C.nr. 222/2007

COURT:	BASIC COURT OF PEJË/PEČ BRUNCH OF KLINË/KLINA
JUDGE:	EULEX Judge Manuel Soares
CLAIMANT:	R.B. from Pejë/Peč, represented by lawyer H.H. from Pristina
RESPONDENTS:	A.K. and R.K. from Pejë/Peč, village Zahaq/Zahac, represented by lawyers Z.M. and C.G., from Klinë/Klina
SUBJECT-MATTER:	Restitution of property and compensation for damages
MAIN HEARING	Concluded on 16 March 2009 Assigned to EULEX Judge on 21 June 2013
DATE OF THE JUDGMENT:	24 October 2013

I. ENACTING CLAUSE

1. The claimant's request that the respondents hand over to him the business facilities they are holding in their possession on his immovable property on cadastral parcel (…) of the possession list (…) Cadastral Commune Klinë/Klina is granted;

2. The claimant's request that the respondents pay him compensation in the total amount of €175.795, including legal interests, is refused as ungrounded;

3. The counterclaim of the first respondent requesting confirmation of his ownership of the ground floor premises with a surface area of 114,63m2 on the southern part of the business facilities on the mentioned property and confirmation of his coownership of the other parts of the same building in the basement and ground floor is refused as ungrounded;

4. The counterclaim of the first respondent requesting that the claimant is forced to pay him a compensation in the amount of €53.741,78 for the investments made on the property is partially granted and therefore the claimant is ordered to pay to the first respondent the amount of €44.230,67 (forty-four thousand two hundred and thirty euros and sixty-seven cents).

5. Each party will bear its own costs of the proceedings.

II. STATEMENT OF GROUNDS

Introductory remark: all the legal provisions mentioned in this judgment will be in respect of the following laws that will be quoted by their abbreviation:

- Law No. 03/L-006 on Contested Procedure amended and supplemented by Law No. 04/L-118 ("LCP");

- Law No. 29/70 on Contracts and Torts, amended and supplemented by Laws 39/85, 45/89, 57/89 and 31/91, published on the Official Gazette of the Federative Republic of Yugoslavia ("LCT");

- Law on Basic Property Relations, published on the Official Gazette SFRY, No. 6/80 ("LBPR");

- Law on Trade of Immovable Property, published on the Official Gazette of the Socialist Republic of Serbia, No. 43/81 ("LTIP");

- Law No. 03/L-154 on Property and Other Real Rights ("LPORR").

II.1 PROCEDURAL ISSUES

According to Article 512.1 of the LCP the proceedings of the Law currently in force are applicable to this case, since the court already performed the procedural action foreseen in paragraph 2 of the same article in the hearing that took place on 30/1/2009 (page 195).

This case started with a request for reconstruction of a claim filed on 8/9/1997 under C.nr. 230/97 (page 11). The only known procedural action of that "missing" case is a copy of a ruling dated 5/2/1998 suspending the proceedings for 6 months. The reasons for that decision are not known but it is relevant to consider the context of the ongoing conflict affecting at that time the regular functioning of public institutions such as the courts. The claimant's representative requested to the president of the court to locate the case (page 9) but no answer to this request is known, certainly because the file wasn't found in the court archive. Instead, the referred copy of the ruling was delivered during a hearing by one of the lawyers that had it in his possession for unknown reasons. Besides that copy there is no documentary evidence of the existence of the "missing" C.nr. 230/97 or of any procedural action performed before and after that ruling. At this stage it is obvious that the reconstruction of the allegedly "missing" file according to the rules of Article 32 of the Regulation on Internal Organization of the Courts of Kosovo approved by the KJC on 4/1/2012 is simply not possible. And, moreover, the claim proceeded for all these years as a new case file ignoring any possible reconstruction of the supposed "missing" case file and in respect of the applicable procedural rules and rights of

the parties. So, as it has been done so far, the court will render this judgment ignoring the initial request for reconstruction of an older missing case.

