THE DISTRICT COURT OF GJILAN/GNJILANE
31st October 2011 **AC.nr.158/2011**

THE DISTRICT COURT OF GJILAN/GNJILANE in a panel composed of the EULEX Civil Judge Rositza BUZOVA, as Presiding Judge, Kosovo Judge Muhamet REXHA and Kosovo Judge Abdullah AHMETI, as panel members,

In the civil case of the claimant SHABAN PAJAZITI from PRISTINË/PRIŠTINA, represented by Lawyer XHAFER MALIQI from PRISTINË/PRIŠTINA, filed against the respondent Private enterprise "PROGRESS" Limited Liability Company (LLC) - village ŠILOVO/SHILOVË, the Municipality of GJILAN/GNJILANE, represented by the Managing Director HEVZI XHELILI from village PËRLEPNICË/PRILEPNICA, the Municipality of GJILAN/GNJILANE, upon a claim for repudiation of a purchase contract on immovable properties due to non-performance under Article 124 of the Law on Contracts and Tort (Official Gazette of the SFRY № 29/78, with amendments in № 39/85, 45/89, 57/89 and in Official Gazette of the FRY № 31/93) (hereinafter "LCT") with value of the contest 3 000 Euros,

Having received the appeal of "PROGRESS" LLC against judgment C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA, dated 22nd March 2011 for approval of this claim and having adjudicated it in the second instance proceedings regulated by Articles 176 – 205 of the Law No. 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No. 38/2008) (hereinafter "LCP"),

After deliberation and voting on the appeal above in a panel session under Article 190, paragraph 1, first hypothesis LCP held on 31st October 2011,

Hereby pursuant Article 195, paragraph 1, item d) in conjunction with Article 200 LCP renders the following

JUDGMENT

The appeal of the PRIVATE ENTERPRISE "PROGRESS" LIMITED LIABILITY COMPANY - village ŠILOVO/SHILOVË, the Municipality of GJILAN/GNJILANE, represented by the Director HEVZI XHELILI from village PËRLEPNICË/PRILEPNICA, the Municipality of GJILAN/GNJILANE is **REJECTED** as non-based and judgment C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA, dated 22nd March 2011 is **CONFIRMED**.

REASONING

I. Procedural Background

1. By judgment C.nr.72/10 of the Municipal Court of KAMENICE/KAMENICA, dated 22nd March 2011 it was approved as grounded the statement of the claim of the claimant SHABAN PAJAZITI from PRISTINË/PRIŠTINA represented by Lawyer

XHAFER MALIQI from PRISTINË/PRIŠTINA filed against the respondent Private enterprise "PROGRESS" LLC - village ŠILOVO/SHILOVË, the Municipality of GJILAN/GNJILANE, represented by the Director HEVZI XHELILI from village PËRLEPNICË/PRILEPNICA, the Municipality of GJILAN/GNJILANE and it was repudiated the purchase contract on real estate between the litigants, attested by the Municipal Court of KAMENICË/KAMENICA as Vr.nr.395/09 on 16th March 2009 because of non-fulfillment of the buyer's obligation to pay the price for cadastral parcels nr.1684/1, 1684/2, 1713, 1714/1, 1715, 2890 and the buildings in cadastral parcels nr.2890-00001, 00002, 00003, 00004, 00005, registered in Certificate nr.UL-71107033-00417, CZ KËRMJAN I POSHTËM/DONJIE KORMINJANE, the Municipality of KAMENICË/KAMENICA; the Directorate for Geodesy, Cadastre and Property was obliged to deregister these immovable properties from the name of the respondent "PROGRESS" LLC and to register the claimant SHABAN PAJAZITI as the holder of the usage right on them for 99 years; the respondent was obliged to reimburse him the costs of the proceedings in the amount of 1 280.80 Euros within 15 days after the entry into force of the judgment under the threat of execution.

2. On 15th April 2011, the respondent Private Enterprise "PROGRESS" LLC - village ŠILOVO/SHILOVË, the Municipality of GJILAN/GNJILANE, through its legal representative the Director HEVZI XHELILI, filed an appeal against judgment C.nr.72/2010 of the Municipal Court of KAMENICE/KAMENICA, dated 22nd March 2011 challenging it for *substantial violations of provisions of the contested procedure* as per Article 182 LCP, *incomplete and erroneous determination of the factual situation* as per Article 183 LCP and *erroneous application of the substantive law* as per Article 184 LCP. The request of the appellant is the second instance court to annul this judgment with remittal of the case to the first instance court for retrial.

3. According to Article 187, paragraph 1 LCP the appeal was served in copies to Lawyer XHAFER MALIQI from PRISTINË/PRIŠTINA on 21st April 2011 and to SHABAN PAJAZITI in person on 23rd April 2011 for reply within 7 days. As it was not filed until the expiry of this prescribed time period on 28th April 2011, pursuant to Article 188, paragraph 1 LCP on 3rd May 2011 the appeal with the case were sent to the District Court of GJILAN/GNJILANE and registered there on 11th May 2011.

II. Competence of the panel of the District Court of GJILAN/GNJILANE

4. AC.nr.158/2011 of the District Court of GJILAN/GNJILANE 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") through ruling issued on 18th July 2011 by an EULEX Judge acting as Delegate of the President of the Assembly of the EULEX Judges based on Decision ref.nr.JC/EJU/OPEJ/2496/ff/11, dated 5th July 2011. The latter after the conduct of the taking over procedure under Article 5, paragraph 7, first sentence of the Law No. 03/L-053 on Jurisdiction and Article 3, paragraph 7 of the Guidelines for Case Selection and Case Allocation for EULEX Judges in civil cases

issued on 3rd August 2011 ruling under Article 5, paragraph 7, second sentence of the Law No. 03/L-053 on Jurisdiction for assignment of the second instance civil case to a mixed panel of the District Court of GJILAN/GNJILAN under Article 5, paragraphs 2 and 4 of the Law No. 03/L-053 on Jurisdiction with Presiding EULEX Judge. The two Kosovo Judges – panel members, after derogation pursuant to Article 5, paragraph 5 of the Law No.03/L-053 on Jurisdiction, were designated by Decision Agj.nr.162/11 of the President of the District Court of GILAN/GNJILANE, dated 4th August 2011.

5. Being legally composed in conformity with the specific requirements of Article 5, paragraphs 1, 2, 4, 5 and 7 of the Law No. 03/L-053 on Jurisdiction, this panel of the District Court of GJILAN/GNILANE is empowered to adjudicate AC.nr.158/11 based on the functional competence of a second instance court foreseen by the general provisions of Article 15, paragraph 2 and Article 176, paragraph 3 LCP.

III. Admissibility of the appeal and the second instance procedure

6. No procedural impediments exist for adjudication of the appeal. *At first place*, its submission is not prohibited but explicitly foreseen by Article 176, paragraph 1, first sentence LCP as the challenged court decision is a first instance judgment on the merits of the claim. *At second place*, the appeal is not belated under the requirements of Article 186, paragraph 2 LCP. Judgment C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA, dated 22nd March 2011 was served to "PROGRESS" LLC through its legal representative HEVZI XHELI on 7th April 2011. Its appeal was filed on 15th April 2011, before the expiry of the 15-days time period prescribed by Article 176, paragraph 1, first sentence LCP on 22nd April 2011. *At third place,* the appeal is not impermissible under Article 186, paragraph 3 LCP as lodged by the respondent in the first instance proceedings through its legal representative. As a litigant, the appellant has the procedural right and legal interest to submit it and has not renounced or withdrawn it. *At fourth place*, the appeal has the mandatory content under Article 178, items a) – d) LCP and is not incomplete as per Article 179, paragraph 1 LCP. In sum, there are no legal grounds excluding the admissibility of the appeal or the second instance procedure under Article 176 – 205 LCP initiated by it.

IV. Summary of the first instance proceedings

7. On 22nd April 2010, SHABAN PAJAZITI from PRISHTINË/PRIŠTINA filed a claim against the Private Enterprise "PROGRESS" LLC–village SHILOV/ŠILOVO, the Municipality of GJILAN/GNJILANE. The allegations in the claim were that being legal and factual possessor of cadastral parcels nr.1684/1, 1684/2, 1713, 1714/1, 1715, and 2890, as well as of the buildings in cadastral parcels nr.2890/1, 2890/2, 2890/3, 2890/4 and 2890/5, registered in Certificate nr.UL-71107033-00417 (Possession List nr.417) CZ KËRMJAN I POSHTËM/DONJE KORMINJANE, the Municipality of KAMENICË/KAMENICA, the claimant sold to the respondent all these immovable properties with the existing facilities based on purchase contract Vr.nr.395/09, attested by the Municipal Court of KAMENICË/KAMENICA on 16th March 2009 at the price of 600 000 Euros. It was agreed this amount to be paid in parts – 400 000 Euros one

month from the date of signing the contract, and the remaining 200 000 Euros by 3 installments in the next two years. The respondent did not fulfill these obligations – according to the bank report attached to the claim until its date he had not transferred to the account of the claimant any amounts as payment of the price. The statement of the claim, as finally amended, was to repudiate the contract pursuant to Article 124 LCT due to non-performance, and to oblige the Directorate for Geodesy, Cadastre and Property to make the respective cadastral changes.

