THE DISTRICT COURT OF GJILAN/GNJILANE

30th September 2011 **AC.nr.35/2011**

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 ILMI BRAHIMI from GJILAN/GNJILANE against the respondent the Municipality of GJILAN/GNJILANE on a claim for confirmation of ownership with legal basis Article 254, paragraph 1 in conjunction with Article 532, paragraph 1 of the Law No. 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No. 38/2008) (hereinafter "LCP"),

Having adjudicated the appeal of ILMI BRAHIMI against judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 for rejection of the claim above in a second instance hearing for direct examination of the case under Article 190, paragraphs 2 and 4 LCP held on 30th September 2011,

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

JUDGMENT

The appeal of ILMI BRAHIMI from GJILAN/GNJILANE is **REJECTED** as non-based and judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 is **CONFIRMED**.

REASONING

I. Procedural Background

1. By judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 it was rejected as unfounded the statement of the claim submitted by ILMI BRAHIMI from GJILAN/GNJILANE against the Municipality of GJILAN/GNJILANE to confirm his ownership on cadastral parcel nr.918, in the place called "POPOVICA", culture – 4th class arable land, with a surface of 00.32.20 ha, registered in Possession List nr.1750, Cadastral Zone (CZ) GJILAN/GNJILANE in the name of the Municipality of GJILAN/GNJILANE, and to oblige the respondent to recognize this right. Pursuant to Article 452, paragraph 2 LCP it was also decided each party to bear its own costs of the proceedings.

2. On 30th November 2011, an appeal was submitted by ILMI BRAHIMI against this judgment challenging it entirely for *substantial violations of the 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 as supplemented in the hearing under Article 190, paragraphs 2 and 4 LCP is the second instance court to annul judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 with remittal of the case to the first instance court for retrial *or* to modify it with approval of the claim.

3. According to Article 187, paragraph 1 LCP on 10th December 2010 the appeal was served to the Municipality of GJILAN/GNJILANE for reply within 7 days. As it was not submitted until the expiry of this prescribed period on 17th December 2010, on 26th January 2011 the Municipal Court of GJILAN/GNJILANE sent the appeal together with the case file to the District Court of GJILAN/GNJILANE pursuant to Article 188, paragraph 1 LCP.

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

4. This second instance civil case AC.nr.35/11 of the DC 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 EULEX Judge acting as Delegate of the President of the Assembly of the EULEX Judges as per 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 in conjunction with Article 3, paragraph 7 of the Guidelines for Case Selection and Case Allocation for EULEX Judges in civil cases, adopted by the Assembly of the EULEX Judges on 27th January 2011, 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 case to a 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 and two Kosovo Judges–members, designated after derogation Decision ref.nr.JC/EJU/OPEJ/2496/ff/11 of the President of the Assembly of EULEX Judges, dated 5th July 2011 under Article 5, paragraph 5 of the Law No. 03/L-053 on Jurisdiction by Decision Agj.nr.161/11 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.35/11 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 terms of Article 186, paragraph 2 LCP. Judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 was served to ILMI BRAHIMI on 19th November 2010. His appeal was filed to the District Court of GJILAN/GNJILANE through the Municipal Court of GJILAN/GNJILANE on 30th November 2010 within the 15-days time period prescribed by Article 176, paragraph 1, first sentence LCP. *At third place,* the appeal is not impermissible under Article 186, paragraph 3 LCP. It is lodged by the claimant in the first instance proceedings who has the right and the 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 and/or the second instance procedure under Article 176 – 205 LCP initiated by it.

IV. Summary of the first instance proceedings

7. On 25th October 2002, ILMI (RAIF) BRAHIMI as a claimant filed a claim against the Municipality of GJILAN/GNJILANE as a respondent for confirmation of ownership right with value of the contest 200 Euros. Allegedly in 1981 by a verbal contract with the previous owner SHEFQET SOPI, the claimant bought cadastral parcel nr.918 in the place called "POPOVICA", culture–arable land, 4th class, with a surface of 00.32.20 ha, registered in Possession List nr.1750, bordering on his cadastral parcel nr.920/2, registered in Possession List nr.4165. After payment of the price, the claimant entered into possession of cadastral parcel nr.918 and had been using it ever since without obstruction by anyone. While applying for its transfer in the cadastre, he found existing registration of this real estate in the name of the Municipality of GJILAN/GNJILANE. This was impossible as cadastral parcel nr.918 was surrounded by private properties and had been continuously used by the previous owners. The statement of the claim was to confirm the property of the claimant on the contested cadastral parcel, to oblige the respondent to recognize his right and to allow its registration by the Directorate for Geodesy, Cadastre and Property (DGCP) – GJILAN/GNJILANE in the name of the claimant, as well as to compensate his costs of the proceedings within 15 days from the date of entry into force of the judgment.

