DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIČKU AGENCIJU

ASC-09-0004

In the lawsuit of

[redacted], Shtime/Štimlje — *Claimant/ 1.Appellant*

Represented by [redacted], lawyer from Prishtinë/Priština

vs.

1. **SOE** [redacted], Shtime/Stimlje — *Respondents*
2. **Kosovo Trust Agency (KTA),** represented by UNMIK
3. **Privatization Agency of Kosovo (PAK),** — *2.Appellant*
   No. 8 Ilir Konushevci Street, Prishtinë/Priština,
4. **Tax Administration of Kosovo**

the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC) composed of Torsten Frank Koschinka, as Presiding Judge, Tapio Vanamo and Mr.sc. Sahit Sylejmani, Judges, on the appeal of the Claimant and the third Respondent against the decision of the SCSC of 26 February 2009, SCC-08-0005, after deliberations held on 08 December 2010, delivers the following:

DECISION

1. **The appeal of the Claimant against the decision of the SCSC of 26 February 2009, SCC-08-0005, is rejected as ungrounded.**

2. **The subsidiary motion for "returning the money, and obliging the Respondent to pay compensation for the damage and lost of profit" is rejected as inadmissible.**

3. **The appeal of the third Respondent is rejected as inadmissible.**

4. **The judgment of the SCSC of 9 June 2009, SCC-08-0005, is upheld.**

5. **On the occasion of the appeal, Point 5 of the decision of the Trial Panel of 09 June 2009, SCC-08-0005, is eliminated.**

6. **The Claimant is obliged to pay court fees in the amount of 505.50 Euro to the Special Chamber**

Factual and Procedural Background:

The Claimant with his claim filed on 10 January 2008 asked to annul a contract over the sale of the cadastral land parcel 302 in Petroviq/Petrović to which the first Respondent is a party. Furthermore, he asked to certify him as the owner of this parcel and to allow him to be registered as such in the cadastral records. The Claimant alleged that he had bought the cadastral land parcel 302/2 with a surface area of 80 Ares legally and fulfilled all the legal obligations. He also alleged that based on the certificate of sale, TAK sold part of the cadastral land parcel 302/2, with an area of 80 Ares for the sum of 85,100.00 (eighty-five thousand and one hundred) Euro, out of which 68,198.90 (sixty-eight thousand and one hundred and ninety eight) Euro and ninety cents was paid into KTA's account no. 1000500559002298 and 16,392.10 (sixteen thousand and three hundred and ninety two) Euro and ten cents was paid into the TAK's account. He claimed that his right of ownership is based on the decision on the public sale of the land parcel by TAK and the fulfillment of his obligations. Furthermore, he claimed that he had acquired the property on the basis of the Law on Basic Property Relations 6/80, Official Gazette, SFRY, Article 20. He provided that he

had filed a request to register the land parcel based on the aforementioned decision of the TAK at the Directory for Geodesy and Cadastre in the Municipality of Shtime/Štimlje and paid the requisite administrative taxes, but was obstructed from registering his rights.

The Trial Panel of the SCSC added, with decisions dating from different dates, the second, third and fourth Respondents to the claim. A reason for that was given only with regard to the TAK, claiming that its involvement into the suit is necessary for the full adjudication of the claim.

The Claimant furthermore requested the SCSC to issue a preliminary injunction on 20 November 2008 to ban the Respondents (SOE and KTA) from undertaking any action in order to sell or otherwise change the ownership title of the cadastral land parcel under discussion.

With its decision dated 26 February 2009, the Trial Panel of the SCSC granted the requested preliminary injunction.

During the first instance proceedings it became apparent that the TAK did not seize the cadastral land parcel under discussion in the law suit from the first Respondent, but another cadastral land parcel, namely cadastral land parcel 37/4 on possession list 42 in Shtime/Ŝtimlje. This parcel was also the one that was announced to be the subject of the public auction held on 6 March 2007, in which the Claimant was announced as the winning bidder. It was not possible to clarify anymore why the TAK on 25 April 2007 issued, a sales certificate to the Claimant, stating that he had bought cadastral land parcel 302 in Petroviq/Petrović, which also was seen as property of the first Respondent.

On 09 June 2009 the Trial Panel of the SCSC issued a judgment rejecting the Claimant's claim as ungrounded and withdrawing the preliminary injunction granted on 26 February 2009.

It based its judgment on the legal argument that, as nobody can transfer more rights to another one than he actually himself possesses, the transfer of the

ownership over the non-seized cadastral land parcel 302 in Petroviq/Petrović was not properly transferred to the Claimant by the TAK.