8. This claim was registered for adjudication as C.nr.30/2010 of the Municipal Court of KAMENICË/KAMENICA. By ruling issued on 18th June 2010 it declared territorial incompetence to decide it pursuant to Article 15, Article 22, paragraph 3, Article 37, paragraph 1, Article 38, paragraphs 1 - 2 and Article 39, paragraph 2 LCP because of the location of the head office of the legal person – respondent and the permanent residence of its legal representative in the territory of the Municipal Court of GJILAN/GNJILANE. After this ruling became final, on 14th July 2010 the case was referred to the Municipal Court of GJILAN/GNJILANE and registered there as C.nr.374/2010. The latter on 22nd July 2010 reasoning itself with the existence of the agreed special territorial jurisdiction for disputes arising under contract according to Article 53 and Article 66 LCP for the Municipal Court of KAMENICË/KAMENICA initiated a conflict for the competence in this case pursuant to Article 24, paragraph 1 and Article 25, paragraph 1 LCP. It was solved by ruling CN.nr.11/10 of the District Court of GJILAN/GNJILANE, dated 27th July 2010 which declared the Municipal Court of KAMENICË/KAMENICA with territorial competence and referred the case to it for further adjudication. On 28th July 2010 the case was returned to the Municipal Court of KAMENICË/KAMENICA and given a new file number – C.nr.72/2010.

9. By ruling C.nr.72/2010 of the Municipal Court of KAMENICË/CAMENICA, dated 10th August 2010 the proposal for temporary measure included in the claim was approved and it was forbidden pursuant to Article 300, paragraph 1, point a) and Article 301, paragraph 1, items a) – d) LCP the respondent to alienate, rent, mortgage, and to conclude any other formal legal transaction or to exercise any other right as per the contested real estate until finalization of the lawsuit.

10. On 19th August 2010, the respondent filed an objection under Article 306, paragraph 2 LCP requesting the temporary measure above to be annulled and the executive procedure based on it to be terminated. The objection was filed by Lawyer MUSTAFË MUSA from GJILAN/GNJILANE as a representative of the respondent authorized by a power of attorney, dated 12th August 2010, with general scope for all procedural actions in C.nr.72/2010 of Municipal Court of KAMENICË/KAMENICA.

11. After a hearing under Article 306, paragraph 2 LCP, ruling C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA, dated 26th August 2010 was issued replacing without any changes the one on temporary measure, dated 10th August 2010 ordering identical security measure until the finalization of the contest pursuant to Article 306, paragraph 3 LCP.

12. By ruling AC.nr.333/2010 of the District Court of GJILAN/GNJILANE, dated 2nd November 2010 it was rejected as ungrounded the appeal of the respondent against ruling C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA, dated 26th August 2010 pursuant to Article 209 LCP.

13. No preliminary hearing was conducted in the first instance proceedings based on the exception foreseen by Article 401 LCP. In the first trial session scheduled for 22nd February 2011 as main hearing present were only the claimant and his authorized representative Lawyer XHAFER MALIQI from PRISHTINË/PRIŠTINA, whereas the legal representative of respondent HEVZI XHELIL,I though duly summoned did not appear. By submission filed to the case on 16th February 2011 he justified his absence with important business trip to Austria from 20th till 26th February 2011 and requested adjournment. It was granted by the Municipal Court of KAMENICË/KAMENICA with reasoning that the legal and authorized representatives of the respondent should be given the opportunity to participate in the main hearing, scheduled for 22nd March 2011 with their summoning being ordered pursuant to Article 422, paragraph 1 LCP.

14. The summon for the main hearing on 22nd March 2011 was regularly served to Lawyer MUSTAFË MUSA, the authorized representative of the respondent, on 25th February 2011 in compliance with Article 107, paragraph 1, Article 110, paragraph 1, first sentence LCP, verified by his signature and date of acceptance indicated in his handwriting on the receipt in accordance with Article 121, paragraph 1 LCP.

15. Lawyer MUSTAFË MUSA filed on 28th February 2011 a written submission to the case for *revocation of his authorization as representative of the respondent* in C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA. He pointed out that all *future* notifications should be sent to the legal representative of the respondent, as well as that *there was sufficient time for him to prepare for the session scheduled for 22nd March 2010 in order not to postpone it.*

16. On 21st March 2011 on behalf of the Private Enterprise "PROGRESS" LLC its legal representative HEVZI XHELILI filed a written submission to the case. While confessing the receipt of the summon addressed to him for the main hearing on 22nd March 2011 and attaching its copy, he requested this session to be postponed until the selection of a new lawyer who would represent the respondent in the case.

17. At the main hearing on 22nd March 2011 the claimant appeared in person with his authorized representative Lawyer XHAFER MALIQI, whereas for the respondent there was no one present. In relation to *this absence* in accordance with Article 432, paragraph 2 LCP the Municipal Court of KAMENICË/KAMENICA determined that this party was duly notified as evidenced by the copy of summon attached to its submission, dated 21st March 2011, as well as that there were no reasons justifying it. In regard to representation of the respondent it was noted that from 28th February 2011, the date of revocation of the power of attorney of Lawyer MUSTAFË MUSA, to 22nd March 2011, the date of the main hearing, this party was able to choose a new authorized representative. Hence, it was concluded that by the request to postpone the

main hearing on 22nd March 2011 the respondent tried to prolong the proceedings and it was decided to conduct this session in the absence of this party in accordance with Article 423, paragraph 4 LCP. In its course, the statement of the representative of the claimant was presented - Article 425, paragraph 1, item a) LCP, the documentary evidence was collected - Article 425, paragraph 1, item c) LCP, the witness proposed by the claimant was examined - Article 425, paragraph 1, item d) LCP, and the final speech of his representative was heard - Article 425, paragraph 1, item f) LCP. Thus the main hearing was completed pursuant to Article 436, paragraph 1 LCP.

18. By judgment C.nr.72/2010 of the MC of KAMENICE/KAMENICA, dated on 22nd March 2011, the statement of claim was approved as grounded based on Article 124 LCT and the respondent was obliged to reimburse the claimant's procedural costs based on Article 452, paragraph 1 LCP. Its copies were duly served to the claimant's representative on 4th April 2011, to the claimant in person on 7th April 2011 and to the legal representative of the respondent on 7th April 2011.

V. Appellate review of the court of second instance under Article 194 LCP

Substantial violations of the provisions of the contested procedure - Article 182 LCP

19. The *first* ground for challenging judgment C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA, dated 22nd March 2011 is under Article 181, paragraph 1, item a) LCP for *substantial violation of the provisions of the contested procedure as per Article 182, paragraph 2, item i) LCP* because of unlawfully denied opportunity of the respondent to attend the main hearing on 22nd March 2011.

20. The prerequisites to conduct main hearing in the first instance proceedings are: 1) dully summoning of all parties – Article 423, paragraph 2 *in fine* LCP; 2) presence of the claimant – Article 423, paragraph 3 LCP; 3) lack of procedural impediments to proceed with the case – Article 424, paragraph 1 LCP; and 4) lack of legal grounds for postponement – Article 437, paragraph 1 and Article 438, paragraph 1 LCP. All of them existed as per the conduct of the main hearing in C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA on 22nd March 2011.

21. The claimant and his authorized representative Lawyer XHAFER MALIQI, being present at the main hearing on 22nd February 2011, were informed for the ruling rendered in the same session for adjournment of the trial for 22nd March 2011 at 10.00 hrs. Thus without additional summoning in writing, *the claimant was duly notified for the main hearing on 22nd March 2011* pursuant to Article 421, paragraph 1 LCP.