In the hearing of 31/5/2005 (page 102) the claimant raised some procedural doubts regarding the admission of the counterclaim. But he is not right because by ruling rendered in the hearing of 6/1/2005 (page 88) the counterclaim was admitted and the respondent was summoned to reply.

So there are no procedural impediments for the court to render a final judgment on the merits of the dispute.

II.2 CLAIMS OF THE PARTIES

The claimant requested that the respondents (1) hand over to him the business facilities they are holding in their possession on the building in his immovable property on cadastral parcel (…) of the possession list (…) Cadastral Commune Klinë/Klina and (2) that they pay him a compensation corresponding to the value of the rents he would have received if the business facilities were not occupied by the respondents in the total amount of €175.795, including legal interests.

The respondents replied stating that the first claimant is the owner of 120m2 of the building that was given to him by the claimant as compensation for his work in transferring the ownership rights to him and obtaining the authorization for construction, and that he spent €34.000,00 on the construction that the claimant will have to pay to him.

The first respondent A.K. filed a counterclaim requesting that (1) it is confirmed he is the owner of the ground floor premises with a surface area of 114,63m2 on the southern part of the business facilities on the building constructed on the referred property registered in the name of the claimant, (2) it is also confirmed that together with the claimant he is co-owner of the other parts of the same building in the basement and ground floor and (2) that he is forced to pay him a compensation in the amount of €53.741,78 for the investments made on the property.

II.3 PRESENTED FACTS AND EXAMINED EVIDENCES

II.3.1 Relevant facts (summary indication)

Facts presented by the claimant (submissions: pages 1 and 27):

- The claimant is the owner of cadastral parcel no. (…);

- The claimant was authorized by the municipal authorities to build a construction that would include business facilities on the ground floor;

- The claimant bought all the materials and paid all the works related to the construction;

- The first respondent supervised the construction during his absence;

- After the construction of the basement and ground floor, the first respondent, without the claimant's authorization, entered in possession of the business facilities and used them, as well as the second respondent, until the present moment;

- The first respondent rented the business facilities and received the amounts of €6.950,00 on rents from 1993 to 1996 and €3.600,00 on rents from 1997;

Facts presented by the respondents in the reply to the claim (submissions: pages 171 and 197):

- The claimant and the first respondent agreed that the claimant would give the first respondent a business shop on the ground floor of the building with the surface of 120m2 as compensation for his work on transferring the ownership and obtaining the construction permission;

- Transferring the ownership right to the claimant and obtaining the municipal authorization for the construction was a long, difficult and expensive process and is was carried out by the first respondent;

- The claimant and the first respondent agreed that the first respondent would finish the construction of the building investing his own money;

- The claimant invested €25.000,00 in the purchase of the property and €6.000,00 on the construction;

- The first respondent spent the total amount of €34.000,00 on the construction;

By the first respondent on the counterclaim (submission: pages 176):

- The total amount spent on the construction of the building was €70.311,48;

- The claimant invested €16.569,70 and the first respondent invested €53.741,78;

II.3.2 Examined evidences

- Minute with a proposal of agreement presented by the claimant to the first respondent, dated 14 July 2002 (page 8);

- Contract of 23/12/1987 nr. 711/1987 (page 87);

- Hearing of the parties (pages 45, 50 and 60):

- Hearing of witnesses P.B., H.K., S.Z., D.S., T.K., H.H. and B.B. (page 76);

- Site inspection (page 40);

- Expertise report on the price of the construction (page 43/2);

- Expertise reports on revaluation and conversion of amounts to euro currency (pages 67 and 138).

No other proposed documents were submitted by the claimant. The witness E.H. was never heard because on the submission of 14/7/2003 the claimant withdrawn the hearing of this proposed witness (page 27, point 4).

