

<p style="text-align: center;">DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT</p>	<p style="text-align: center;">SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS</p>	<p style="text-align: center;">POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODMOSE NA KOSOVSKU POVERENIÇKU AGENCIJU</p>
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ASC – 10 – 0033

In the lawsuit of

1. [REDACTED], natural person

Milloshëvë/Milošëvo village, Obiliq/Obilić

2. [REDACTED], natural person

Milloshëvë/Milošëvo village, Obiliq/Obilić

3. [REDACTED]

Bakshi/Bakšija village, Obiliq/Obilić

4. [REDACTED] and others

Milloshëvë/Milošëvo village, Obiliq/Obilić

Claimants

vs

[REDACTED], Agricultural and Industrial Combine

Fushë Kosovë/Kosovo Polje

Respondent

[REDACTED]

Bakshi/Bakšija village, Obiliq/Obilić

Appellant

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Eija-Liisa Helin, Judges, on the appeal of the Claimant/Appellant against the decision

of the SCSC of 11 February 2010, SCC – 09 – 0080, after deliberation held on 17 August 2010, delivers the following

DECISION

- 1. The appeal is rejected as ungrounded. The Decision of the Trial Panel of the Special Chamber in the case SCC – 09 – 0080 dated 11 February 2010 is upheld.**
- 2. On the occasion of the appeal point 2 of the decision of the SCSC of 11 February 2010 is eliminated.**
- 3. The Appellant is obliged to pay court fees in an amount of 60 Euros for the appeals proceedings to the Special Chamber.**

Procedural and factual background

On 18 May 2009 the Appellant together with the other Claimants filed a claim with the SCSC requesting the verification of their property rights and the restitution of agricultural land which is registered in the name of the Respondent.

On 8 June 2010 the Trial Panel issued a clarification order requesting the Claimants to clarify:

- whether the claim was brought by the four claimants indicated or by all the villagers;
- in case the claim was brought on behalf of all of the villagers, to hand in the name and address of each Claimant as well as a power of attorney signed by each Claimant;
- "the subject matter and all material facts pertaining to the claim, especially but not limited to:
 - The land parcels requested by each claimant
 - Precise details of the manner in which the immovable property came into the possession/ownership of the claimants
 - Precise details of the evidence which the claimants intend to prove during the hearing of the case to prove their allegations"
- (...)

III

On 11 February 2010 the Trial Panel rejected the claim as inadmissible pursuant to Section 28.4 of UNMIK AD 2008/6, since the requirements of Section 25 and 27 of the same AD were not met.

In particular the Trial Panel stated that the Claimants have not submitted a clarification to the order dated 8 June 2009, requesting, among other points, clarification on whether the claim was brought by only four Claimants or by all the villagers, as required by Section 27.3 of the UNMIK AD 2008/6 and the indication of the subject matter and all material facts pertaining to the claim, especially but not limited to the land parcels, as required by Section 27.2 (e) of UNMIK AD 2008/6.

The decision was served on the Appellant on 1 March 2010.

On 10 March 2010, ██████████ filed an appeal against the above mentioned decision, pointing out that he is not willing to be part of the collective action any longer.

The Appellant states that his claim is about 6 hectares of land, which were the property of his late father, who had inherited it from his own father. The Appellant is contesting the decision of the Trial Panel as incomplete and based on a wrong evaluation of the factual situation. He maintains that his family and himself were using the land in question since the year 1998, land which is located opposite the petrol station "██████████". However all documentation related to it got lost during the conflict, therefore the Appellant is requesting to hear witnesses "who shall verify the claim".

Legal Reasoning

The appeal is admissible, but ungrounded. Based on Section 63.2 of UNMIK AD 2008/6 the Appellate Panel decided to dispense with the oral part of the proceedings.