22. As no one attended the main hearing on 22nd February 2011 for the respondent, while adjourning in the same session for 22nd March 2011 at 10.00 hrs the Municipal Court of KAMENICË/KAMENICA acting in accordance with Article 422, paragraph 1 LCP ordered summoning in writing of its legal representative – HEVZI XHELILI, Director of "PROGRESS' LLC, and its authorized representative Lawyer MUSTAFË MUSA. The receipt of the *first summon* addressed to "PROGRESS' LLC *through HEVZI XHELILI* was admitted in his submission presented to the case on 21st March

2011 and evidenced by the attached copy of the summon sent on 22nd February 2011 for the session scheduled for 22nd March 2011 – 10.00 hrs. This summoning complies with the requirements of Article 75, Article 77, paragraph 1, Article 107, paragraph 1 and Article 110, paragraph 1, first sentence LCP. As per the *second summon* sent to "PROGRESS" LLC *through Lawyer MUSATFË MUSA,* it was delivered to him by the post on 25th February 2011 in accordance with Article 86, paragraph 2, Article 91, paragraph 1, item a), Article 103, paragraph 1, Article 107, paragraph 1 and Article 110, paragraph 1, first sentence LCP. This service is evidenced by a receipt enclosed in the case, dated and signed by this recipient as demanded by Article 121, paragraph 1 LCP. On 25th February 2011, the date of delivery of this summon, the status of Lawyer MUSATFË MUSA was of an authorized representative of "PROGRESS" LLC under Article 85, paragraph 1 LCP. As the scope of his authorization determined by the power of attorney, dated 22nd January 2011, was general for all actions under Article 90, paragraph 1, item a) LCP, it *included the representation of the respondent under Article 107, paragraph 1 LCP in the said service of the summon for the main hearing on 22nd March 2011 effected on 25th February 2011.* The revocation of the authorization of Lawyer MUSATFË MUSA as representative of the respondent was communicated to the Municipal Court of KAMENICË/KAMENICA by his written submission filed on 28th February 2011 at 8.57 hrs, officially verified by the court stamp placed on it. Thus according to Article 94, paragraph 2 LCP *the revocation produced its legal effect in the proceedings as of 28th February 2011, ex nunc only.* It did not invalidate retroactively any of the actions already undertaken by this lawyer in this case before 28th February 2011, when his revocation of the power of attorney given by the respondent was filed to the case in compliance with Article 94, paragraph 2 LCP. Due to the non-retroactivity of this revocation under Article 94, paragraph 1 LCP, effective as of *28th February 2011*, the prior service of the summon received by Lawyer MUSATFË MUSA on *25th February 2011* on behalf of "PROGRESS" LLC for the main hearing on 22nd March 2011, remained regularly delivered with legal effect as due notification of this litigant for this court session. It was served on 25th February 2011, more than 7 days before the main hearing, as prescribed by Article 402, paragraph 2 LCP. Or, *the claimant* was informed for the date and time of the main hearing on 22nd March 2011 at the previously adjourned one on 22nd February 2011 in compliance with Article 421, paragraph 1 LCP, while *the respondent* was summoned in writing in compliance with Article 422, paragraph 1 LCP. Therefore both litigants were notified and this first condition for the conduct of the main hearing laid down by Article 423, paragraph 2 LCP was met.

23. As officially recorded in the minutes of the main hearing on 22nd March 2011, *the claimant was present at this session.* Hence, the legal consequences of his absence under Article 423, paragraph 3 LCP were non-applicable – the claim could not be assumed withdrawn and the main hearing on 22nd March 2011 could not be cancelled on this ground. The failure of the duly summoned respondent to appear could not exclude its regularity since in this hypothesis Article 423, paragraph 4 LCP explicitly

foresees *the conduct of the session in the absence of the respondent.* No contradiction with none of the provisions of the contested procedure, alleged in the appeal, could be identified in this regard.

24. No procedural impediments to proceed with the case were determined by the court *ex officio* or upon an objection of a party according Article 424, paragraph 1 LCP. Therefore the main hearing on 22nd March 2011 was not inadmissible because of inadmissibility of the first instance proceedings in C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA in general under Articles 391 – 392 LCP.

25. *No legal grounds existed for postponement* of the main hearing on 22nd March 2011. *At first place*, as the legal conditions for its initiation under Article 424 LCP were met and there were no non-collected items of evidence to be presented at this session, the latter could not be rescheduled *ex officio* based on Article 437, paragraph 1 LCP. *At second place*, the proposal of the respondent for postponement of the main hearing on 22nd March 2011 made by the submission, dated 21st March 2011, was not related to the collection of any item of evidence having bearing on the decision in the case, non-obtained by this party. The Municipal Court of KAMENICË/KAMENICA therefore could not postpone the main hearing on 22nd March 2011 pursuant to Article 438, paragraph 1, item a) LCP since the conditions required by the same provision for such postponement did not exist as per this court session. *At third place*, Article 438, paragraph 1, item a) LCP was also non-applicable – the parties did not propose the main hearing on 22nd March 2011 to be postponed in order to reach amicable court settlement or an extrajudicial settlement. *At fourth place,* since the legal grounds for postponement of the main hearing in the first instance proceedings are *explicitly* and *exhaustively* enumerated in Article 437, paragraph 1 and Article 438, paragraph 1, items a)–b) LCP, *per argumentum ad contrario* the one on 22nd March 2011 could not *be lawfully postponed for any other reasons,* including those indicated in the appeal.

26. Unfounded are all the other arguments of the appellant related to the alleged procedural violation under Article 182, paragraph 2, item i) LCP. *At first place*, the absence of the respondent at the main hearing on 22nd March 2011 does not constitute a procedural infringement *per se* – its conduct in the absence of this party is explicitly permitted by Article 423, paragraph 4 LCP. *At second place*, as long as there were no reasons for *postponement* or *continuation* of the main hearing of the ones envisaged in Chapter XXIV, Section 2) LCP, and all stages of the main hearing listed in Article 425, paragraph 1 LCP were completed on 22nd March 2011, the Municipal Court of KAMENICË/KAMENICA was obliged by Article 436, paragraph 1 LCP to declare it closed at the end of the same session. This completion of the first instance trial in the absence of the respondent complied with the provisions of the contested procedure and *vice versa* did not violate them in any way. *At third place*, Lawyer MUSTAFË MUSA revoked the authorization given by the Private Enterprise "PROGRESS" LLC by his submission filed to the case on *28th February 2011*, as officially evidenced by the electronic court stamp used for registration of incoming documents, *not on 20th*

March 2011, as wrongly alleged in the appeal. Since the revocation of the power of attorney of Lawyer MUSTAFË MUSA, dated 12th August 2010 produced its legal effect in the proceedings on 28th February 2011, when it was communicated to the Municipal Court of KAMENICË/KAMENICA in writing pursuant to Article 94, paragraph 1, second hypothesis in conjunction with Article 94, paragraph 2, second hypothesis LCP, the submission of the respondent, dated 21st Match 2011, contrary to the allegations in the appeal *could not constitute withdrawal* of the same authorization by this party under Article 94, paragraph 1, first hypothesis LCP - being unilaterally revoked by the representative, it was already annulled and could not be subsequently withdrawn by the party. Further, the same submission of the respondent, dated 21st March 2011 *could not constitute written communication of revocation* of the power of attorney of Lawyer MUSTAFË MUSA under Article 94, paragraph 2 LCP in the presence of an earlier written communication, made by Lawyer MUSTAFË MUSA himself by his submission, dated 28th February 2011. Therefore, by the submission, dated 21st March 2011 his authorization was neither withdrawn by the respondent, nor communicated by the same party to the court, as already revoked by its representative. Lawyer MUSTAFË MUSA cancelled his power of attorney according to Article 94, paragraphs 1 and 2 LCP, effective from 28th February 2011, and according to Article 94, paragraph 3 LCP *had to undertake procedural actions on behalf of the respondent for another 15 days after the cancellation* till 15th March 2011, in order to avoid any damage that might be caused to this party over that period. The *ratio* is to neutralize the procedural risks that might arise for this party following the revocation of the authorization of its previous representative and to give it the opportunity to organize adequately its future participation in the proceedings either personally pursuant to Article 74, paragraph 1 LCP, or through a newly authorized representative pursuant to Article 85, paragraph 1 LCP. By this temporary representation established *ex lege* for a 15-days time period after the authorization has been revoked, the procedural rights of the respective litigant are secured by Article 94, paragraph 4 LCP in order to avoid any damages that might be caused over that period. This is way the revocation of the authorization under Article 94, paragraph 1 LCP *is not normatively foreseen as a ground neither for suspension and adjournment of the proceedings under Article 277 LCO, nor for postponement of the main hearing under Article 437, paragraph 1 or Article 438, paragraph 1 LCP*. Lawyer MUSTAFË MUSA revoked his power of attorney on 28th February 2011, the 15-days time period under Article 94, paragraph 4 LCP in which he had the duty to continue to represent the respondent expired on 15th March 2011, while the main hearing was held on 22nd March 2011. As of its date the time period under Article 94, paragraph 4 LCP had already expired, the representation of Lawyer MUSTAFË MUSA for the respondent was *fully* invalidated pursuant to Article 94, paragraphs 1, 2 and 4 LCP, he had lost his procedural status of authorized representative, and *his absence at the session was legally irrelevant for its conduct. At fifth place*, according to the appellant the main hearing on 22nd March 2011 should have been postponed in order to engage another lawyer since this was his unopposed lawful right pursuant to Article 85 LCP entitling each party to be represented by a

