AC. Nr.170/2010

THE DISTRICT COURT OF GJILAN/GNJILANE

Through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding Judge and Reporting Judge, EULEX Civil Judge JOHANNA SCHOKKENBROEK and Kosovo Judge MUHAMET REXHA, as panel members,

In the civil case of

The MUNICIPALITY of VITI/VITINA - VITI/VITINA, represented by the Mayor NEXHMEDIN ARIFI and MUSTAFE MUSA, Lawyer from GJILAN/GNJILANE,

Vs.

"DRENUSHA" HUNTING ASSOCIATION - VITI/VITINA, represented by the President VEHBI SELMANI and SHEMSEDIN PIRAJ, Lawyer from GJILAN/GNJILANE

Upon a claim filed for confirmation of ownership right having as its legal basis Article 254, paragraph 1 of the Law No. 03/L-006 on Contested Procedure (hereinafter "LCP") with value of the contest in the amount of 60 000 Euros

Having adjudicated the appeal of the MUNICIPALITY of VITI/VITINA against judgment C.nr.66/2009 of the MUNICIPAL COURT of VITI/VITINA, dated 19 March 2010 in a public hearing under Article 190, paragraphs 2 and 4 LCP conducted on 6 October 2010 according to Article 191 – 193 LCP

Hereby after deliberation and voting on the appeal held on 6 October 2010 unanimously according to Article 140, paragraph 1, second sentence LCP renders the following

JUDGMENT

I. The appeal of the MUNICIPALITY OF VITI/VITINA is partially **REJECTED** as non-based and judgment C.nr.66/2009 of the Municipal Court of VITI/VITINA, dated 19th March 2010 is **CONFIRMED** in the part of **POINTS 1 and 3** of the enacting clause pursuant to Article 195, paragraph 1, item d) in conjunction with Article 200 LCP.

II. The appeal of the MUNICIPALITY OF VITI/VITINA is partially **APPROVED** as based and judgment C.nr.66/2009 of the Municipal Court of VITI/VITINA, dated 19th March 2010 is **MODIFIED** in the part of **POINTS 2 and 4** of the enacting clause which are invalidated pursuant to Article 195, paragraph 1, item e) in conjunction with Article 201, paragraph 1, items e) LCP.

REASONING

I. Procedural History

1. With judgment C.nr.66/09 of the MC of VITI/VITINA, dated 19 March 2010 the claim submitted to the case by the claimant the MUNICIPALITY of VITI/VITINA was REJECTED as ungrounded, the request of the respondent "DRENUSHA" HUNTING

ASSOCIATION was APPROVED as grounded, the procedural costs were charged on the claimant – Article 452, paragraph 1 LCP and the competent cadastral services in VITI/VITINA were ordered cancellation of the current registration entitling the claimant as the owner of the contested parcel.

2. On 2 April 2010, an appeal was filed by the MUNICIPALITY of VITI/VITINA against the first instance judgment above. The appellant challenged it on the grounds of *substantial violations of the provisions of the contested procedure* - Article 181, paragraph 1, item a) LCP, namely under Article 182, paragraph 1 in conjunction with Article 143, paragraph 1, Articles 252 – 253, Article 391 LCP and under Article 182, paragraph 2, items (n) and (o) LCP, *incomplete and erroneous determination of the factual situation* as per Article 181, paragraph 1, item b) in conjunction with Article 183 LCP and *erroneous application of the substantive law* - Article 181, paragraph 1, item c) LCP in conjunction with Article 184 LCP. This second instance court was requested to approve the filed appeal as based - to modify judgment C.nr.66/2009 of the MC of VITI/VITINA, dated 19 March 2010 with recognition of the ownership right of the Municipality of VITI/VITINA or alternatively to annul it and return the case for retrial to the court of first instance.

3. "DRENUSHA" HUNTING ASSOCIATION filed an initial reply to the appeal on 19 April 2010 according to Article 187, paragraph 2 LCP and additional one on 12 August 2010 according to Article 187, paragraph 4 LCP. Summarized, they stated that the attacked judgment was lawfully rendered without any of the grounds indicated in the appeal and/or the ones that are to be reviewed *ex officio* according to Article 194 LCP. The appellate requested the appeal to be entirely rejected as non-based and judgment C.nr.66/2009 of the MC of VITI/VITINA, dated 19 March 2010 to be confirmed.

4. During the public hearing under Article 190, paragraphs 2 and 4 LCP held on 6 October 2010, the appellant stood by the appeal and the appellate stood by its reply to it, as summarized in points 3 and 4 above, respectively.

II. Admissibility of the appeal and the second instance procedure

5. No procedural impediments exist for the adjudication of the appeal. It is filed within the 15-days time period prescribed by Article 176, paragraph 1, first sentence LCP and is not belated under Article 186, paragraph 2 LCP. Fulfilling the panel ruling of 3 August 2010, the appellant completed the appeal as per all the requisites under Article 99, paragraph 2, second sentence LCP by submitting to the case its signed original. Therefore in accordance with Article 102, paragraph 2 in conjunction with Article 193 LCP its form and content are considered regular as required by Article 99, paragraphs 1 and 2 and Article 176 LCP from the date when the appeal was initially filed on 2 April 2010. It is not impermissible under Article 186, paragraph 3 LCP – it is explicitly confirmed by the Mayor of the MUNICIPALITY of VITI/VITINA as its legal representative with his written submission nr.02-07/1895, dated 5 August 2010 and in this way was retroactively validated pursuant to Article 93, paragraph 4, second sentence *in fine* LCP. The latter entitles each party to accept all procedural actions undertaken on its behalf without due authorization for representation. Allowed *during the entire course of the case* – Article 93, paragraph 4, first sentence LCP, the possibility for this validation is precluded with the completion of the proceedings. Therefore the appeal might be

accepted by the appellant at the stage of its preliminary examination by the court of second instance under Articles 389 – 390 in conjunction with Article 193, which is the instant hypothesis. Once the consent of the appellant with its filling is given, pursuant to Article 93, paragraph 4, second sentence LCP the appeal could not be annulled any more by the court. Therefore after its confirmation it is considered valid and being bound by its legal force this second instance is obliged to adjudicate it on the merits.

III. Appellate review of the court of second instance pursuant to Article 194 LCP

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

6. The *first* ground under Article 181, paragraph 1, item a) LCP to be reviewed according to Article 194 LCP as invoked in the appeal is for essential violation of the provisions of the contested procedure as per Article 182, paragraph 1 in conjunction with Article 143, paragraph 1 LCP. The appellant reiterates the last legal norm that the court shall decide *by a judgment* on the principal matter and the ancillary claims, whereas by *a ruling* only if the claim is related to obstruction of possession (Article 142, paragraph 3 LCP) or a payment order (Article 142, paragraph 4 LCP). Recalled on this point of the appeal is also Article 142, paragraph 5 LCP that on all other issues in the proceedings the court is to decide *by a ruling*. However, these procedural requirements have not been violated – the MC of VITI/VITNA decided on the principal matter in C. nr.66/2009 – the claim of the MUNICIPALITY of VITI/VITINA vs. "DRENUSHA" HUNTING ASSOCIATION - with a *judgment* as demanded by Article 143, paragraph 1 LCP. This legal qualification is explicitly given by the court of first instance to its act with the title on the first page, as well as with numerous internal references in the reasoning. C. nr.66/2009 of the MC of VITI/VITINA was taken over pursuant to Article 5, paragraph 1, item c), sub-items (i) and (ii) and paragraph 7 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and was adjudicated by the EULEX Judge assigned to this civil case. Accordingly the challenged judgment was drafted in *English* recognized as an *official language of the court* pursuant 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, Article 6, paragraph 1 and Article 97 LCP, as well as Article 12, paragraph 1 of the Law No. 02/L-037 on Use of Languages. Therefore its English version being original and authentic upon discrepancies *always* prevails over its Albanian translation notified to the parties according to Article 6, paragraph 2 LCP and Article 14 of the Law No. 02/L-037 on Use of Languages. Hence, the present panel concludes that the attacked judicial act as per its *Point 1* represents a judgment under Article 160 LCP and its issuance is not contrary to Article 143, paragraph 1 LCP. Its *Point 3* being a decision on the costs of the proceedings is legally considered a ruling (Article 142, paragraph 6 LCP), but being included in the enacting clause of the judgment (Article 160, paragraph 3 LCP) is textually integrated in this judicial act of higher rank under its title. Summarily, this first procedural infringement under Article 181, paragraph 1, item a) LCP in the appeal is unfounded and does not justify its approval.