II.4 DETERMINATION OF THE FACTUAL SITUATION

The determination of the factual situation will address only the facts presented by the parties in their claim, reply to the claim and counterclaim, according to Articles 7.1, 253.1b), 319.1 and 396.2 of the LCP. Any other fact stated on the hearings of the parties or by any witness will not be considered because the factual object of the case can only be alleged on the claim or reply to the claim or on a specific submission to complete or modify the claim that was never filed.

II.4.1 Proven facts

Based on the examined evidences that will be described ahead and considering the rules on the burden of prove the court finds that the following facts were proven:

a) By a written contract certified in the court on 23/12/1987, the claimant represented by the first respondent purchased the cadastral parcel No. (…) of Possession List No. (…) of Cadastral Municipality of Klinë/Klina, with a surface of 0.05.98ha and paid for it the price of 1.150.000 dinars;

b) Following the contract the claimant bought materials and paid workers for the initial stage of the construction, even before obtaining the authorization from the municipal authorities, spending the amount of €6.000,00;

c) The claimant and the first respondent had agreed verbally in 1984-1985 that the claimant would give the first respondent a business shop on the ground floor of the future building to be built with a surface area around 120m2 as compensation for his work in transferring the ownership and obtaining the construction permission;

d) Transferring the ownership right to the claimant since 1984-85 to 1987, and obtaining the municipal authorization for the construction during around one year after the contract, was a long, difficult and expensive process and is was carried out by the first respondent;

e) The claimant was finally authorized in 1988-1989 by the municipality to build a construction that would include business facilities on the ground floor;

f) The claimant and the first respondent agreed that the first respondent would finish the construction of the building supervising it and investing his own money;

g) The total value of the construction of the building, at current prices, is €70.311,48;

h) On the construction the claimant invested in total, including the initial amount mentioned above on paragraph b), €16.569,70, and the first respondent invested in total €28.105,37;

i) After the construction of the basement and ground floor, around 1989-1990, the first respondent entered into possession of a part of the building in the ground floor with a total surface area of 114,05m2, divided in the rooms A, B, B1 and C (marked in red on the plans of page 43/11), with the respective surfaces of 48,58m2, 50,274m2, 2,796m2 and 13,48m2, which

at the present moment are occupied by the first respondent and also by the second respondent upon authorization of the first respondent;

j) The first respondent rented parts of the business facilities that he was using considering as his property and received as payment 700DM for seven months' rent in 1993 from J.G. and 1050DM for seven months' rent after 1993 from H.K.; from 1 July 1996 the first respondent also rented to E.H. a part of the business facilities that he was not using because he considered is as the claimants' property, but until 31 December 1996 no rent was paid because it was decided to compensate the investment of 12.000 to 13.000 DM made by E.H. on the premises;

II.4.2 Facts not proven

Based on the examined evidences that will be described ahead, the court considers that the following alleged facts were not proven:

a) All the materials and all the works for the construction were paid by the claimant;

b) The amounts of rents received by the first respondent were of €6.950,00 from 1993 1996 and of €3.600,00 from 1997;

c) The first respondent entered into possession of part of the business facilities without claimant's authorization;

d) The amount of €70.311,48 is the total cost spent by the parties on the construction;

e) The claimant invested only €6.000,00 in the construction;

f) The first respondent invested €53.741,48 in the construction.

II.4.3 Reasoning for the proven and not proven facts

For proven facts on II.4.1:

a) The examined contract of 23/12/1987 nr. 711/1987, on page 87 of the case file, which is not disputed by the parties, is a sufficient evidence for the purchase and respective price. The claimant said the price was 21.700 USD (hearing on session of page 45) and the first respondent said it was €25.000,00 (reply to the claim on pages 171 and 197) but as there is no evidence of the conversion of the value of dinars in 1987 to USD or Euros the court considered as more accurate the price mentioned in the written contract. All parties agreed, however, both in their submissions and in their hearings that the price was paid by the claimant. And this is what matters for this purpose.