8. The claim was registered for adjudication in C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE. No preliminary hearing was scheduled in the case based on the exception for its conduct previewed by Article 284, paragraph 4 of the Law on Contentious Procedure (Official Gazette of the SFRY No. 4/1977, 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991 and Official Gazette of the SRS No. 27/1992, 31/1993, 24/1994, and 12/1998).

9. The first instance proceedings commenced directly with a main hearing held on 4th February 2003, subsequently adjourned for 17th February 2003, 17th March 2003, 1st April 2003, and 15th December 2008.

10. By ruling C.nr.559/02 of the Municipal Court of GJILAN/GNJILANE, dated 26th December 2008 this contested procedure was suspended for 180-days period as initiated against a public authority based on Article 277, item f) LCP, Articles 67 and 68 of the Law No.03/L-048 on Public Financial Management and Accountability with notifications to the Ministry of Justice and the Ministry of Economy and Finance.

11. After the suspension period had expired, the contested procedure was resumed and continued with sessions of the main hearing on 25th November 2009, 28th January 2010, 16th March 2010, 21st April 2010, 26th May 2010, 9th August 2010, 15th September 2010 and 6th October 2010. After the completion of all its stages, the first instance trial was concluded pursuant to Article 436, paragraph 1 LCP.

12. By judgment C.nr.559/2002 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 the statement of the claim was rejected as unfounded. In the reasoning it was pointed out that the purchase contract for cadastral parcel nr.918 was concluded by the claimant with the deceased SHABAN SHURDHANI who was not its owner, since it was registered in the name of RAHIM MUHARREM NAMANI and ISLAM DAUT ISLAMI as co-owners with ½ ideal parts each one of them till 1962–1963 when its registration was changed as social ownership of the Municipal Assembly of GJILAN/GNJILANE. The first instance court concluded that the late SHABAN SHURDHANI could not transfer to the claimant this real estate as he himself was not a holder of its property right. Based on Article 452, paragraph 2 LCP, it was decided the parties to bear their own procedural costs without reimbursement.

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

13. The *first* ground for challenging judgment C.nr.552/02 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 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 n) LCP.* However, its wording is just partially quoted without any concretization based on the content of the appealed judgment. No errors excluding its examination are specified by the appellant that might be reviewed by this panel. The enacting clause is comprehensible and not contradictory by itself or with the reasoning. In compliance with Article 160, paragraph 4 LCP the statement of grounds includes, *inter alia,* findings for the relevant contested facts, established in the proceedings with the evidence used for their determination, as well as their legal assessment. The judgment contains clear and objective grounds in relation to the material facts, decisive in this dispute, which are not ambiguous or contradictory. On the contrary, the reasons are convincing, comprehensive and fully justify the rendered judgment. No inconsistencies exist between them as per the documents and records of statements given in the case and their actual content. Therefore the panel considers that the procedural ground under Article 182, paragraph 2, item n) LCP in the appeal is unfounded and does not exclude the sustainability of the judgment.

14. 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 in this appellate review under Article 194 LCP. The judgment was rendered on a claim falling within the exclusive territorial jurisdiction of the Municipal Court of GJILAN/GNJILANE under Article 41 LCP in immovable property disputes (*Article 182, paragraph 2, item b) LCP*). It was not based on unlawful disposition of the parties under Article 3, paragraph 3 LCP (*Article 182, paragraph 2, item g) LCP*). None of the litigants was denied the right of interpretation in his/her own language in the main hearing as previewed by Article 96 LCP (*Article 182, paragraph 2, item j) LCP*). The persons that participated in the case were entitled to act as parties in the proceedings with the required procedural capacity and due representation (*Article 182, paragraph 2, item k) LCP*). The publicity of the main hearing guaranteed by Article 444, paragraph 1 LCP was not excluded in any of its held sessions (*Article 182, paragraph 2, item m) LCP*).

15. 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 n) 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 since they are not included in the permissible scope of the appellate review, restricted by Article 194 LCP. Therefore the challenged 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

16. 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.

