C.nr.2724/2006

THE BASIC COURT OF PRISHTINË/PRIŠTINA in the first instance through the EULEX Judge ROSITZA BUZOVA in the civil case of the claimant FK from Prishtinë/Priština, represented by Lawyer NH, against the respondent PS, previously from Prishtinë/Priština, with current residence in Novi Sad, the Republic of Serbia, for confirmation of ownership, annulment of decision for allocation of apartment and purchase contract in accordance with Article 142, paragraph 5, Article 387, paragraph 1, item w), Article 391, items d) and g) of the Law No 03/L-006 on Contested Procedure, amended and supplemented by Law No 04/L-118 (hereinafter "LCP"), on 26th February 2013 issues the following

RULING

The claim of the claimant FK from Prishtinë/Priština, represented by Lawyer NH, filed against the respondent PS, formerly from Prishtinë/Priština, now residing in Novi Sad, the Republic of Serbia, for confirmation of ownership on apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35, annulment of decision for its allocation to and the contract for its purchase by the respondent is **DISMISSED** as **INADMISSIBLE** pursuant to Article 102, paragraph 3, first sentence LCP, Article 78, paragraph 4 *in fine* LCP, Article 253, paragraph 5 LCP in conjunction with Section 6.6 of the Administrative Direction № 2008/2002 of the Kosovo Judicial Council on Unification of the Court Fees, and Article 166, paragraph 2 LCP in conjunction with Section 2.7 of UNMIK Regulation No 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission.

REASONING

I. PROCEDURAL BACKGROUND

1. On 20th December 2006, FK filed to the Municipal Court of Prishtinë/Priština a claim against PS, alleging that as an employee of OPPB "ELEKTROEKONOMIA Ë KOSOVËS", now "KOSOVO ENERGY CORPORATION", MS "Kosovo" Bardhë by Decision № 2092, dated 18th September 1989 was allocated apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, IX floor, nr.35. He could not enter into its possession since the apartment at that time was still under construction. Meanwhile, by Decision № 3432, dated 16th November 1990, the Interim Body of the enterprise terminated his employment. This dismissal as discriminatory and unlawful was appealed by him before the Associated Labour Court - Prishtinë/Priština. In 1993 the apartment was allocated to a Serbian employee, PS, and was then sold to him. This allocation decision was unlawful, contrary to the normative acts of the enterprise. Hence, the purchase contract based on it was also legally ungrounded. The petitum is

the court to confirm that the claimant is the owner of the apartment, to annul the decision for its allocation and the purchase contract of the respondent.

2. The claim was registered for adjudication in C.nr.2724/2006 of the Municipal Court of Prishtinë/Priština. No procedural actions were taken in the case in the next 6 years, *inter alia,* the claim was not corrected, completed or amended by the claimant.

II. COMPETENCE OF THE BASIC COURT OF PRISHTINË/PRIŠTINA

3. This first instance civil case was selected based on Article 5, paragraph 1, item c) of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("the Law No.03/L-053 on Jurisdiction") (Official Gazette of the Republic of Kosovo No. 27/2008) and Article 3, paragraph 1 of the Guidelines on Case Selection and Case Allocation for EULEX Judges in Civil Cases, adopted by 21st Assembly of the EULEX Judges on 11th December 2012 ("the Guidelines") through ruling ref.nr.ED/EJU/MJU/0016/cd/12, issued on 1st November 2012 by Delegate of the President of the Assembly of EULEX Judges as per decision ref.nr.2012.OPEJ.0064-0001 of 30th October 2012. After the taking over procedure had been conducted as foreseen by Article 5, paragraph 7, first sentence of the Law No.03/L-053 on Jurisdiction and Article 3, paragraph 6, paragraph 6 of the Guidelines by ruling ref.nr.2012.OPEJ.0142-0001 of the Vice President of the Assembly of the EULEX Judges, dated 26th December 2012 pursuant to Article 5, paragraph 7, second sentence of the Law No. 03/L-053 on Jurisdiction and Article 3, paragraph 8 of the Guidelines, the case was assigned to EULEX Civil Judge at the Mobile Unit for Basic Court Level to be designated in compliance with Article 4, paragraph 2, first sentence and paragraph 4 of the Guidelines.

4. Pursuant to the transitional provision of Article 39, paragraph 2 of the Law No 03/L-199 on Courts (Official Gazette of the Republic of Kosovo No 49/2011), this first instance civil case of the Municipal Court of Prishtinë/Priština as non-completed on 1st January 2013 after this date should be treated as a case of the Basic Court of Prishtinë/Priština.

III. FORMAL AND PROCEDURAL DEFICIENCIES OF THE CLAIM

5. Upon the initial examination of the claim, its deficiencies were identified and as foreseen by Article 390 LCP the claimant was obligated to remove them by ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština, dated 15th January 2013.

6. As the claim does not contain *the permanent or temporary residence* of the claimant according to Article 253, paragraph 1, item f) in conjunction with Article 99, paragraph 2, second sentence LCP, the latter was instructed to complete it with data as per his domicile pursuant to Article 102, paragraph 1 LCP.

7. Since contrary to Article 253, paragraph 1, item d) LCP *the value of the contest* is not specified, the claimant was requested to determine it according to Article 102, paragraph 1 in conjunction with Article 30, paragraph 1 and Article 32 LCP.