Although the appeal is ungrounded (compare the reasons given below), the Appellate Panel on this occasion wants to point out that parts of the reasoning given for the dismissal of the claim by the Trial Panel do not stand a legal review:

The Trial Panel's opinion cannot be followed insofar, as it rejected the claim as inadmissible due to a lack of clarification on the question in whose name the claim is lodged. The Appellant complied with the Trial Panel order concerning the part requesting the clarification on the number of the claimants, since the file contains, along with the claim signed by 4 (four) representatives of the Claimants, the names and signatures of the villagers of Milloshevë/Miloševo village, Obiliq/Obilić municipality. It is obvious, that those are the Claimants. As all of them also signed, there was also no need for any power of attorney.

As far as the Trial Panel rejected the claim as inadmissible due to a lack of facts and legal arguments, including "all material facts pertaining to the claim, especially but not limited to the land parcels, as required by Section 27.2 (e) of UNMIK AD 2008/6", this legal argumentation can not be followed (see ASC-09-0072):

Section 28.2 (f) lists among the admissibility criteria for a claim (all) "... the requirements of Sections 25 and 27 ...", at first sight giving the impression that all the elements listed therein may lead to the dismissal of the claim as inadmissible, if not provided upon order (see Section 28.4 AD 2008/6). A closer reflection, however, reveals that the scope of this provision has to be reduced on teleological grounds:

Apparently, one of the main common principles of continental European Civil Procedural Codes is the conclusiveness of a claim (as the question if the claimed facts, in connection with the legal arguments presented may have the legal

consequence as requested in the claim) not being an issue of the admissibility of the claim, but of its merits. If (sufficient) facts and / or legal arguments are not presented, or the claimed facts do not lead to the conclusion as drawn by the Claimant, the claim can only be subject to rejection as ungrounded, if not clarified upon request.

The same goes, as far as it was included in the Trial Panel's clarification order, although not explicitly reflected in the challenged decision, for the request to provide "precise details of the evidence which the claimants intend to prove during the hearing of the case to prove their allegations": On principle, only contested facts need to be proven by the Claimant. If the Respondent does not contest the facts as claimed in a conclusive claim, there is no need to take evidence. A list of evidence may come in handy only if the gathering of evidence is necessary. If at all, a claim may be rejected as ungrounded if the Claimant fails to submit evidence to proof the facts the Respondent has contested. Prior to the involvement of the Respondent, the list of evidence may well be asked for, if the Claimant has to clarify on other issues, anyway, but cannot be an issue at that stage of the proceedings. Moreover, the missing of evidence which might be needed for the merits can never lead to the dismissal of the claim as inadmissible.

In the case at hand, the Respondent had not been involved yet. Material facts, the list of evidence, and legal arguments therefore are not yet relevant issues.

However, the Appellant failed to clarify the subject matter. He did not produce any indication for the land parcels in question, nor provided for any cadastral plot numbers. This kind of information is, as correctly seen by the Trial Panel, of utmost importance for the admissibility of a claim, as it has to be very clear, what exactly would be covered as *res judicata* in case a decision on the merits will be taken.

Concluding the above, based on Section 65 lit. a of UNMIK AD 2008/6 the Appellate Panel holds the appeal to be ungrounded and rejects it, at the same time upholding the decision of the Trial Panel. Since the court did not decide on the merits of the case the rejection does not create *res judicata*; consequently the Claimant / Appellant may file again a proper claim, outlining exactly and

precisely which are the parcels he wants to be the subject of the claim, with the SCSC.

Lately, point 4 of the appealed decision has to be omitted on the occasion of the appeal, too, as instructions to file an appeal by quoting the law, without any discretion on the side of the court, are no decisions to be taken in the enacting clause. Such information may be, if at all, given within the legal reasoning or – rather – to be attached to a decision only, but cannot be a part of it (see ASC-09-0108 et al.).

Costs / Court fees

The following court fees for the appeals proceedings apply (see ASC – 09 – 0072 et al.):

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in conjunction with 10.21 (Decision on second instance)	30 Euros
Total	60 Euros

These court fees are to be borne by the Appellant, who is therefore obliged to pay the mentioned amount to the Special Chamber.

Richard Winkelhofer, EULEX Presiding Judge	signature
Torsten Koschinka, EULEX Judge	signature
Eija-Liisa Helin, EULEX Judge	signature
Tobias Lapke, EULEX Chief Registrar	signature