17. It is indisputably determined by the challenged judgment that that the contested real estate is **cadastral parcel nr.918,** located in the place called "POPOVICA", culture–arable land, 4th class, with a surface of 00.32.20 ha (3 220 m^2), registered initially in **Possession List nr.1755,** CZ GILAN/GNJILANE *in the name of ISLAM DAUT ISLAMI and RAHIM MUHARREM NIMANI, both from* GJILAN/GNJILANE, with ½ ideal parts for each one of them. In 1962 – 1963 after change in its property with ordinal number nr.218/62, the same cadastral parcel nr.918 was registered in new **Possession List nr.1750,** CZ GJILAN/GNJILANE as *social ownership of the Municipal Assembly of GJILAN/GNJILANE* without any subsequent changes as per its location, surface, culture, category and status. It is surrounded by cadastral parcel nr.920/1 of RIDVAN HAMITI, cadastral parcel nr.916 of HALIL RAFUNA,

cadastral parcel nr.913 of BLAGIČA VUČKOVIČ, cadastral parcel nr.935 of NIKOLA DIMITRJIEVIČ, cadastral parcel nr.917 – social property and cadastral parcel nr.907 of ILIJA ČVETKOVIČ. These facts related to the characteristics and the registration of the contested real estate are determined by the following evidence administered in the first instance proceedings: the written findings and opinion of the geodesy experts MUSA RAMA and XHELAL HAZIRI, dated 18th February 2003, their additional ones, dated 19th April 2010 and 19th May 2010, the respective copy of plan nr.5, sketch nr.16, Record of Possession Lists – 1962, site inspection on 17th February 2003, Partial Possession List nr.1750 issued by the Department for Cadastre, Geodesy and Property – GJILAN/GNJILANE on 2nd October 2002 and 17th February 2003, as well as the Certificate for Immovable Property Rights nr.P-70403013-00918-0, issued by the Municipal Cadastral Office–GJILAN/GNJILANE on 20th April 2010.

18. By contract on sale for immovable property Vr.nr.143/1981, attested by the Municipal Court of GJILAN/GNJILANE on 4th February 1981 GAGICA RAZA as owner of **cadastral parcel nr.920**, located in the place called "POPOVICA", culture–arable land, 4th class, with a surface of 1.16.85 ha according to Possession List nr.2406, CZ GILAN/GNJILANE, sold a part of it with a surface of 0.38.95 ha (3 895 m^2), to IBRAHIM RAIF BRAHIMI from GJILAN/GNJILANE at the price of 20 000 dinars. After cadastral formation of the purchased real part, it was registered in the name of the buyer as **cadastral parcel nr.920/2**, neighboring cadastral parcel nr.918 in its south–western boundary, evidenced by copy of plan nr.5, sketch nr.16. *No other factual or legal relation has been alleged or proven between these two properties.*

19. According to the testimonies of the witnesses ENVER SHABANI, RIDVAN HAMITI and SHEFQET SOPI examined in the session on 1st April 2003 and the hearing of ILMI BRAHIMI in the session on 21st April 2010, in the parts credited by the court of first instance, in 1981 a purchase contract was concluded between the now deceased SHABAN SHURDHANI as seller and ILMI BRAHIMI as buyer for cadastral parcel nr.918 at the price in dinars, equal to 6 000 DM. The contract was verbally reached, without its signing in a written form and attestation by the court. SHABAN SHURDHANI did not present any document – property title for cadastral parcel nr.918. After the price was paid, the possession of the real estate was handed over to ILMI BRAHIMI who ever since non-interruptedly had cultivated the fertile part of this arable land, without being obstructed or otherwise impeded by anyone.

20. In the appeal hearing under Article 190, paragraphs 2 and 4 LCP new evidence has been adduced for the *transformation of the private co-ownership* on cadastral parcel nr.918 into *social property*. In the Regional Archive of GJILAN/GNJILANE it has been found out duly kept in original and has been presented to the case in full officially certified copy file nr.166/63 of the Municipality of GJILAN/GNJILANE for registration of cadastral change nr.04-2276/63 based on Decision nr.01-2276/2-63. It contains minutes nr.03-2776/1, compiled on 1st March 1963 in the office of the Sector for Immovable Property Relations of the People's Board of the Municipality of