8. The claims joined in this case are *not properly individualized as per their factual and legal basis* under Article 253, paragraph 1, item b) and e) in conjunction with Article 99, paragraph 2, first sentence LCP to the extent demanded for their proper adjudication under Article 2, paragraph 1 LCP. *At first place,* the claim for confirmation of the ownership on the contested apartment has been filed without any alleged ground for its acquisition by FK of the ones defined by Article 20 of the Law on Basic Property Relations (Official Gazette of the SFRY № 6/1980) – by law itself, legal transaction, inheritance, decision of a public authority or in a way and under conditions determined by special law. *At second place*, the annulment of the decision for allocation of the contested apartment to PS is claimed without its specification by number, date, or issuer, as well as without concretely invoked reasons for illegality. No statutory provisions whatsoever are mentioned in the claim as violated by its issuance. *At third place*, the challenged contract is not described by parties, number, date or any other criterion in the claim which also fails to concretize the type of its alleged invalidity, grounds and the relief sought against it. *At fourth place*, the legal basis of none of the joined claims has been stated by the claimant as previewed by Article 253, paragraph 1, item e) LCP, and no evidence has been proposed to prove them, though demanded by Article 253, paragraph 1, item c) and Article 99, paragraph 3 LCP. To provide these missing requisites of the claim, the claimant was instructed to specify the facts related to the acquisition of the ownership on the contested apartment, the number, date and issuer of the challenged allocation decision in the name of PS with reasons for its unlawfulness, the number, date and parties of the challenged purchase contract with the grounds for its invalidity, the evidence to prove the facts alleged, and precise the statement of the claim as per the remedies sought against these decision and contract, corresponding to the invoked invalidity grounds, pursuant to Article 102, paragraph 1 in conjunction with Article 253, paragraph 1, items a), b), c), e) and f) and Article 99, paragraph 3 LCP.

9. Contrary to Article 253, paragraph 4 LCP the claim has been submitted *without an attached certificate for paid court fees* though their payment is required at the time of filing - Section 5.1 of Administrative Direction № 2008/02 of the Kosovo Judicial Council on Unification of the Court Fees, amended and supplemented by Decisions № 20/12, dated 9th March 2012 and № 37/12, dated 23rd March 2012 (hereinafter "KJC Administrative Direction № 2008/2002"). This is why the claimant was given a notice according to Article 253, paragraph 5 LCP and Section 6.5 of the KJC Administrative Direction № 2008/2002 to pay the court fees in the amounts determined by the tariff under Section 10 of the KJC Administrative Direction № 2008/2002 with warning for the legal consequences of non-payment previewed by Article 253, paragraph 5 LCP and Section 6.6 of the KJC Administrative Direction № 2008/2002.

10. As noted in ruling C.nr.2724/06 of the Basic Court of Prishtinë/Priština, dated 15th January 2103 (point 7 of its reasoning) in view of the subject – matter to the case, it could not be duly adjudicated with the participation of PS only as a respondent. He lacks the passive legitimacy in *the second claim* for invalidity of the allocation

decision issued in his name which should also be decided with respect to the public entity–*its issuer* or its current legal successor, having the general procedural capacity to be a party in the case according to Article 73, paragraph 1 LCP. As per the *third claim* for annulment of the purchase contract, the nature of the legal relationship is such that the dispute could only be resolved in the same manner in relation to the *two contracting parties* that concluded it. Hence, the seller of the disputed apartment or its legal successor should also be a respondent in the case together with PS as its buyer under consolidated joint litigation under Article 269, paragraph 1 LCP. Since PS is not legitimated to be a single respondent in the case, to set this fault right in compliance with Article 78, paragraph 1 LCP by ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština, dated 15th January 2103 (point III) the claimant was instructed to correct the claim by extending its subjective scope to the issuer of the contested allocation decision, and the seller of the challenged sale contract or their current legal successors so that the proceeding will continue with the participation of all these respondents who under consolidated joint litigation under Article 269 LCP only together might be a party in the dispute with this subject-matter.

11. The claim was submitted to the court on 20th December 2006 with introductory part according to which FK is *represented* by Lawyer NH from Prishtinë/Priština, Ulpiana, Dëshmorët e Kombit Square, nr.72/A-2. In this way by the claim itself the claimant *personally* authorized *in written form* this lawyer to represent him in this case in compliance with Article 97, paragraph 1 of the Law on Contested Procedure (Official Gazette of SFRY No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 and Official Gazette of SRY No. 27/92, 31/93, 24/94, and 12/98) (LCP 1977). Generally granted, not specified in its details, this authorization is applicable for all actions in the proceedings, as presumed by Article 95, paragraph 1 LCP 1977. Its validity and scope have not been affected by the entry into force of the new LCP – its Article 533, paragraph 1 states that the court proceedings pending in first instance shall *continue* in compliance with the provisions of the new law without retroactivity for the procedural actions taken prior to its entry into force. Apart from that, Article 92, paragraph 1 LCP which now prescribes the written form for validity of procedural authorization is identical with Article 97, paragraph 1 LCP 1977, while Article 90, paragraph 2 LCP which defines its scope reproduces Article 95, paragraph 1 LCP 1977. For all these reasons, copy of ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština of 15th January 2013 was served to the claimant FK on 21st January 2013 through Lawyer NH as previewed by Article 107, paragraph 1, Article 110, paragraph 1, first sentence, and Article 118, paragraph 1, first sentence LCP. Being rendered in English as an official language of the court - Article 17 of the Law No. 03/L-053 on the Jurisdiction, the ruling was served with its translation into Albanian in compliance with Article 14 of the Law No. 02/L-37 on Use of Languages. The acknowledgement of its receipt was duly signed both by the recipient and deliverer - Article 121, paragraph 1, first sentence LCP, while its date - 21st January 2013 is

properly indicated by the recipient in his handwriting - Article 121, paragraph 1, second sentence LCP.

