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-08-0261

[redacted]
Llapje Sellë/Laplje Selo
Represented by [redacted], lawyer from Fushë Kosovë/Kosovo Polje

Claimant

vs.

[redacted]
SOE, [redacted], Fushë Kosovë/Kosovo Polje
Represented by the **Privatization Agency of Kosovo**

Respondent

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber), Trial Panel composed of the Presiding Judge Norbert Koster, Judge Roxana Comsa and Judge Ilmi Bajrami, after deliberation held on 24 February 2011, issues the following

JUDGMENT

1. **The claim of [redacted] seeking the recognition of ownership rights over cadastral parcel [redacted] in at a place called "[redacted]" and the annulment of land purchase contract between the late [redacted]" Collective Farm Cer. No. 3203/1962 (dated 15 December 1960) is hereby rejected as ungrounded.**

2. **The value of the litigation is determined by the Court in the amount € 17,629 (seventeen thousand six hundred twenty-nine Euro)**

3. **[redacted] is obliged to pay the sum of € 126.3 (one hundred and twenty-six Euro and thirty Cent) as Court fees to the Special Chamber.**

Factual and procedural background:

On 26 September 2008, the claimant filed a claim with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber) to certify him as the owner of the cadastral parcel Nr. [redacted] with surface of 3, 52, 58 ha, situated in Caglavica/Čaglavica. The claimant requested the Special Chamber to annul the sale contract Nr. 3203/1962 passed on 15 December 1960, certified by the District Court of Prishtina on 21 December 1962, between his late father and the legal predecessor of the respondent, "[redacted]" Collective Farm, as well as allow the same be registered in the cadastral records. He also requested reimbursement of the procedural expenses.

With his claim, he submitted the notification to the Agency, the contract of sale and a power of attorney.

The claimant stated that in 1962 his late father, [redacted], was forced to sell the above mentioned land parcel to the predecessor of the Respondent. Claimant asserted that the contract is in breach with Art. 103 of the Law on Obligations. In order to prove his allegations the claimant proposed summons of witnesses.

On 3 October 2008 pursuant to section 25.4 of UNMIK Administrative Direction (AD) 2006/17, the Judge Rapporteur issued an order, instructing the claimant to provide the Special Chamber with written information within a period of two weeks of having been served with the order regarding the following questions:

- The cadastral records of the parcel Nr. [redacted] in Caglavica/Čaglavica,
- Proof of that [redacted] is the successor of "[redacted]" Collective Farm,
- Details of the evidence which he intends to provide during the hearing of the case to prove his allegations especially but not limited to the coercion,
- Evidence of inheritance,
- What disposition does he propose with the offset price paid by the predecessor of the respondent?

The claimant submitted the requested documents and clarification in time on 28 October 2008. He explained that he requested the cadastral records, but did not receive an answer so far. He submitted the judgment of the Municipal Court of Prishtinë/Priština P.br. 122/08 as proof of the fact that PIK [redacted] is the successor of "[redacted]" and requested the appointment of a financial expert to calculate the offset price.

On 7 July 2009 the Special Chamber repeatedly ordered the claimant to provide the Special Chamber with written information within a period of two weeks of having been served with the order regarding the following questions:

- The cadastral records of parcel [redacted] in Caglavica/Čaglavica. (if the claimant is not able to obtain the document as alleged previously, he has to prove that his request was denied by the Cadastral Office)
- Details of the evidence which the claimant intends to provide during the hearing of the case to prove his allegations especially but not limited to the coercion.
- Evidence of inheritance, in order to prove that the claimant is the only inheritor of the late [redacted].

On 28 July 2009 the claimant replied to the order and asserted that the cadastre refused to deliver cadastral records to other than official bodies or Courts. He considered that his birth certificate together with his father's identity card proved his inheritance, indicating that he could not yet get his father's death certificate since the documents were destroyed.

On 17 December 2009, the Special Chamber served the claim on the respondent. The respondent did not file a defense up to this date although it was properly served.

On 12 October 2010 the Special Chamber requested *ex officio* the cadastral records of the disputed parcel.

The same day the Privatization Agency of Kosovo (PAK) was served with the claim.

PAK submitted its defense on 2 November 2010. PAK requested the Special Chamber to reject the claim as ungrounded. PAK argued that the Claimant failed to give prior notice to the Agency did not provide legal arguments to the claim, did not submit any material evidence, and did not prove his active legitimacy (lack of inheritance decisions). Further PAK claims that the time to request the annulment of the contract prescribed since Art. 8.a of the Law on Basic Property Relations is not applicable pursuant to UNMIK Reg.1999/24.

On 26 November 2010 Claimant filed his reply, whereby repeated his previous submissions.

In its rejoinder filed on 6 January 2011 PAK assumes that the annulment of the contract should have been initiated by the public prosecutor, otherwise upheld its previous submissions.

After several unfruitful attempts the Court on 31 January 2011 finally received information from the Municipal Cadastral Office of Graçanicë/Gračanica. The cadastral office informed the Court that the cadastral parcel [redacted] does not exist in Caglavica/Čaglavica.

The public hearing which was scheduled for 10 February 2011 but had to be postponed due to unsatisfactory service of the PAK.

In the following hearing on 24 February 2011 the parties upheld their previous statements. The Claimant insisted on that the cadastral parcel [redacted] in Caglavica/Čaglavica exists and as proof he submitted documents issued by the Republic of Serbia in fact referring to cadastral parcel [redacted] in Preoc/Preoce. He also submitted death and birth certificates of [redacted] and - in order to prove the legitimacy of his arguments referring to Art. 103 of the Law on Obligations - the Decision of the Municipal Court of Prishtinë/Priština P.br 3182/97 whereby – allegedly – the neighbouring property parcel No. [redacted]

The respondent raised the issue of the applicability of the Law on Obligations taking into account that this law was promulgated later than the contested contract was signed by the parties. PAK further raised that if the Claimant wishes to use Art. Art. 8/a of the Law on Transfer of Real Property he should be aware that such annulment proceedings should be initiated by the public prosecutor. The Respondent finally argued about the distinction between nullity and contestability as foreseen by the Law on Obligations claiming that the threat on which the claim is based upon is not a case of nullity but a case of contestability; hence it prescribed already.

Legal reasoning:

After the individual and combined evaluation of the presented fact and arguments of the Parties the Special Chamber finds the claim of [redacted] ungrounded.

1.) uncertainty about the cadastral parcel 7/2

As mentioned above the panel is in the possession of two conflicting documents regarding the existence of parcel No. [redacted]. It is noteworthy that from the very beginning of the litigation in each and every document the contested land parcel was addressed as Nr. [redacted] with surface of 3, 52, 58 ha and situated in Caglavica/Čaglavica what the claimant never objected although the contested parcel is most likely not located in Caglavica/Čaglavica. The panel, however, concludes that there is no need to reopen the proceedings in order to clarify whether the contested parcel is in fact located in Caglavica/Čaglavica or Preoc/Preoce, since it would have no effect on the final outcome of the litigation. The Court found the way satisfactory how the contested parcel is described. Further, the confirmation of the ownership is preconditioned on the annulment of the contract (Nr. 3203/1962 passed on 15 December 1960, certified by the District Court of Prishtina on 21 December 1962); if that precondition is not fulfilled there is no need to further clarify the exact location of the parcel.

2.) applicability of the Law on Obligations

Claimant based his claim solely on Art 103 of the Law on Obligations (Official Gazette of SFRY 29/78). Pursuant to Art 532.1 of the Law on Contested Procedure (Law. No. 03/L-006, hereafter LCP) in the ongoing first instance proceedings this present law shall apply. Although Art. 253.1 of the LCP obliges the claimant to indicate the legal basis of the claim Art. 253.2 of the same law declares that the Court is not bound by the legal basis of the claim. Regardless, the Special Chamber clarifies this issue mainly because in this particular case and in several other cases claimants are quoting the jurisdiction of the local courts from the 1990s where property was returned based on Art. 103 of the Law on Obligations. Most of these cases and particularly the one at hand originate from the 1960s. The Law on Obligations, however, entered into force on 1 October 1978. Art. 1106 of this law explicitly states that the provisions will not be applied to obligations created prior to the time when the law entered into force which is 1 October 1978 (Article 1109 of the Law on Obligations). Conclusively there is no legal possibility to return property and/or annul a contract based on the Law on Obligations when such contract is dated prior to 1 October 1978.

As a consequence the claim is ungrounded for this reason.

3.) Invalidating a contract

The panel underlines that even in the event of the Law on Obligations being applicable the claim would not be grounded either. Based upon the reasoning of the claim Article 103 of the Law on Obligations would not be applicable. Article 103 requires that a contract was made contrary to coercive regulations, public order or good business practices. This, however, is not what the Claimant alleges. According to his claim his predecessor was threatened and entered into the contract under the influence of this threat. Such situation falls under the provision of Article 60 of the Law on Obligations which reads:

(1) If a contracting or a third party caused justified fear to the other party by an illicit threat so that he/she concluded the contract out of fear, ...
(2) Fear is considered justified if it is obvious from the circumstances that life, body or other significant assets of the contracting party or third entity is in serious danger.

The distinction between these two provisions – Article 103 on the one hand and Article 60 on the other hand – is of crucial importance, because the legal consequences of these two provisions are fundamentally different. Hence the structure, the legal grounds and the terminology regarding the invalidation of a contract have to be made clear.

First of all, invalidation is the general term which is a procedural act; it defines the claims whereby claimants are seeking the possibility to get out of a contractual obligation claiming that the contract is deficient. The aim is to get the contract declared invalid and hence without legal effect.

In this context "invalid" is a general term. Within that category the material law, namely the Law on Obligations, distinguishes between two different legal concepts: *nullity* and *contestability* (the latter in the English translation of the Law on Obligations called "relatively void contracts"). The dogmatic difference between these categories is that in case of nullity the state (legislator) directly intervenes in the contractual autonomy of the parties, whereas in case of contestability this intervention is only conditional and dependent on the will of a contracting party to contest the validity of the contract.

Nullity is an objective category, meaning that it is not depending on the discretion of the parties and/or the court. Nullity is unconditional – *ipso iure* – and the examination of the circumstances is not necessary (it is indifferent what was the aim of the contracting parties). The Court *ex officio* considers the possibility of nullity; there is no statutory limitation as the right to invoke nullity cannot be terminated (Articles 109 and 110 of the Law on Obligations). In case of nullity the contract seems as it has never existed *(ex tunc).* In order to avoid confusion regarding the nullity of a contract/obligation the legislator regulates it by explicitly stating that if a contract is in breach of certain principles it is "null and void". The most common cases of nullity are the following: impossible, illicit or undetermined object; incapacity of the contracting party (e.g. mentally ill, can be invoked only in the interest of such person); contracts made under physical coercion (only promulgated by Art. 8/a of the Law on Transfer of Real Property in 1992).

Contestability on the other hand is a subjective category, meaning that the allegations of the parties have to be proven (contractual circumstances). Contestability is conditional; only those whose rights are directly affected can invoke it within the time limit prescribed by law. When the court invalidates a contract based on the contestability it terminates the contract only, meaning that it has no further effects *(ex nunc),* and parties have to explicitly claim *in integrum restitutio.* The statutory time limit is usually one year from the date of the contract and/or from the time when the contestability was or should have reasonably been realized (Article 117 of the Law on Obligations). The most common cases of contestability are threat (Article 60) and significant mistake (Article 61).

In the case at hand the Claimant referred to the principle of nullity of a contract. He asserted that his predecessor was threatened by the administration and the Respondent; consequently the contract shall in his opinion be null and void. From the above, however, it is evident that the Claimant mistakenly used the argument of nullity. Throughout the whole proceedings he never alleged that his predecessor was physically coerced. His allegations only refer to threats which results in the application of Article 60.1 rather than Article 103. Hence based upon the above the contract is not null and void. The rights of the Claimant are limited to requesting the annulment of the contract which might be relatively void.

This request, however, would not be grounded for two reasons.

Firstly, his description of facts regarding the alleged threat is neither concrete nor specified and does not allow the Court an assessment whether this threat was serious enough to fulfil the requirements of Article 60 of the Law on Obligations.

Secondly, even if the description of facts was to be seen as sufficient, the Claimant is legally not allowed to request the annulment of the contract due to the elapse of time.

As indicated above, contestability is subject to statutory limitation. The general statutory time limit is 10 years pursuant to Article 379.1 of the Law on Obligations, meaning that after ten years any claim is ungrounded due to the elapse of time. A more specific time limit for contestability is stipulated in Article 117 of the Law on Obligations. According to Paragraph 1 of this Article the right to request invalidation of a relatively void contract shall cease within one year from the disclosure of the reason for the relative invalidation and pursuant to Paragraph 2 in any event after three years from the day of concluding the contract. It is evident that all these periods of time have elapsed long time ago. Conclusively the Claimant has lost his right to challenge the land purchase contract Cer. Nr. 3203/1962 (dated 15 December 1960) even if the court would have considered the argument – which was not raised by the Claimant – that during the oppressive regime of Yugoslavia his access to court was limited if not denied.

4.) restitution and/or compensation

Concluding the above there is currently no option for the Court or any other authority in the territory of Kosovo allowing a decision sought by the Claimant. Without contesting the validity of the allegations of the Claimant (and people in similar situations) it needs to be pointed out that the courts and other authorities would require a legal basis to enter into these arguments on a general or individual level. Such law does currently not exist. To that regard it is up to the legislator to follow Martti Ahtisaari's Comprehensive Proposal for Kosovo Status Settlement - according to Article 143 of the Constitution of Kosovo directly applicable and even superseding the Constitution itself - which explicitly names the requirement that the property restitution shall be addressed. Until a general law governing the issues of property restitution is passed there is no legal ground to grant claims such as the Claimant's.

Court fees:

In accordance with Section 11 of UNMIK Regulation 2008/4 and Section 56.2 of UNMIK Administrative Direction 2008/6 costs of the proceedings shall be borne by the unsuccessful party, here the Claimant.

Pursuant to Section 10 of Kosovo Judicial Council Administrative Direction No. 2008/02 read with Additional Procedural Rules regarding court fees established by the President of the Special Chamber, the Chamber's fees are on the following basis:

- For claims not exceeding the amount of € 10,000 (Article 10.1): a fee of € 50 plus 0.5% up to € 500;
- For the issuance of the Judgment (Article 10.12): is the same as mentioned above.

Since Claimant did not specify the value of his claim it is the duty of the Judge to calculate it pursuant to Art. 3.2 of Kosovo Judicial Council Administrative Direction No. 2008/02. As a method of calculation the Special Chamber used the following: the area of the contested parcel was multiplied by the estimated market price of € 0.5/m2 (35,258 m2 * € 0.5/m2 = € 17,629)

Therefore, the amount of the Court fees is 176.3 €. The Claimant has already paid the sum of 50 €; thus the Claimant shall pay the Special Chamber an additional the sum of €126.3.

The Respondent did not present any request for reimbursement of its own costs of the proceedings and since the Respondent is represented by its own lawyer the Respondent is not entitled to receive reimbursement for reasonable attorney's fees.

Legal advice

Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this judgment can be submitted in writing to the Appellate Panel of the Special Chamber within thirty (30) days from the receipt of this judgment.

Norbert Koster, Presiding Judge — signed
EULEX

Roxana Comsa, Judge — signed
EULEX

Ilmi Bajrami, Judge — signed

Tobias Lapke, Registrar — signed
EULEX