GJILAN/GNJILANE, to record the statement made by ISLAM ISLAMI before that organ as owner of cadastral parcel no.918, by which he voluntarily and without being forced by anyone gave up all his rights on it, namely on permanent use and disposal, to the benefit of the state – the Municipality of GNJILANE/GJILANE. He reasoned himself with the impossibility to cultivate the land because of his employment by a municipal enterprise, the payment of income tax for it, the disqualification from children support allowances, and the need for its future utilization in public interest. ISLAM ISLAMI signed the records for his statement on 1st March 1963 without any objections to its content. Upon Letter nr.03-45, dated 6th March 1963 of the Sector of Finances of the People's Board of the Municipality of GJILAN/GNJILANE, its Cadastral Office issued a copy of Possession List nr.1755, dated 8th March 1963 verifying that at that date cadastral parcel nr.917 in the place called "POPOVICA", culture–arable land, 4th class, with a surface of 00.07.04 ha (704 m^2), and cadastral parcel nr.918 in the place called "POPOVICA", culture–arable land, 4th class, with a surface of 00.32.20 ha (3 220 m^2), with a total surface of 00.39.24 ha (3 924 m^2), were registered as co-ownership in the name of ISLAM DAUT ISLAMI with ½ and the People's Board of the Municipality of GJILAN/GNJILANE with ½. By Decision nr.01-2776/2 of the People's Board of the Municipality of GJILAN/GNJILANE, dated 10th May 1963 on the basis of Article 46 of the Law on the Municipal People's Boards, Article 66b of the Law on Transfer of Land and Buildings, Articles 205 and 210 of the Law on the Administrative Procedure and Article 28 of the Statute of the Municipality of GJILAN/GNJILANE, the land ceded by ISLAM ISLAMI, recorded in Possession List nr.1755 as cadastral parcel nr.917 and nr.918, with a surface of 00.19.50 ha (1 950 m^2), culture-field, in place called "POPOVICA", was accepted. It was ordered once the decision would become final to be submitted to the Cadastral Office of GJILAN/GNJILANE for recording of this real estate in possession list as social property of the People's Board of the Municipality of GJILAN/GNJILANE. The registration of cadastral parcel nr.918 was changed accordingly, evidenced by Certificate for Immovable Property Rights nr.P-70403013-00918-0 of the Municipal Cadastral Office – GJILAN/GNJILANE on 25th August 2011.

21. The factual situation determined after the direct examination of the case by the second instance court remains without substantial differences compared to the one contained in judgment C.nr.559/02 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 as per the main legally relevant facts, namely, that cadastral parcel nr.918 after being private co-ownership in ½ ideal parts of two natural persons in 1962 - 1963 became social ownership without subsequent changes in its property and/or its cadastral registration. Since after the collection of the new evidence in the second instance proceedings, it has been determined a factual state which though with more details does not differ in essence from the one established in the judgment of the court of first instance, the latter could not be qualified neither as erroneous, nor as incomplete. As Article 319, paragraph 2 LCP requires only *the facts of relevance* for the decision to be proven in the proceedings, the non-establishment of the property

status of the neighbouring parcels, and the possession on cadastral parcel nr.918 after 1981 is not incompleteness of the challenged judgment since these facts are irrelevant for the acquisition of the contested real estate. The arguments of the appellant related to the second ground in the appeal under Article 181, paragraph 1, item b) 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

22. 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.

23. The Law on Basic Property Relations (LBPR) (Official Gazette of the SFRY, No. 6/1980), effective from 1st September 1980 (Article 90) till 20th August 2009 (Articles 296 – 297 of the Law No.03/L-054 on Property and Other Real Rights (Official Gazette of the Republic of Kosovo, No.57/2009), being in force in Kosovo on 22 March 1989 is the one applicable according to Section 1.1 (b) of UNMIK Regulation 1999/24, as amended by UNMIK Regulation No. 2000/59, in *June 1981*, the moment alleged for the acquisition of cadastral parcel nr.918 by ILMI BRAHIMI. The property rights regime established by LBPR is legally defined in all its elements. Article 1 LBPR stipulates that citizens could be holders of property rights *only within the limits* and *under the conditions prescribed by law*, Article 2, paragraph 2 LBPR *prohibits their existence on objects under social ownership*, whereas Article 20 LBPR *exhaustively enumerates the legal grounds for their acquisition* being *the law itself, a legal transaction, inheritance* or a *decision of a competent government authority*. The compliance with all these requirements of LBPR is not evidenced in this case as per the acquisition of cadastral parcel nr.918 by ILMI BRAHIMI, even though according to Article 319, paragraph 1 and Article 322, paragraph 1 LCP as claimant in the proceedings he has the duty to prove all the facts on which his claim is based, namely *that the property right on the contested real estate has come into existence for him.*