12. As the service of ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština, dated 15th January 2103 was conducted on 21st January 2013 this is the initial moment of the 3-day time period under Article 102, paragraph 1, second sentence LCP and Article 78, paragraph 3 LCP for regularization of the claim prescribed by points I - III of the enacting clause. Calculated according to the rule of Article 126, paragraph 2 LCP from the next day as commencement, this time period elapsed on 24th January 2013 (Thursday) without postponement under Article 126, paragraph 5 LCP till the next working day or extension under Article 125, paragraph 2 LCP requested by the party. There were no submissions whatsoever filed to the case by the claimant or on his behalf till the expiry of the deadline on 24th January 2013.

13. On 20th February 2013, a separate power of attorney, dated 19th February 2013 was submitted to the case signed by FK in the name of Lawyer NH for representation in C.nr.2724/06 of the Basic Court of Prishtinë/Priština with general scope including all procedural actions under Article 90, paragraphs 2 and 3 LCP. On 22nd February 2013, a copy of ruling C.nr.2724/06 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 with its translation into Albanian was delivered *again* to Lawyer NH, *after this new authorization* of 19th February 2013, in conformity with Article 107, paragraph 1 and Article 110, paragraph 1, first sentence LCP. This second service was ordered to guarantee the procedural rights of the party and to neutralize any risks as per their exercise. It was duly performed and also verified. Counted from the date of this second service – 22nd February 2013, the 3-day time period given by ruling C.nr.2724/06 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 (points I–III) in compliance with Article 102, paragraph 1 LCP and Article 78, paragraph 3 LCP elapsed on 25th February 2013 again without removal of the deficiencies of the claim pursuant to Article 390 LCP.

IV. GROUNDS FOR DISMISSAL OF THE CLAIM UNDER ARTICLE 391, ITEM G) LCP

14. The claim does not contain all requisites mandatory for its content pursuant to Article 253, paragraph 1 and Article 99, paragraph 2, second sentence and paragraph and 3 LCP. Their lack makes it formally deficient, illegible to be adjudicated by the court contrary to the requirement of Article 99, paragraph 2, second sentence LCP, unless retroactively regularized according to Article 102, paragraph 2 LCP. To this end, the claimant by ruling C.nr.2724/0206 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 (point I) was instructed on the corrections and additions of the claim needed and was prescribed a period of three (3) days to make them pursuant to Article 102, paragraph 1 LCP. However, no submission was filed to the court for precision of the claim. This non-correction and non-completion within the set legal deadline under Article 102, paragraph 1, second sentence LCP is equalized by Article 102, paragraph 3, first sentence LCP to withdrawal of the claim and is the first ground

to be dismissed pursuant to Article 391, item g) LCP and the proceedings in the case to be terminated according to Article 387, paragraph 1, item w) LCT.

15. The claim in the case is without attached certificate for paid court fees contrary to Article 253, paragraph 4 LCP, Section 3.1, Section 4.4 and Section 6.1 of the KJC Administrative Direction № 2008/02. Therefore by ruling C.nr.2724/06 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 (point II) the claimant was given a notice under Section 6.5 of the KJC Administrative Direction № 2008/2002 to pay the court fees in amounts determined by the tariff under its Section 10 within the 3-day time period provided by Article 102, paragraph 1, second sentence LCP. Their non-payment without exemption under Articles 468 – 469 LCP or Section 7.2 of the KJC Administrative Direction № 2008/02 is presumed as withdrawal of the claim and is a second ground for its dismissal pursuant to Article 253, paragraph 5 LPC and Section 6.6 of the KJC Administrative Direction № 2008/2002, with consequent termination of the proceedings pursuant to Article 387, paragraph 1, item w) LCP.

16. Due to the nature of the legal relationship, the dispute for the legality of the allocation decision can only be identically resolved with respect to the allocation right holder that issued it and the titular of the occupancy right that was established by it as consolidated joint litigants under Article 269, paragraph 1 LCP. Similarly, the dispute as per the validity of the challenged contract is to be decided in the same manner with respect to the parties that have concluded it – seller and buyer under the terms of consolidated joint litigation under Article 269, paragraph 1 LCP. Therefore, PS is not procedurally passively legitimated to be a single respondent in the case. This is why by ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 (point III) the claimant was instructed within three (3) days to extend the scope of the claim to all these respondents that must participate in the case according to Article 78, paragraph 1 LCP and the rules for consolidated joint litigation under Article 269, paragraph 1 LCP. As this time period under Article 78, paragraph 3 LCP expired, and the said faults in the passive legitimacy were not cured, the claim being filed against a natural person that could not be a single respondent in the case should be dismissed based on Article 78, paragraph 4 *in fine* LCP – a third ground under Article 387, paragraph 1, item w) LCP to terminate the proceedings in the case.

