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

SCC – 07 – 0311

[redacted]

Claimant

Vs.

1. Kosovo Trust Agency, represented by UNMIK

2. [redacted] SOE, Mitrovicë/Mitrovica

3. Privatisation Agency of Kosovo
Str. Ilir Konushevci No.8,
10 000 Prishtinë/Priština

Respondents

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, sub – panel composed of Laura PLEŞA, EULEX Presiding Judge and Piero LEANZA, EULEX delegated by the Trial panel composed of Laura PLEŞA, Presiding Judge, Piero LEANZA and Gyltene SYLEJMANI, Judge, with the order dated 21 April 2010, issues on this 30 July 2010 the following

JUDGMENT

1. **The claim of [redacted] for handing the possession of the land and compensation is rejected as ungrounded.**

Factual and Procedural Background

On 30 July 2007 the Claimant filed a claim with the Special Chamber of the Supreme Court of Kosovo, for the restitution of a parcel of land, submitting that he was unable to enter into possession of his property. He also claimed compensation of lost profits in the amount of 90.000, 00 Euro.

The claimant maintains that he bought the parcel of land no.534, possession list 260, of 0.38,67 hectares, CZ Nekodim, Ferizaj/Uroševac, on 2 November 2006. This parcel was sold by KTA during the liquidation procedure of the SOE [redacted] from Mitrovicë/Mitrovica, and he now is the legal owner, as evidenced by the contract of sale and

the certificate of immovable property rights issued by the Kosovo Cadastral Agency in Ferizaj/Uroševac.

The Claimant further maintains that since the date of purchase, he had not been able to enter into possession of the parcel of land, because of some claims by other occupants submitted to the Municipal Court in Ferizaj/Uroševac. As it is also evidenced in the notice sent to KTA on 29 March 2007, the Claimant alleged that in the parcel of land he bought from KTA, the occupants had built a 3 storey building of strong material, entering about 1.5 meters inside, and about 10 meters lengthwise in the parcel, while another building of strong material of 20 meters square has been built entirely inside his parcel.

The Claimant called on the KTA, based on article 26 of UNMIK Regulation 2005/18, to take adequate measures, such as ask the assistance of the police, KFOR and other temporary self-governing institutions, in order to implement the authorizations made in accordance with that Regulation.

As a consequence of that, the Claimant affirms that he also addressed the Municipal Court in Ferizaj/Uroševac for interruption of possession and release of the property, but the court had not taken any decision so far.

The Claimant finally states that such situation caused him financial losses due to the fact that on 5 November 2006 he had entered into a lease contract with a private company, [redacted] from Shtime/Štimlje, whereby he was renting the parcel in question to [redacted] for 30 months, for the sum of 45,000 Euro, which was paid in advance. The claimant affirms that the Company [redacted] filed a claim against him at the Municipal Court in Ferizaj/Uroševac and that the court charged the claimant to pay compensation and financial damages.

On 29 March 2007, the Claimant also sent letters to the Legal Office of KTA, to the Head of KTA Board, to request the release of the contested property.

On 10 October 2007 the KTA submitted its Defence to the Special Chamber. It requested the Chamber to dismiss the claim as ungrounded, as the KTA was not obliged to transfer the parcel free of illegal occupation.

The KTA refers to the process of Liquidation of the Socially Owned Enterprise [redacted] initiated on 14 October 2005. On 28 February 2006, the actual sale of the parcel in question took place, under the "Rules of Tender for Sale of property through a competitive sealed bidding process", and the legal terms and conditions of sale.

The KTA maintains that the Claimant was made aware by the KTA of such Rules of Tender and the legal terms and conditions of sale were explained as well as of the fact that the Property was at the time occupied by a third party, [redacted] The Claimant's reply was that he knew about this fact, and he was just interested to buy the parcel.