b) The fact that the claimant bought materials and paid workers at the initial stage spending €6.000,00 was admitted by the respondents in the reply to the claim (pages 171 and 197). The claimant alleged that he paid all the materials and all the workers but he did not provide evidence to support this allegation. So, the court considered as proven only the fact that was admitted by the respondents.

c) The agreement regarding the use of a shop in the building by the first respondent is disputed by the parties. The claimant argued that he agreed on renting a shop to the first respondent but the respondents claim that he promised to give it for free. It is a certain conclusion that some agreement was reached between the claimant and the first respondent because they both refer to it. And it is also sure that this agreement is connected with the construction of the building because the claimant also recognized that in his final arguments (pages 141, 145 and 170). Moreover, it is reasonable and a matter of common sense to assume that the agreement had to be advantageous for the first respondent because it would not have any logic that he would spend money, time and effort, with personal sacrifice, just to have a rented shop. That's something he could easily obtain anywhere else. It was under this agreement that the first respondent entered into possession of an area of approximately 120m2 on the ground floor. Therefore, the version of the first respondent about that agreement is much more credible than the version of the claimant. Even because the claimant by denying the obvious and trying to hide a fact that is clear and undisputed, i.e. by never admitting that the first respondent invested his own money in the construction, does not deserve that much trust from the court. And besides these reasons the court also attended to the witnesses' hearings to consider this fact proven. There is no strong reason to cast doubts on the veracity of the witnesses testimonies not only because they essentially all said the same but mainly because they have direct knowledge of the facts and are friends of both parties, without any personal interest in the outcome of the dispute. The proven agreement was reached between the claimant and the second respondent in the presence of the witnesses P.K., H.K., S.Z. and T.K. that reported to the court clearly that the claimant promised to give the second respondent a shop for free and not to rent it to him.

d) The claimant admitted that the transfer of the ownership rights and the authorization for construction were obtained by the first respondent. The witnesses H.K., S.Z., T.K. and B.B. that accompanied all those efforts confirmed that the first respondent spent a lot of money and time for that purpose.

e) This fact is not disputed by the claimant and it was confirmed by the witnesses D.S., that worked on the construction, and H.H., that made the architectural project of the building.

f) The claimant in his written submissions never admitted that the first respondent invested his own money in the construction. However, when he was heard as a party (page 45) he said that if the first respondent spent any money on the construction it was without his knowledge and consent. What the claimant did not explain properly is how the construction was built only with the money he gave, that clearly was not enough for it. And he also did not give any reasonable explanation for the fact that he proposed to the first respondent a written agreement to settle the dispute accepting the fact that investments were made by him (page 8). This attitude shows that the claimant simply does not want to admit a fact that he knows is not on his favor. But it doesn't make any sense that the first respondent would spend a lot of his money on the construction of a house that was not his (the witnesses said he even had to sell his car and a

cow to find money to keep the construction going) and also contracted the workers and the architect (that where the witnesses D.S. and H.H.) if there was no agreement with the owner and he had nothing to gain. No one is unreasonable to throw money and time away for no purpose. On these grounds the court considers credible the testimony of the witnesses H.K., S.Z., T.K. and B.B. confirming the expenditure of money by the first respondent.

g) According to the expertise (page 43), based on the examination of the building and the average value of the materials and the respective works, the total value of the construction is of €70.311,48. There is no reason to raise doubts on the report of the expert, moreover because the claimant only objected to the expert findings but did not provide better evidence to the court.

h) On the counterclaim the respondents admitted that the claimant spent the total amount of €16.569,70 (22.800 USD). The claimant claimed he spent more but did not prove it. The expertise (page 67) concluded that the first respondent spent the total amount of €28.105,37. He also claimed he spent more but he did not prove it. It is important to note that the value of tax that according to the expert should be added was not considered by the court because there is no evidence that the first respondent actually paid it. What matters for the purpose of determination of the expenses is the amount that was paid and not the amount that according to the law should have been paid. Finally, the objections that the claimant presented against the expertise conclusions are not relevant because the expert was careful enough to assess each document and even disregarded some that he did not consider credible.