17. Summarizing, the non-regularization of the claim according to Article 390 LCP due to non-removal of the aforementioned deficiencies under Article 78, paragraph 1 and Article 102, paragraph 1 LCP by the claimant within the period of time prescribed by court is procedurally sanctioned by Article 391, item g) LCP with dismissal.

V. GROUND FOR DISMISSAL UNDER ARTICLE 166, PARAGRAPH 2 LCP

18. According to Article 166, paragraph 2 LCP the court is obliged to consider *ex officio* during the entire course of the proceedings whether the claim has been already adjudicated, and if it finds that the proceedings have been initiated by a claim already resolved by a final decision, it shall be dismissed as inadmissible.

19. To fulfill its duty under Article 166, paragraph 2 LCP, the court is authorized by Article 332 LCP to obtain *ex officio* all the documents needed by any public entity. Accordingly, by ruling C.nr.2724/2006 of the Basic Court of Prishtinë/Priština, dated 15th January 2013 (point V) the Kosovo Property Agency (KPA) was requested to provide the court with copies of DS000853 (A) & DS003414 (C) files of the Housing and Property Directorate concerning apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35. The requested documents were submitted to the case by letter ref.nr.00055/13/gz of the Executive Director of KPA, dated 17th January 2013. After their review by the court, it has been determined the following.

20. On 15th November 1999, UNMIK Regulation No 1999/23 on the Establishment of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) came into force. Its Section 1.2 provides that as an exception of the jurisdiction of the local courts, HPD shall receive, register and refer to HPCC for resolution the claims listed in the provision, *inter alia*: a) claims of natural persons whose ownership, possession or occupancy right to residential real property have been revoked subsequent to 23rd March 1989 on the basis of legislation discriminatory in its application or intent; c) claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24th March 1999, do not enjoy its possession, where the property has not voluntarily been transferred. Section 2.5, first sentence of UNMIK Regulation No 1999/23 further states that HPCC shall have exclusive jurisdiction to settle the categories of claims listed in Section 1.2.

21. On 23rd November 2000, FK filed a claim (No. DS000853) under Section 1.2 (a) of UNMIK Regulation No 1999/23 to HPD with allegations that the apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35 was allocated to him while under construction on the basis of employment by Decision № 267/1989 of 16th February 1989 and Decision № 2092 of 18th September 1989 of the Workers Council of OPPB "Elektroekonomia ë Kosovës", OP PER PRODHIMIN E THENGJILLIT, OTHPB MS. "KOSOVA"–BELLAQEVCE, as well as Decision № 2093 of 18th September 1989 of the Director of the enterprise. FK ascertained also that by Decision № 3432 of 16th November 1990 of the INTERIM BODY of NP "ELEKTROEKONOMIA Ë KOSOVËS PER PRODHIMIN E THENGJILLIT DHE ENERGISE ELEKTRIKE" his employment relationship was terminated as a discriminatory measure. He challenged his dismissal by objection ref. № 876, dated 23rd January 1991 to the Interim Body, and later by appeal, lodged on 4th March 1991 to the Associated Labour Court - Prishtinë/Priština and never decided. FK acknowledged that he did not conclude contract on use for the apartment with the Public and Housing Enterprise and only obtained its possession in 1999 after the NATO air campaign. The request of FK to HPD/HPCC was to restitute his property right over the apartment.

22. On 27th December 2001, PS filed a claim (No. DS003414) under Section 1.2 (c) of UNMIK Regulation No.1999/23 to HPD/HPCC with factual allegations that he was allocated the disputed apartment by Decision № 2517 of the Commission for

Appeals of his employer, dated 26th August 1992, entered into it and concluded with the Public and Housing Enterprise - Prishtinë/Priština a contract on its use № 1193/15292, dated 10th September 1992. Later ELEKTROPRIVREDA SRBIJE, JP ZA PROIZVODNJU, PRERADU I TRANSPORT UGLJA - POVRŠINSKI KOPOVI "KOSOVO" as seller and PS as buyer signed contract on its purchase № 3582/1920, dated 2nd March 1993, attested by the Municipal Court of Prishtinë/Priština with Vr.nr.9182/1993 on 29th September 1993. Finally, PS alleged before the HPD/HPCC that he fled Kosovo on 22nd June 1999 in the circumstances surrounding the conflict, lost the possession of the apartment and requested its repossession.

23. The HPD/HPCC proceedings on the claims above, both filed within the legal deadline under Section 3.2, second sentence of UNMIK Regulation No 2000/60 – 1st July 2003, as competing for one and the same apartment, raising common legal and evidentiary issues, were joined according to Section 19.5 (a) of UNMIK Regulation No 1999/23. They were resolved by the HPCC in the first instance by Decision No. HPCC/D/97/2003/A&C, dated 17th October 2003. The A claim DS000853 of FK was refused because he failed to prove any property right capable of restitution as required by Section 1.2 (a) of UNMIK Regulation No 1999/23 and being unable to show that he ever had a lawful possession on the apartment (paragraph 7). The C claim DS003414 of PS was granted by HPCC holding that he had evidenced *prima facie* ownership on the apartment, loss of its possession in the circumstances surrounding the NATO air campaign and did not voluntarily dispose of his property right (paragraphs 11 and 13). Hence, the HPCC decided in favour of the C claimant by ordering his reinstatement in possession of the apartment, obliging any person occupying it to vacate it within 30 days under the threat of eviction in case of failure to comply with it within the time stated.