7. The *second* ground under Article 181, paragraph 1, item a) LCP is as per Article 182, paragraph 1 in conjunction with Article 252, Article 253, paragraph 1, item a) LCP and Article 391 LCP. The appellant quotes the provisions, stressing that the adjudication of a case in a contested procedure shall commence by filing of a *written claim* (Article 252 LCP) with a *statement* on the principal and ancillary matters (Article 253, paragraph

1, item a) LCP). Further, the appellant states that the court should have decided within this scope of the claim (Article 2, paragraph 1 LCP) and should not dismiss it pursuant to Article 391 LCP after the completion of the main hearing. No breach of the law is found out by the panel in this respect. The contested procedure in C.nr.66/2009 of the MC of VITI/VITINA was initiated on 13th March 2009 when the claim of the MUNICIPALITY of VITI/VITINA against "DRENUSHA" HUNTING ASSOCIATION was filed in the written form prescribed by Article 252 LCP with the content required by Article 253, paragraph 1 LCP, inclusive a statement for confirmation of the ownership right on the contested immovable property. It was adjudicated in the first instance proceedings in two hearings - preliminary and main - as required by Article 12 LCP. In judgment C.nr.66/2009, dated 19th March 2009 (see the last paragraph of its page 1 and the first paragraph of its page 2) the MC of VITI/VITINA specified it *literally quoting the statement of the claimant* under Article 253, paragraph 1, item a) LCP in the end of the claim. *Having identified it in the way it was submitted by the MUNICIPALITY of VITI/VITINA to C. nr.66/2009, the court of first instance REJECTED it as ungrounded with Point 1 of the challenged judgment.* Thus with reference to this description of the claim given in the introductory part under Article 160, paragraph 2 LCP, it was rejected with the enacting clause under Article 160, paragraph 3 LCP in its Point 1. Consequently, the MC of VITI/VITINA decided on the claim submitted by the claimant to C.nr.66/2009 according to Article 252 LCP *within the scope* of its statement under Article 253, paragraph 1, item a) LCP according to Article 2, paragraph 1 LCP, *on its merits with rejection* of the contested ownership right of the MUNICIPALITY of VITI/VITINA according to Article 143, paragraph 1 and Article 160, paragraph 3 LCP, *without any dismissal because of inadmissibility*. Since Article 391 LCP was not applicable in the instant civil case, its *non-application* could not constitute a violation under Article 182, paragraph 1 LCP. As Article 391 LCP has not been applied by the MC of VITI/VITINA in the course of the proceedings in C.nr.66/2009, there is no *misapplication* of this provision that might be qualified as an infringement under Article 182, paragraph 1 LCP. If this argument of the appellant originates from the translation of the judgment served to the litigants, it is irrelevant for its legality which is to be reviewed *on the basis of its original in English* as official language of the court pursuant 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, Article 6, paragraph 1 LCP and Article 12, paragraph 1 of the Law No. 02/L-037 on Use of Languages.

8. Regarding the *third* violation under Article 181, paragraph 1, item a) LCP, in the appeal its formulation is more than blank – Article 182, paragraph 2, item n) LCP is literally quoted word by word without any concretization based on the content of the challenged judgment. No errors excluding its examination are specified by the appellant that might be reviewed by this appeal panel. The enacting clause is comprehensible and not contradictory by itself and with the reasoning which is provided for all relevant facts, decisive in this dispute. The appellant has not indicated any concrete material fact for which there are inconsistencies between what is stated in the reasoning on the documents or records of statements given in the course of the proceedings and their actual content. As per Article 182, paragraph 2, item n) LCP, after its examination within the scope of this ground indicated in the appeal according to Article 194 LCP, the panel considers that is generally invoked, as well as is unfounded as a reason excluding the sustainability of the judgment.

9. The *fourth* procedural violation under Article 181, paragraph 1, item a) LCP stated in the appeal as per Article 182, paragraph 2, item o) LCP is only partially founded. *First,* with regard to Point 2 of the judgment where *"the request submitted by the respondent "DRENUSHA" HUNTING ASSOCIATION was APPROVED, as grounded."* In this way the maximum adjudication scope under Article 2, paragraph 1 LCP determined by the claims submitted by the parties in litigation as limit for the jurisdiction of the court in contested proceedings was exceeded. As verified from the file of C.nr.66/2009 and acknowledged by the authorized representative of "DRENUSHA" HUNTING ASSOCIATION in the appeal hearing on 6 October 2010, no counterclaim has ever been filed by this respondent in the course of first instance proceedings neither *before* the end of the preparatory session pursuant to Article 256, paragraph 1 LCP, nor *after* its conduct pursuant to Article 252, paragraph 2 LCP. Since it should meet the general requirements for the form and the content of each claim under Article 252 and Article 253, paragraph 1 LCP, as well as for the initial payment of the respective court fee due according to Article 253, paragraph 3 LCP, none of the submissions in C.nr.66/2009 could be legally qualified as *counterclaim* of "DRENUSHA" HUNTING ASSOCIATION filed according to Article 256, paragraph 1 or 2 LCP. Namely, this status could not be conferred to its reply of 13 September 2009 – its was submitted according to Article 395, paragraph 1 LCP in response of the claim of the MUNICIPALITY of VITI/VITINA in order to deny it, to raise the procedural objections of the respondent, to present the facts substantiating his statements with the evidence that prove them in compliance with Article 396, paragraphs 1 and 2 LCP. As long as these procedural actions of the respondent are legally different from one another, the *reply* of "DRENUSHA" HUNTING ASSOCIATION under Article 395, paragraph 1 LCP could not be equalize to his *counterclaim* under Article 256, paragraph 1 LCP. Hence, the MC of VITI/VITINA had to analyze the position outlined with the reply, *only in the reasoning* of the judgment in C.nr.66/2009 according to Article 160, paragraph 4 and 5 LCP *and not to decide on it with the enacting clause under Article 160, paragraph 3 LCP.* Further, in the absence of a counterclaim under Article 256 LCP, the MC of VITI/VITINA was not empowered to decide on the existence of any property rights of the respondent. Point 2 of the judgment as rendered without a claim submitted by a party in the proceedings contradicts Article 2, paragraph 1 LCP by going beyond the adjudication limits set up by the same provision. As a result in this part of the judgment, the scope of the charge has been exceeded – infringement under Article 182, paragraph 2, item o) LCP. *Second,* the same violation is identified as per *Point 4* of the enacting clause. Since the claim of the claimant MUNICIPALITY of VITI/VITINA was rejected with Point 1, while with Point 3 a non-submitted counterclaim of the respondent "DRENUSHA" HUNTING ASSOCIATION was approved, this judgment did not solve the ownership at stake. This is why according to Article 26, paragraph 1 of the Law No.03/L-008 on Executive Procedure (LEP) the judgment could not serve as an executive title under Article 24, paragraph 1, item a) LEP for execution through the *establishment of these property rights* through their registration in the respective public book in compliance with Chapter XXI LEP. Without such an executive document according to Article 288, paragraph 1 LEP, the court of first instance should not have ordered the cadastral service in VITI/VITINA to conduct any changes in the registration of the contested parcel, including deletion of currently registered property right under Article 287, paragraph 1 LEP. There is no other provision entitling the court to order *ex officio* the cancellation a register inscription with invalidity determined in the course of a contested procedure as a prejudicial issue under Article 13, paragraph 1 LCP.

Consequently, this order of the MC of VITI/VITINA to the Municipal Cadastral Office - VITI/VITINA exceeds the scope of the charge contrary to Article 182, paragraph 2, item o) LCP. These procedural violations affect only Points 2 and 4 of the enacting clause, and *vise versa* do not vitiate in any way its Points 1 and 3. For this reason, they could be the basis for *partial* and *not for complete* challenging of judgment C. nr.66/2009 of the MC of VITI/VITINA according to Article 181, paragraph 1, tem c) LCP.

10. No violations of the contested procedure under Article 182, paragraph 2, items b), g), j), k) and m) LCP which the court of second instance is obliged to examine *ex officio* have been determined by the panel in this appellate review under Article 194 LCP.

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

11. In relation to the ground under Article 181, paragraph 1, item b) LCP the appellant stated that the factual situation was not fully and correctly determined. The arguments for this complaint are not accepted by this judicial instance. There is neither erroneous, nor incomplete determination of the factual situation according to Article 183, paragraph 1 LCP – the court of first instance did not determine any relevant material fact incorrectly and did not fail to establish such fact. Based on all submissions and evidence adduced in C. nr.66/2009, in the reasoning of its judgment the MC of VITI/VITINA (see pages 4 - 7) enumerated all facts presented by the parties, classified them into two categories – the fist – undisputable (accepted) facts and the second - disputed (contested) facts, listed all exhibits produced by the claimant and by the respondent, identified the relevant contested facts and then analyzed each one of them. In compliance with Article 160, paragraph 4 LCP the court of first instance specified in its statement on the grounds all facts that were established and the evidence used for this determination after conscientious and careful examination under Article 8 LCP. All other arguments in the appeal in the part dedicated to Article 181, paragraph 1, item b) LCP are not connected with *the factual findings*, but with the *legal conclusions* of the first instance court, namely whether the claimant is or is not the owner of the contested immovable property, whether it has been granted for use or in ownership to the Hunting Association "JELEN", if there has or has not been valid succession between this social legal person and the Hunting Association "DRENUSHA", whether this social ownership has or has not been transformed into private one of a NGO without privatization. Since all these are *legal issues* on the merits of the dispute, they are not related to *the factual situation* established by the court of first instance and therefore by definition could not justify the application of Article 183 LCP.