Appeal of the 3.Respondent against the decision of the Trial Panel dated 26 February 2009

On 25 March 2009, the third Respondent filed an appeal against the decision of the SCSC of 26 February 2009, requesting the withdrawal of the preliminary injunction.

Appeal of the Claimant against the SCSC judgment of 9 June 2009

On 10 December 2009, the Claimant filed an appeal against the judgment of the Trial Panel of 9 June 2009 for wrongful and incomplete certification of the factual situation and the wrongful application of the material right. The Claimant requests that the judgment be cancelled and the matter referred to the first instance for retrial and for rendering a new decision; or, alternatively, to change the challenged decision and to approve the Claimant's claim as grounded for the cadastral land parcel 302 in Petroviq/Petrović; or, alternatively, to oblige the Respondent to return the money and pay compensation for damages and lost profits, including all the procedural expenses and expenses of this appeal. He does not provide any new facts and does not challenge the facts stated by the Trial Panel, but simply challenges the first instance decision by alleging that the situation was not assessed properly.

Legal Reasoning:

1. The appeal of the third Respondent:

The appeal of the third Respondent against the decision of the SCSC of 26 February 2009 is inadmissible and had thus to be rejected.

As in the meantime the attacked preliminary injunction was withdrawn by the Trial Panel with its decision dated 9 June 2009, there is no legal gravamen for the third Respondent left, which could be the basis for his appeal. A lack of gravamen makes an appeal inadmissible.

On the occasion of the appeal, the Appellate Panel would like to clarify the following point: It is unclear for the Appellate Panel, why the second, third and fourth Respondents have been called into the suit and added ex officio as Respondents. Insofar, it has to be stated that the mere "inclusion" of another party as Respondent, without the Claimant(s) having extended the claim towards those Respondents, is in general without any legal relevance, and without any impact on the "party" called into the suit (compare ASC-09-0029, ASC-09-0035, ASC-10-0022 et al.). It is one of the main principles of the civil procedure (at least in the continental European context) that it exclusively rests with the Claimant whom he wants to take action against, not with the Court. Apart from that principle consideration, the preliminary injunction issued and withdrawn by the Trial Panel also in terms of passive legitimation addressed the wrong Respondents, as only the owner (alleged owner) of a parcel can initiate any changes to its ownership status. The second and the third Respondents could only have acted as representatives of the first Respondent, which means that it would have been fully sufficient to issue a preliminary injunction with the given content only against the first Respondent. The request to issue such an injunction against the second and the third Respondent would have had to be rejected as ungrounded, due to a lack of passive legitimation of the named Respondents.

As the parties "called into the suit" by the Trial Panel nonetheless, as obliged by the issued preliminary injunction, are actual parties at least to the Appeals Proceedings, for this purpose they remained in the status of parties in front of the Appellate Panel.

2. The appeal of the Claimant:

The appeal of the Claimant is with regard to the main motion admissible, but ungrounded (a). With regard to the subsidiary motion the appeal is inadmissible (b). The judgment of the SCSC of 9 June 2009, SCC-08-0005 has to be upheld.

a. The Claimant cannot claim the ownership over the parcel 302 in Petroviq/Petrović. The TAK was, in the result, right to cancel the sale contract with the Claimant, as the TAK itself was not in the legal position to sell the parcel to the Claimant. According to Art.28-30 of the Law on Tax Administration and Procedures promulgated by UNMIK Regulation 2005/17, the TAK is allowed to sell property that it seized from a tax debtor in order to gather the money the debtor owes to the TAK. As the Trial Panel correctly pointed out, applying not only the law itself but also applying it in the light of the general rule that no one is able to transfer a right that he himself does not possess (nemo plus iuris ad alienum transferre quam ipse haberet) – with the obvious, but in the case at hand not given, exemption of bona fide sales, which, in cases of transfer of real estate, need a bona fide presumption in the form of the seller being registered as owner/possessor – the TAK could not with binding force transfer the ownership over the Cadastral land parcel in discussion, as it did not only not seize it before, but as it also did not put it up for auction. Thus the sales contract cancelled by TAK was null and void ex principio.