24. On 23rd November 2004, FK submitted to the HPD a request to the Commission for reconsideration of its Decision No.HPCC/D/97/2003/A&C, dated 17th October 2003 pursuant to Section 14.1 of UNMIK Regulation No.2000/60. It was partially granted by Decision No. HPCC/REC/60/2006, dated 31st March 2006 where Decision No. HPCC/D/97/2003/A&C, dated 17th October 2003 was overturned and amended *in so far A claim DS000853 was concerned by*: a) its refusal; b) referral to the local court of the determination of a legal relief, if any, available to the A claimant under the applicable law for the allegedly irregular manner in which the apartment was allocated and acquired by the C claimant; c) freeze order prohibiting all transfers until the decision of the local court except based on an amicable settlement between the parties which will lapse unless the A claimant within 60 days lodges with the court a notice to continue the proceeding. In the reconsideration the C claim DS003414 of PS was again granted – by Decision No. HPCC/REC/60/2006, dated 31st March 2006 (point 2) it was ordered his reinstatement in possession of the apartment, obliging any person occupying it to vacate it within 30 days under the threat of eviction. In the reconsideration the Commission reaffirmed its first instance conclusions that FK as A claimant failed to provide sufficient evidence for property rights on the apartment, and

had never entered in its lawful possession as required for a valid occupancy right to come into existence (paragraph 5). As per the connected C claim DS003414 in the reconsideration HPCC reiterated its findings in the first instance, that PS had shown *prima facie* property rights over the apartment, lost possession in the circumstances surrounding the NATO air campaign, and non-disposal of the ownership right in compliance with Section 1.2 (c) of UNMIK Regulation No 1999/23 and Section 2.6 of UNMIK Regulation No 2000/60 (paragraph 9). In this regard, the HPCC verified as genuine the contract on use of 10th September 1992 and the purchase contract of 29th September 1993, presented by PS in support of his claim, and hence decided that he had acquired an *occupancy right* based on the first contract and then an *ownership right* - based on the second. Thus, C claim DS003414 was finally granted by HPCC as being substantiated with sufficient evidence as per the *acquisition of the ownership over the apartment by PS* prior to 24th March 1999 and compliance with the other conditions laid down by Section 1.2 (c) of UNMIK Regulation No 1999/23 and Section 2.6 of UNMIK Regulation No 2000/60.

25. Decision No. HPCC/REC/60/2006, dated 31st March 2006 was signed by the HPCC Chairperson according to Section 22.9, first sentence of UNMIK Regulation No 1999/23. The *finality* of this decision as of the date of its issuance was explicitly verified on its last page with reference to and quotation of the provision of Section 2.7 of UNMIK Regulation No 1999/23.

26. The HPCC *individual decision* on the reconsideration with requesting party FK and responding party PS on claims DS000853 & DS003414 for apartment located in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35 based on the HPCC Cover Decision No. HPCC/REC/60/2006, dated 31st March 2006 was certified by the Registrar of the HPCC on 11th May 2006 as previewed by Section 22.9, second sentence of UNMIK Regulation No 2000/60. After quotation of the relevant part of the enacting clause of the Cover Decision No HPCC/REC/60/2006, it was pointed that claims DS000853 & DS003414 after being individually researched and adjudicated were resolved as part of this cover decision in terms of Section 22.9 of UNMIK Regulation No 1999/23, approving all individual decisions identified in it, where apart from the generally applicable paragraphs of its reasoning, paragraphs 2, 4, 5, 7, 8 and 9 apply specifically to claims DS000853 & DS003414.

27. Certified copies of the HPCC Reconsideration Decision above were delivered by the HPD in compliance with Section 13.1, first sentence of UNMIK Regulation No 2000/60 to FK on 26th May 2006, and to PS on 31st May 2006, evidenced by signed acknowledgment receipts. Thus Decision No. HPCC/REC/60/2006 *became effective* from the date of its delivery to the last party - 31st May 2006, since it does not provide otherwise according to Section 13.1, second sentence of UNMIK Regulation No 2000/60. No further legal remedies were *de facto* or *de jure* applied against it by the parties and/or third persons.

28. The Decision HPCC/REC/60/2006, dated 31st March 2006 became executable 30 days after the delivery to the A claimant FK on 26th May 2006 as occupant of the apartment at that time – Section 13.3 of UNMIK Regulation No 2000/60. The eviction warrant No 2006/W/4602/HPCC issued by the Registrar on 4th July 2006 was executed by HPD as foreseen by Section 13.3, item a) and Section 13.6, first and second sentences of UNMIK Regulation No 2000/60 on 14th July 2006. The keys of the apartment were delivered to a representative of PS on 19th July 2006, verified by a keys handover protocol–receipt, whereupon, on 25th July 2006, the claimed property was registered as taken in repossession by this C claimant, and on 8th August 2006, the HPD/HPCC case was closed.