Erroneous application of the substantive law - Article 184 LCP

12. Pursuant to Article 194 LCP the present 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 the existence of a violation of the substantive law as per Article 184 LCP.

13. The claim under adjudication after its final completion and correction in the appeal hearing according to Article 102, paragraph 2 in conjunction with Article 193 LCP is with legal basis Article 254, paragraph 1 LCP for **confirmation of the ownership right of the MUNICIPALITY of VITI/VITINA on cadastral parcel nr.3259**, located in the place called "SELO SHKOLA", culture: house - building with surface of 0.08.50 ha (850 m^2) and yard with surface of 0.40.26 ha (4026 m^2), Cadastral Zone VITI/VITINA, registered in Possession list nr.546 of the Department for Cadastre, Geodesy, Property

and Residence-VITI/VITINA, in the part which now is **cadastral parcel nr.P-70101007-03259-2,** located in the place called "SELO SHKOLA", culture: building–yard with total surface of 0.07.05 ha (705 m^2), Cadastral Zone VITI/VITINA, registered in Certificate nr.P-70101007-03259-2 of the Municipal Cadastral Office - VITI/VITINA.

According to Article 319, paragraph 1 LCP *each party in the litigation shall have the duty to prove the facts on which it bases its claims and allegations.* Unless otherwise provided for by law, *the party that claims the existence of a right shall prove that he/she holds the right* - Article 322, paragraph 2 LCP, while the party that objects the right shall prove that it has not come into existence, cannot be exercised or has ceased to exist - Article 322, paragraph 3 LCP. In compliance with these requirements, in this case *the MUNICIPALITY of VITI/VITINA bears exclusively the burden to prove all facts for the existence of its ownership right on the contested immovable property as municipal one.* If they are not established with certainty (Article 8 LCP), pursuant to Article 322, paragraph 1 LCP the court applying the rules for the burden of proof above is to conclude that these facts have not occurred in reality and consequently that the claimed municipal ownership based on them is non-existing. This is the hypothesis.

Non - acquisition of the contested immovable property as municipal ownership

14. In the instant case no facts and/or evidence were presented for *the acquisition* of cadastral parcel nr.3592 *by the MUNICIPALITY of VITI/VITINA*. Neither in the claim, nor in the course of the proceedings was ever specified and/or verified *when, how and on what grounds it was initially acquired as municipal ownership.* The determination is necessary in view to the legal regime under the Law on Basic Property Relations (OG of SFRY, No.6/1980), which entered into force on 1 September 1980 (Article 90), lost effect on 20 August 2009 (Articles 296 – 297 of the Law on Property and Other Real Rights (OG of the Republic of Kosovo, No.57/2009) and being effective in Kosovo on 22 March 1989 should be considered applicable under the terms of Section 1.1 (b) of UNMIK Regulation 1999/24, amended by UNMIK Regulation No.2000/59. This legal regime as per all its elements - holders (Article 1), objects (Article 2), types (Article 3 – 6), acquisition, protection and cessation (Article 7) – had to be defined by law. In line with this general requirement, its Article 20, paragraph 1 stated that the property right could be acquired *by law itself (Article 21 – 32)*, a *legal transaction (Article 33-35)* and *inheritance* (Article 36), while its Article 20, paragraph 2 provided that ownership could also be acquired by a *decision of the government authorities.* None of these grounds for acquisition of property rights, exhaustively defined by the Law on Basic Property Relations, was ever been proved by the MUNICIPALITY of VITI/VITINA as per cadastral parcel nr.3259. Therefore, from the burden of proof rule under Article 319, paragraph 1, Article 322, paragraphs 1 and 2 LCP follows that the *ownership right of the MUNICIPALITY of VITI/VITINA on this parcel never had come into existence.*

Status of the contested immovable property as social ownership

15. Contrariwise, it was established with absolute certainty in this case that since the 60s of the XX century till 21 March 2008 without any intermediate changes, **cadastral parcel nr.3259** had always been **registered** in the respective public book as **SOCIAL OWNERSHIP.** *First*, this is evidenced by Possession List nr.546 of the Department for Cadastre, Geodesy and Property-VITI/VITINA – in its respective column *"Property*

type" of the parcel it is certified as *"Social"*, as well in the column with the name of the title – holder with the abbreviation **"D.S."-DRUSTVENA SVOJINE** (social ownership). *Second*, this corresponds to the data in the Copy Plan to this possession list. *Third*, the same status is proved also by Certificate nr.UL-7010101007-546/05.02.2008 (89/2008) of the Municipal Cadastral Office–VITI/VITINA – in column A the owner of parcel nr.3259 is indicated as **"P.S."** - the Albanian abbreviation for **PRONES SHOQERORE** (social property). *Third*, this is also confirmed by Letter ref. nr.0702/397/08.02.2010 of the Directorate for Geodesy, Cadastre and Property – VITI/VITINA stating that parcel nr.3259 has been recorded as SOCIAL OWNERSHIP undivided with a total surface 4876 m^2 since the establishment of the office in the 60's, after the air survey in 1958, without any changes of the title-holder till 2008. *Fourth*, the social ownership on the contested immovable is admitted by the MUNICIPALITY of VITI/VITINA – such acknowledgment by this litigant has been made in its appeal, as well as in the appeal hearing (Article 321, paragraph 2 LCP) without subsequent contest excluding or reducing its evidentiary force (Article 321, paragraph 3 LCP).

16. The exhibits in the section above are in conformity with the Law on Registration on Real Properties in Social Ownership (OG SAPK, No. 37/71), applied from 1 January 1972 according to its Article 7 and recognizing with its Article 6 the recording under the Law on Recording of Real Properties in the Social Ownership (OG, SFRY, No 12/65). They all show that **the contested real property was registered in social ownership** in the public register according to its Article 1, paragraphs 1and 3 and Article 3, as well as a holder of the right to use it was recorded the Primary School "MLADEN MARKOVIC" pursuant to its Article 1, paragraph 1, Article 2, paragraph 1 and Article 4, paragraph 1. As to **the MUNICIPALITY of VITI/VITINA,** it was not recorded **neither as the owner, nor even as the holder of the right on use** pursuant to Article 2, paragraph 1 or Article 4, paragraph 2. No changes under Article 1, paragraph 2 were registered until 21 March 2008. Therefore up to that date the status of the contested real property officially verified by the inscriptions made on the basis of the Law on Recording of Real Properties in the Social Ownership (OG, SFRY, No 12/65) and the Law on Registration on Real Properties in Social Ownership (OG SAPK, No. 37/71) was that of **social ownership** and *vice versa* **not of municipal ownership.**

17. The registration above is in conformity with the **constitutional property regime** established with the Constitution of the Socialist Federal Republic of Yugoslavia (OG SFRY, No.9/1974), in force from the date of its publication - 21 February 1974 (Article 402). According to its main principles (point I - preamble) it was adopted in order to realize and provide: socialist public relations, self-governance system of the working people, unification and harmonization of the material base of the socialist society, as well social-economic relations. The social property was to serve as their foundation in public interest (point II-preamble). Therefore no one - neither a socio - political community, nor an organization of associated labor, a group of citizens or individual–could have socially-owned resources in ownership or in possession (point III - preamble). Because they were considered common material basis of society existence and development, self managed by the organizations of associated labor, the self-managing communities of interest, the local communities and the other basic organizations in all spheres of public life (points III and IV - preamble). Apart from this general characteristics, the social property was regulated in Chapter I "The Socio–economic System", Section 1 CSFRY. With Article

12, paragraph 1 CSFRY it was established on all means of production and other means of associated labour, the products generated by them and incomes realized, **the resources intended for fulfilment of associated and general social needs,** nature prosperity and **goods in general use**. Thus the scope of social property was officially defined for the very first time after being undetermined for more than 20 years. Article 12, paragraph 2 CSFRY imperatively stated that **no one may acquire the right of property on social resources** representing work conditions in the organizations of associated labour, or material base for the functions of self-managing, socio-political communities and other organizations. Section 9, Chapter I "The Socio-economic System" governed specifically the **property relation regime**. Articles 78 and 79 CFRY set up the limitations of the ownership on movables and real estate of citizens and their associations. Article 81, paragraph 1 CSFRY specifically stated that there might be no **ownership right of land in cities and localities of an urban character, as well as in other areas envisaged for housing and other complex construction**, proclaimed as such by the Municipality in conformity with the conditions and pursuant to a procedure determined by the law. Further Article 85 CSFRY defined **the land as one of the goods of general interest** and provided that its usage should be under the conditions and in the way specified by the law. This was further elaborated by Article 86 CSFRY with the requirement that all lands must be used in conformity with statutorily-defined general conditions so that to ensure their rational utilisation and other general interests.