lawyer in the hearing. The argument is legally non-based. Quoted literally, Article 85, paragraph 1 LCP stipulates that each party *may* undertake actions in the proceedings personally or through an authorized representative, but the court may also instruct the party so represented to make its own statement on the facts that must be established. Or, Article 85, paragraph 1 LCP regulates the permissible *forms for participation* of the parties in the proceedings permitting *as fully equal alternatives* the conduct of procedural actions *in person* or *through an authorized representative*. As their legal effect is the same one pursuant to Article 86, paragraph 2 LCP, each litigant is entitled to choose freely without limitations the first and/or the second of these two *options*. Accordingly, Article 85, paragraph 1 LCP is *non-imperatively* formulated – the party *may* authorize its representative in the case, but *is not obliged to do so*. Unlike the *mandatory defence* in criminal proceedings required in the hypotheses of Articles 73, paragraph 1, subparagraphs 1 - 4 and Article 74, paragraph 1, subparagraphs 1 - 2 KCCP, in civil proceedings *the representation based on an authorization is never mandatory*. Consequently, its lack by itself is not a ground for appointment of a temporary representative under Article 79 LCP of the party without authorized representative, *does not constitute a procedural impediment* in the sense of Article 424, paragraph 1 LCP excluding the adjudication of the case in general and/or the conduct of the main hearing under Article 12, item b) LCP as one of the two stages of the first instance proceedings. As long as Article 85, paragraph 1 LCP recognizes to each litigant the procedural right to authorize a representative, its exercise *should comply with the provisions of the contested procedure* by the issuance of a power of attorney with the *content* under Article 89 LCP, in the *written form* prescribed by Article 92, paragraph 1 LCP, *presented at the very first action taken in the proceedings* by the representative according to Article 93, paragraph 1 LCP. As the *non-exercise* and *the unlawful exercise* of all procedural rights by the parties to litigation, including the one under Article 85, paragraph 1 LCP, is without any legal consequences, the *non-authorization* by the respondent in C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA of a new authorized representative under Article 85, paragraph 1 LCP instead of Lawyer MUSTAFË MUSA is not foreseen by any of the provisions of LCP *as a reason for suspension, adjournment or postponement* in the course of its proceedings. *At sixth place*, each party to litigation has the duty to exercise all its procedural rights *conscientiously* pursuant to Article 9 LCP. The court shall have the duty *to conduct the proceedings without delay*, and prevent *any abuse granted to the parties to litigation* pursuant to Article 10, paragraph 1 LCP. The court may sanction them for misused procedural rights pursuant to Article 10, paragraph 2 LCP. The Private Enterprise "PROGRESS" LLC as a respondent in C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA did not submit reply to the claim according to Article 395, paragraph 1 LCP within the legal deadline set forth by this provision. No submission was ever filed by this litigant in the first instance case with any concrete objections on the merits of the dispute and/or proposals for evidence to be collected in its course. Private Enterprise "PROGRESS" LLC was not represented in none of the two main hearing sessions scheduled in C.nr.72/2010 of the Municipal

Court of KAMENICË/KAMENICA, subsequently requesting their postponement. For the session on 22nd February 2011, the motivation was *"important business trip in Austria"* of HEVZI XHELILI, its Director. However, it was not verified by any travel documents and as of its date it could be represented by Lawyer MUSTAFË MUSA. For the session on 22nd March 2011, the postponement was asked to select another lawyer because the time period was short to get a new representative, though the respondent had *three weeks* from 28th February 2011, the date of revocation of the authorization of Lawyer MUSTAFË MUSA, till 22nd March 2011, the date of the main hearing, which *should have suffice* this litigant to authorize a *new representative* under Article 85, paragraph 1, second hypothesis LCP. These 3 weeks were *legally sufficient for the new authorization,* considering that the time period prescribed by Article 402, paragraph 1 LCP for summoning the parties and *their preparation* for *each hearing is 7 days.* Within this minimum the respondent should have engaged its new lawyer according to Article 85, paragraph 1 LCP or should have prepared its participation in the main hearing on 22nd March 2011 through its legal representative according to Article 75, paragraphs 1 and 3 LCP. The respondent could not invoke *its own 3 weeks subjective inaction* to use any of these alternative procedural possibilities for postponement of the main hearing on 22nd March 2011 since, as a rule, *no litigant could benefit from its procedural passiveness, expressed in non-exercise of rights or other omissions.* In view of the overall behaviour of the respondent in the case, namely the systematic non-participation in the hearings and the subsequent requests for postponement, by the last one as per the session on 22nd March 2011 *this party misused its procedural rights with the intent to prolong the proceedings*, as properly determined by the Municipal Court of KAMENICË/KAMENICA. Hence, its decision to conduct the main hearing on 22nd March 2011 *in the non-justified absence of the duly summoned respondent* complied with Article 423, paragraph 4 LCP, and the duty of this first instance court under Article 10, paragraph 1 LCP to *adjudicate the case without delays and to prevent any abuse of the rights granted to the parties* by LCP. *At seventh place*, contrary to the allegations in the appeal, after the main hearing on 22nd March 2011 was announced opened according to Article 423, paragraph 1 LCP, the Municipal Court of KAMENICË/KAMENICA *checked the presence of the summoned parties, verified the reasons for the non-appearance of the respondent* according to Article 423, paragraph 2 LCP, *qualified it as non-justified and decided to conduct the session in its absence* according to Article 423, paragraph 3 LCP. In this way the first instance court adhered to the mandatory sequence in the conduct of the main hearing and did not violate it. For all the reasons given above, the non-approval of the respondent's request the main hearing on 22nd March 2011 to be postponed was not a procedural infringement as well – *firstly, it* was not justified with any of the reasons for postponement, exhaustively listed in Article 437, paragraph 1 and Article 438, paragraph 1 LCP; *secondly,* it was impermissible - according to Article 428, paragraph 2 LCP one and the same party may propose the postponement of the main hearing *once,* whereas the respondent has proposed it *twice* – on 22nd February 2011 and on 22nd March 2011; *thirdly,* the last one contrary to Article 441, paragraph 1

LCP was for postponement of the main hearing *for an indefinite period of time*, till the selection of a new lawyer of the respondent in the case. Summarizing, *there is no unlawful act* of the Municipal Court of KAMENICË/KAMENICA that has denied the respondent the opportunity to attend the main hearing on 22nd March 2011. This party deprived itself from the opportunity to participate in the same session, *misusing its procedural right under Article 85, paragraph 1 LCP for legally unjustified delay in proceedings.*

27. Within the limitations of the appellate review imperatively defined by Article 194 LCP, the court of second instance concludes that the violation of the provisions of the contested procedure under Article 182, paragraph 2, item i) LCP indicated in the appeal and the ones under Article 182, paragraph 2, items b), g), j), k) and m) LCP, controlled *ex officio,* do not exist. No other procedural infringements, regardless of their substantiality, could be examined within the permissible scope of the appellate review. Therefore the challenged first instance judgment could not be annulled for procedural reasons as per Article 181, paragraph 1, item a) LCP.

Erroneous and incomplete determination of the factual situation - Article 183 LCP

28. The *second* ground in the appeal is under Article 181, paragraph 1, item b) LCP for *erroneous and incomplete determination of the factual situation*. However, it is also non-based as per the criteria of Article 183, paragraph 1 LCP – the court of first instance did not determine any relevant material fact incorrectly and did not fail to establish it.

29. It is indisputably determined that on 1st December 2008 SHABAN PAJAZITI from PRISTINË/PRIŠTINA, as a *seller* and the Private enterprise "PROGRESS" Limited Liability Company (LLC) - village ŠILOVO/SHILOVË, the Municipality of GJILAN/GNJILANE, represented by the Director HEVZI XHELILI from village PËRLEPNICË/PRILEPNICA, the Municipality of GJILAN/GNJILANE as a *buyer* concluded in writing a contract on purchase of real estate Vr.nr.395/2009, attested by the Municipal Court of KAMENICË/KAMENICA on 16th March 2009. It was agreed by the parties that at the moment of its conclusion, SHABAN PAJAZITI was *the holder of the right of use for 99 years* counted from 21st November 2006 on cadastral parcels nr.1684/1, 1684/2, 1713, 1714/1, 1715, 2890 and the buildings constructed in cadastral parcels nr.2890-00001, 00002, 00003, 00004, and 00005, registered in Certificate nr.UL-71107033-00417 (Possession List nr.417) – Article 1.1. The right on use on this real estate was *bought* by SHABAN PAJAZITI from the Kosovo Trust Agency (KTA) by public and open bid with closed offers – sale procedure with liquidation, organized by the Regional Office in GJILAN/GNJILANE as a public selling GJI-0601, number item 01, described as "premises of the factory PIONEER", used in the past for textile production–Article 1.2. On 21st November 2006, SHABAN PAJAZITI was handed over this real estate from KTA based on Agreement for Transferring the Real Estate Pr.nr.111/2006 – Article 1.3. On 14th December 2006, by Decision nr.314-358/2006 of the Cadastral Office-KAMENICË/KAMENICA,

SHABAN PAJAZITI was recorded in the Immovable Property Rights Register *as the holder of the 99-years right of use on this real estate* - 1.4. The same one expressing his free will *sold* it to "PROGRESS" LLC for the total price of 600 000 Euros – Article 2.1 and 2.2. The parties agreed that *its full payment would be done completely (100 %, 600 000 Euros) after approval of the credit from the relevant banks* – Article 3, by transfer to the account of the seller nr.1501001005846864 at "RAIFFEISEN BANK of Kosovo" JSC – Article 4. The parties also agreed that another price might be paid only based on their mutual consent before the expiry of the deadline of 24 months after signing the contract and its attestation by the court – Article 10.1, as well as that the seller could not request from the buyer its change before the same deadline – Article 10.2. This contract was signed by SHABAN PAJAZITI (UNMIK ID 1014870098) and HEVZI XHELILI (UNMIK ID 1005904672) for "PROGRESS" LLC, attested by the Municipal Court of KAMENICË/KAMENICA as Vr.nr.395/09 on 16th March 2009.