i) It is an undisputed fact admitted by all parties in their submissions and hearings that the first respondent entered into possession of a part of the business premises on the ground floor after it was built. From the site inspection and the plant of page 43/11 drawn by the expert it was possible to determine exactly the rooms in possession of the respondents and their respective areas (the areas where found calculating from the measures of the respective walls) – to facilitate its location, the court pointed out in the plant the surface areas. The same evidence also show that the second respondent was authorized by his brother, the first respondent, to invest his money in the place and following that investment he also entered into possession of those premises.

j) This fact was admitted by the first respondent in his hearing (pages 50 and 60). He denied any other payments and the claimant did not present any evidence to support his allegation.

For facts not proven on II.4.2:

a) According to the claimant statements all materials and works were paid by him. No evidence was presented to support his allegation and it was proven in paragraphs a), g) and h) that this is not true. The court could not establish the exact division of costs. It was only possible to conclude that the value of the construction is €70.311,48. For the remaining €25.625,41 not enough evidence was presented. The parties interested in the demonstration of the veracity of this fact had the burden to produce evidence to prove it.

b) The claimant did not present one single piece of evidence to prove his allegation. It was only possible to conclude that the first respondent received the rents he admitted and nothing else. The expertise on the rental value of the place (page 138) is not sufficient evidence on how much rent was paid. These are different realities: the rent received by the first respondent and the rent it would have been possible to receive if the premises were rented all the years and the rent was paid.

c) As it was pointed above, there was an agreement by which the claimant promised to give a shop to the first respondent and that was the reason for him entering into possession of it. For this reason it is not possible to affirm that there was no authorization of the claimant. This does not mean that the agreement is or is not a valid form of transferring ownership. That's a matter that will be addressed further by the court.

d) The expert report analyzed the construction and accessed its value based on average prices of construction and materials. But that does not mean that this money was spent. That's the reason why the court only considered proven the value of the construction but not the total cost spent on it by the parties.

e) This statement of the respondents in the reply to the claim was not proven because in the counterclaim it was admitted a larger amount of investment, as proven above in paragraph h).

f) The first respondent had the duty to prove his allegation that he spent this amount. His statement is not enough for obvious reasons, as he is an interested party. His witnesses only knew he spent money but not how much. The documents he presented were accessed by the expert and he concluded that there are no credible proofs for an investment superior to €28.105,37.

II.5 APLICATION OF SUBSTANTIVE LAW

The court will begin to answer to the question of the procedural legitimacy of the second respondent raised in the ruling of the second instance court that annulled the previous judgment. Subsequently, all substantive questions raised in the claim and counterclaim regarding the disputed property and the compensation for damages requested by both parties shall be addressed at the most logical sequence possible. Therefore, the court will address the following issues next:

- The procedural legitimacy of the second respondent;

- The property rights over the disputed property: if the whole building belongs to the claimant or if a part of it was transferred to the first respondent;

- The partial occupation of the building by the respondent/s: if it was authorized and legitimate or abusive and the destiny of the parts in possession of the respondent/s: if it is to be restituted to the claimant or to be maintained by the respondent/s;

- Compensation for damages: if the claimant has the right to be compensated for the deprivation of property rights and if so in which amount;

- Compensation for damages: if the first respondent has the right to be compensated for the investments spent on the construction and if so in which amount.

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II.5.1 The procedural legitimacy of the second respondent

Passive legitimacy means that the respondent has to have a direct interest in the proceedings, which is given by the possibility of his legal position be affected by the outcome of the dispute. The claimant stated that the second respondent is in possession of the building shops he is requesting to be restituted and also is asking for damage compensation against him. It is obvious that the second claimant is to be considered a legitimate party in the proceedings because he has a legal interest in opposing the claim – as he did. A different question is to know if the claimant's statements are right, i.e. if he proved the facts against the second respondent and if the application of the law to those facts is able to grant the claim against him. That's a matter of substantive right and not of procedural legitimacy. So, the court concludes that the second respondent has passive legitimacy.