18. The *federal* property regime above was literally reproduced in Articles 11, 78, 79, 81, 85 and 86 of the Constitution of the Socialist Republic of Serbia (OG SFRY, No. 9/1974) and Articles 10, 78, 79, 81, 85 and 86 of the Constitution of the Socialist Autonomous Province of Kosovo (OG SAPK No.4/1974). Thus it was established as being identical at all levels–*federal, republican and provincial.* Without any subsequent changes it was in force in Kosovo on 22 March 1989 and as such was applicable in the terms of Section 1.1 of UNMIK Regulation 1999/24, amended by UNMIK Regulation No.2000/59, till 15 June 2008 when the Constitution of Republic of Kosovo entered into force.

19. Several are the main characteristics of this legal regime, relevant for this dispute, deduced from the systematic interpretation of its provisions. At first place, under its terms **no municipal ownership was recognized**. It was not established normatively **neither as an independent type of property, nor as a sub-type of the social ownership.** It was not regulated in any form by the provisions of the three 1974 constitutions or the ordinary legislation applicable in Kosovo. Without being defined by law, **municipal ownership did not exist as type of property at all** until it was introduced for the very fist time with UNMIK Regulation No. 2000/45 on Self-government of Municipalities in Kosovo, in force from 11 August 2000. For that reason till that date **no property could have been acquired as municipally-owned, the contested one being included**.

20. Since cadastral parcel nr.3259 once was registered as *social ownership intended for general social (educational) needs*, on one hand, and, on the other hand, as *land* was one of the *goods in general interest and use* under Article 85 of the 1974 Constitution of SFRY, Article 85 of the 1974 Constitution of the Socialist Republic of Serbia and Article 85 of the 1974 Constitution of SAPK, **no one could acquire property right on it.** Because of the imperative prohibition for this acquisition under Article 12, paragraph 2

of the 1974 Constitution of SFRY, Article 11, paragraph 2 of the 1974 Constitution of the Socialist Republic of Serbia and Article 10, paragraph 2 of the 1974 Constitution of SAPK. As it was explicitly explained and stressed in their preambles, **no one could have ownership on such socially – owned resources - neither socio-political community**, nor organization of associated labor, group of citizens or an individual. Therefore **this property right was forbidden for all municipalities** in SFRY since according Article 116, paragraph 1 of the 1974 Constitution of SFRY and Article 266, paragraph 1 of the 1974 Constitution of SAPK they were **basic socio-political communities** – status that made them addressees of the ban imposed with Article 12, paragraph 2 of the 1974 Constitution of SFRY, Article 11, paragraph 2 of the 1974 Constitution of the Socialist Republic of Serbia and Article 10, paragraph 2 of the 1974 Constitution of SAPK.

21. Apart from this specific restriction, **generally no asset, while social property, could belong to another owner** because of one main legal feature: **it never ceased to be owned by the broader social community understood as a unique group comprising all citizens of the former Yugoslavia.** Retrospectively, its original legal framework and that of self-management was the 1950 Act on Worker Management, supplemented in 1950 and 1951. The ideological rationale behind was that it combined a rejection of the Soviet-style system and symbolic return to the Marxist orthodoxy. The first socially-owned properties in circulation were state-owned properties that had been denationalized for that purpose (enterprises, industrial assets, real estate). Over time, the number and the variety of social properties increased, notably because the gradual disengagement of the state from the economy. However, they had not been determined officially for more than 20 years that served as a trial period for the authorities to identify their pervasiveness. The first formal definition of social property was given with CSFRY 1974 (Article 12) in such a broad scope that soon it pervaded the whole Yugoslav economic system, albeit in different proportions. Without any theoretical or empirical indication that the federation, the republics and/or the provinces ever had, or exerted, directly or indirectly ownership right on these assets, they were not state-owned. Undoubtedly they were not private. The social property was *sui generis* in nature **collective ownership** under self-management - **every citizen's indivisible property, characterized not by a lack of owner, but by a lack of identifiable owner.** Since **it belonged to the broader social community,** which term in its original definition was the sum of all nationals of SFRY, till 15 June 2008 when Article 159 of the Constitution of the Republic of Kosovo entered into force, the social ownership, regardless of the physical and/or legal form of its assets, **could not belong individually to anyone** because it was generally vested to everyone. On the plane of the instant case, this means that **the contested land while being social property was owned by the broader social community and could not be ownership of any natural and legal person, inclusive the MUNICIPALITY of VITI/VITINA.** The status of *social ownership*, while constitutionally regulated, excluded automatically the one of *municipal ownership* since they are legally, formally different and vice versa neither identical, nor substitutable.

Legal consequences of the 1985 exchange

22. The Decision nr.011-97 of the Municipal Assembly of VITI/VITINA, taken by the Council of Associated Work and the Council of the Local Communities in a session held on 4 October 1985 (OG KSAK, No. 15 of 15 October 1985) does not prove the active

legitimacy of the MUNICIPALITY of VITI/VITINA as owner of parcel nr.3259. Neither the legal grounds quoted in its introductory part, nor its disposition could qualify its as a *decision of a competent government authority for the acquisition of this cadastral plot* by the MUNICIPALITY of VITI/VITINA according to Article 20, paragraph 2 of the Law on Basic Property Relations (OG SFRY, No.6/1980). Therefore this land was not *acquired* by this self-managing and socio-political community for the first time with the approval of this decision on 4 October 1985.

23. The legal effect of this act, identified after systematic analysis of is content and the applicable laws in force on 4 October 1985, is not and moreover could not be a title for the ownership of the MUNICIPALITY of VITI/VITINA on cadastral parcel nr.3259 since municipal property was not provided constitutionally at that time (see Section 19 above). The legal consequences produced by the Decision nr.011-97 of the Municipal Assembly of VITI/VITINA of 4 October 1985 are different and are as follows.

24. Cadastral parcel nr. 2067/1, with the surface of 0.07.50 ha, located in the place called "KONJUSHKA-BASHTE" as explicitly certified in Article 2 of Decision nr.011-97 of the Municipal Assembly of VITI/VITINA on 4 October 1985 was *construction land–social ownership* with a *holder of the right of use on it (user)* Hunting Association "JELEN". Cadastral parcel nr.3259 with the surface of 0.07.50 ha, located in the place called "SELO SHKOLA" as explicitly certified in Article 2 of the same decision as of the same date was *construction land – social ownership* with *holder of the right of use* on it *(user)* the Primary School "MLADEN MARKOVIC". As *construction land* according to Articles 5, paragraph 1, Articles 6-7 of the Law on Land for Construction (OG of SAPK, No 14/80), **these two cadastral plots were social property as goods of general interest** in accordance with Article 12, paragraph 1 in conjunction with Article 85 of the Constitution of SFRY (1974), Article 10, paragraph 1 in conjunction with Article 85 of the Constitution of SAPK (1974) and Article 3 of the Law on Land for Construction. As a result of this status, they had to serve the needs of the social community and to be used in conformity with their destination and the statutorily-defined conditions so that to ensure their rational utilization and the general interests. Accordingly, Article 12, paragraph 2 and Article 10, paragraph 2 of the Constitution of SAPK provide that *no one might acquire the right of property on these social resources*, whereas Article 2, paragraph 2 of the Law on Basic Relations states that *no right of property can exist over objects that can only be under social ownership.* In line with this, Article 4, paragraph 1 of the Law on Transfer of Real Property (OG of SAPK, No. 45.1981) foresees that agricultural and *construction land,* forest and forest land *may not be transferred from social ownership, unless otherwise provided by law.* The only exception of this kind is the one envisaged in Article 4, paragraph 2 of the Law on Transfer of Real Property where the *transfer* of real properties under Article 4, paragraph 1 of the same law is allowed *between social legal persons, with or without compensation.* The rationale being that in this hypothesis the prohibition of Article 12, paragraph 2 and Article 10, paragraph 2 of the Constitution of SAPK is not violated - the construction land – being *socially-owned prior* this transfer remains *socially – owned - after* it is realized. It is *only the right of use* that is devolved from one social legal person to another social legal person - Article 2, point 2 of the Law on Trade of Immovable Property (OG of SRS, No.43/81 with amendment OG of SRS No. 24/85). Accordingly, Article 4, paragraph 2 of the Law on Transfer of Real Property alludes only to the transfer of the *real properties* under Article 4, paragraph 1 as *material*

