BASIC COURT OF PRISHTINË/PRIŠTINA

C. no. 2147/09

THE BASIC COURT OF PRISHTINË/PRIŠTINA, through EULEX Judge Franciska Fiser, acting upon decision of EULEX Judge delegated by the President of the Assembly of EULEX Judges, dated 28 November 2012, in the civil case of the claimant H.Sh from Prishtinë/Priština, Dardania SU-3/2, Entrance A floor II, flat 11 represented by lawyer N.P from Prishtinë/Priština against the respondents M.M from Prishtinë/Priština, temporary residing in Serbia, represented by Lawyer Ž.J from Prishtinë/Priština and The National and University Library from Prishtinë/Priština, represented by I.A for annulment of sale contract and verification of occupancy right, acting ex officio, following main trial session held on 16 April 2013 and letter received on 17 May 2013, renders the following

J U D G M E N T

I.

The following claim request:

"It is approved the claim statement of the claimant H.Sh. from Prishtina as grounded.
It is confirmed the contract nr. 973 concluded on 11 November 1993 amongst The National and University Library and the respondent M.M as a buyer, is not valid – absolutely null.
It is confirmed the claimant H.Sh. from Prishtina is holder of occupancy right of the flat located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11

square meters surface, based on the contract of use of flat nr. 1193/11934 dated 20 July 1984.
The respondent is obliged to pay procedural expenses within 15 days from the day he is served the judgment, under threat of forcible execution."

is rejected.

II.

The claimant is ordered to pay the amount of 300 EUR in respect of procedural costs, within the period of 15 days after the receipt of this decision under the threat of execution.

R e a s o n i n g :

The claimant filed a claim with the Municipal Court in Prishtinë/Priština on 7 September 2006 against first respondent requesting to approve his claim and confirm that the claimant is occupancy right holder of the flat located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface, based on the contract of use of flat nr. 1193/11934 dated 20 July 1984, whereby the respondent is obliged to recognize this right to the claimant and not to undertake any acts by which he would obstruct the claimant on achieving this right.
The claimant alleged in his claim he was holder of ownership right of a flat located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface. The flat was allocated to him with the decision no. 495/3 dated 6 June 1984 of the Board of the former National Library of Kosova University, now The National and University Library. Upon the allocation of the flat the claimant concluded a contract with Self-governing Community of Interest (hereinafter: SCI) for use of flat no. 1193/11934 dated 20 July 1984 and legally moved into the flat with family where he was resided until 1993.

In 1993 when compulsory measures entered in the Library by Serbian government installed in Kosovo after year of 1989 the flat was taken back; the claimant was forcibly evicted and the first respondent moved into the flat.

The claimant initiated the procedure for legal re-possession of flat in Housing and Property Department (HPD) as an applicant of the request of A category as the flat was taken back under discrimination ground. The first instance commission approved the request, however in the review procedure his request was rejected instructing the claimant to address to the competent local court to assessing the way the substantial flat was allocated to the first respondent.

The claimant also alleged that he moved into the flat based on contract of use and pursuant to the Article 11 of the Law on Housing Relation acquired the housing right and pursuant to the Article 2 paragraph 1 of the same law the right to permanently use the flat. Based on Article 19 of the law occupancy right may cease in the cases and manners defined by law in Articles 45 and 58. In the case of the claimant these procedures were not respected.

The first instance court with the judgment issued on 8 April 2008 rejected his claim as ungrounded.

Upon the appeal filed by the claimant the appellate court with its ruling dated 9 September 2009 annulled the first instance judgment and remitted the case to the first instance court for retry.

The appellate court approved the appealing allegations of the claimant that the factual state was determined erroneously with the reasoning that the first instance court has not assessed the fact regarding the course of the procedure of the former Basic Court of Associated Labor in Prishtina, started in 1984 and the Court of Associated Labor of Kosovo started to operate in 1985.

According to the instructions of the appellate court in the re-trial the first instance court must avert the faults in concord with these remarks; therefore the parties should be instructed to present to the court the decisions of Basic Court of Associated Labor in Prishtina and the Court of Associated Labor of Kosovo.