29. The reconsideration procedure under Section 14 of UNMIK Regulation No 2000/60 was completed by the HPCC Decision No.HPCC/REC/60/2006 of 31st March 2006 as foreseen by Section 25 of UNMIK Regulation No 2000/60. In the absence of any further legal remedies provided by UNMIK Regulation No 1999/23 and UNMIK Regulation No 2000/60 and non-applicability of the ones under the general procedural law (LCP) pursuant to Section 2.7 of UNMIK Regulation No 1999/23 and Section 28 of UNMIK Regulation No 2000/60, HPCC Decision No.HPCC/REC/60/2006 became final as of the date of its issuance under the terms of Section 22.9, first sentence of UNMIK Regulation No 2000/60 – 31st March 2006, officially certified by the HPCC Registrar in compliance with Section 22.9, second sentence of UNMIK Regulation No 2000/60 on 11th May 2006. Thus, the HPD/HPCC procedures on the property claims DS000853& DS003414 filed by FK and PS based on Section 1.2 (a) and (c) of UNMIK Regulation No 1999/23 for the contested apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35 had been completed with exhaustion of the legal remedies available under UNMIK Regulation No 2000/60. Consequently, the HPCC Decision No.HPCC/REC/60/2006 became final, binding and enforceable, not subject to review by any court or administrative authority in Kosovo, pursuant to Section 2.7 of UNMIK Regulation No 1999/23.

30. The legal basis of the HPCC Decision No. HPCC/REC/60/2006 is defined by UNMIK Regulation No 1999/23 and UNMIK Regulation No 2000/60 which prevail over other applicable laws on property rights – Section 4 of UNMIK Regulation No 1999/23, and supersede all provisions inconsistent with them – Section 28 of UNMIK Regulation No 2000/60. The first sentence of Section 1.2 of UNMIK Regulation No 1999/23, quoted above, empowered the HPD to receive and register the claims listed in the provision, *limiting the competence of the local courts* in this respect. The HPCC was established by Section 2.1 of UNMIK Regulation No 1999/23 as an independent organ of HPD, *which as an exception of the jurisdiction of the local courts,* shall settle private non-commercial disputes for residential property referred to it by the HPD till the Special Representative of the Secretary - General determines that the local courts are able to carry out the said functions. Therefore, HPCC is to be acknowledged as a *tribunal* in the meaning of Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), having the main characteristics defined in the

jurisprudence of the European Court of Human Rights (ECtHR) to which reference is made pursuant to Article 53 of the Constitution (*Bellios v Switzerland* A 132 (1988), 10 EHRR 466; *Cyprus v Turkey* 2001-IV, 35 EHRR 731; *H. v Belgium,* A 127-B (1987) 10 EHRR 339). *Firstly*, HPCC was established on the basis and in compliance with the applicable law in Kosovo. *Secondly*, it was entrusted with *judicial functions*, taken temporarily from the local courts until transferred back to them after the end of its mandate. *Thirdly*, HPCC met the requirements for independence – Section 2.1 of UNMIK Regulation No 1999/23, impartiality - Section 17.12 of UNMIK Regulation No 2000/60, its members' terms of office – Section 17.3 of UNMIK Regulation No 2000/60, and the guarantees afforded by its procedure–Sections 18 and 19 of UNMIK Regulation No 2000/60. *Fourthly*, and most importantly, the HPCC had the statutory power *to resolve private disputes* on residential properties *by legally binding decisions* on the basis of rules of law and after proceedings conducted in a prescribed manner (*Benthem v Netherlands* A 97 (1985) 8 EHRR 1 PC). This was a substantive litigation on justiciable property disputes that could be only settled through judicial resolution. *Fifthly,* HPCC decisions could not be set aside by any administrative body (*Cooper v UK* 2003-XII 39 EHRR 171GC), whereas their enforcement could not be suspended by another public institution based on law (*Van de Hurk v Netherlands* A 288 (1994) 18 EHRR 48, para 45). Therefore, the HPCC decisions being rendered by jurisdiction upon their finality became *res judicata* on the property disputes resolved and may not be thereafter questioned or disregarded, challenged or re-decided, while bearing same legal value as the acts of the regular courts.

31. On this legal basis, HPCC found admissible DS000853 claim filed by FK on 23rd November 2000 under Section 1.2 (a) of UNMIK Regulation No 1999/23, and DS003414 claim filed by PS on 27th December 2001 under Section 1.2 (c) of UNMIK Regulation No 1999/23, *inter alia*, as falling within its competence under Section 2.5, first sentence of UNMIK Regulation No 1999/23. Based on Section 19.5 (a) of UNMIK Regulation No 1999/23 these two claims were decided together by HPCC in the first and second instance with exhaustion of the reconsideration foreseen by Section 14 of UNMIK Regulation No 2000/60 and non-applicability of the legal remedies – regular and extraordinary – under the general law for civil proceedings. As noted above, by its final Decision No HPCC/REC/60/2006 refused the claim of FK for the failure to evidence any property right of the ones enumerated in Section 1 of UNMIK Regulation No 2000/60 (*ownership, lawful possession, right on use or occupancy right*), capable of restitution according to Section 1.2 (a) of UNMIK Regulation No 1999/23 and Section 2.2 of UNMIK Regulation No 2000/60. At the same time, HPCC granted the claim filed by PS as satisfying Section 1.2 (c) of UNMIK Regulation No 1999/23 and Section 2.6 of UNMIK Regulation No 2000/60, *inter alia,* established property rights under Section 1 of UNMIK Regulation No 2000/60 – first an *occupancy right* evidenced by *the contract on use of 10th September 1992,* and then an *ownership right* acquired by *the purchase contract of 29th September 1993*, both verified in the HPCC proceedings as genuine. HPCC decided

the property rights in DS000853 & DS003414 by ordering repossession of the apartment in favour of PS - Section 22.7 (b) of UNMIK Regulation No 2000/60, and refusing the A claim of FK - Section 22.7 (f) of UNMIK Regulation No 2000/60. In all its elements the dispositive of this decision is *determinative* for these contested civil rights in the sense of Article 6(1) of the ECHR.