objects (Article 2, paragraph 1 of the Law on Basic Property Relations) and *vice versa* not to the *ownership* on them (Article 3, paragraph 1 of the Law on Basic Property Relations). Because the latter is not affected - *the social property* on the construction land in view of the status of the transferor and transferee *is not alienated* or *otherwise altered.* This is why the transfer might be without or without any compensation, which in any case is limited to the expenses made for investments on the construction land. Since there is no disposal with the social property on it, according to Article 4, paragraph 2 of the Law on Transfer of Real Property *this compensation* could not be measured with the *value of this construction land.* Pursuant to the same provision, *no price could be at all determined in this case,* whereas it is mandatory for all contracts on the basis of which a social legal person transfers real property from social ownership to a third person, as well as for the contracts on the basis of which a social legal person receives real property from the holder of the ownership right (Article 12, paragraph 1 of the Law on Transfer of Real Property). As per the Law on Trade of Immovable Property (OG of SRS, No 43/81) on 4 October 1985 it was in force as amended with Article 61 of the Law on Amendments and Addenda to the Law on Fines for Offences (OG of SRS No. 24/85). However, its Articles 2 - 4, Article 5, paragraphs 1 and 2, Article 6, 7 and 13 equally applied in the entire territory of the Socialist Republic of Serbia pursuant to Article 33 on the basis of Article 300, paragraph 1, point 2 of the Constitution of SRS 1974), did not regulate differently the transfer of construction land and/or the one between social legal persons in a unique manner for the whole republican territory. Consequently, the republican Law on Trade of Immovable Property did not on the basis of its priority in the federal legal hierarchy prevail over the provincial Law on Transfer of Real Property pursuant to its Article 1 *in fine.* In fact the two legal acts fully correspond to each other since Article 2, point 1 in conjunction with Article of the Law on Trade of Immovable Property also admits the *unilateral transfer* of socially-owned property – construction land *from one social legal person to another*, as well as *its bilateral exchange* and clearly delimits both of them from the disposal through *alienation* of *socially-owned property*, as well as from the acquisition of the right of ownership to socially-owned immovable property by *citizens, associations of citizens and other legal persons* under Article 2, point 2. The grammatical interpretation of the these norms together with their systematic analysis clearly lead to the conclusion that in the hypothesis of transfer of socially–owned construction land from one social legal person to another or its exchange between them, there is no *alienation* of socially-owned property right and/or *acquisition* by any other person. Therefore after this transfer the construction land is not excluded from the patrimony of the social community but remains in its scope. As a result, the social ownership on this land is neither *modified* as a property right, nor is *ceased* under Articles 45 or 48 of the Law on Basic Property Relations. Decision nr.011-97 of the Municipal Assembly of VITI/VITINA complies with all these requirements applicable as of the date of its approval and entry into force – 4 October 1985. Issued on the basis of Article 4, paragraph 2 of the Law on Transfer of Real Property, it has as its corresponding legal effect defined in its Article 2-*the exchange of socially-owned immovable properties–construction land* (the first, parcel nr.2067/1 in its total surface of 0.07.50 ha and the second, parcel nr.3259 in part of its surface of 0.05.00 ha) *between one social legal person to another social legal person.* The scope of the exchange, explicitly determined in Articles 2 and 3 of the decision, complies with the provincial and republican applicable legal regime and is limited to swap of **the right on use of these two socially-owned real properties between the two social legal persons**

– **their holders.** Further, the enforcement of Decision nr.011-97 ordered with its Articles 3 and 4 is conformity with Article 1, paragraph 1 of the Law on Registration of Real Properties in Social Ownership requiring any change of this kind in the holder of the right of use to be recorded in the public register where they are inscribed. However, Article 4, paragraph 1 of the Law on Trade of Immovable Property in conjunction with its Article 33 and Article 1 of the Law on Transfer of Real Property required also a *contract for the exchange of socially-owned properties between these social legal persons concluded in writing*. Such evidence has not been presented by the parties, but its lack is not crucial. What is relevant is that either because of invalidity in the absence of such contract, or because of its scope, after the exchange under Decision nr.011-97, **the social ownership on cadastral parcel nr.3259 was preserved** – it was not alienated in whosesoever favor, including the MUNICIPALITY of VITI/VITINA, and continued to exist unmodified and non-ceased on this plot.

25. The second legal consequence of Decision nr.011-97 ensues from the status of the of **cadastral parcel nr.3259 as land for construction** – with its Article 2 *in fine* Hunting Association "JELEN" has been granted the right of use on part of it with surface of 500 m^2 **for the construction of a hunting house**. Therefore cumulatively applicable for this hypothesis of transfer of rights of use of socially-owned land for construction is the Law on Land for Construction (OG of SAPK, No.14/80) according to its Article 1. As of 4 October 1985 cadastral parcel nr.3259 being located within the borders of the general city plan of VITI/VITNA was *urban land of construction* as defined by paragraph 1 of Article 5 and Article in the legal form of *parcel for construction* under Article 7 of the Law on Land for Construction. As *social legal person* given with Decision nr.011-97 the *right of use* on *non-constructed part* of this parcel with the surface of 500 m^2 over the minimum of 300 m^2 and below the maximum of 1000 m^2 determined by Article 7 *in fine*, Hunting Association "JELEN" had also *the priority right of construction* pursuant to Article 50, paragraph 1 of the Law on Land for Construction. Under these circumstances applying its *Article 14, paragraph 1* of the same law, the MUNICIPALITY of VITI/VITINA had the power to give this non-constructed part of this holder of the priority right of construction for indefinite (permanent) use in order to build invested or other object in accordance with the general conditions foreseen for the usage of such parcels. On the other side, as long as the instant one represented social land for construction, the MUNICIPALITY of VITI/VITINA had the power to grant the right of use on it to the Hunting Association "JELEN" as a social legal person also on the basis of *Article 39, paragraph 1* of the Law on Land for Construction. So, its establishment pertained from *the priority right* of the social legal person – holder of the right of use on it and the *social ownership* on the land. With Article 11, paragraph 1 **the right of use on constructed land for construction is equalized to the right to use the parcel for construction** that includes the land under the building and the land that serves for regular use of buildings on which exist the right of use, as well as *the property right within the limits determined by law as long as the building exists*. Article 24, paragraph 1 of the Law on Land for Construction and Article 6, paragraph 1 of the Law on Trade of Immovable Property permit the ownership on a building on socially – owned urban land for construction together with the accessorial right on use of the land under it and the land necessary for its regular use as long as the building exists. This is not contrary to Article 81, paragraph 1 of the Constitution of the SFRY (1974) and Article 81, paragraph 1 of the Constitution of SAPK in conjunction with Article 8, paragraph 3 of the Law on Land for Construction since they prohibit *only*

the ownership right on land envisaged for housing and other complex construction, proclaimed as such by the Municipality in conformity with the conditions and procedure determined by the law. Therefore the second legal effect of Decision nr.011-97 of the Municipal Assembly of VITI/VITINA, dated 4 October 1985 ensues from its Article 2 *in fine* and consists of **the grant of the right of use on cadastral parcel nr.3259 in a non-constructed part with the surface of 500 m^2 as urban land for construction–social ownership to the Hunting Association "JELEN" as a social legal person in order to build a new hunting house according to its needs and the general conditions for the use of such parcels** pursuant to Article 14, paragraph 1 in conjunction with Article 50, paragraph 1 and Article 39, paragraph 1 of Law on Land for Construction. In other words, because of the status of this real property on 4 October 1985 as construction land – social ownership the regimes under the Law on Transfer of Real Property and the Law on Land for Construction were cumulated: a) first with a **transfer of the right of use on this parcel as socially-owned** from the Primary school "MLADEN MARKOVIC" to the Hunting Association "JELEN" as social legal persons; and b) **the establishment of the right of use for construction** in favor of the Hunting Association "JELEN" on the same parcel for the building of a new hunting house.

26. Having these two legal consequences, the Decision nr.011-97 of the Municipal Assembly of VITI/VITINA, dated 4 October 1985 did not modify, nor did otherwise affect the ownership right on the land in the borders of cadastral parcel nr.3259 – **prior and after its approval on 4 October 1985 it remained socially-owned** in conformity with the prohibition for someone's else property right on construction land under Article 12, paragraph 2 and Article 81, paragraph 1 of the Constitution of SFRY (1974) and Article 10, paragraph 2 and Article 81, paragraph 1 of the Constitution of SAPK (1974). This imperative ban excluded the ownership right on *all socially-owned recourses–goods of general use* under Article 85 of the Constitution of SFRY (1974) and Article 85 of the Constitution of SAPK (1974), *including the construction land,* generally with respect to *all socio-political communities*, organizations of associated labor, groups of citizens and individuals (point III of the preambles). Having this scope, this prohibition was also valid for the *municipalities* since under Article 116, paragraph 1 the Constitution of SFRY (1974) and Article 116, paragraph 1 of the Constitution of SAPK (1974) they were basic *socio-political communities.* Therefore the arguments of the appellant that transferring the right on use on the contested parcel in favor of the Hunting Association "JELEN" with Decision nr.011-97, the MUNICIPALITY of VITI/VITINA has detained the ownership on it is without legal basis since **the existence of its property right as a socio-political community on this socially-owned construction land was constitutionally forbidden.**