TAK seized cadastral land parcel 37 and 318/1 on possession list 42 in Shtime/Štimlje with a surface area of 9.53.62 Ha in order to secure the tax liability of the SOE in the amount of 16,392 Euro, pursuant to Articles 28 and 30 of Law No. 2004/48 on Tax Administration and Procedures. A public auction was held for the sale of cadastral land parcel 37. However, errantly TAK issued a certificate of sale to the Claimant for cadastral land parcel 302 of the SOE in Petroviq/Petrović, which was, as already pointed out, never seized by TAK nor sold at the public auction.

Neither the Trial Panel had, nor the Appellate Panel has to decide on the self-evident question arising from the uncontested facts, if the Claimant in fact bought in the course of the public auction, the parcel that was announced there and if he has the right to claim his ownership – or, more precise, his claim

against the TAK to transfer the ownership to him – over the land parcel 37/4 on possession list 42 in Shtime/Štimlje

b. As far as the Claimant asks, alternatively, for "returning the money, and obliging the Respondent to pay compensation for the damage and lost of profit", this has to be understood as a subsidiary motion in case his main motion will be denied. As such, it is inadmissible according to Sections 61.4 and 60.4 of UNMIK AD 2008/6.

The Appellate Panel interprets the – from its wording highly unclear – request of the Claimant for "returning the money, and obliging the Respondent to pay compensation for the damage and lost of profit" as the motion to oblige the first and the fourth Respondent to pay back the purchase price and to pay additional – not further specified with regard to type and amount – damages. Changing one's claim from an ownership claim to a regular action for payment (of a whatsoever imprecise way) means changing the subject matter of the proceedings. According to Section 60.4 UNMIK AD 2008/6, as the Claimant did not ask for returning the purchase prize or granting him damages in the proceedings before the Trial Panel, he cannot be heard with his "new" claim within the proceedings before the Appellate Panel. Thus, his subsidiary motion had to be treated as an inadmissible appeal.

3. Instructions to file an appeal (point 5 of the enacting clause of the attacked decision):

Point 5 of the enacting clause of the appealed decision has to be omitted ex officio, as the instructions to file an appeal by quoting the law, without any discretion on the side of the court, are not decisions to be taken in the enacting clause. Such reasoning may be given within the legal reasoning or - rather - to be attached to a decision only, but cannot be part of it (ASC-09-0108 et al.).

4. Costs

In analogy to Article 12 paragraph 1 of the Law on Court Fees (Official Gazette of the Socialist Autonomous Province of Kosovo, 3 October 1987), the Privatization Agency of Kosovo is exempt from court fees (ASC-09-0020 et al.).

According to Section 11 of UNMIK REG 2008/4 and Section 66 of UNMIK AD 2008/6, the Trial Panel has to decide on the allocation of costs in the proceedings in the first instance and the Appellate Panel – when deciding a case finally – on the allocation of costs of the proceedings in both instances.

Based on Section 57.2 of UNMIK AD 2008/6, the Special Chamber issued Additional Rules regarding Court Fees, according to which the court fees in both instances consist on the one hand of a fee for the filing of submission(s), and on the other hand, of a fee for the issuance of (a) decision(s).

As for the appeals procedure: the value of the fee for the filing of the appeal as governed by Section 10.11 of the Administrative Direction of the Kosovo Judicial Council No. 2008/2 on Unification of the Court Fees ("ADJ") is 30 (thirty) Euro.

Section 10.12 of ADJ determines that for decisions based on the value of the object the fee shall be paid according to the tariff number 10.1. This applies to decisions in second instance too (Section 10.23 ADJ refers to Sections 10.12 to 10.18 ADJ). Therefore, Section 10.12 in conjunction with Section 10.23 covers decisions in the second instance based on the value of the object.

According to Section 10.1 in conjunction with Sections 10.12 and 10.23, the court fee for the decision on the value of an object above 10,001 Euro, the court fee is 50 Euro + 0,5% to a maximum of 500 Euro.

In the case at hand, the value of the appeal is 85,100 Euro. The court fee for the decision in the second instance is therefore set to 475.50 Euro.

In total, the following court fees for the proceedings apply:

Court Fee Tariff Section 10.11 (filing of the appeal) 30 Euro

Court Fee Tariff Section 10.12 in conjunction with 10.23 and 10.1 (decision in second instance)	475.50 Euro
Total	505.50 Euro

These court fees are to be borne by the Claimant

Issued by the Appellate Panel of the SCSC in the case ASC-09-0004 on this 8 December 2010:

Torsten Frank Koschinka, Presiding Judge
EULEX

Tapio Vanamo, Judge
EULEX

Mr.sc. Sahit Sylejmani, Judge

Tobias Lapke, Registrar
EULEX