30. It is indisputably determined that SHABAN PAJAZITI has duly fulfilled his obligations as seller under this contract – by handing over to "PROGRESS" LLC the real estate, described in its Article 1.1, together with the respective documents, based on which this buyer has been registered as *the holder of its right of use for definite time* - 99 years, according to UNMIK Regulation nr.2003/13, evidenced by Certificate for the Immovable Property Rights nr.UL-73507033-00417 issued by the DGCP - KAMENICË/KAMENICA on 17th July 2009.

31. It is established by the first instance court based on the testimonies of witness ALUSH SEJDIU, examined in the main hearing on 22nd March 2011, that the parties to the contested contact verbally agreed that the total purchase price of 600 000 Euros would be paid by the buyer through transfers to the bank account of the seller in two installments - the first one in the amount of 400 000 Euros within 1 month from the conclusion of this contract, and the second one in the amount of 200 000 Euros within 24 months after its conclusion and attestation by the court. Since the first rate was not paid long after the expiry of its initial deadline, in the end of 2009 the parties verbally extended it till 31st January 2010. SHABAN PAJAZITI warned HEVZI XHELILI, the Director of "PROGRESS" LLC, that upon non-payment within this new deadline he would repudiate the contract. The witness ALUSH SEJDIU was present at the conclusion of the contract and its attestation, as well as at the negotiations of the parties for its subsequent verbal amendments related to the payment of the purchase price. The first instance court trusted his testimonies as concrete, objective, logical, as well as corresponding to all the other elaborated evidence. The statement of grounds of its rendered judgment includes the facts established by this witness and assessment of his testimonies, as required by Article 160, paragraph 4 LCP. The same ones have *their own probative value* according to Articles 339 – 355 LCP, though the parties have not been heard by the first instance court according to Articles 373 – 378 LCP *due to the lack of such proposal under Article 425, paragraph 1, item c) LCP made by any of them*. Contrary to the opinion of the appellant, the hearing of the parties under

Articles 373 – 378 LCP is never mandatory, could not be conducted *ex officio* and is not normatively foreseen as a condition for lawfulness of the first instance trial.

32. It is not contested the fact that *"PROGRESS" LLC has not paid the purchase price of 600 000 Euros* neither completely, nor partially. There has been no such bank transfer to the private current account of SHABAN PAJAZITI, specified in Article 4 of the contract Vr.395/2009, dated 16th March 2009, nor any other form of payment of the price within any of the deadlines or after their expiry.

33. The first instance court did not trust the letter issued with the logo of "TEB" JSC–GJILAN/GNJILANE Branch that HEVZI XHELILI, owner of "PROGRESS" LLC, on 16th July 2009 applied in this bank for a loan of 1 500 000 € reasoning itself with the lack of the requisites, mandatory for the validity of such bank document (number, date, position of the person who signed it), as well as with its content, non-verifying the grant of a bank credit. This is not confuted by the letter of "TEB" JSC–GJILAN/GNJILANE Branch, dated 15th April 2011, attached to the appeal, that the application of "PROGRESS" LLC filed on 16th July 2009 for a loan in the amount of 1 350 000 € and OVD in the amount of 150 000 € has been rejected.

34. The factual situation described in the appeal corresponds to the one contained in judgment C.nr.72/10 of the Municipal Court of KAMENICE/KAMENICA, dated 22nd March 2011 as per the facts under Article 319, paragraph 2 LCP, relevant for its rendering. Namely, it is *explicitly acknowledged by the appellant* the conclusion of the contract, *the agreed final deadline for payment of the whole purchase price in 2 years after the attestation of the contract,* as well *as its non-payment* till the expiry of this deadline on 16th March 2011. This *non-withdrawn admission of these facts has its own evidentiary value* which excludes the need to be proven pursuant to Article 321, paragraph 2 LCP, without any evaluation as per Article 321, paragraph 3 LCP. The other facts mentioned in the appeal related to negotiations prior the formal conclusion of the contract, the deterioration of the relations between the parties, the changed market trend as per the value of the contested immovable properties, the motives of the seller to request repudiation, the attempts of the buyer to receive bank credits *are legally irrelevant* under the criteria of Article 319, paragraph 2 LCP. Hence, they non-determination by the first instance judgment does not exclude the completeness or the correctness of its factual state. Summarizing, all the arguments of the appellant related to the second ground in the appeal under Article 181, paragraph 1, item a) LCP, are non-based – *the factual situation established by the first instance court is neither erroneous, nor incomplete* as per Article 183 LCP.

Erroneous application of the substantive law - Article 184 LCP

35. Pursuant to Article 194 LCP this court of second instance shall examine the challenged judgment within the scope of the grounds indicated in the appeal, as well as *ex officio* for *erroneous application of the substantive law* under Article 184 LCP.

36. The Law on Contracts and Tort (*Original title*: *Zakon o obligacionim odnosima* Published in the Official Gazette of the SFRY, No. 29/1978, amendments in Nos. 39/1985, 45/1989, and 57/1989; final amendments in the Official Gazette of the FRY No.31/1993) ("LCT'), in force from 1st October 1978 onwards is the one *applicable* in this lawsuit pursuant to Section 1.1, item (b) of UNMIK Regulation No. 1999/24, as amended by UNMIK Regulation No. 2000/59. According to Article 124 LCT, with *bilateral contracts*, if one party *fails to perform its obligation*, the other party, *unless something else has been determined,* may request performance of the obligation *or, under the terms of Articles 125 – 132 LCT, may repudiate the contract, should its rescission could not be effected on the ground of law.*

37. The *repudiation* is a legal instrument provided to the titular of a right, arising from a bilateral contract, when the corresponding counter-obligation is not fulfilled by the other party. Since the non-performance does not rescind the bilateral contract by itself, while the obligations in its content are interconnected, the creditor is entitled with the right to repudiate it upon debtor's non-compliance with its terms. Since the *performance* of the obligations of one of the parties requires performance of the ones of the other party, their *non-performance* should be neutralized either by the objection under Article 122 LCT, or the repudiation right under Article 124 LCT. The latter is *accessoria*l (it arises only if a bilateral contract has been concluded), *secondary* (it is based on its non-performance as a secondary juridical fact, following the primary one of its conclusion), and *constitutive* (exercised unilaterlally by the party – its titular, it produces as a legal change - cessation of this non-fulfilled contract). In this case the prerequisites for repudiation under Article 124 LCT exist.

38. By the contested contract on purchase of real estate Vr.nr.395/09, attested by the Municipal Court of KAMENICË/KAMENICA on 16th March 2009, SHABAN PAJAZITI *as a seller assumed the obligation* to transfer to "PROGRESS" LLC as a buyer the 99-years right of use on cadastral parcels nr.1684/1, 1684/2, 1713, 1714/1, 1715, 2890 and the buildings constructed in cadastral parcels nr.2890-00001, 00002, 00003, 00004, 00005, registered in Certificate nr.UL-71107033-00417 (Possession List nr.417), CZ KËRMJAN I POSHTËM/DONJE KORMINJANE and deliver them to the buyer, whereas the latter assumed the obligation to pay their price and take over their possession. Prior to that, subject to the limitations set out by UNMIK Regulation No. 2003/13 on the Transformation of the Right of Use to Socially-owned Immovable Property, *the right on use* on the same parcels and buildings thereon, registered in the name of P.SH. "FABRIKA E TEKSTILIT–NITEKS", was *transferred* to a subsidiary corporation of this socially-owned enterprise in accordance with Section 8 of UNMIK Regulation No. 2003/13, transformed into *leasehold,* including, *inter alia,* the right to possess and use for 99 years (Section 2.1 (a) of UNMIK Regulation No. 2003/13), and transferred from KTA to SHABAN PAJAZITI by Agreement Pr.nr.111/06, dated 21st November 2011 (Section 2.1 (b), Section 2.3 and Section 3.1 of UNMIK Regulation No.2003/13). Thus acquired, this leasehold could not be affected by *physical changes* of the properties–its subject or *legal changes* to the underlying ownership (Sections 7