II.5.2 The property rights

It was proven that around 1984-1985 the claimant and the first respondent agreed verbally that the claimant would give the first respondent a business shop with a surface area around 120m2 on the ground floor of a building that would in the future be built on land he was intending to purchase, as compensation for his work in transferring the ownership rights of that land and on obtaining the municipal permission for the construction (proven fact d). The first respondent managed to accomplish the ownership transference and the land was purchased in 1987 by the claimant (proven facts a) and d). Also the construction permit was obtained around 1988 by the first respondent and the building was built (proven fact e). After the construction, around 1989-1990, the first respondent entered in possession of a part of the building in the ground floor with a total surface area of 114,05m2 (proven fact i).

Based on the described factual established situation, the court will have to decide if by the verbal agreement the first respondent is to be considered the owner of the shops he is possessing or, on the contrary, if those shops are the property of the claimant and are being unlawfully occupied.

As a rule, unless prohibited, the parties had the right to conclude contracts that would be submitted to the provisions of the LCT (Articles 10 and 25(1),(3) *LCT*). The described verbal agreement between the parties must be considered as a Preliminary Contract (referring to Article 45(1) *LCT*). In fact, it was intended to produce its effects in the future, i.e.: if the first respondent would fulfill his obligations in transferring the property right and obtaining the

construction permit and when the building was ready, then the claimant would give to him a 120m2 shop on the ground floor. The transfer of the property of the shop to the first respondent would have to be concluded in a future contract because at the time of the verbal agreement the shop did not exist and therefore any final contract regarding its transfer would be void by lack of object (Articles 46(2) and 47 *LCT*). In the court's view the applicable rule on the interpretation of contracts under which an onerous contract must be interpreted in a way that establishes an equitable relationship between mutual commitments (Article 101 *LCT*) leads to the conclusion that on their verbal agreement the parties assumed obligations to enter into a future principal contract; the transfer of the property of the shop to the first respondent was not foreseen as an immediate effect of the agreement and it would have to be subjected to a future valid contract to transfer the right to him. Having this conclusion in consideration, the court finds that the preliminary contract did not fulfill the legal requirements of form. The terms concerning the form of the principal contract were applicable to the preliminary contract (Article 45(2) *LCT*) and as the matter relates to transfer of property rights over an immovable property, the legal mandatory form was a written contract signed by both parties and certified by a court, otherwise it would be null and void (Article 4§2,3 *LTIP*). So, not only because the formal requirement is a specific validity requisite of the preliminary contract but also because any contract not concluded in the prescribed form would not have legal effect (Articles 45(2) and 70(1) *LCT*), the mentioned verbal agreement was not valid, neither to transfer the property of the shop immediately to the first respondent nor to encumber the claimant with the obligation of doing it in a future final contract.

But this conclusion does not close the discussion because there are other forms of acquiring property rights besides the contract. The first respondent claimed alternatively that he acquired the property right by "joint investment". Is that so?

Besides the acquisition of property rights by contract – which the court just considered not grounded – and by inheritance – which is not applicable – it was also admissible acquisition by law, namely by building on somebody else's land (Articles 20§1 and 21 *LBPR*). However, looking carefully at the provisions of the *LBPR* the court finds that the acquisition of property rights over the land on which the building was build it is only admitted for cases where there are different ownership rights over the land and the new building, i.e., when someone built a building on land that is not his; and when the request is for acquisition of property rights over the whole building and land (Articles 24, 25 and 26 *LBPR*). This is not the case. The first respondent only supported partially the costs of the construction along with the owner of the land that supported the rest of it. He does not claim that he owns the whole building since he did not construct it alone. What the first respondent is requesting is to be considered owner of 114,63m2 of the building. This partial acquisition cannot be granted by the referred provisions of the *LBPR*.