24. The ownership on cadastral parcel nr.918 has not been proven as acquired by ILMI BRAHIMI on the basis of a *legal transaction* under Article 20, paragraph 1, second hypothesis in conjunction with Articles 33 LBPR. *At first place,* pursuant to Article 3, paragraph 1 LBPR only *the ownership holder* has the right to *dispose of* it within the limits defined by law. Similarly, according to Article 4, paragraph 1 of the Law on Trade of Immovable Property (Official Gazette of the SRS, No. 15/1974 and 14/1977) ("LTIP 1974"), in force for the whole territory of the Republic of Serbia (Article 64) from 22nd April 1974 (Article 65, paragraph 2) till its abrogation on 10th August 1981 by Article 34, paragraph 1 of the Law on Trade of Immovable Property (Official Gazette of the SRS No. 43/1981, 24/1985, 28/1987, 6/1989 and 40/1989) ("LTIP 1981") *citizens can transfer only the immovable property on which they have the ownership right.* The same requirement reproduced in Article 4, paragraph 2 of the

LTIP 1981 for the whole territory of the Republic of Serbia (Article 33) from 10th August 1981 (Article 35) states that *contracts on transfer of immovable property can be concluded with the ownership right holders only*. The Law on Transfer of Real Property (Official Gazette of the SAPK No. 45/1981 and 29/86) pursuant to its Article 1, paragraph 1 was non-applicable on this issue regulated by the mentioned republican laws in uniform manner for the whole territory of the Republic of Serbia at that time, and, moreover, none of its provisions derogated this basic requirement *the ownership on real estate to be transferred by the holder of the property right on it.* However, this capacity was not proven in this case neither for SHEFQET SOPI initially specified in the claim as seller from whom ILMI BRAHIMI bought cadastral parcel nr.918, nor for SHABAN SHURDHANI indicated as his seller in the course of the proceedings. There are no documentary evidence whatsoever in that respect. Their non-existence was admitted by ILMI BRAHIMI according to Article 321, paragraph 2 LCP at the main hearing in the first instance proceedings on 21st April 2010, as well as at the appeal hearing in the second instance proceedings on 30th September 2011 with the confession that *he had never been presented by the seller of cadastral parcel nr.918 a document–its property title* based on which he could dispose of the ownership right on it according to Article 34, paragraph 2 LBPR. The geodesy experts appointed by the first instance court in the main hearing on 6th October 2010 according to Article 366, paragraph 1 LCP verified *that neither SHEFQET SOPI, nor SHABAN SHURDHANI had ever been registered as owner(s) of cadastral parcel nr.918*. Finally, its property could not be considered acquired by the second one based on positive prescription – *firstly*, this ground for acquisition was introduced by Article 21 in conjunction with Article 90 LBPR from 1st September 1980 without retroactivity for the period 1967 – 1980 when according to the witness ENVER SHABANI, heard on 1st April 2003, the family of SHABAN SHURDHANI used the contested real estate; *secondly*, the same testimonies did not prove possession without obstruction for minimum 20 years, but only for 13 years from 1967 to 1980; *thirdly*, after being transformed in 1963 into social ownership, this real estate could not be possessed or acquired by a citizen in view of the prohibitions for such changes affecting its property status under Article 3 LTIP 1974 and the previous republican laws restricting the circulation of the social property. Summarizing, ILMI BRAHIMI did not acquire cadastral parcel nr.918 based on the contract reached in 1981 with SHEFQET SOPI according to his allegations in the claim, or SHABAN SHURDHANI according to his allegations in the proceedings *since none of them was the holder of its property and could not legally transfer it.* Since this purchase contract exceeded the limits established by Article 3, paragraph 1 *in fine* LBPR, pursuant to Article 5, paragraph 1 LTIP 1981 ILMI BRAHIMI did not acquire the ownership on the contested immovable property on its basis. *At second place*, the same transaction *did not comply with the compulsory requirements for its validity*. As explicitly admitted by ILMI BRAHIMI in the appeal hearing, he bought cadastral parcel nr.918 from SHABAN SHURDHANI in June 1981 *by a verbal contract* which was not signed in writing and was not attested by the court as legally demanded by Article 10, paragraph 1 LTIP 1974 till 10th August 1981. Concluded in