After the tender procedure, the Claimant was selected as the winning bidder. A letter was sent to him by the Liquidation Unit of KTA authorizing him to monitor the parcel as provisional winning bidder. KTA affirms that from this moment onwards, the Claimant had the possibility to be aware of the factual situation; however, he never raised any concern about the status of the property, and after 7 months signed an Agreement for the Transfer of Real Property. The

agreement stated among others, in its section 2.3, that the Claimant agreed that it was accepting the SOE's rights and title to and interest in the property "as is".

After the signature of the agreement between the KTA and the Claimant, the KTA Regional Office in Mitrovicë/Mitrovica sent a letter to the Kosovo Police Service in Ferizaj/Uroševac, on 30 November 2006, requesting their intervention in freeing the occupied property, though according to the Rules of Tender, the KTA was not obliged to do so.

After that, the KTA maintains that it received information that the claimant was able to enter into possession of his property.

Therefore, the KTA asserts that the Claimant is not in the position to act against the KTA, since the claim is not grounded on the merits, or ask for any compensation for damages.

On 4 September and 22 October 2007 the Judge in charge issued two orders, requesting clarification regarding claims submitted at the municipal courts.

Based on the replies of the claimant of 14 September 2007, and 9 November 2007 it appears that a number of cases were initiated in the Municipal Court in Ferizaj/Uroševac before the liquidation and purchase of the land and after that.

They were:

1. Case before the Municipal Court Ferizaj/Uroševac, C.nr.173/97 of 14 March 1997. It was a claim by [redacted] for the annulment of a donation contract of 1949/1951 between his predecessors and the Municipal Council in Ferizaj/Uroševac, SOE [redacted] and SOE [redacted] ([redacted]) in Mitrovicë/Mitrovica, for the cadastral parcel no.534, possession list no.260, C.Z. Nekodim.
   Because it was not concluded, this case was reactivated after the war, and a new number was assigned to it: **C.315/03**. The main hearing in this case was decided to be held on 31 May 2006, but after notification that the Claimant had died three years ago, and after notification by a decision of KTA that SOE [redacted] [redacted] [redacted]) was under liquidation, the Municipal Court decided to terminate this procedure in accordance with Article 212, points 1 and 4 of LPK. (Claimant had died, and liquidation procedure of [redacted] had started.) The procedure has not resumed since. There is another file – 160/2007 in which the claim of [redacted] and the others against Municipality of Ferizaj and SOE [redacted] for verification of ownership and annulment of contract is disputed. By the judgment taken in 12.05.2009, the case was stayed and this judgment was confirmed by the second instance Court in 08.02.2010.
2. The Claimant also mentions in the context of the "process verbale" of the preliminary hearing in the Case ND.nr.258/06 (*settlement of boundaries),* that the contest in the case **CNR 563/98** of 1 March 1999 had been finalized as regards the part of property of parcel 534, possession list 151, only as regards an area of 0,70,90 ha. The Claimant submits that KTA had to resolve this matter before the privatization, but although it was aware of it, it did not take this fact into consideration.

A number of other cases were initiated after the sale of the property by the claimant.
They were:

1. Case ND.nr.258/06. The Claimant [redacted], on 16 November 2006 submitted a proposal before the Municipal Court in Ferizaj/Uroševac for the settlement of boundaries for the abovementioned land parcel bought from the KTA, with the other bordering parcels of [redacted] and others (non contesting procedure). A preliminary hearing was held in this case on 18 December 2006. Since for the same parcel, another case C.315/03 was ongoing at the same court, case ND.nr.258/06 was suspended until a decision is taken in the case C.315/03. The claimant was advised to start a civil suit.
2. Another claim C.nr.169/07 was filed on 15 March 2007 at the Municipal Court in Ferizaj/Uroševac, by [redacted] against [redacted] and others, claiming that he was deprived from possession, because his privatised property was occupied by the Respondents, and requesting the release of the contested parcel. By the decision taken in this case on 4.04.2008 the claim was rejected but in the appeal proceedings District Court in Pristina on 17.11.2008 approved the claim.
3. Case C.nr.412/07 claim for damage compensation. NTP [redacted] submitted a claim at the Municipal Court in Ferizaj/Uroševac, against [redacted] for damage compensation in the amount of 90.000 Euro plus 3,5% interest from the day of entering into the lease contract of 5 November 2006. According to the contract, [redacted] was obliged to hand over the contested property to NTP [redacted] but he was not in a position to do so since the KTA had not surrendered the property to [redacted] This had happened because the KTA had not considered the fact that at the time of privatization there were a number of cases pending at the Municipal Court in Ferizaj/Uroševac. The claimant submits that the case C.nr.412/07 is still pending.
4. Another claim SCC-06-0159 was submitted at the Special Chamber by [redacted], [redacted] and [redacted], for the annulment of the KTA privatization decision for the contested parcel of 0.38.67 ha, against the KTA and SOE [redacted] in Mitrovicë/Mitrovica. The Special Chamber took a decision on 8 June 2007, for interrupting the procedure until the conditions of article 215 para. 2 of LPK are fulfilled. This decision is final, legally binding and not appealable.
5. Ac 126/2010 (the file of the appeal in the executive procedure. By the decision dated 24.02.2010 District court of Prishtinë/Priština sent for retrial the proposal for execution of the decision for restitution the land (dated 4.04.2008). With this document it is shown that the possession is not yet gained by the claimant (executive procedure not being finished).

On 28 April 2008 an evidentiary hearing was held, after which the Claimant submitted an amendment of the claim on 8 May 2008. On 6 May 2009 the Privatisation Agency of Kosovo requested to be included into the suit, and therefore the amended claim was served onto the Respondents.

On 25 May 2009 the Privatisation Agency of Kosovo is called into the suit.

The Kosovo Trust Agency filed its defence on the amended claim on 28 May 2009 reiterating its arguments about that fact that the Agency was not obliged to transfer the parcel free of illegal occupation, that it did not mislead the Claimant in any way about the conditions of the property being sold and that it did not breach the terms and conditions of the Agreement.

After a further serving of the submissions the Claimant requested the Special Chamber to set up an additional hearing.

Additional documentations were submitted and served, without relevant additions to the information already provided to the Special Chamber.

Final submissions were filed by the Privatisation Agency of Kosovo, which submits that considering the decision of the District Court in Prishtinë/Priština declaring the Claimant the legal owner of the premise and ordering the Respondents ([redacted] family) to refrain from obstructing the quite and peaceful enjoyment of his property, the Agency does not have any responsibility *vis á vis* the Claimant. Therefore the claim of the Claimant should be rejected in its entirety.

The Kosovo Trust Agency submits that the Claimant in its reply to the Privatisation Agency of Kosovo' submission is not producing any new fact or evidence in support of the claim.
The Kosovo Trust Agency mentions also the decision of the District Court of Prishtinë/Priština of 17 November 2008 which in the proceedings 169/2007 decided that the respondents obstructed the Claimant' s quite and peaceful enjoyment of his property, which is the subject matter of the case pending in front of the Special Chamber.
Therefore the claim itself became partially obsolete as there is already a decision recognising the Claimant's rights.

As for the request of compensation for the damages, the Kosovo Trust Agency requests for the rejection, since there is no obligation from the Kosovo Trust Agency side to sell the property subject matter of the dispute, free of any illegal occupation, as it was already submitted to the Special Chamber on 10 October 2007 and 25 May 2009.

On 21 April 2010, the trial panel delegated the conducts of hearing to a sub-panel. And a final hearing was held 28 May 2010.

Legal reasoning

The applicable law to be verified in order to decide upon the claim is Art. 508-515 of the Law on contracts and torts (Official Gazette of the SFR of Yugoslavia nr. 29/1978 amendments in no 39/1985, 45/1989, 57/1989) .