In the court's opinion the first respondent did not acquire validly property rights over the shops he is possessing and cannot be declared as its owner. He may have a right to be compensated

by his investment, but that is a completely different legal consequence that will be addressed further.

II.5.3 The occupation and the restitution of the building by the respondents

As the court concluded that the first respondent cannot be considered owner of property rights over the building and as it was proven that he entered into possession of shops with a surface area of 113,05m2 (proven fact i) it is now the moment to verify if he is occupying it legitimately or abusively.

The partial construction of the building terminated around 1989-1990 and the first respondent entered immediately into possession of a surface area equivalent to the one he had been years earlier promised to be given. Moreover he did it after spending his own money on the finalization of the construction by agreement with the claimant (proven facts c), f), h) and i). Only seven years later the claimant reacted filing a claim in court (referring to lost C.nr. 230/97). From these facts it is possible to draw two undisputable conclusions: in the first place the first respondent entered into possession of the shop convinced he had the right to do so; in the second place the claimant authorized him to do so, or at least did not oppose it strengthening the first respondent's conviction he was acting correctly. The first respondent acted reasonably in the conviction he had the right and the court cannot conclude he acted faulty (in the sense of Article 158 *LCT*). Therefore the court finds that he did not incur in violation of the claimant property rights (contrary to Article 3§2 *LBPR*) and that he acted as a conscientious holder (for the purpose of Article 38 *LBPR*). Only now with this judgment the ownership matter is clarified and the first respondent is aware that he cannot legitimately keep possession of the shops anymore.

Regarding the second respondent he is not in possession of the shops on his behalf but instead on behalf of his brother, the first respondent, that authorized him to do so (proven fact i). So *a fortiori* the court also considers that he is not offending the rights of the claimant acting faulty.

But the above conclusions don't mean that the shops in possession of the first and second respondent are not to be restituted to the claimant. As the court noted the first respondent did not acquire property rights over the building and there is no other legal reason to grant him the possession. He is not a lessee and has no other legal or contractual title to maintain the occupation. The claimant is indubitably the owner of the land and the building and has the right to possess it and to be restituted on it (Articles 3§1 and 37 *LBPR*). This right does not expire by the lapse of time (Article 37§3 *LBPR*). Consequently the respondents will have to restitute the shops to the claimant.

II.5.4 The claimant's request for compensation

The claimant requested the court to render a judgment granting him a compensation for damages occurred in result of deprivation of his property. As a rule, the law admits compensation of damages when someone has used his property unlawfully (Article 219 *LCT*). But in this case the claimant doesn't have that right for three different but equally strong reasons.

In the first place, the right to be compensated has expired due to the lapse of time. The right to claim for damages for losses expired in the period of three years starting at the moment the claimant became aware of the injury (Article 376(1) *LCT*). Since the first respondent entered in possession of the property on 1989-1990, the date on which the claimant became aware of deprivation of property, the claim for compensation would have to be filed until the end of 1993, at least. As the claimant only filed a claim regarding this matter in 1997 (referring to lost C.nr. 230/97) the request is belated. The court can consider the claim belated because the respondents invoked it in their final arguments (minute on page 141 and written arguments on page 145).

In the second place, the first respondent acted in good faith when he entered into possession of the shop and this means he has to be considered a conscientious holder. As so, even if the right for compensation hadn't prescribed, he would not have to pay compensation for use of the property (Article 38 *LBPR*).

In the third place, in case it would be considered the claim was not prescribed and the claimant had the right to be compensated, even so that right could not be granted because of its misusage. The law established a principle of good faith and honesty on the establishment of obligation relations and realization of the respective rights and duties and prohibited the realization of a right contrary to the purpose established or recognized by law regarding such right (Articles 12 and 13 *LCT*). This means that a right formally existent cannot be exercised in a manner that will lead to a substantial unfair consequence in result of a behavior contrary to good faith and honesty. This will normally be the case when someone intends to benefit from a situation he created against the interest of others – *venire contra factum proprium non potest*. The claimant promised to give the first respondent a shop if he helped him, as he did, asked him to pay the finishing of the construction, as he did, and accepted for several years that he possessed the shop, as he did; but then, after creating the conviction that the first respondent was acting correctly and according to their agreements, pretends to be compensated for damages that he himself created. This is a prohibited misuse of a formal right, against good faith and honesty principles, and could not be granted by the court.