violation of this requirement, pursuant to Article 10, paragraph 2 LTIP 1974 the purchase between SHABAN SHURDHANI and ILMI BRAHIMI did not produce legal effect. So, the lack of this form prescribed by Article 10, paragraph 1 LTIP 1974 for the validity of all contracts on transfer of immovable property resulted in *nullity* in the one above since at the moment of its conclusion – June 1981 – LTIP 1974 did not foresee anything else according to its Article 10, paragraph 2 *in fine.* Namely, LTIP 1974 neither *excluded the nullity* of this contract not concluded in the form prescribed by its Article 10, paragraph 1, nor allowed its *validization through performance.* LTIP 1981 which abrogated LTIP 1974 on 10th August 1981, by its Article 4, paragraph 2 identically demanded that all contracts on transfer of immovable property should be concluded *in writing with attestation of the signatures of the contracting parties by the court.* The ones non-complying with the form required by Article 4, paragraph 2 LTIP 1981 were null and void - Article 4, paragraph 3 LTIP 1981. No exception whatsoever was provided till 1st August 1987, when a new paragraph 4 was added to Article 4 LTIP 1981 (Official Gazette of the SRS No. 28/1987), stating that the contracts on the transfer of rights to immovable property concluded in writing without the signatures of the parties being attested by a court might nevertheless be deemed valid, if they had been fulfilled, the limits of the law had not been exceeded, the taxes payable had been settled, and the right of pre-emption and other social interests had been respected. This validization is not applicable, however, for the 1981 purchase between SHABAN SHURDHANI and ILMI BRAHIMI *since it was not concluded in writing* as demanded by Article 4, paragraph 4 LTIP 1981. It could not be deemed valid also pursuant to Article 73 of the Law of Contract and Torts (Official Gazette of SFRY No.29/1978, 39/1985, 45/1989, 57/1989 and 31/1993). *Firstly*, as *lex generalis* for all contracts it is derogated by Article 4, paragraph 4 LTIP 1981 as *lex specialis* for the ones on transfer of immovable property. *Secondly*, only contracts whose conclusion is made dependent on *simple written form* might be validated through performance based on Article 73 of the Law of Contract and Torts and *vice versa* not the ones on the transfer of rights to immovable property since the form prescribed for their validity according to Article 10, paragraph 1 LTIP 1974 till 10th August 1981 and Article 4, paragraph 2 LTIP 1981 after that date is *qualified written form with signatures of the parties, attested by the court.* The *"substantial performance"* exception under Article 73 of the Law of Contract and Torts cannot apply to contracts on transfer of immovable property since it can substitute only *their non-signing in writing when this is the only formal requirement for its legally binding effect* and not all the three elements demanded for the transfer of property rights on real estate to be completed (written contract, its verification by the court and cadastral registration). *Thirdly*, as the form prescribed by Article 10, paragraph 1 LTIP 1974 till 10th August 1981 and Article 4, paragraph 2 LTIP 1981 in its *obvious purpose* goes beyond the performance of the obligations of the parties to the individual contract as it is destined to guarantee stability of the ownership record and the real estate circulation in public interest, its lack is to be always sanctioned with *invalidity* under Article 70, paragraph 1 of the Law of Contract and Torts, whereas the validization through performance

should be inapplicable pursuant to its Article 73 *in fine*. Hence, the purchase contract that was verbally reached in June 1981 between SHABAN SHURDHANI and ILMI BRAHIMI without signing it in and attesting it by the court, due to the lack of this validity form under Article 10, paragraph 1 LTIP 1974 (Article 4, paragraph 2 LTIP 1981) is *null and void without legal effect* - Article 10, paragraph 2 LTIP 1974 (Article 4, paragraph 3 LTIP 1981). It could not be deemed valid based neither on Article 10, paragraph 2 *in fine* LTIP 1974 since this law did not foresee validization, nor based on Article 4, paragraph 4 LTIP 1981 since the same contract apart from being non-attested by the court was not signed in writing by the seller and the buyer. Irrelevant for its validization is the price paid by ILMI BRAHIMI and the possession on cadastral parcel nr.918 handed over by SHABAN SHURDHANI since pursuant to Article 73 *in fine* of the Law on Contract and Torts the purpose of the missing written form with signatures of the parties, attested by the court, exceeds the fulfillment of their contractual obligations, guaranteeing in general the stability of the immovable property transfers. *At fourth place,* as admitted by the appellant in the hearing on 30th September 2011, there were no administrative, tax and/or legal obstacles to sign the contract with SHABAN SHURDHANI for cadastral parcel nr.918 in writing and attest it in the court and it was only verbally reached because of their subjective negligence. In this connection ungrounded is the argument presented in the hearing on 1st April 2003 by Lawyer MUSTAFA MUSA, authorized representative of ILMI BRAHIMI in the first instance proceedings, justifying the informal conclusion of the contract with the necessity to provide the consent of the Ministry of Finance of the Republic of Serbia according to *Article 3 of the Law on Restrictions on the Transfer of Immovable Property*. It was published in the Official Gazette of the SRS No. 30/1989 on 22nd July 1989 and entered into force on the same date pursuant to its Article 8 without retroactivity. Such *ex tunc* legal effect was not provided also by the *Law on Amendments and Supplements to the Law on Restrictions on the Transfer of Immovable Property* (Official Gazette of the SRS, No. 42/1989) and/or by *the Law on Amendments and Supplements to the Law on Restrictions on the Transfer of Immovable Property* (Official Gazette of the SRS, No.22/1991), which re-titled it into *the Law on Specific Conditions for the Transfer of Immovable Property*. However, the non-signing of the purchase between ILMI BRAHIMI and SHABAN SHURDHANI in written form and its non-attestation by the court could not be justified with the non-applicability of this discriminatory law under Section 1.2 of UNMIK Regulation No. 1999/24, *since its restrictive regime entered into force on 22nd July 1989, 8 years after the informal conclusion of the transaction above*. As per the form and procedure under Article 10, paragraph 1 LTIP 1974 and later by Article 4, paragraph 2 LTIP 1981, they were *separately* established, not being preconditioned on administrative permission, and as *non-discriminatory* are mandatory according to Section 1.1, item (b) of UNMIK Regulation No. 1999/24. Therefore *the non-compliance with these imperative formal requirements* has made the purchase contract of SHABAN SHURDHANI and ILMI BRAHIMI *null and void, without any legal effect* as per the transfer of the property right on cadastral parcel nr.918. *At fifth place*, the acquisition