With submission dated 20 October 2011 the claimant extended the claim against the second respondent and amended the claim requesting to confirm that the contract nr. 973 concluded on 11 November 1993 amongst The National and University Library and the respondent M.M as a buyer, is not valid – absolutely null and to confirm that the claimant H.Sh. from Prishtina is holder of occupancy right of the flat located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface, based on the contract of use of flat nr. 1193/11934 dated 20 July 1984.
In his submission the claimant alleged that the contract for purchase of the flat dated 11 November 1993 is in contradiction with imperative legal norms, thus as such is invalid in sense of Article 103 of Law on Contracts and Torts, therefore as such should be announced absolutely null. When the Law on Housing entered into force in mid of 1992 the claimant acquired the capacity to be enabled to buy the flat pursuant to the Article 16 since he was holder of occupancy right due to the contract no. 1193/11934 dated 20 July 1984. The contract of purchase of the flat no. 973 dated 11 November 1993 concluded amongst the first and second respondent is in contradiction with Article 16 of the Law on Housing. As such is not valid; and the court in comprehension of Article 103 should announce the same as absolute null.

With the ruling dated 28 November 2012 issued by the Vice President of the Assembly of EULEX Judges the case has been taken over in EULEX Judges jurisdiction and assigned to the EULEX Civil Judge at the Mobile Unit at Basic Court Level according to the provisions of the Law No. 03/L-053 on Jurisdiction, Case Selection, Case Allocation of EUELX Judges and Prosecutors in Kosovo.

The first respondent filed a reply to the claim in which he denies the claim in its entirety as ungrounded.
He alleged that the claimant did not bring any new facts in this lawsuit nor does not propose new evidence apart from those that he presented in the procedure held in the Directorate for Housing and Property Issues. In 1984 a competition was announced in the National and University Library for allocation of 5 apartments. After the workers' council made a decision on allocation of the apartments several employees of the library

(4 – 5 of them), all of the Albanians, immediately requested protection of their rights in the Basic Court of Associated Labor in Prishtina. By its decision ST-113/84 dated 25 July 1984 the court revoked the decision of the workers' council as unlawful and obliged the library to do re-allocation of the apartments. The same court also issued the ruling ST no. 112/84 dated 6 June 1984 and issued a temporary measure suspending the execution of the decision of the workers' council on allocation of the apartments and prohibited moving into the disputed apartment until the final judgment was issued. The claimant did not abide by the pronounced measure and moved into the disputable apartment. The library appealed the judgment of the Basic Court of Associated Labor ST 113/84 but the Court of Associated Labor of Kosovo by its judgment Z. no. 1136/85 dated 27 December 1985 confirmed the judgment of first instance court. The first respondent pointed out that the judges of associated court were Albanians at the time, and the president of the Court of Associated Labor of Kosovo was Mr. A.Q. and considering such facts, the claimant cannot call on discrimination.

The second respondent also filed a reply to the claim on 4 February 2013 in which the respondent alleged that after examination of the existing documentation in the National and University Library of Kosovo it can be confirmed that based on the Decision of the Council no. 495/3 of 6 June 1984 a two rooms apartment, which is located in Prishtina, "Dardania" SU-9/2, L-a, III no. 11 covering a surface of 60,43 square meters was allocated to the employee H. Sh. On 20 July 1984 the contract with number 1193/11934 on using the said apartment was concluded with the Public Housing Enterprise in Prishtina.

The second respondent also alleged that when the application of the compulsory measures happened in 1990 in the institution of the National and University Library the claimant on 14 November 1990 was expelled from his job forcibly as the majority of Albanian employees. After he was expelled from his job, on 15 July 1993 it followed his expel from his apartment forcibly.

At the proposal of the litigants and in order to establish the factual situation, the court produced and read the following evidence:

- The decision of the allocation of the flat No. 495/3 dated 6 June 1984;
- The contract on use of the flat no. 1193/11934 dated 20 July 1984;
- A page of the newspaper “Bujku” dated 17 July 1993;
- HPD decision dated 18 June 2005;
- HPD decision dated 15 July 2006;
- The decision of dismissal of his job No. 467 dated 14 November 1990;
- Decision to allocate the apartment no. 728 dated 17 June 1993;
- Contract on use of apartment for unlimited period of time no. 770 dated 30 June 1993;
- Contract on lease of apartment no. 1193/11934 dated 28 July 1993;
- Contract on buyout of the flat dated 11 November 1993;
- Decision on Implementation of Modification in Cadaster books dated 19 November 1993;
- Contract nr. 1193/973 on participation of the owners of the particular part of the building in the expenses of the building maintenance and other obligations dated 21 February 1994;
- Decision of former Basic Court of Associated Labor in Prishtina no. 113/84 dated 25 July 1984;
- Decision of the Court of Associated Labor of Kosovo no. 1136/85 dated 27 December 1985;
- Hearing of litigation parties.