27. Accordingly, Decision nr.011-97 of the Municipal Assembly of VITI/VITINA of 4 October 1985 was issued as **on the basis of the administrative competences** of **the MUNICIPALITY of VITI/VITINA as a local authority** and *vice versa* **not on the basis of its property right as owner of cadastral parcel nr.3259.** Thus it fulfilled its **public functions** and contrariwise **did not exercise any of the non-public rights associated with ownership** according to the traditional Roman law triptych defined with Article 3, paragraph 1 of the Law on Basic Relations. *First*, Article 116, paragraphs 1 and 2 of the Constitution of SFRY (1974) and 116, paragraphs 1 and 2 of the Constitution of SAPK (1974) defined the municipality as self-managing basic socio-political community, based on the *government* and self-management of working class and all working people where

conditions for their life and work were provided, their common needs were satisfied and government and administration of social issues were realized. Pursuant to Article 116, paragraph 3 of the Constitution of SFRY (1974) and Article 116, paragraph 3 of the Constitution of SAPK (1974) empowered the municipality with *all government and administration functions except the ones, according to the same constitutions, were realized in wider socio-political communities.* Some of these main functions illustratively enumerated in Article 117, paragraph 2 of the Constitution of SFRY (1974) and Article 117, paragraph 2 of the Constitution of SAPK (1974) included the creation of conditions for the life and work, coordination of the economic and social development, performance of affairs of common and general public interest, immediate implementation of the laws unless it was within the competences of the bodies of wider socio-political communities, realization of the lawfulness of property, coordination of the usage of goods in general use, etc. Apart from these, rights and obligations of the municipality had to be determined in its Statue - Article 117, paragraph 1 of the Constitution of SFRY (1974) and Article 117, paragraph 1 of the Constitution of SAPK (1974). In sum, **the municipalities** were vested with **self-managing, public and other social functions** in a very wide spectrum in order to exercise them in conformity with the constitutional, law and statute provisions as local authority and administration - point IX of the preamble and Article 94 of the of the Constitution of SFRY (1974) and point IX of the preamble and Article 94 of the Constitution of SAPK (1974). Therefore the municipalities, namely their organs, were at that time **public local bodies** empowered with **administrative competences**. *Second*, based on this general status, the municipalities were specifically vested with a number of *public functions with respect to construction land in social ownership.* Article 81, paragraph 2, second sentence of the Constitution of SFRY (1974) and Article 81, paragraph 2, second sentence of the Constitution of SAPK (1974) mode and conditions for the utilization of such land should be determined by the municipality. Its powers were set out in many provisions of the Law on Land for Construction. According to Article 3 the municipality provides rational use of socially-owned land for construction, as well as realization of other common interests regarding its arrangement. According to Article 10, paragraph 1 it governs the urban land for construction, unless otherwise provided by law. Pursuant to Article 14, paragraphs 1 and 2 and Article 39, paragraph 1 it may grant the right of use for construction. Article 32 provides that the management designated for construction is to be undertaken on the basis of self-government by the municipalities in conformity with the principles contained in this law. Article 37, paragraph 1 foresees that the municipal assembly determines the obligations of the holders of the rights of use on construction land and other rights related to its usage. Summarized, the functions of the municipality defined by these as well as by some other provisions of the Law on Land for Construction are to be qualified as **administrative competences of a local public body for the governance, management and arrangement of socially-owned land for construction**. In practical terms given the decentralized system in place in the former SFRY, in a first phase, a socially-owned asset of this kind was typically placed **under the administration of municipality** in temporary custody till the municipal authorities decided to whom and for what purposes to allocate it for use. *Third*, this constitutional and legal regime was in full correspondence with the Statute of the MUNICIPALITY of VITI/VITINA (OG of SAPK, No.3/1976), in force as of 4 October 1985. Its Article 84 defined as activities of specific social interest for the MUNICIPALITY of VITI/VITINA in the area of economy the *maintenance and the arrangement of the land for construction.*

Article 154, paragraph 1, first sentence empowered the Municipal Assembly to determine the land for construction and the land in other areas foreseen for construction of residential buildings and other construction complexes, as well as the manner and conditions of utilization of that land. Article 154, paragraph 1, second sentence explicitly provided that by a decision of the Municipal Assembly should be determine the manner of having the permit for utilization of the land, *the right on use of social land and the manner of designation of the land foreseen for construction.* Article 276 specified in the text of Decision nr.011-97 of the Municipal Assembly of VITI/VITINA of 4 October 1985 as one of its two legal grounds stated that Council of Associated Labor and Council of Local Communities shall equally discuss and decide within their scope of activities *on the maintenance of cadastral land.* Summarizing all arguments above based on the constitutional, legal and statutory regime of the municipalities as self-managing basic socio-political communities - holders of public functions, the conclusion to be reached is that Decision nr.011 97 was issued by the Municipal Assembly of VITI/VITINA **as administrative activity of a local public administration body** in compliance with the applicable legislation in Kosovo, within the administrative competences vested in it, and for the purposes that such competences were vested for-maintenance, rational utilization and arrangement of the land for construction. Contrariwise, by Decision nr.011-97 **the MUNICIPALITY of VITI/VITINA did not act in the non-public capacity of an owner and did not exercise a property right on the contested parcel nr.3259.**

No general normative legal grounds for the transformation of the contested social ownership into municipal

28. There is absolutely no law applicable in Kosovo according to Section 1.1 of UNMIK Regulation 1999/24, as amended, or adopted by the Assembly of the Republic of Kosovo – *normative basis for the transformation* of *the social ownership* on old cadastral parcel nr.3259 or the newly formed cadastral parcel nr.3259-2 into *municipal ownership* after 4 October 1985.

29. UNMIK Regulation No. 2000/43 on the Number, Names and Boundaries of Municipalities, in force from 27 July 2000, as amended by UNMIK Regulation No. 2004/36, the latter in force from 8 September 2004, provides that Kosovo *shall* have thirty municipalities as set out in the annexed Schedule A (Section 1.1) – each with area and boundaries delineated by component cadastral zones set out in the annexed Schedule B (Section 2). Individualized in this way, all these *post-war municipalities* in Kosovo are newly formed **without any kind of legal succession**–structural, functional or patrimonial – with the *pre-war municipalities*. So, even if hypothetically is assumed that the contested parcel was owned in the past by the old pre-war MUNICIPALITY of VITI/VITINA, in the absence of such legal succession, *defined by law*, it could not be considered transmitted by law itself to the new post-war MUNICIPALITY of VITI/VITINA and thus acquired by it pursuant to Article 21 of the Law on Basic Relations.

30. UNMIK Regulation No.2000/45 on Self-government of Municipalities in Kosovo, in force from 11 August 2000, as amended by UNMIK Regulation No. 2006/54, in force from 5 September 2006, *establishes* officially as provisional institutions for democratic and autonomous self-government at local level the municipalities in Kosovo and defines them as basic territorial units (Section 2.1). Each municipality is recognized its own legal status, as well as *the right to own and manage property* (Section 2.4). However, there are

only two provisions related to its – Section 44.1 requires all land and buildings owned or occupied by the municipality to be registered in a specific record, whereas Section 44.2 prohibits their sale or lease for more than ten years without approval of UNMIK acting as Central Authority. However, **no items–immovable or movable–are enumerated or are otherwise determined as being objects–municipal property *ex leges***. In particular, no socially-owned assets located in the territories of the municipalities are converted into municipal. Thus UNMIK Regulation No.2000/45 only introduces the municipal property on land and buildings in view of *its future acquisition* from 11 August 2000 onwards *but has no retroactive legal effect on the social ownership of assets administered by the pre-war municipalities in the past.*

31. UNMIK Regulation No. 2003/13 on the Transformation of the Right of Use to Socially-owned Immovable Property, in force from 9 May 2003, as amended by UNMIK Regulation No. 2004/45, in force from 19 November 2004, *here is not applicable.* Its scope is limited to the rights of use on property registered *in the name of socially–owned enterprise* as defined by UNMIK Regulation No. 2002/12 *transferred to their subsidiary corporations in* accordance with Section 8 of UNMIK Regulation No. 2002/12 and then transformed into leasehold, as well to *land assets included in the liquidation of a socially owned enterprise* in accordance with Section 9 of UNMIK Regulation No. 2002/12. As *the contested property has never been part of the assets of any socially-owned enterprise* and/or registered in its name as per the right of use, it is not subject to the transformation under UNMIK Regulation No. 2003/13, as amended.

32. UNMIK Regulation No. 2005/13 on the Long-term Allocation of Socially-owned Immovable Property managed by Municipalities in Kosovo, in force from 4 March 2005, with its Section 2.1 authorizes a municipality *to allocate* any property, as defined by Section 1 – socially-owned land, including any structures thereon, and parts thereof – for which it is the holder of a right as defined by Section 1 - registered in cadastral records or court-authenticated title documents as a holder of a right of use or as a possessor – to a natural or legal person or entity for the duration of the term as defined by Section 1 – period of time up to ninety nine years. Pursuant to Section 2.2 *the authority* regarding this allocation is a *public* one – selection of a person or entity through non-discriminatory, open, transparent and fair procedures in conformity of the Law on Public Procurement in Kosovo, promulgated with UNMIK Regulation No. 2004/3 in order to ensure proceeds – public money subject to the Law on Public Financial Management and Accountability, promulgated with UNMIK Regulation No. 2003/17, as amended. The *legal effect* of the allocation is *change of the municipality as holder of the right on use or the possession* of the land by the selected beneficiary as new holder in the respective official record for the duration of the term (Section 2.3). Upon termination of this allocation, *the right to use or hold the property reverts to the municipality* (Section 5). This procedure has never been applied by the MUNICIPALITY of VITI/VITINA for the contested parcel and, moreover, even used its legal effect would have been limited to a *temporary change of* the *right of use* or *possession* and not of the property. The land is classified *socially-owned* before the allocation (Section 2.1), during its term (Sections 3–4) and after its termination (Section 5). The allocation *could not alter this social ownership* in any way, namely to convert it into *municipal.* Hence, such transformation has not occurred for the contested parcel on the basis of UNMIK Regulation No. 2005/13.