of the ownership right on this real estate by ILMI BRAHIMI on the basis of this legal transaction is excluded as *it has never been recorded in the cadastral books in accordance with Article 33 LBPR*. As admitted by him in the appeal hearing on 30th September 2011, this is not due to any technical omission, but to refusal of the DGCP–GJILAN/GNJILANE to register cadastral parcel nr.918 in his name because of non-fulfilled conditions for this change. Therefore, non-existing is also the third formal prerequisite for acquisition of the contested real estate on this ground. In sum, *ILMI BRAHIMI has not acquired the property on cadastral parcel nr.918 on the basis of legal transaction under Article 20, paragraph 1, second hypothesis in conjunction with Articles 33–34 LBPR* since the purchase contract with SHABAN SHURDHANI has not been concluded with the ownership right holder in writing, has not been attested by the court and has not been registered in the cadastre.

25. It is has not been alleged or proven at any stage of the proceedings that ILMI BRAHIMI has acquired cadastral parcel nr.918 *by inheritance* pursuant to Article 20, paragraph 1, third hypothesis in conjunction with Article 36 LBPR or *by a decision of any government authority* pursuant to Article 20, paragraph 2, LBPR. It is also excluded the acquisition of this property right *by law itself* pursuant to Article 20, paragraph 1, first hypothesis in conjunction with Article 21 LBPR, namely *by adverse reverse possession* under Articles 28 – 30 LBPR. *At first place,* it is established with certainty in the proceedings that since 1963 cadastral parcel nr.918 has been registered as *social ownership in the name of the Municipal Assembly of GJILAN/GNJILANE*. This status has been officially verified by the public documents administered in the case with binding evidentiary effect pursuant to Article 329, paragraph 1 LCP. Thus in Possession List nr.1750 of the DCGP - GJILAN/GNJILANE, dated 2nd October 2002 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 "P.SH." (*social ownership*). Identically in Certificate nr.P-70403013-00918-0 of the DGCP–GJILAN/GNJILANE, dated 20th April 2010 and 25th August 2011 the owner - possessor of cadastral parcel nr.918 is indicated as "P.SH."- *"prones shoqerore" (social property)*. Being compiled in the appropriate form by the competent bodies, all these public documents prove according to Article 329, paragraph 1 LCP with binding evidentiary effect *the social ownership on cadastral parcel nr.918*, as well as the compliance with the requirements for its registration as socially-owned real property laid down by Article 1, paragraphs 1 and 3, Article 3, item 3) and Article 4, paragraph 2 of the Law on Registration of Real Properties in Social Ownership (Official Gazette of SAPK, No. 37/1971). *At second place*, till 1962 – 1963 cadastral parcel nr.918 was private co-ownership of ISLAM ISLAMI and RAHIM NIMANI with ½ ideal parts for each one of them. By file nr.166/63 of the Municipality of GJILANE/GNJILANE found in the Municipal Archive of GJILAN/GNJILANE, it was established that on 1st March 1963 in the office of Sector for Immovable Property Relations of the People's Board of the Municipality of GJILAN/GNJILANE, ISLAM ISLAMI made statement, waiving all his property rights on cadastral parcel nr.918 in favour of the state–the