32. The disputed apartment as covered by UNMIK Regulation No 1999/23 since its entry into force on 15th November 1999, by its Section 2.5 was taken away from the competence of the local courts and placed under the exclusive jurisdiction of HPCC to settle the claims concerning this residential property listed in Section 1.2 like the ones of FK and PS. They were resolved by HPCC Decision No. HPCC/REC/60/2006, which, pursuant to Section 2.7 of UNMIK Regulation No 1999/23, being final as of the date of its issuance – 31st March 2006 became binding *(res judicata),* and enforceable under Section 13 of UNMIK Regulation No 2000/60, not be subject to review by any court or administrative authority in Kosovo. These legal effects foreseen by Section 2.7 of UNMIK Regulation No 1999/23 are recognized in the jurisprudence of the Constitutional Court, stating explicitly that the final HPCC decisions are *res judicata*, as per the right to property, guaranteed by Article 46 of the Constitution, and Article 1 of Protocol 1 of the ECHR, while any interference in its peaceful enjoyment by a court through re-adjudication of the same dispute, previously solved by HPCC, should be considered a violation of this human right (judgment of the Constitutional Court in Case No.KI.104/10, *Arsić Draža vs. Karacevo*, of 23rd April 2012, paragraphs 64, 73, 75, 76 and 79).

33. Likewise, the practice of Kosovo Property Claims Commission (KPCC) is to dismiss claims filed to it, previously considered and decided by final decisions of the HPCC due to their *res judicata* pursuant to Section 11.4 (c) of UNMIK Regulation No 2006/50, adopted and amended by Law No 03/L-079, and Section 2.7 of UNMIK Regulation No 1999/23 (Decision No KPCC/D/R/152/2012 of the KPCC of 19th April 2012, paragraphs 41 – 45). Without transitional provisions of UNMIK Regulation No 2006/10, UNMIK Regulation No 2006/50, Administrative Direction No 2007/5, and Law No 03/L-079 which provide otherwise, all decisions taken by the HPCC after the establishment of the KPA and the KPCC continue to be legally valid.

34. The *res judicata* produced by each final HPCC decision, regardless of the type of claim(s) covered and/or the outcome, in its negative function prohibits any court, if seized with this dispute, to adjudicate it and decide it on the merits (*non bis in idem*). This non-resolvability of the resolved dispute being *an absolute negative procedural prerequisite* makes any subsequent claim inadmissible as the procedural right to file it is precluded by the *res judicata* of the final HPCC decision. Section 2.7 of UNMIK Regulation No 1999/23 bans its review, direct or indirect, by any Kosovo court, thus guaranteeing its irrevocability in compliance with the legal certainty principle. Its *res judicata* hinders the submission of a new claim like the one settled by HPCC, makes impermissible any next trial between the same parties on the same subject, and allows

the final forceful HPCC decision to remain effective avoiding duality with conflicting decision(s). The *res judicata* impedes any renewal of the dispute by the institution of judicial proceedings on it since Article 166, paragraph 2, and Article 391, item d) LCP imperatively oblige the court to dismiss *ex officio* the claim duplicating the one finally determined by the HPCC in compliance with Section 2.7 of UNMIK Regulation No 1999/23 based on its exclusive jurisdiction under Section 2.5 of UNMIK Regulation No 1999/23.

35. FK and PS being parties in the HPD/HPCC proceedings and addressees of Decision No HPCC/REC/60/2006 of 31st March 2006, were bound to cease their dispute as per the apartment located in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35. After this decision became effective on 31st March 2006, they could not challenge the factual and legal determinations, contained in it as to this residential property which makes its status adjudicated, defined, beyond dispute. Due to the joinder of the DS000853 & DS003414 cases by its Decision No. HPCC/REC/60/2006 HPCC refused based on Section 22.7 (f) of UNMIK Regulation No 2000/60 the claim under Section 1.2 (a) of UNMIK Regulation No 1999/23 *denying* the property rights of FK over the contested apartment, and simultaneously granted the claim under Section 1.2 (c) of UNMIK Regulation No 1999/23 by *confirming* the ownership right of PS on it and ordering re-possession in his favour pursuant to Section 22.7 (b) of UNMIK Regulation No 2000/60. He was reinstated in the lost possession of this residential property as its *owner* in the first hypothesis of Section 1.2 (a) of UNMIK Regulation No 1999/23, legitimated by the purchase contract of 29th September 1993, and *vice versa* not in the capacity of its *ex-possessor* in the second hypothesis of Section 1.2 (a) of UNMIK Regulation No 1999/23 in conjunction with Section 22.5 of UNMIK Regulation No 2000/60. All causes available to the parties were examined in the HPCC proceedings and exhausted in its framework. The property rights on this apartment on the factual and legal grounds claimed before the HPCC were thus established on their merits by Decision No HPCC/REC/60/2006 and being *res judicata* as of 31st March 2006 could not be thereafter contested, tried or otherwise derogated.