and 8 of UNMIK Regulation No. 2003/13). Being *freely transferable* to third parties (Section 2.1 (c) of UNMIK Regulation No.2003/13), this leasehold was sold by the contested contract from SHABAN PAJAZITI to "PROGRESS" LLC (Section 2.3 of UNMIK Regulation No. 2003/13). Though having this *specific complex of rights* for its subject-matter, by its legal qualification this is a *sale* under Article 454, paragraph 2 LCT. It was concluded *in writing* and *attested by the court* on 16th March 2009 in compliance with Article 4, paragraph 2 of the Law on Trade of Immovable Property (Published in the Official Gazette of the SRS, No. 43/1981, 24/1985, 28/1987, 6/1989 and 40/1989) in conjunction with Section 3.2 of UNMIK Regulation No. 2003/13. This transfer of leasehold was *registered in the cadastre* pursuant to Section 6 of UNMIK Regulation No. 2003/13. Apart from complying with these mandatory formal requirements for its validity, its *content* included the *constitutive elements* of each sale – 1) *object* under Article 458, paragraph 1 LCT, which is *possible, permitted* (in trade) and *determined* according to Article 46, paragraph 2 LCT - 6 cadastral parcels and 5 buildings thereon, specified with their registration data, under social ownership with leasehold, including 99-years right of use; 2) *price – determined by the contract* in the total amount of 600 000 Euros according to Article 462, paragraph 1, first hypothesis in conjunction with Article 394 LCT, *not subject to other determination,* namely by prescribed price (Article 463 LCT), current stipulated price (Article 464 LCT), by a third person (Article 464 LCT) or by a negotiating partner (Article 465 LCT). Since the parties came to an agreement as per these essential constitutive elements (terms) for the contract on sale, the contested one *had been concluded* according to Article 26 LCT with the legislative provisions applicable for this type of contract supplementing or replacing its terms not confronting to them based on Article 27, paragraph 2 LCT. The contract is not null and void, namely: 1) as its *subject* is not impossible, unlawful, unspecified or undetermined (Article 47 LCT); 2) *its ground* is not non-existing or non-permitted (Article 52 LCT); 3) it is concluded between a natural and legal person with the *capacity* under Article 2 and Article 54, paragraph LCT to enter into to this contract; 4) none of the *deficiencies of will* under Article 60 - 66 LCT are alleged or proven with respect to any of the parties; 5) as the *form* is the prescribed one, non-applicable is the nullity sanction for its lack under Article 70, paragraph 1 LCT; 6) the contract is not void for being contrary to *compulsory regulations, public policy or fair usage* according to Article 103, paragraph 1 LCT. Unfounded is its qualification as: 1) *non-existing* under Article 63 LCT as there has never been misunderstanding between the parties regarding *the nature of this contract* and/or the *ground* and *subject* for any of their obligations; 2) *fictive* under Article 66 LCT – it is not apparent, or simulative because of the lack of deadlines for payment of the price in its written content as this incompleteness is supplemented *ex lege* according to Article 27, paragraph 2 LCT by the provision of Article 516, paragraph 2 LCT. These *motives are not decisive* for the first instance judgment which in based on the conclusion for the contested contract as: 1) *sale* under Article 454, paragraph 2 LCT of leasehold on socially-owned properties; 2) *bilateral* as it has created obligations for both contracting parties; 3) *in its legal effect not null and void or rescindable.* Therefore each of the parties has been validly

bound by it according to Article 148, paragraph 1 LCT to fulfill its obligations bearing the legal responsibility upon failure for fulfillment pursuant to Article 17, paragraph 1 and Article 121 LCT. Bilateral with legal effect, this contract could be repudiated due to non-performance pursuant Article 124 LCT.

39. "PROGRESS" LLC *has failed to perform its obligation as a buyer to pay the purchase price* according to Articles 2, 3 and 4 of contract Vr.359/2009, dated 16th March 2009 and Article 516, paragraphs 1-2 LCT. The non-performance of this single monetary obligation as debtor's delay under Article 324, paragraph 1 LCT suffices the repudiation under Article 124 LCT. *At first place,* according to the general rule of Article 314 LCT each obligation should be fulfilled within the time limit determined (*contractually or normatively*) for its fulfillment. Similarly, according to the specific rule of Article 516, paragraph 1 LCT the buyer should be bound to pay the price at the time specified in the contract, or if there is no such clause - at the moment of delivery of the object pursuant to Article 516, paragraph 2 and Article 475 LCT. In the instant case the contested contract has been concluded in writing and attested by the court in compliance with the formal statutory requirements prescribed for its validity – Article 67 *in fine* LCT. In its written content, attested by the court, *the time limit for payment of the price is not explicitly determined by any of its clauses.* However, as long as the parties reached *simultaneous verbal agreement on this deadline not mentioned in the document,* which is not contrary to its content and/or the reasons for prescribing the statutory form, the same one is valid pursuant to Article 71, paragraph 1 LCT. Their *subsequent verbal agreement regarding the time limit for payment,* reached in end of 2009, is also valid pursuant to Article 67, paragraph 3 LCT. It is non-contested by any of the litigants, it is indisputably determined by the evidence administered by the first instance court and it is explicitly acknowledged by "PROGRESS" LLC in the appeal that the parties verbally agreed *the total purchase price of 600 000 Euros to be fully paid within 24 months (2 years) from the date of conclusion and attestation of the contract by the court - 16th March 2009.* Counted according to Article 77, paragraph 2 LCT from this initial date, *the final time limit expired on 16th March 2011.* Therefore, by this deadline at the latest "PROGRESS" LLC should have transferred to the bank account nr.1501001005846864 of SHABAN PAJAZITI at "RAIFFEISEN BANK of Kosovo" JSC in accordance with Article 318, paragraph 1 LCT the agreed price in its full amount of 600 000 Euros. *At second place,* if the abovementioned simultaneous and/or subsequent agreements are hypothetically considered without legal effect, then in the absence of any clause in the written document of the contract as per the time limit for payment of the price, its content would be *supplemented* according to Article 27, paragraph 2 LCT by the legislative provision of Article 516, paragraph 2 LCT, requiring *the price to be paid simultaneously with the delivery of the object.* In the instant hypothesis, as verified by Article 10, paragraph 1 of the contested contract, the immovable properties specified in its Article 1 on the date of its conclusion – 16th Mach 2009 have already been delivered from SHABAN PAJAZITI to "PROGRESS" LLC with the documents needed for registration of the respective cadastral change, as

required by Article 467, paragraph 1 LCT. Therefore if the time period for payment of the price is not validly determined by the contract according to Article 516, paragraph 1 LCT, then applicable is the one, normatively defined under Article 516, paragraph 2 LCT requiring its full amount to have been paid on the mutually acknowledged date of delivery of the immovable properties with sold right on use – 16th March 2009. *At third place,* it is indisputably established by the first instance court and explicitly admitted in the appeal that "PROGRESS" LLC has not fulfilled its obligation to pay price neither within the *contractual* final deadline under Article 516, paragraph 1 LCT –16th March 2011, nor in the subsidiary *normatively* prescribed deadline under Article 516, paragraph 1 LCT – 16th March 2009. There has been no fulfillment *by the debtor or a third person* (Article 296, paragraph 1 LCT), with or without subrogation under Articles 299–304 LCT, *to the creditor or any of the other persons authorized to accept it on his behalf* according to Article 305 LCT, *in the agreed content of this obligation or its substitution* according to Articles 307 - 308 LCT, *partially or fully* according to Article 310 LCT, before or after the expiry of any time limit under 314 – 318 LCT and/or at any place for performance under Article 319–320 LCT. In sum, the obligation of "PROGRESS" LLC as buyer to pay the price *has not been terminated by fulfillment* in the first hypothesis of Article 285, paragraph 1 LCT. *At fourth place,* it is not alleged or proven its termination also in the second hypothesis of Article 285, paragraph 1 LCT on the basis of any other grounds provided by law – *compensation* under Articles 336 – 343 LCT, *remission of the debt* under Articles 344 – 347 LCT, *substitution (innovation)* under Articles 348 – 352 LCT, *merger (integration)* under Article 353 LCT, *statutory limitation* under Articles 360 – 393 LCT and/or any other legally foreseen reason. Therefore, there is *full non-performance* of the obligation of PROGRESS" LLC *to pay the price,* assumed by the contract Vr.359/2009, dated 16th March 2009, which is a next prerequisite for its repudiation under Article 124 LCT.