33. The contested socially-owned land could not be acquired by the MUNICIPALITY of VITI/VITINA on the basis of *adverse possession* as this acquisition of social property till 20 August 2008 was imperatively prohibited by Article 29 of the Law on Basic Relations.

34. The Law No. 03/L-154 on Property and Other Real Rights (OG of the Republic of Kosovo No.57/2008), in force from 20 August 2008, *does not apply to real rights in public or common assets–subject to specific legislation*, unless it is otherwise provided in this law. As all types of public properties *are generally excluded from its scope*, it does *not regulate the transition) from one type into another,* namely from social ownership into municipal ownership.

35. The Law No. 03/L-040 on Local Self Government (OG of the Republic of Kosovo No.57/2008), in force from March 2008, recognizes *the right of the municipality in the capacity of a legal person to have the right to own and manage immovable and movable properties* – Article 5, item (b) and Article 14, paragraph 1. Further it is allowed to sell and lease them according to the law, except for the sale of land that will be regulated by a special law - Article 14, paragraph 1 and is obliged to maintain a register for those owned or occupied by the municipality. Apart from these few provisions, in the Law No. 03/L-040 on Local Self Government there are no other related to the municipal property. Thus it is *merely defined as a type of property,* however, without regulation of its creation, content, transfer, protection, and termination. In particular, there are no categories of *real properties determined as municipal* by the Law No. 03/L-040 on Local Self Government, such *granted in municipal ownership by the same law.* No *transformation*, whatsoever is foreseen for *the socially-owned assets into municipal.* Without such explicit provisions, the entry into force of the Law No. 03/L-040 on Local Self Government had absolutely no impact on the status of cadastral parcel nr.3259 – *neither the social ownership on it ceased* pursuant to Article 45-48 of the Law on Basic Relations, *nor municipal ownership was acquired* by the MUNICIPALITY of VITI/VITINA pursuant to Article 20 - 21 of the Law on Basic Relations, *derivatively or not.*

36. The Constitution of the Republic of Kosovo, in force from 15 June 2008, declares the right to property as one of the values of its constitutional order (Article 7, paragraph 1) and guarantees this right to every natural and legal person (Article 46, paragraph 1 in conjunction with Article 21, paragraph 4). However, the *types of property* are not defined by the Constitution of the Republic of Kosovo – per all of them Article 121, paragraph 1 delegates this question to the ordinary legislation. Accordingly, its Chapter X deals with the general principles, organization and operation of the local self-government *and does not regulate the municipal ownership* at all. Governed directly by the Constitution of the Republic of Kosovo without delegation is only the socially-owned property. According to its Article 159, paragraph 2 **all socially owned interests in property shall be owned by the Republic of Kosovo.** The norm is explicit, self-applicable and general in scope – all **socially-owned properties**, without exception, are normatively converted into **state-owned** by the Constitution of the Republic of Kosovo itself. This transformation in force from 15 June 2008 automatically excludes any other after this date for same socially-owned properties – namely, their conversion into municipal.

37. The conclusion is that the contested land was not acquired by the MUNICIPALITY of VITI/VITINA after 4 October 1985 as a consequence of normative transformation of its social property into municipal in whatsoever legal form.

No individual legal grounds for the transformation of the contested social ownership into municipal

38. The Decision of the Municipal Assembly of VITI/VITINA was adopted on 6 March 2008 with ref. nr.01-013/802/10.03.2008 pursuant to Article 49, paragraph 1, point 2 of the Statute of the MUNICIPALITY of VITI/VITINA in order to allow *"the change of the purpose of the municipal building placed on cadastral parcel nr.3259/2 from the previous user – former Hunting Association "JELEN" (after 1999 "DRENI") with a main office in VITI/VITINA to the new user Directorate for Education, Culture, Youth and Sports of the MUNICIPALITY of VITI/VITINA" (Article 1).* This decision being **issued by a non-competent administrative body shall be deemed absolutely invalid administrative act** pursuant to Article 92, item (b) of the Law No 02/L-28 on the Administrative Procedure (LAP), promulgated with UNMIK Regulation No 2006/3. As such it is *to be always ignored* by any natural and legal person to whom it is directed – Article 93, paragraph 2 LAP. Its absolute invalidity might be declared *at any time* – Article 93, paragraph 3 LAP. This why and because it is prejudicial matter in this dispute the court is authorized by Article 13 LCP to determine it incidentally in the framework *this contested procedure. On this point is to be recalled that according to Article 2 LAP the administrative competences is a set of competences over cases and territory of the public administrative body envisaged by or by law.* According to the principle of legality under Article 3, paragraph 1 LAP the public administrative bodies *shall exercise their administrative activity in compliance with the applicable legislation in Kosovo, within the scope of the competences vested in them,* and for the purposes they were vested for. The same rule is reiterated in Article 16, paragraph 1 LAP – the competences of the *public administrative bodies are vested by laws and by-laws* and their exercise in this scope is binding. In violation of all these requirements, the Municipal Assembly of VITI/VITINA adopted Decision ref. nr.01-013 **without any normative authorization – there is no provision of whatever legal rank in force on 6 March 2008 empowering this local public administrative body to declare or otherwise appropriate cadastral parcel nr.3259/2 and/or the building constructed on it as municipal.** Article 49, paragraph 1, point 2 of the Statute of the MUNICIPALITY of VITI/VITINA, dated 27 April 2001, specified as the only legal ground of Decision ref. nr.01-013/802, says that the *President of the Municipal Assembly of VITI/VITINA is responsible to propose decisions, provisions and other general acts to be approved by the Assembly.* This provision apart from being *generic* is *procedural* - refers to the proposals to be made by the President to the Municipal Assembly of VITI/VITINA. It *does not vest* to the President and/or to the Municipal Assembly of VITI/VITINA *any competences related to the property regime.* Issued on the basis of Article 49, paragraph 1, point 2 of the Statute of the MUNICIPALITY of VITI/VITINA, dated 27 April 2001, Decision ref. nr.01-013/802 is rendered by a non-competent public administrative body absolutely invalid administrative act. Pursuant to Article 93, paragraph 2 LAP **it did not produce any legal consequences whatsoever, including modification of the ownership on the disputed land/or building.**

39. The Decision of the Municipal Assembly of VITI/VITINA was adopted on 1 October with ref. nr.01-013/4608/03.10.2008 pursuant to Article 13 of the Law No. 03/L-040 on Local Self Government. This norm states only that the *Mayor shall have the right to issue instructions and decisions and does not envisage any powers for the reversal of socially-owned properties into municipal.* Therefore this administrative act is also issued

without competences vested by any law and/or any by-law contrary to Article 2, Article 6, paragraph 1 and Article 16, paragraph 1 LAP and is absolute invalid under Article 92, item a) LAP. Since it has no legal consequences pursuant to Article 93, paragraph 1 LAP, the acquisition of the contested property by the MUNICIPALITY of VITI/VITINA could not originate from this individual administrative act. There are two more arguments for the same conclusion. The *first* – the scope of Decision ref. nr.01-013/4608/03.10.2008 of the Municipal Assembly of VITI/VITINA *is limited to socially-owned real properties registered in the name of socially-owned enterprises.* The *contested property was never part of the assets of any socially-owned enterprise, had never been registered in the name of any socially-owned enterprise and could not be privatized* according to the Law on the Privatization Agency of Kosovo. Hence, it is not included in the scope of the Decision with ref. nr.01-013/4608/03.10.2008 and the latter is not applicable to cadastral parcel nr.3259 and/or cadastral parcel nr.3259/2. The *second* argument is that in the course of the proceedings Decision ref. nr.01-013/4608/03.10.2008 was invalidated by Decision of the Municipal Assembly of VITI/VITINA adopted on 5 March 2010 with ref. nr.01-013/893 according to Article 40, paragraph 2, Article 82, paragraph 3 of the Law No. 03/L-040 on Local Self Government and Article 22.1 of the Statute of the MUNICIPALITY of VITI/VITINA, dated 18 November 2008. As absolutely invalid, non-applicable and subsequently officially abrogated by the Municipal Assembly of VITI/VITINA, Decision ref. nr.01-013/4608/03.10.2008 has no legal effect and therefore cannot be deemed as an individual administrative act-legal ground for the acquisition of the contested immovable by the MUNICIPALITY of VITI/VITINA according to Article 20, paragraph 2 of the Law on Basic Relations.