The Claimant is in the position of the buyer who claims his entitlement for compensation. The compensation is the money that the lessee – company [redacted] (within the contract that Claimant entered into) asked from the Claimant for not delivering to the company the promised possession of the land. The loss caused by the encumbrance on the object bought is the usurpation of the land by the third parties (who claimed before their rights against the seller).

The KTA defends itself pointing out the clause no 2.3 of the contract and stating that it was not obliged to transfer the land free from occupation. This reasoning cannot be received by the Court. It is of the essence of the contract of sale that the seller is obliged to deliver the good (Section 3 of Chapter VII of part Two) meaning transferring the possession and not " merely " the right. It is definitely to be understood that from the contract of sale the buyer, in principle, has the right to enjoy the quiet possession of the good.

That is why the parties found necessary to include the clause no 2.3- to exclude the seller's liability for legal deficiencies of the object (as Art. 513 of the Law on contracts and torts allows). The land subjected to a third party's infringements – occupation of the land - is an object with legal deficiency so this provision is applicable to the situation in the file.
The Court learned from the collected evidence that the Respondent had knowledge about the disturbance of quiet possession. With the notice dated 17.05.2004 KTA was informed about the claim of [redacted] regarding the sold land. Also the witness (minutes of the hearings from 29 April 2008) testified that the agents of the seller found out about the occupants of the said property.

Article 513 paragraph 2 from the Law on contracts and torts declares null and void the clause on excluding liability for legal deficiencies that the seller was aware of or that could not have remained unknown to him at the date of entering into contract.

But in the condition that both parties knew about the "deficiency" of the good, the liability will run from seller to buyer. (Article 508 paragraph 1, last sentence of the Law on contracts and torts).

The witness declared about the discussion with the buyer on which occasion he was informed about the claims for the land. It has no relevance that the buyer didn't inform the seller about a specific claim pending at that time. It is proved that the impediments that claimant faces in having his possession is that the Court (case Ac 126/2010 of the District Court of Pristina mentioned before) considered that the case of fam. [redacted] – for restitution of the land - has to be decided first. But in this matter it is enough that the claimant was informed about the general issue consisting of the existence of "the interest in the land" of family [redacted]. From the moment of the tendering to the moment of the signing of the contract the Claimant had the time to check any registration of the claim so it has to be considered that he bought the land accepting the risks that emerged from that situation.

The cause of the infringement is the key issue in deciding upon the liability. The cause of the breach of the warranty of good title has to occur when tender of delivery is made (which for sale of the Real Property is at the moment of signing the contract, the moment of delivering a certificate by which the goods may be taken over, in the wording of Art. 467 paragraph 2 of the Law on contracts and torts). When the buyer asks for compensation for this breach, the cause has to be no later than this moment. The only cause for which the buyer may be liable is the situation as it was until the moment of the signing of the contract. The situation acknowledged by the seller was the claim of family [redacted] and for its consequences the seller might be liable if it hadn't made aware the buyer of the situation– until the moment of entering the contract (it is with no relevance that the Claimant didn't know about the claim at the moment of tender procedure).

As for the other claim – file 563/1998, there is no evidence that the seller knew about it. That is why for any consequences that might derive from that, the clause of point 2.3 operates.

Taking into consideration all of these reasoning, the court finds out that the seller has no obligation in defending the claimant from the occupation – hence no obligation in handing over the land – and in compensating for the alleged loss.

As for the sum asked as compensation, the Court found no evidence according to Art. 189 paragraph 2 of the Law on contracts and torts (the claimant didn't provide any evidence

of the payment of the sum and any evidence for the rent that an owner could obtain from renting a land with the characteristics of the land bought by the Claimant).

Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this decision can be submitted in writing to the appellate panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters within 30 (thirty) days from the receipt of this decision.

Therefore it is decided as in the enacting clause of this Decision.

Laura Pleşa, Presiding Judge
EULEX

Piero Leanza, Judge
EULEX

Tobias Lapke, EULEX Registrar