36. Based on Section 2.5, first sentence of UNMIK Regulation No 1999/23 and Section 22.7 (g) by point 1(b) of Decision No HPCC/REC/60/2006 it was retained to the competent local court *only* to determine in a regular proceeding, if initiated at all within 60 days thereafter, the legal relief available under the applicable law to this A claimant for the allegedly irregular manner in which the said apartment was allocated to and then acquired by this C claimant. The single issue so referred by the HPCC to this first instance court was the discrimination and upon its existence - the award as an alternative legal relief against the allocation right holder of a monetary compensation for the discriminatory damages that might have been caused by this enterprise to FK after 23rd March 1989. However, his actual recourse to the court in this case does not correspond to the referral envisaged by the HPCC.

37. The parties in the completed HPCC proceedings, being bound by Decision No HPCC/REC/60/2006 pursuant to Section 2.7 of UNMIK Regulation No 1999/23 had to comply with it - PS was entitled to exercise the ownership over the apartment, while FK was obligated not to violate this right, or further contest it. The latter in contrast submitted a claim to the court re-arguing the property of the apartment located in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35, previously solved by HPCC. There are no facts alleged by FK in C.nr.2724/2006 newly occurred after 31st March 2006 – the date of finality of HPCC Decision No HPCC/REC/60/2006 as time limit of its *res judicata*. All facts in his claim to the court of 20th December 2006 proceed 31st March 2006, have been already invoked before the HPCC and have been covered by the *res judicata* of its decision. The property rights established by the Commission as 31st March 2006 could not be subsequently challenged by facts preceding this moment. The lawsuit filed by FK against PS on the basis of such old facts restores the dispute settled by HPCC – a possibility barred by Decision No HPCC/REC/60/2006. The preclusion is applicable given the *identity of the objective scope* of its *res judicata* and the claim to the court, as well as their *subjective identity* - FK and PS after being parties to the HPCC proceedings are litigants in C.nr.2724/06. In sum, the *personal, material and temporal limits* of the competing claims solved by HPCC, and the *res judicata* of its final decision, coincide with the ones of the present lawsuit to the court. This full correspondence is the requisite one for the provision of Article 166, paragraph 2 LCP to apply.

38. As the HPCC had finally and conclusively determined the ownership issues as per the apartment in Prishtinë/Priština, "Dardania" SU-9, L-1, 9th floor, nr.35 between FK and PS, the claim in C.nr.2724/2006 as an attempt to revive this property dispute, definitely resolved by this exclusive jurisdiction, is to be dismissed by this court *as res judicata* pursuant to Article 166, paragraph 2 and Section 2.7 of UNMIK Regulation No 1999/23. This dual trial being instituted after the completion of the HPCC case between the same parties on the same subject-matter as legally prohibited is to be terminated pursuant to Article 387, paragraph 1, item w) LCP. The lawsuit to the court being filed for re-resolution of a decided dispute is impermissible as the procedural right for its submission has been precluded by the *res judicata* of the final Decision No HPCC/REC/60/2006. The latter being determinative for the property rights in question and their underlying legal grounds could only be acknowledged by the court, while the adjudication of C.nr.2724/06 may only produce substantial procedural violations - transgress of the jurisdiction of the Basic Court of Prishtinë /Priština - Article 182, paragraph 2, item b) LCP and re-decision of a decided *res judicata* claim - Article 182, paragraph 2, item l) LCP. In addition, any pursuit of this case by the court will interfere in the right to property, established by the final HPCC Decision No HPCC/REC/60/2006, protected by Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR, in breach of its domestic and international law guarantees (judgment of the Constitutional Court in Case No. KI.104/10, *Arsić Draža vs. Karacevo*, of 23rd April 2012). The non-dismissal of the new contestation pursuant

to Article 166, paragraph 2 LCP would also impair *the right to a fair trial* under Article 31 of the Constitution and Article 6(1) of the ECHR (*Brumarescu v. Romania* App. No. 28342/95, 1999; 33 EHRR 862), which, *inter alia,* in compliance with the legal certainty principle requires that the final *res judicata* decisions on civil rights not to be called into question in order to remain irreversible as per the stability of all their legal effects and thus to preserve intact the property rights consequences already produced by their enforcement.

VI. CONCLUSION

39. Based on these considerations, the court concludes that the claim in this case does not meet the legal requirements for its admissibility and shall dismiss it for non-correction and non-completion of its content pursuant to Article 391, item g) in conjunction with Article 102, paragraph 3, first sentence LCP, non-regularization of its subjective scope pursuant to Article 78, paragraph 4 *in fine* LCP, non-payment of the court fees pursuant to Article 253, paragraph 5 LCP in conjunction with Section 6.6 of the KJC Administrative Direction № 2008/02, and as *res judicata* pursuant to Article 166, paragraph 2 and Article 391, item d) LCP in conjunction with Section 2.7 of UNMIK Regulation No 1999/23.

In view of the aforementioned reasoning it is decided as in the enacting clause.

LEGAL REMEDY: According to Article 206, paragraph 1 LCP each party may file an appeal against the present ruling to the Court of Appeals through the Basic Court of Prishtinë/Priština within fifteen (15) days from the date of its receipt.

THE BASIC COURT OF PRISHTINË/PRIŠTINA

C.nr.2724/2006 on 26.02.2013

EULEX JUDGE ROSITZA BUZOVA

Prepared in English as an official language according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo