

**SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA**

**KOSOVO PROPERTY AGENCY (KPA) APPEALS PANEL
KOLEGJI I APELIT TË AKP-së
ŽALBENO VEĆE KAI**

GSK-KPA-A-8/11

Prishtinë/Priština

24 August 2011

In the proceedings of:

B.B.

Claimant/Appellant

vs.

S.H.

Respondent/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Antoinette Lepeltier-Durel, Presiding Judge, Anne Kerber and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/R/18/2008 (case file registered at the KPA under the number KPA01417), dated 30 April 2008, after deliberation held on 24 August 2011, issues the following

JUDGMENT

- 1- The appeal of B.B. is rejected as ungrounded.
- 2- The decision of the Kosovo Property Claims Commission KPCC/D/R/18/2008, dated 30 April 2008, as far as it relates to the case registered under the number KPA01417, is confirmed.
- 3- Costs of the proceedings determined in the amount of € 530 (five hundred thirty) are to be borne by the appellant, B.B., and to be paid to the Kosovo Budget within 15 (fifteen) days from the day the judgment is delivered or otherwise through compulsory execution.

Procedural and factual background:

On 5 December 2007, B.B., Director of the X Enterprise Prishtinë/Priština, filed a claim with the Kosovo Property Agency (KPA) seeking for confirmation of his property right, a user right concerning a parcel with a building, situated in Prishtinë/Priština, Aktas, Pal Palucaj 11, a building with 2 floors, 10 rooms and a surface of 327,75 m². The claimant asserted that the loss of the property was a result of the circumstances in 98/99 in Kosovo and that the date of the loss was 26 March 1999.

To support his claim, he provided the KPA amongst others with the following documents:

- lease contract concluded between him as the lessee and the X Enterprise, represented by himself as its Director, dated 3 December 2007, giving the claimant lease of the “Villa located in Pristina, Pal Palucaj Street No. 11, cadastral parcel No. 2763/7, Possession List No. 9204 i.e. 9206, former Street Sremska” until 3 December 2008 for the price of € 0,50 per square-meter; the contract is signed two times by B.B., once on behalf of the lessee, once on behalf of the lessor;
- a certified copy of the purchase contract no. 4573/1, dated 5 August 1987, with which the Y Enterprise transferred the right of disposition, use and management of “*the commercial building*”

in Pristina, Sremska Street 11 in Pristina with a surface of 327,75 m², a garage with an annex building of 40 m² and a yard with a fence, all registered in the possession list no. 9204, cadastral parcel no. 2763/7 in the Municipal Cadastre Office of Pristina to the X Enterprise for the total amount of 51.523.923,00 dinars?;

- receipt of the payment of the purchase price, dated 4 December 1987.

The KPA proceeded with the verification of the documents. On 7 April 2007, the claimant provided the KPA with the information that he never had lived in the claimed property. The KPA continued with the notification of the claim. The KPA officers found the property occupied by S.H., who claimed a legal right to the property and signed a notice of participation on 21 January 2008. On 20 February 2008, the respondent stated that he had bought the property on 29 June 1999 from S.B. for the price of 25.000 DM. He provided the KPA with a written contract, dated 29 June 1999, sustaining his allegations. The respondent added that due to the circumstances at that time the parties of the contract had not been able to have it certified or to complete the documentation of the purchase. Besides, he provided the KPA with two newspaper articles concerning the activities of the claimant.

Nevertheless, the KPCC considered the claim as uncontested.

With letter dated 12 December 2007, the X Enterprise also had asked the KPA to vacate the litigious property.

On 30 April 2008, the KPCC with its decision KPCC/D/R/18/2008 dismissed the claim. The Commission argued that B.B. had failed to submit any evidence to demonstrate that he ever had possession of the claimed property or any property right with respect to the property during the relevant period.

The KPCC's decision was served on S.H. on 9 June 2009, on B.B. on 24 December 2010.

On 20 January 2011, B.B. (henceforth: the appellant), filed an appeal with the Supreme Court against the aforementioned decision which, according to him, involved a fundamental error and serious misapplication of the applicable procedural or material law or rested upon an erroneous or incomplete determination of facts.

He alleged that he had proven that during a certain period of time he had been in possession of the claimed property and submitted the following documents:

- the abovementioned lease contract dated 3 December 2007;
- lease contract no. 03-2848/1, dated 22 December 2008, concluded between him and the X Enterprise, again signed by him on behalf of the lessee as well as on behalf of the lessor, the X Enterprise. With this contract the X Enterprise leases the litigious property to the claimant for a monthly payment of € 0,50 per square meter. The contract under Article 3 reads as follows: *“This contract is concluded for permanent lease”*; under Article 7: *“The lease contract shall be terminated if: - both parties agree, - the lessee does not meet his/her obligations, - the lessor decides to sell the Villa, after offering the lessee to purchase it and the lessee does not wish to purchase it”*;
- a copy of a plan no. 52/possession list no. 9206, issued on 21 July 2008 by the department of Urbanism, Cadastre and Environmental Protection of Prishtinë/Priština, showing the X Enterprise Prishtinë/Priština as the owner/user of the parcel no. 2763/7;
- certificate UL-71914059-09206, issued by the Municipal Cadastral Agency of Prishtinë/Priština on 18 July 2008, which showed that the X Enterprise in Prishtinë/Priština was the possessor of parcel no 2763/7.

The appeal was served on S.H. (henceforth: the appellee) on 16 May 2011. S.H. replied on 25 May 2008. He stated that the challenged decision was correct. He also explained that a claim concerning the same property was ongoing before the Municipal Court of Prishtinë/Priština (case file 1636/08) between the X Enterprise and him and another person. The appellee stated that owner of the property since 18 June 1991 was the Municipality of Prishtinë/Priština and that he had bought the property on 29 June 1999. He provided the Court with documents regarding the proceedings before the Municipal Court of Prishtinë/Priština.

Legal reasoning:

The appeal is admissible, but not grounded.

The appellant has filed his appeal within the deadline prescribed by Section 12.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079. The KPCC’s decision KPCC/D/R/18/2008, dated 30 April 2008, was served on the appellant only on 24 December 2010. The appellant filed the appeal on 20 January 2011, within the deadline of 30 days prescribed by the

law.

The appeal, however, is not grounded.

The claim had to be rejected as it is not within the jurisdiction of the KPCC.

1. The claim, however, has been filed in time, even if it has been filed two days after the expiry of the prescribed time limit.

As Section 8 of the Administrative Direction No. 2007/5 as amended by Law No. 03/L-079 provides, a claim with the KPA must be submitted to the Executive Secretariat on or before the expiry of six months from the date of promulgation of the Administrative Direction. The AD No. 2007/5 was promulgated on 1 June 2007. Therefore, the deadline for submitting the claims would have been 1 December 2007. As this was a Saturday, the deadline was extended until the end of the first following working day (Section 7.2 of AD No. 2007/5 as amended by Law No. 03/L-079), that is Monday 3 December 2007. In the interest of the efficient and fair resolution of claims, however, the Commission may extend any deadline with any procedural rule of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 (Section 3.8. of Annex II of AD 2007/5 as amended by Law No. 03/L-079). By not dismissing the claim as belated, the KPCC has implicitly extended the deadline.

2. Yet the claimant has not proven any right which could entitle him to file a claim with the KPA.

The claimant does not claim to be the owner of the litigious property (Section 3.1 subparagraph (a) of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079).

According to Section 3.1 subparagraph (b) of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079, the KPA has to adjudicate “Claims involving property use rights in respect of private immovable property, including agricultural and commercial property”. The claimant has not proven such property use rights.

- a. The lease contract dated 3 December 2007 does not provide such a right.

It is already highly questionable whether this contract is valid, as the claimant was

active on both sides of the contract, both as lessee and as representative of the lessor. The conflict of interest (the lessee wants to pay only a lease as low as possible, whereas the lessor, here a publicly owned enterprise, the X Enterprise in Prishtinë/Priština, should be interested in receiving a lease as high as possible) is obvious.

More importantly, however, a lease contract does not provide any property use right as mentioned in Section 3.1 subparagraph (b) of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079. Property use rights are real rights of use as described in Part VII of Law No. 03/L-154 on Property and other Real Rights, for example usufruct in things or real servitudes. These are rights that can be claimed against everybody. A lease contract, however, does provide only a so-called relative right of possession which can only be claimed from the lessee, not from anybody else. The right stemming from the lease contract therefore is no right which could be claimed in proceedings before the KPCC.

- b. The lease contract dated 22 December 2008 also does not provide the necessary property use right.

The Court takes the contract into consideration, even if it is a new fact to the proceedings, because the contract could not have been submitted to the KPCC before its decision, which is dated 30 April 2008 (Section 12.11 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079).

This contract, however, does not provide the necessary property use right.

To begin with, the contract is not valid. Article 36.4 of Law No. 03/L-87 on Publicly Owned Enterprises (in force since 15 June 2008, applicable to the case as the X Enterprise is listed as a Publicly Owned Enterprise in Schedule 2 of this law) prescribes that a director is absolutely prohibited from attempting to influence any decision of the Board of Directors or its officers that relate in any way to any matter in which such officer or director has a personal interest. This interdiction should comprise cases like those in which the director of a publicly owned enterprise (POE) concludes a contract with himself, as this is the highest possible form of influencing the decisions of the POE's representatives. This conclusion is sustained

by Article 11 subparagraph x. of the Law No. 02/L-133 on Preventing Conflict of Interest in Exercising Public Function (in force since 14 July 2008, see Article 24 of this law), according to which the official, while exercising his function, is forbidden to undertake actions which in any way would suit his personal interest. Officials in the meaning of the law are amongst others the “heads of public enterprises” (Article 5 subparagraph xviii. of the Law No. 02/L-133), that includes directors of publicly owned enterprises like the appellant. Consequently, the grounds of the contract were contrary to the compulsory legislation. According to Article 51 subparagraph (b) of the Law of Contract and Torts (Official Gazette of the SFR Nr. 29/1978), such grounds are not permitted, according to Article 52 of the Law of Contract and Torts this contract is void.

Secondly, this contract as well as the contract dated 3 December 2007 is just a lease contract, which does not give the necessary property use right. Indeed, in the contract it is mentioned that it is concluded “for permanent lease”. Article 7, however, states that the contract “shall be terminated if [...] the lessor decides to sell the Villa”. Therefore the contract is not about “permanent lease”, which could be interpreted as a property use right, but just a plain lease contract which can be terminated at any time and does not provide a property use right in the sense of the law.

Costs of the proceedings:

Pursuant to Article 8.4 of Administrative Direction (AD) 2007/5 as amended by the Law No. 03/L-079, the parties are exempt from the costs of the proceedings before the Executive Secretariat and the Commission.

However such exemption is not foreseen for the proceedings before the Appeals Panel.

As a consequence, the normal regime of court fees as foreseen by the Law on Court Fees (Official Gazette of the SAPK-3 October 1987) and by AD No. 2008/02 of the Kosovo Judicial Council on Unification of Court fees are applicable to the proceedings brought before the Appeals Panel.

Thus, the following court fees apply to the present appeal proceedings:

- court fee tariff for the filing of the appeal (Section 10.11 of AD 2008/2): € 30
- court fee tariff for the issuance of the judgment (Sections 10.21, 10.12 and 10.1 of AD 2008/2), considering that the value of the claimed property use right might be estimated at € 150.000 (Article 30 subparagraph 2 of the Law on Court Fees): € 500 (€ 50 + 0,5% of € 150.000 to a maximum of € 500)

These court fees are to be borne by the appellant who loses the case.

According to Article 45.1 of the Law on Court Fees, the deadline for fees payment is 15 days. Article 47.3 provides that in case the party fails to pay the fee within the deadline of 15 days, the party will have to pay a fine of 50% of the amount of the fee. Should the party fail to pay the fee in the given deadline, enforcement of payment shall be carried out.

Legal Advice

Pursuant to Section 13.6 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, this judgment is final and enforceable and cannot be challenged through ordinary or extraordinary remedies.

Signed by: Antoinette Lepeltier-Durel, EULEX Presiding Judge

Signed by: Anne Kerber, EULEX Judge

Signed by: Sylejman Nuredini, Judge

Signed by: Urs Nufer, EULEX Registrar