which a residential and business building is constructed (allegedly the one in which the disputed premises are situated). They say this land had been seized from the V. brothers by the Municipality in Shtime/Štimlje. No compensation was given to them. During the construction there was an ongoing dispute regarding the possible return of the land, which dispute never ended because of the war. To avoid prohibition for the construction the company "Gradjevinar" took over the responsibility to compensate

the V. brothers (it is not clear in what legal form and following what procedure the company "took over" this responsibility).

The claimants assert that there was a novation – *novatio*, in the terms of articles 348-352 of the Law on Obligations (Law of 1978) of the alleged "contract on settlement" and this novation was made with the contracts of 15 November 1995. With the novation the contract on settlement was changed by three separate contracts on pooling the resources for the construction on business premises. With the same contract it is prescribed that each joiner has the right on registration over the business space after the fulfillment of the obligations by both contracted parties and certification of the contract before the competent court. The armed conflict in Kosovo precluded the realization of the contracts on pooling the resources for the construction of business premises. However the V. brothers have fulfilled their obligations to "Gradjevinar" company. The appellants say: "the funds that "Gradjevinar" owed to them (the V. brothers) on the basis on the concluded contract on settlement were joined for the construction premises". Therefore the appellants consider the conclusion of the KPCC that they did not fulfill their obligations to "Gradjevinar" as incorrect.

Further the appellants assert that on 21 March 1997 the V. brothers together with the respondent F.B. went to the director of "Gradjevinar" and they informed him that they have arranged the sale of their business premises to F. B. This was fictive, they wanted just to ensure that "Gradjevinar" will not sell the premises to someone else, once the premises are "sold" to B. R. V. even gave to B. 10000 DM to be handed over back to him in front of the director of "Gradjevinar", so that the latter should believe that this is the first payment that B. is doing to the V. brothers. However there was no real contract between the V. brothers and F. B.. After the Serbian forces retreated from Kosovo F. B. took possession of the business premises and he always stated that he bought them from V. brothers. He used them illegally until 20 February 2005 when he concluded purchase contracts with "Gradjevinar". These contracts were concluded without the knowledge of the V. brothers. The appellants conclude that a multiple sale of the same immovable property occurred, which was very common. They claim it is a well-known fact in Shtime/Štimlje that the V. brothers joined their means for the construction of the business premises. F. B. also knows this. He was unscrupulous and betrayed the trust of V. brothers.

The appellants elaborate on the issue of multiple sells of immovable property: The accepted stand of the Jugoslav judicial practice was that the later buyer of the immovable property who is registered in the register of immovable properties wins over the earlier buyer only if he was conscious. Otherwise the dispute is won by the earlier buyer. They refer to a conclusion No 3, accepted at the consultation of the civil and the commercial departments of the Federal Court, the Supreme Court of Republic and Autonomous Provinces

and Supreme Army Court held on 28 and 29 May 1986 in Belgrade, published in "Bilten sudske prakse", Supreme Court of Serbia, No. 3, Belgrade 1987, page No 5.

Legal reasoning:

Admissibility of the appeal:

The appeal is admissible. It has been filed by an interested party, who took part in the proceedings in front of the KPCC and within the 30 day period after the service of the decision, as prescribed by the Law – section 12.1 UNMIK/REG/2006/50, as amended by Law No. 03/L-079.

On the merits:

The Supreme Court after evaluating the file, the appealed decision and the allegations of the appellant considers that the appeal is unfounded.

The right of property can be acquired by law itself, based on a legal transfer (legal affair) or inheritance - art. 20 of the law on Basic Property Relations (OG SFRY, No 6/1980), applicable at the time of the alleged transfer of property (as pointed by the claimants the alleged transfer occurred in 1996).

In the particular case the claimants assert that their own land has been expropriated by the Municipality of Shtime/Štimlje. Afterwards the family of V. had a long dispute (they do not specify whether it was formalized in court proceedings) and as a result of it a socially owned enterprise "Gradjevinar" decided to compensate them for the loss of the land by building business premises for them (there is no data that "Gradjevinar" was allocated with the right to use the land where the business premises were constructed).

The claimants have not presented any evidence for the alleged expropriation and the alleged settlement agreement (contract) for the determination of the compensation for the expropriated land. They have not presented any evidence that the socially owned enterprise "Gradjevinar" had the right to use the allegedly expropriated land to construct a building and respectfully to transfer this right of use.

Based on the allegations, made by the appellants/claimants in the first instance there are several relevant legal facts to be determined: whether the V. brothers owned the land on which the business premises were constructed, whether the land was expropriated by the Municipality, whether there was a settlement agreement (contract) for compensation for the expropriated land and whether "Gradjevinar" had the right to

use the land for construction and therefore also the right to transfer this right to other persons and if yes whether this right was transferred in the right form.

According to the 1992 Constitution of the Federal Republic of Yugoslavia (the federation formed between Montenegro and Serbia), (art. 69, 3) "no one may be deprived of his property, nor may it be restricted, except when so required by the public interest, as determined by law, subject to fair compensation which may not be below its market value". The expropriation was regulated by the provisions of the Law on Expropriation (OG of SAP Kosovo, No. 21/1978) – the Law was not revoked with the Constitution of 1992 or afterwards, therefore it was still applicable after 1992. In art.2 the Law stipulates that immovable property can be expropriated for the construction of economic, housing, communal, health, cultural and other objects in common interest. The owners could have been given monetary compensation – arg. after art. 29 *ibid,* prescribing that the compensation for 1 sq m. of expropriated land for construction will be determined by the percent of average market price what is set in previous year for one square meter of housing space. The Law did not preview a possibility of compensation with another immovable property. Even if it did there is no data within the file that a land was expropriated from the family of the claimants and that there was a settlement agreement (contract) for a compensation for the alleged expropriation.

In addition to that the Law, in art. 49 (1) prohibited the possibility the settlement agreement (contract) for compensation to be amended and changed in any way after the decision of the expropriation becomes final: "After the decision on expropriation became final the parties cannot make the agreement on amount of compensation out of the assigned procedure by this article and articles 49 of this law". Therefore a "novation (*novatio*)" of this settlement agreement, if it existed at all, under art. 348-352 of the Law on obligations (1978) would be null and void as contradictory to an imperative provision of the Law, which is art. 50 of the Law on expropriation. Art. 52, in relation to art. 51 (2) Law on Obligational Relations defines that contracts with unpermitted ground – e.g. contrary to compulsory legislation and public policy, are void. *Ibid* in art. 103 (1) Law on Obligational Relations.

Regardless of those legal considerations, and even if a novation of a compensation settlement agreement was permissible, there is no such agreement presented in order to elaborate on its legal nature and whether it can be subject of a *novatio.*

Second, there is no data that the socially owned enterprise "Gradjevinar" was the legal person to whom the right to use the land for construction was allocated in accordance with the Law on the land for construction (OG of SAP Kosovo, No 14/80) - art. 11.

In case "Gradjevinar" was entitled to such right (for which there is no evidence) and accordingly with the right to transfer it within its limits, such transfer should have been accomplished in the form, required for any transfer of ownership rights over an immovable – *i.e.* written form and attestation/certification by the relevant court, requirements defined systematically in the legislation – art. 455 of the Law on obligational relations (1978) in relation with art. 33 of the Law on Basic Property Relations (OG SFRY 6/1980) and art. 4 of the Law on trade of immovable property (OG SRS 43/1981).

As already mentioned there is neither data for the entitlement of "Gradjevinar" to transfer any rights, nor that the contracts (dated 15 November 1996) presented are registered at the Court.

In this respect it becomes obsolete whether and when the monetary obligations of the investors (the V. brothers) were fulfilled.

The contracts presented could not have transferred the right of property over the disputed premises.

Within the current proceedings it is irrelevant whether, if ever, the respondent party S. B. has acquired the right of property.

Therefore, the Supreme Court (even though on different grounds regarding the merits) concluded that the KPCC decision is right and lawful and has to be confirmed as stipulated in article 13.3 (c) of the UNMIK Regulation 2006/50 amended with Law 03/L-079. Respectfully the appeals stand to be rejected.

Costs of the proceedings:

Pursuant to Annex III, Section 8.4 of the Administrative Direction (AD) 2007/5 as amended by Law No. 03/L-079, the parties are exempt from costs of proceedings before the Executive Secretariat and the Commission. However such exemption is not foreseen for the proceedings before the Appeals Panel. As a consequence, the normal regime of court fees as foreseen by the Law on Court Fees (Official Gazette of the SAPK-3 October 1987) and by AD No. 2008/02 of the Kosovo Judicial Council on Unification of Court fees are applicable to the proceedings brought before the Appeals Panel.

Thus, the following court fees apply to the present appeal proceedings:

- court fee tariff for the filing of the appeal (Section 10.11 of AD 2008/2): € 30

- court fee tariff for the issuance of the judgment (10.1 and 10.21 of AD 2008/2) considering that the value of the properties at hand could be reasonably estimated at € 10.000,00 and is € 50,00.

The court fee is to be borne by the appellants who lose the case. According to Article 46 of the Law on Court Fees, when a person with residence or domicile abroad is obliged to pay a fee, the deadline for the payment may not be less than 30 days and no longer than 90 days. The Court decides that the deadline here is 90 (ninety) days. Article 47.3 provides that in case the party fails to pay the fee within the deadline, the party will have to pay a fine of 50% of the amount of the fee. Should the party fail to pay the fee in the given deadline, enforcement of payment shall be carried out.

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.

Anne Kerber, EULEX Presiding Judge

Elka Filcheva-Ermenkova, EULEX Judge

Sylejman Nuredini, Judge

Urs Nufer, EULEX Registrar