II.5.5 The respondent's request for compensation

The first respondent filed a counterclaim against the claimant requesting to be compensated for damages in the amount of €53.731,78 correspondent to the investments he made in the property.

It was proven that the total value of the construction of the building is €70.311,48, on which the first respondent spent €28.105,37 and the claimant €16.569,70 (proven facts g) and h) – the some of those amounts is €44.675,07. The parties did not present sufficient evidence on the payment of the remaining €25.636,41. The investment of the claimant and the first respondent represents respectively 37,08% and 62,90% of the known amount. So, by applying the same percentage to the unknown amount it is possible to consider that the claimant spent more €9.505,98 and the first respondent more €16.125,30. It is a reasonable and equitable conclusion to assume that the first respondent invested in the construction the total value of €44.230,67 and the claimant €26.075,68.

The first respondent upon agreement with the claimant finished the construction of the building investing the referred amount of his money (proven fact f). This agreement cannot be considered a contract for the supply of services (Article 600 *LCT*) or a contract of construction (Article 630 *LCT*). In both those contracts the person that benefits from the services or from the construction assumes the obligation of paying a monetary remuneration and in this case there wasn't such an agreement. The first respondent finished the construction not to be paid but in anticipation on the conviction that he would be owner of a part of the building. Therefore the right to be restituted of his investment cannot be analyzed on the perspective of a contractual obligation.

The court finds that this situation falls under the general provisions of the civil liability and the specific provisions on restoration of expenses incurred for another person. Any other solution that would lead to a result by which the claimant would get the ownership of the entire building without paying to the first respondent his investments would lead to an unacceptable unjust enrichment.

The behavior of the claimant agreeing with the first respondent that he would spend money on a construction under the presumption that he would own part of it but then refusing to transfer to him that right constitutes an intentional cause of injury and binds him to pay the damages, unless he would prove that he had no fault, which he did not (Articles 154 and 158 *LCT*). On the other hand, the law also stated that whoever paid for expenses for another person, which were duty of such person, would be entitled to claim recovery of those expenses from such person (Article 218 *LCT*). Based on the mentioned provisions the court finds that the claimant will have to compensate the first respondent for all his investments on the construction. The compensation shall be equivalent to the money he spent – €44.230,63 – as result of the principle of reestablishment of the situation previous to the damage (Articles 185(1) and 190 *LCT*).

II.6 CONCLUSIONS

The second respondent has passive legitimacy.

The first respondent did not validly acquire property rights over the shops he is possessing and cannot be declared as its owner. Therefore the claimant's request for restitution from both respondents is granted and the first respondent's request to be recognized as owner is not granted.

The claimant's request for monetary compensation has expired. Even if it hadn't he would not have the right to be compensated because the first respondent occupation was in good faith and the claimant was misusing his right and exercising it abusively.

The first respondent has the right to be compensated by the claimant for his investment in the construction of the building, and so he is entitled to receive from him €44.230,67.

II.7 COSTS OF THE PROCEEDINGS

According to the rules of Article 452 of the *LCP*, considering that both parties where partially successful in their claims and that is not possible to quantify it, the court considers equitable that each one of them bears their own costs.

III. LEGAL REMEDY

An appeal can be filed against this decision within 15 (fifteen) days of the day the copy of the judgment has been served, at the Court of Appeals, according to Articles 176, 178 and 185 of the LCP.

BASIC COURT OF PEJË/PEČ, BRUNCH OF KLINË/KLINA

C.nr. 222/2007, on 24 October 2013

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EULEX Judge Manuel Soares