Having assessed each and every piece of evidence separately and as a whole conscientiously and carefully pursuant to article 8 of the Law on Contested Procedure (hereinafter: LCP), the court comes to its conclusion that the claim request cannot be approved.

During the evidence procedure the following factual situation was established.

By the decision of the Board of the second respondent no. 495/3 dated 6 June 1984 the claimant was allocated two-rooms apartment located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface.
The fact that the two-rooms apartment located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface was allocated to the claimant is not disputable between parties.
There is a discrepancy in surface in comparison with the statement made by second respondent; in his reply to the claim dated 4 February 2013 he stated that the apartment at the address "Dardania" SU-9/2, L-a, III no. 11 covering a surface of 60,43 square meters was allocated to the claimant. The court deems the surface of 58,11 square/meters as correct.

It is also not disputable that the contract on use no. 1193/11934 was compiled on 20 July 1984 between the claimant and second respondent.
The claimant stated in his statement that he moved into said apartment when the contract on use was signed and that he lived in the apartment until 1993 when he and his family was evicted.
The first respondent opposed claimant's allegations stating that after the decision on allocation of the apartments was made some employees of the second respondent requested protection of their rights in the Basic Court of Associated Labor in Prishtina which by its decision ST-113/84 dated 25 July 1984 revoked the decision of the workers' council as unlawful and obliged the second respondent to do re-allocation of the apartments. The same court also issued the ruling ST no. 112/84 dated 6 June 1984 and issued a temporary measure suspending the execution of the decision of the workers' council on allocation of the apartments and prohibited moving into the disputed apartment until the judgment became final. The second respondent appealed the judgment of the Basic Court of Associated Labor ST 113/84 but the Court of Associated Labor of Kosovo by its judgment Z. no. 1136/85 dated 27 December 1985 confirmed the judgment of first instance court. Based on these decisions the second respondent filed a proposal for eviction in 1993 and the claimant was evicted from the apartment.

The court will assess the decisions of Basic Court of Associated Labor and the Court of Associated Labor of Kosovo and their meaning as evidence later.

On 14 November 1990 the decision was issued by which the claimant was dismissed form the work due to the serious violation of work and working duties.
In his statement the claimant stated that the decision was made based on discriminatory measures which were in force between 23 March 1989 and 24 March 1999, known as discriminatory period.

After the claimant's eviction in 1993 the same apartment has been allocated to the first respondent by the decision no. 728 dated 17 June 1993. Later, on 30 June 1993 the contract on use no. 770 was compiled.
After this the first respondent concluded a contract on lease of the apartment no. 1193/11934 with Public Housing Enterprise Prishtina on 28 July 1993. On 11 November 1993 he signed the contract on buyout of the flat concluded between him and the second respondent.

The claimant and also first respondent filed claims with Housing and Property Directorate (hereinafter: HPD) which were registered under case no. DS007396 & DS301357. The claimant filed a claim as category A Claimant and first respondent as category C Claimant.

With the Cover Decision no. HPCC/D/197/2005/A&C dated 18 June 2005 the Housing and Property Claims Commission (hereinafter: HPCC) decided the above claims ordering that the category A claim be granted and the claimant's property right be restored. The category A claimant was ordered to pay the sum pursuant to section 4.2 of the UNMIK Regulation No. 2000/60 (hereinafter: UNMIK/REG/2000/60). Upon payment of this sum the Commission would issue a final decision awarding ownership of the property to the category A claimant. If the category A claimant would pay the referred sum, the category C claimant would not be entitled to possession under his corresponding claim, but would be entitled, upon request, to be compensated by the Directorate for the amount he had

paid for the purchase of the property, plus a percentage of the current market value of the property as well for the costs of any improvements he had made to the property. And if the category A claimant would not pay the sum referred to, he would be issued by the certificate by the Directorate pursuant to the section 4.4 of the UNMIK/REG/2000/60 and the category C claimant would be entitled to possession of the claimed property.