40. There is *no impossibility for fulfillment* due to any *objective circumstances* for which "PROGRESS" LLC as debtor for the contractual obligation for payment of the price is not to be blamed according to Article 354, paragraph 1 LCT. This party has not proven in the case by any evidence *its exemption from liability* because of the existence of such circumstances according to its burden of proof, foreseen by Article 354, paragraph 2 LCT. Moreover, as long as its obligation is *monetary* and as such *specified by its kind,* pursuant to Article 355, paragraph 2 LCT *the same one could never come to an end because of objective impossibility for fulfillment.*

41. The repudiation under Article 124 LCT is not excluded also because of *non-responsibility* of "PROGRESS" LLC as debtor for non-performance of the contested contract. *At first place,* the non-payment of the price is not a result of *creditor's delay* in any of its alternatives. As a seller of SHABAN PAJAZITI has not *refused to accept the fulfillment* of "PROGRESS" LLC and *has not prevented its conduct* (Article 325, paragraph 1 LCT). He has not failed to fulfill any of his obligations assumed by the contract for simultaneous fulfillment with payment of the price, due by "PROGRESS" LLC (Article 325, paragraph 2 LCT). The creditor's delay is legally impossible in this

case since "PROGRESS" LLC *has never offered to SHABAN PAJAZITI the price* and, moreover, *has never had the financial means to pay it* (Article 325, paragraph 3 LCT). Hence, its legal effect under Article 326, paragraph 1 LCT could not occur - *without creditor's delay* of SHABAN PAJAZITI, this provision is non-applicable in the case - *"PROGRESS" LLC has not been exonerated from any of the legal consequences of its debtor's delay*, namely the repudiation of the contract under Article 124 LCT due to the breach of its obligation as a buyer to pay the price. *At second place*, no objection under Article 122, paragraph 1 LCT has been invoked by "PROGRESS" LLC at first and/or second instance level in order to *exculpate from the responsibility for non-performance* - it is not alleged and proven that this litigant has not paid the price due by him as buyer because SHABAN PAJAZITI has not fulfilled or has not been ready to fulfill its obligations as seller in this transaction *simultaneously*. Since the failure of "PROGRESS" LLC to fulfill its obligations is not the result of exercised *objection under Article 122, paragraph 1 LCT for simultaneous performance by the other party*, it remains attributable to its debtor's fault. *At third place*, the submission of the claim in C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA could not be the cause for the fully non-paid price due by "PROGRESS" LLC, since *there is no factual or legal nexus between the initiation of this case and the non-payment*. The claim was filed on 22nd April 2010 after the expiry of 15 months from the conclusion of the contract on 1st December 2008, 13 months after its attestation by the court on 16th March 2009, 12 months after the initial deadline for payment of the I installment of 400 000 Euros on 16 April 2009 and 3 months after the subsequent deadline for its payment on 31st January 2011. Therefore SHABAN PAJAZITI as a seller has given to "PROGRESS" LLC as a buyer *more than sufficient tolerance to perform before seeking legal redress for its continuous non-performance*. Though the claim was filed on 22nd April 2010, before the expiry of the final deadline for payment of the agreed price on 16th March 2011, it is not *premature*. *Firstly*, pursuant to Article 128 LCT should prior to the expiration of the time limit for performing the obligations it becomes obvious that the other party is not going to meet them, *the other party may repudiate the contract*. This is the hypothesis. When the sale was concluded on 1st December 2008, "PROGRESS" LLC lacked the financial means, necessary to pay the price of 600 000 Euros; 15 months later when the claim was filed, as well as 35 months later when the appeal proceedings was completed, the company could not still fund its payment by bank credits, investors or other source of financing. In view of all these circumstances obviously demonstrating inability of "PROGRESS" LLC pay any amount of the price, SHABAN PAJAZITI was entitled to claim repudiation of the contract *prior to expiration of the final time limit for its payment* pursuant to Article 128 LCT. Since this time limit elapsed on *16th March 2011* before the conclusion of the main hearing in the first instance on *22nd March 2011*, according to Article 144, paragraph 3 LCP *the claim could not be dismissed as premature*. This ground invoked by the appellant contradicts Article 128 LCT and Article 144, paragraph 3 LCP, as well as Article 167, paragraph 2 LCP stipulating that *rendering the judgment the court is bound by the status of the contested legal relationship at the time of conclusion of*

the main hearing. In this case the first instance proceedings according to Article 436, paragraph 1 LCP was completed on 22nd March 2011, as of which date the obligation of "PROGRESS" LLC to pay the price of 600 000 Euros, *though due from 16th March 2011 for its whole amount, was non-paid.* Hence, the non-performance of this litigant could not be reasoned with *pre-maturity* of this obligation as *its maturity* occurred before the completion of the main hearing in compliance with Article 167, paragraph 2 LCT. *At fourth place*, there is *no creditor's fault* of SHABAN PAJAZITI because of the *proposal for temporary measure* in the case, releasing "PROGRESS" LLC from its *debtor's fault.* The prohibition for alienation, renting, mortgage or any other formal legal transaction with the contested real estate was ordered by the Municipal Court of KAMENICË/KAMENICA pursuant to Article 300, paragraph 1, item a) and Article 301, paragraph 1, items a) and d) LCP with a *ruling for temporary measure*, dated 10th August 2010, under Article 306, paragraph 1 LCP, replaced by a *ruling for security measure*, dated 26th August 2010, under Article 306, paragraph 3 LCP. The objection of "PROGRESS" LLC under Article 306, paragraph 2 LCP against the first one was not approved by the Municipal Court of KAMENICË/KAMENICA, while its appeal based on Article 310, paragraph 1 LCP against the second one was refused by ruling AC.nr.333/2010 of the District Court of GJILAN/GNJILANE, dated 2nd November 2010. Therefore the prohibitions as per the contested real estate were not established by SHABAN PAJAZITI as a creditor but were imposed by *final court decisions*, confirmed as lawful after being challenged by "PROGRESS" LLC with all the legal remedies available. Therefore, *there is no creditor's fault* of SHABAN PAJAZITI in regard to this temporary/security measure, excluding the liability of "PROGRESS" LLC for its failure to fulfill its obligation *in good faith* and *entirely* as demanded by Article 263 LCT. This non-performance being legally non-justified itself, justifies the repudiation of the contract pursuant to Article 124 LCT.

42. The *impossibility* of "PROGRESS" LLC to fulfill its obligation is *subjective, not objective* since: 1) it existed only for this company, not *erga omnes* for the third persons - Article 364, paragraph 1 LCT; 2) it was not caused by circumstances newly occurred after the conclusion of the contested contract which this debtor was not able to eliminate or avoid – Article 263 LCT. *At first place*, as of 16th March 2011, when the final time limit for payment of the price expired, the failure of "PROGRESS" LLC to fulfill this obligation represents *debtor's delay* under Article 324, paragraph 1 LCT *for reasons for which this party is liable.* This 2-years tolerance gratis contractual time period substantially exceeds the one that is adequate for the said performance and is customary for legal transactions of the type and value. However, till its expiry "PROGRESS" LLC *has not provided the amount of the price from the proceeds of its business activities* or by *sale of available assets*, has not *received bank credits* from any of the commercial banks, licensed in Kosovo, *has not found alternative financial sources,* and *has not undertaken any other legal and factual actions* needed to fund the payment due to SHABAN PAJAZITI. *At second place*, non-substantiated is the allegation in the appeal that "PROGRESS" LLC could not get bank credits because of

the temporary measure ordered by ruling C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA, dated 10th August 2010. In the absence of any document in the case issued by any commercial bank in Kosovo or other evidence confirming that a bank credit requested by "PROGRESS" LLC has been rejected *because of this temporary measure*, applying the burden of proof rule under Article 322, paragraph 1 LCP the court is to conclude that *there is no such refusal*. Moreover, the temporary measure was imposed on *10th August 2010* and could not retroactively justify the non –receipt of any bank credits by "PROGRESS" LLC in the 19 months elapsed after the conclusion of the contract on *1st December 2008*. Further, neither ruling C.nr.72/2010 of the Municipal Court of KAMENICË/KAMENICA, dated 10th August 2010 for a *temporary measure* under Article 306, paragraph 1 LCP, nor ruling C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA, dated 26th August 2010 for a *security measure* under Article 306, paragraph 3 LCP were sent *ex officio* pursuant to Article 307, paragraph 1, second sentence LCP for compulsory execution or for registration in the immovable property rights register. Consequently, the second ruling has not produced according to Article 307, paragraph 3, first hypothesis LCP *the legal effect of an executive title* under the Law No. 03/L-008 on Executive Procedure, as well as and *has not become binding for third persons* according to Article 307, paragraph 3, second hypothesis LCP since they could not be considered informed for this security measure by its entry into this public registry as previewed by Section 7.2 of Law No. 2002/5 on the Immovable Property Rights Register, amended and supplemented by Law No. 2003/13. Finally, as evidenced by Certificate nr.UL-71107033-00417, CZ KËRMJAN I POSHTËM/DONJE KORMINJANE, the contested real estate is still in the name of the SOE "FABRIKA E TEKSTILIT–NITEKS" *as social ownership*. This status excludes the establishment of a *mortgage* on this property as collateral for any banks credits of "PROGRESS" LLC. *Without being the owner* of cadastral parcels nr.1684/1, 1684/2, 1713, 1714/1, 1715, 2890 and/or the buildings in cadastral parcels nr.2890-00001, 00002, 00003, 00004, 00005, this private company is not entitled according to Article 173 and Article 174, paragraph 1 of the Law No. 03/L-154 on Property and Other Real Rights to conclude a mortgage agreement with any mortgage creditor (including bank) for creation of a mortgage on these immovable properties. Further, since *only the 99-years right on use* under Section 2.1, item a) of UNMIK Regulation No. 2003/13 was sold by the contract (see its scope defined by Article 1) and *vice versa* not any of the other rights – elements of the leasehold on the contested real estate set out in Section 2.1, items b) and c) of UNMIK Regulation No. 2003/13, *the right to establish encumbrances* had not been transferred to "PROGRESS" LLC. Being social ownership this property could not be placed under mortgage as collateral of bank credits by *this private company which is not its owner but only holder of the right of use for the 99-years duration of its term*. These legal limitations consequent to the property status of the real estate – subject of the leasehold, sold by the contested contract, *existed at the moment of its conclusion* and *did not take place after its entry into force* as demanded by Article 263 LCT *for release of "PROGRESS" LLC from its debtor's liability for non-performance*. As long as *no objective impossibility for*