40. Cadastral parcel nr.3259-2, formed out of the old cadastral parcel nr.3259-2, was registered as property of the MUNICIPALITY of VITI/VITINA according to Decisions with ref. nr.01-013/802/10.03.2008 and with ref. nr.01-013/4608/03.10.2008 of the Municipal Assembly of VITI/VITINA (See Letter nr.07-02/397/08.02.2010 of the Directorate for Geodesy, Cadastre and Property – VITI/VITINA). Based on these two absolutely invalid administrative acts and as accessorial to them **the decision of the Municipal Cadastral Office – VITI/VITINA for the respective change of the cadastral registration made on 21 March 2008 is also absolutely invalid** – first under Article 92, item b) LAP and second under Article 92, item d) LAP as issued in violation of the procedural rules set by the Law No.2002/05 on the Establishment of the Immovable Property Rights Register, promulgated by UNMIK Regulation No 2002/22, amended and supplemented by Law No. 2003/13, promulgated by UNMIK Regulation No 2002/22, in force from 18 August 2003. The request for this registration was not duly supported with the documentation for immovable property rights of the MUNICIPALITY of VITI/VITINA as demanded by the applicable law (Section 3.1). It was approved although it had to be rejected since this documentation was not sufficient to prove that the MUNICIPALITY of VITI/VITINA was the holder of the claimed ownership - Section 3.4 (i), it contained irregularities - Section 3.4 (ii) and the validity of the supporting Decisions ref. nr.01-013/802/10.03.2008 and ref. nr.01-013/4608/03.10.2008 of the Municipal Assembly of VITI/VITINA was in question-Section 3.4 (iii). The decision of the Municipal Cadastral Office–VITI/VITINA for this cadastral change, dated 21 March 2008 infringed also the similar procedural rules of Section 8.5 and Section 8.6, second sentence of the Law No. 2003/25 on Cadastre, as amended by Law No. 02/L-96 – the registration had to be rejected and not approved as it was not supported with documentation for municipal ownership in compliance with the

provisions of the applicable law. Finally, none of the requirements for *parcel formation through subdivision* from the old basic cadastral parcel nr.3259 of the new cadastral parcel nr.3259/2 foreseen by the Law No. 2003/25 on Cadastre, as amended by Law No. 02/L-96 were dully fulfilled when this change was registered on 21 March 2008. For all these reasons, **the decision of the Municipal Cadastral Office-VITI/VITINA** for this new cadastral registration of the contested property is absolutely invalid under Article 92, items b) and d) LAP and being deprived according to Article 93, paragraph 1 LCP from any legal effect is unable to verify officially the current status of the disputed property. This is why all certificates for immovable property rights issued after 21 March 2008 by the Municipal Cadastral Office-VITI/VITINA, including the ones collected in the fist case with nr.P-70101007-03259-2/22.10.2008 and nr.P-70101007-03259-2/11.01.2010, are not complied in the appropriate form within the scope of authorization of this public entity under the Law No.2002/05 on the Establishment of the Immovable Property Rights Register and/or the Law No. 2003/25 on Cadastre, as amended, and contradict their requirements for valid cadastral registration of the claimed immovable property right. Hence, all these certificates do not have the evidentiary effect of official documents under Article 329, paragraph 1 LCP and are unable to prove the municipal ownership on cadastral parcel nr.3259/2, registered as newly formed on 21 March 2008. Moreover, all of them in their column A, titled *"PRONARI/POSEDUESI–VLASNIK/DRZALAC–OWNER/POSESSOR"* certify that the MUNICIPALITY of VITI/VITINA is **possessor** of cadastral parcel nr.3259/2 and **not its owner.**

41. Based on this analysis, the conclusion of this court of second instance is that the MUNICIPALITY of VITI/VITINA as a party bearing according to Article 319, paragraph 1 and Article 322, paragraph 2 LCP the exclusively burden to prove all facts for the existence of its ownership right on the contested immovable property has failed to prove them in the present contested proceedings. There are no evidence adduced that it has ever been acquired by the MUNICIPALITY of VITI/VITINA by law itself, a legal transaction, inheritance or valid decision of a competent government authority according to Article 20 of the Law on Basic Relations and/or the respective provision of the Law No. 03/L-154 on Property and Other Real Rights. Since the active legitimacy of the MUNICIPALITY of VITI/VITINA as the owner is not established with certainty (Article 8 LCP), the court of first instance acting in accordance with Article 322, paragraph 1 LCP has applied the rules for the burden of proof under Article 319, paragraph 1 and Article 322, paragraph 2 LCP and has concluded that the claimed municipal ownership is non-existing. Judgment C. nr.66/2009 as per its Point 1 has been rendered by the MC of VITI/VITINA *without erroneous application of the substantive law* under Article 184 LCP and could not be modified in this part by this court of second instance pursuant to Article 195, paragraph 1, item e) in conjunction with Article 201, paragraph 1, items d) LCP, as requested by the appellant.

Passive Legitimacy of "DRENUSHA" HUNTING ASSOCIATION

42. Since the active legitimacy of the claimant the MUNICIPALITY of VITI/VITINA is not successfully proved in this contested procedure, all questions related to the passive legitimacy of the respondent "DRENUSHA" HUNTING ASSOCIATION to the claim are to be left without consideration. *At first place*, because there is no duly filed counterclaim by the litigant in the first instance proceedings according to Article 256, paragraphs 1 and 6 LCP that is to be adjudicated and decided in the enacting clause of the judgments of the

first and/or second instance court in accordance with Article 143, paragraph 1 and Article 160, paragraph 3 LCP. If "DRENUSHA" HUNTING ASSOCIATION alleges ownership on the same property, it is to submit a claim for its confirmation for adjudication in a new contested procedure before the competent Kosovo court according to Article 2, paragraph 1 LCP. In the present civil case the existence of ownership right of the "DRENUSHA" HUNTING ASSOCIATION has not been introduced in its adjudication scope under Article 2, paragraph 1 and cannot be decided neither through its confirmation, nor through its rejection. *At second place*, since the ownership of the MUNICIPALITY of VITI/VITINA on the disputed real property *has never come into existence*, by definition *it could not cease to exist* on any of the legal grounds for such termination determined by the Law on Basic Relations and/or the Law No. 03/L-154 on Property and Other Real Rights, including its acquisition – derivative or non-derivative – by "DRENUSHA" HUNTING ASSOCIATION. This is why all arguments of the litigants in this connection, namely the ones related to the existence or non-existence of legal succession between the Hunting Associations "JELENDI", "DRENI" and "DRENUSHA", as irrelevant are not to be examined. *At third place*, the court of second instance acting *ex officio* pursuant to Article 76 LCP shall only consider that the "DRENUSHA" HUNTING ASSOCIATION at present is established and registered as a non-governmental organization according to Section 2.1 and Section 4.2 respectively of UNMIK Regulation No.1999/22 on the Registration and Operation of Non-governmental Organizations in Kosovo. This status has been verified by a certificate issued pursuant to Section 4.6 of the same regulation and has been acknowledged by the representative of the MUNICIPALITY of VITI/VITINA in the appeal hearing. Therefore "DRENUSHA" HUNTING ASSOCIATION *has the status of a legal person* under Section 6.1 UNMIK Regulation No.1999/22 and as such pursuant to Article 73, paragraph 1 LCP has the procedural capacity to be a party in the present proceedings.

Conclusion

43. After this appellate review under Article 194 LCP the court of second instance shall reject the appeal of the MUNICIPALITY OF VITI/VITINA partially as non-based and shall confirm judgment C.nr.66/2009 of the Municipal Court of VITI/VITINA, dated 19 March 2010 as per **Points 1 and 3** of the enacting clause pursuant to Article 195, paragraph 1, item d) in conjunction with Article 200 LCP since no grounds under Article 181, paragraph 1 LCP have been established in these parts with respect to the rejection of the ownership claim as submitted to this case by the MUNICIPALITY of VITI/VITINA against "DRENUSHA" HUNTING ASSOCIATION and the responsibility for the procedural costs charged to the claimant pursuant to Article 452, paragraph 1 LCP.

44. After this appellate review under Article 194 LCP the court of second instance shall approve the appeal of the MUNICIPALITY OF VITI/VITINA partially as based and shall modify judgment C.nr.66/2009 of the Municipal Court of VITI/VITINA, dated 19 March 2010 through invalidation of as **Points 2 and 4** of the enacting clause because the existence of the ground under Article 182, paragraph 2, point (n) LCP contained in the appeal has been determined (see section 9 above) with respect to these two parts that exceed the scope of the adjudicated claim of the MUNICIPALITY of VITI/VITINA against "DRENUSHA" HUNTING ASSOCIATION and pursuant to the competences of the court of second instance on the appeal defined by Article 195, paragraph 1, item e) in conjunction with Article 201, paragraph 1, items e) 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.170/2010 on 06.10.2010

PRESIDING JUDGE

ROSITZA BUZOVA

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