Upon the reconsideration request filed by the category C claimant the HPCC issued a Decision on Reconsideration Request no. HPCC/REC/65/2006 dated 15 July 2006. With this decision the reconsideration request was granted, the Commission's decision No. HPCC/D/197/2005/A&C was overturned and in respect to the category A and category C claims new decision was issued.
Based on this new decision the category A claim (the claim filed by the claimant) was refused and the determination of legal relief, if any, that may be available to the category A Claimant under the applicable law as a result of the allegedly irregular manner in which the claimed property was allocated to the category C Claimant, has been addressed to the competent local court. With the same decision the category C Claimant was given the possession of the disputed property.

At first the court emphasizes that according to the UNMIK Regulation No. 1999/23 (hereinafter: UNMIK/REG/1999/23) and UNMIK/REG/2000/60 the HPD and HPCC were mandated to process and adjudicate all housing and property claims related to property rights.

Pursuant to Section 2.1 of UNMIK/REG/1999/23 the HPCC (the "Commission") is an independent organ of the Directorate which shall settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.

Furthermore pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.

Pursuant to Section 3.1 of the UNMIK/REG/2000/60 no claim for restitution of residential property lost between 23 March 1989 and 24 March 1999 as a result of discrimination may be made to any court or tribunal in Kosovo except in accordance with UNMIK Regulation No. 1999/23 and the present regulation.

The Commission is entitled to refer issues arising in connection with a claim, which are not within its jurisdiction to a competent local court or administrative board or tribunal as foreseen in Section 22.1 of the UNMIK/REG/2000/60.

Also pursuant to the Section 2.5 of the UNMIK/REG/1999/23 the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not raise the issues listed in section 1.2.

The court determines that afore-mentioned UMNIK Regulations shall be applied in the present civil dispute.

With amended claim the claimant requested from the court to confirm that the contract nr. 973 concluded on 11 November 1993 amongst second respondent, The National and University Library, and first respondent, M.M as a buyer, is not valid – absolutely null and to confirm that the claimant H. Sh. from Prishtina is holder of occupancy right of the flat located in Prishtina, Dardania SU-3/2, entrance A second floor, flat no. 11 of 58,11 square meters surface, based on the contract of use of flat nr. 1193/11934 dated 20 July 1984.

When testing and deciding on such amended claim request the court has to emphasize two crucial facts.

The first one is a question does the claimant has a legitimacy of a party in this civil proceeding.

Since the claimant's claim as category A claimant was refused by Decision on Reconsideration the court cannot find the claimant as "interested person" pursuant to the Article 109 Law on Contracts and Torts (hereinafter: LCT).

He could be an "interested person" if he proves that; in case of his success for a declaration of invalidity of the transaction; he can assert a right or benefit as provides by law.

The claimant requests from the court to confirm that the contract nr. 973 concluded on 11 November 1993 amongst The National and University Library and the respondent M.M as a buyer, is not valid – absolutely null. Upon this request, if it would be approved, the claimant would assert a right to confirm that he is holder of occupancy right of the flat.

But the court has to emphasize again that this claim; to confirm he is holder of occupancy right of the flat; has been decided and refused by HPCC by Cover Decision on Reconsideration Request no. HPCC/REC/65/2006 dated 15 July 2006 issued by HPCC (hereinafter: Decision on Reconsideration).

And once more, pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of the Commission are binding and enforceable and cannot be reviewed by the court.

Thus the claimant did not prove that he can assert a right or any other benefit in case the contract on buyout would be declared as invalid.

The second one is the question if the claim request filed by the claimant is in compliance with the Decision on Reconsideration.

The claimant's claim filed with HPCC was considered as category A claim according to the Section 1.2 of the UNMIK/REG/1999/23 and Section 2.2 of the UNMIK/REG/2000/60.

Pursuant to the Section 2.2 of the UNMIK/REG/2000/60 any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a

right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right or compensation.

A category A Claimant who seeks restitution of a property right must show that:

- he or she had a property right to residential house or apartment;
- the property right is capable for restitution;
- the right was revoked or lost;
- the loss or revocation took place between 23 March 1989 and 24 March 1999; and
- the loss or revocation was a result of discrimination.

It is considered that the claimant has acquired an occupancy right if he or she:

- has a decision taken by the allocation right holder to allocate the apartment to him or her;
- has entered into a valid contract on use; and
- has moved into apartment lawfully.

With the Decision no. HPCC/D/197/2005/A&C dated 18 June 2005 (hereinafter: HPCC Decision) the category A claim was granted since all, in previous two paragraphs, mentioned requirements were met.