fulfillment under Article 354, paragraph 1 LCT could exits for the *monetary* obligation of "PROGRESS" LLC as a buyer to pay the price due for the leasehold purchased from SHABAN PAJAZITI as a seller - Article 355, paragraph 1 LCT, while *the delay in its fulfillment is not caused by the creditor* - Article 325, paragraphs 1 and 2 LCT, it is *due to reasons for which this debtor is liable, without being released from liability* – Article 263 LCT. The lack of financial means does not exempt "PROGRESS" LLC from the consequences of its *failure to perform this obligation,* as a prerequisite under Article 124 LCT for repudiation of the contract.

43. The other normative conditions and limitations set out for this repudiation are also met. *At first place,* they are not derogated or modified by the parties by *anything determined in the contested contract* which excludes or restricts the application of Article 124 LCT in the case. *At second place*, there is *no rescission of the contested contract effected on the grounds of law,* non-compatible with its repudiation by one of the parties after failure of the other to perform its obligation. *At third place*, since the payment of the price within a specified time limit was not an essential element (term) of the contract, it was not repudiated *ex lege* pursuant to Article 125, paragraph 1 LCT because of the failure of "PROGRESS" LLC to pay on time. Though with preserved legal effect according Article 126, paragraph 1 LCT, its repudiation by the other party is admissible *without leaving to this defaulter a subsequent time limit for performance* according to Article 126, paragraph 2 LCT based on the *exception under Article 127 LCP since the defaulter's conduct indicate inability to fulfill its obligation within such extension*. For the same reasons, the repudiation has become admissible *prior to the expiration of the final time limit* for payment of the price pursuant to Article 128 LCT. *At fourth place,* the non-performance in question affects *the essential obligation* of the buyer under Article 516 LCT to pay the price and by itself *is substantial* as the price of 600 000 Euros is fully non-paid. Therefore *the repudiation is not impossible* under Article 129 LCT due to non-performance *(breach) of a minor term* of the contract –its *non-fulfillment by the buyer amounts to 100 % and is not minor both absolutely and relatively as per the interest of the seller*. His motives, mentioned in the appeal, are legally irrelevant for his *right* under Article 124 LCT to repudiate a contract, entirely non-fulfilled by the other party almost 3 years after its conclusion on 1st December 2008, long after the expiry of all kinds of deadlines. This right *is not accessorial or otherwise dependent* on his entitlement as a creditor under Article 124 *in fine,* Article 262, paragraph 3 and Article 266, paragraph 1 LCT *to compensation for the damages sustained consequent to the same debtor's delay*. Hence, the repudiation in this case is not impermissible for being claimed *separately* from the damages caused by the non-performance – its basis. Finally, apart from the *normative limitations* above, there are *no additional ones* agreed by the parties excluding the repudiation in the case. As it is claimed *due to non-performance only*, non-applicable are the rules for repudiation *due to changed circumstances (hardship)* laid down by Articles 133 – 136 LCT.

44. The contested contract was lawfully repudiated by the appealed judgment for *non-performance of the obligation* of "PROGRESS" LLC as a buyer to pay the price

due to SHABAN PAJAZITI as a seller of the leasehold on immovable properties – its subject. The prerequisites and the restrictions for this repudiation under Articles 124 – 131 LCT were complied with. The failure for fulfillment of this contract by this party was so substantial and continuous that its purpose could not be realized in the mutual interest of both parties and it would be unjust to maintain its validity, unilaterally fulfilled only by one of them. The *consequences* of the pronounced repudiation were determined by the first instance court in accordance with its legally foreseen effect. As it released both parties from their obligations under the contract, except the one of "PROGRESS" LLC for compensation of subsequent loss, pursuant to Article 132, paragraph 1 LCT, the restitution of what was given on its basis envisaged in Article 132, paragraph 2 LCT was realized by ordering the competent DGCP to deregister "PROGRESS" LLC as the holder of the purchase 99-years right on use and then to register it in the name of SHABAN PAJAZITI as the titular of the same right before its invalidated sale.

45. Rendering the appealed judgment the first instance court neither has failed to apply the correct substantive law provisions, nor has applied them improperly *as per the criteria defined by Article 184 LCP*. This third ground for its challenging under Article 181, paragraph 1, item c) LCP because of erroneously applied substantive law is also unfounded.

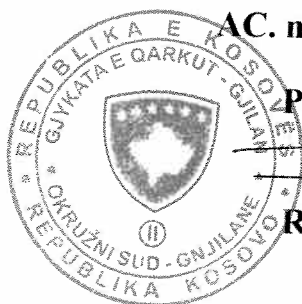
VI. Conclusion

46. After this appellate review, the court of second instance decides to reject the appeal as non-based and to confirm judgment C.nr.72/10 of the Municipal Court of KAMENICË/KAMENICA, dated 22nd March 2011 pursuant to Article 195, paragraph 1, item d) in conjunction with Article 200 LCP. It is lawfully rendered without the grounds for its challenging under Article 181, paragraph 1, items a) – c) LCP invoked in the appeal or others identified *ex officio* in this second instance proceedings as per the approval of the claim pursuant to Article 124 LCT and the reimbursement of the procedural costs pursuant to Article 452, paragraph 1 LCP.

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

LEGAL REMEDY: No appeal is allowed against this judgment.

THE DISTRICT COURT OF GJILAN/GNJILANE
AC. nr.158/2011 on 31.10.2011



PRESIDING JUDGE

ROSITZA BUZOVA

SAKTËSINË E KOPJËS E VËRTETON
TAČNOST OTPRAVKA POTVRDJUJE

Punëtori i autorizuar
Ovlašceni radnik

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.

NOTE OF DELIBERATION AND VOTING

THE DISTRICT COURT OF GJILAN/GNJILANE in a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, Kosovo Judge MUHAMET REXHA and Kosovo Judge ABDULLAH AHMETI as panel members, **on 31st October 2011 deliberated and voted unanimously as in the enacting clause.**

The present note is added to judgment of the District Court of GJILAN/GNJILANE AC.nr.158/2011, dated 31st October 2011 in accordance with Article 140, paragraph 1, second sentence LCP.

THE DISTRICT COURT OF GJILAN/GNJILANE

AC.nr.158/2011 on 31.10.2011

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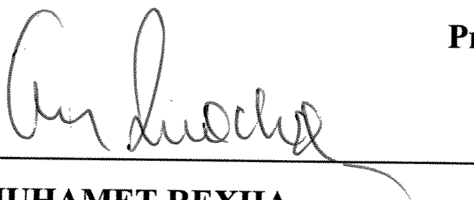
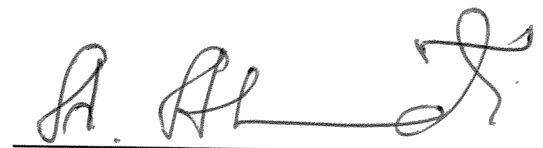
ROSITZA BUZOVA

Presiding Judge



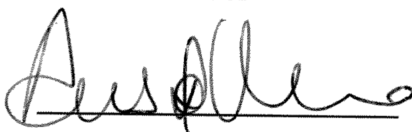
MUHAMET REXHA

Panel Member



ABDULLAH AHMETI

Panel Member



ANDRES MORENO

EULEX Legal Officer

XHANGYLE ILJAZI

Interpreter/Translator (English/Albanian)

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 and signed by the Kosovo Judges after translation by the above referred interpreter/translator.