The category C claimant (the first respondent in this civil case) requested reconsideration of HPCC Decision alleging that the category A claimant's allocation decision was annulled by the Basic Court of Associated Labor in Prishtina in 1984 in a non-discriminatory court proceeding. This decision was confirmed by the Court of Associated Labor of Kosovo in 1985. In support of is allegations the category C claimant produced the request for eviction of the category A claimant, in which reference is made to the said court decisions.

With Decision on Reconsideration the claimant's claim filed with HPCC to restore the property right was refused. As a reason for such decision the HPCC stated in point 9 that the Commission found, on the basis of new evidence presented by Requesting Party

(category C claimant and first respondent in this civil case), that the Responding party (category A claimant, the claimant in this civil case) failed to demonstrate that he lost a property right as a result of discrimination as set out in section 2.2 of UNMIK/REG/2000/60. It is also stated that even if he was evicted in 1993, the eviction was based on decisions of the relevant courts before 1989 which have not been shown to have been motivated by discrimination.
As it is stated in the reasoning the Commission was of the opinion that the claimant was prevented from participating in the apartment reallocation process as a result of discrimination and that this aspect should be considered by the local courts having jurisdiction.

Finally the court has to emphasize also the fact that the restitution of occupancy rights to socially owned apartments lost as a result of discrimination is regulated in the Sections 3 and 4 of the UNMIK/REG/2000/60 which specifies that restitution for category A Claimant may take the form of restoration of the property right – restitution in kind or monetary compensation.

Since the claimant's claim for restitution of a property right was refused by the HPCC Decision; and the said decision is final and cannot be reviewed by the court; according to afore-mentioned provisions of the UNMIK/REG/2000/60 the claimant may request only a monetary compensation if all other conditions are met.

Regarding the instructions given by District Court to instruct the parties to present to the court the decisions of Basic Court of Associated Labor and of Court of Associated Labor of Kosovo and of course to assess them the court finds the following.
The court requested from the first respondent to present both decisions since he proposed them as evidence. The decisions were not submitted by the first respondent neither by second respondent or claimant. All of them stated they are not in their possession.
The claimant stated in his statement he never heard of them and never came across to see them. He was told by people at the library that whoever complained regarding this apartment they disregarded those complaints "since the apartment was his".

The first respondent is also not in their possession but he became aware of them in 1991 when he started to work in the library. As a secretary of the library he prepared the request for the Municipality, the administrative authority for residential issues to issue a decision for eviction. The said request was presented on the main trial held on 19 March 2013 but it was not allowed as evidence since it has not been proposed during the preliminary hearing pursuant to the Article 428 paragraph 2 of the LCP.

With letter dated 16 April 2013 the court ex officio requested the decisions from the Basic Court of Prishtinë/Priština since this court is keeping the archive of former Basic Court of Associated Labor and of Court of Associated Labor of Kosovo. On 17 May 2013 the court received the answer that the case file was not found in the archive.

However the court has to emphasize again that these decisions have already been assessed by HPCC. They were presented as new evidence in the proceeding at HPCC and based on them the Commission found that the claimant failed to demonstrate that he lost a property right as a result of discrimination as set out in section 2.2 of UNMIK/REG/2000/60 and that the eviction was based on decisions of the relevant courts before 1989 which have not been shown to have been motivated by discrimination.

And as it has been emphasized before the decisions made by Commission are binding and cannot be reviewed by court.

From all the above the court has assessed that in this case legal conditions are not met according to the provisions of UNMIK/REG/2000/60 and UNMIK/REG/1999/23, specially pursuant to Sections 3 and 4 of the UNMIK/REG/2000/60 and decided as in enacting clause of this judgment.

Pursuant to the Article 452 paragraph 1 of the LCP the court decided that the claimant shall reimburse the costs incurred to the first respondent. The second respondent did not request reimbursement of his costs.

When appraising the expenses pursuant to article 453 paragraphs 1 and 2 of the LCP the court considered all circumstances and decided that the request filed by representative of first respondent in amount of 300 EUR; 100 EUR per each hearing; is founded.

Legal remedy:

The parties may file an appeal against this judgment in the Court of Appeals through the Basic Court of Prishtinë/Priština within fifteen (15) days of the day the copy of the judgment has been served to the parties.

Basic Court of Prishtinë/Priština
C. no. 2147/09
16 April 2013

Drafted in English,
an authorized language

Presiding Judge
Franciska Fiser