Municipality of GJILAN/GNJILANE. This renouncement declared by *the citizen – ownership right holder* on this *agricultural land not encumbered with burdens* in the legally demanded *form* of a written unilateral declaration before the competent body *to the benefit of a socio–political community* in compliance with Article 66b of the Law on Transfer of Land and Buildings (Official Gazette of SFRY No. 26/1954, 19/1955, 48/1958 and 30/1962) *transferred and thus transformed this real property into social ownership*. Under the same provision, *legally irrelevant are the motives for this renouncement.* Therefore even if ISLAM DAUT ISLAMI ceded cadastral parcel nr.918 in order to avoid disqualification from children support allowances, and to gain in future the right to receive them, this motive did not exclude or otherwise affect the validity of his act. This is why groundless is its qualification as *fictive*, made by Lawyer ISA MUSTAFA in the appeal hearing. There are no allegations made at any stage of the proceedings and no evidence collected whatsoever that the renouncement of ISLAM ISLAMI has been made involuntarily, under threat, fraud or with other deficiency of the will. Hence, there is no factual and evidentiary basis to consider the renouncement *null* or *rescindable*. Without being invalid or invalidated, it produced its legal effect envisaged in Article 66b, paragraph 1 of the Law on Transfer of Land and Buildings – *cessation of the private property rights on cadastral parcel nr.918 with its transfer into social ownership*. The *legal basis* for this transformation, as explicitly stated in Article 66b, paragraph 2 of the Law on Transfer of Land and Buildings, is *the unilateral declaration* for renouncement of ISLAM ISLAMI. On the contrary, neither the conclusion of a *contract* with the respective socio-political community, nor the issuance of a *decision of public body* is normatively demanded for the transformation of the private into social ownership under Article 66b of the Law on Transfer of Land and Buildings. In accordance with the same provision in the minutes nr.03-2776/1, compiled on 1st March 1963 in the Sector for Immovable Property Relations of the People's Board of the Municipality of GJILAN/GNJILANE, it has been recorded an explicit declaration of ISLAM ISLAMI to give up in favour of the Municipality of GNJILANE/GJILANE his property rights on cadastral parcel nr.918, registered in Possession List nr.1755. Thus the objective scope of the renouncement under Article 66b of the Law on Transfer of Land and Buildings has been determined *with reference to the cadastral registration* of this real property as cadastral parcel nr.918, located in the place called "POPOVICA", culture–arable land, 4th class, surface of 00.32.20 ha (3 220 m^2). Since its acceptance by the social community was not required by the Law on Transfer of Land and Buildings in any form, the Decision nr.01-2776/2 of the People's Board of the Municipality of GJILAN/GNJILANE, dated 10th May 1963 *had no constitutive legal effect for the transformation of the private property on cadastral parcel nr.918 into social ownership*. Therefore its issuance for acceptance of cadastral parcels nr.917 and nr.918, for half of the total surface 00.39.24 ha (3 924 m^2), amounting to 00.19.50 ha (1 950 m^2), *did not affect the validity* of the prior statement of ISLAM ISLAMI made on 1st March 1963 for renouncement of his property right on cadastral parcel nr.918, registered in Possession List nr.1755, with a surface of 00.32.20 ha (3 220 m^2).

Firstly, the Decision nr.01-2776/2 of the People's Board of the Municipality of GJILAN/GNJILANE, dated 10th May 1963 *exceeds* the scope of the declaration of ISLAM ISLAMI recorded in the minutes nr.03-2776/1, dated 1st March 1963 only for *cadastral parcel nr.917*, which is not contested in this case, and *vice versa* coincides for *cadastral parcel nr.918*, which is the disputed one. *Secondly*, the transformation of the contested real estate from private into social ownership results from the unilateral declaration of ISLAM DAUT ISLAMI under Article 66b of the Law on Transfer of Land and Buildings, in which *it is accurately indicated as cadastral parcel nr.918 with description corresponding to the one under its cadastral registration.* Hence, the renouncement is not void for impossible, unlawful, unspecified or undeterminable subject. Being declared for agricultural land, existing as cadastral unit, specified as registered *the renouncement is valid as having possible, permitted, concrete and determinable subject.* As such, it has produced the legal consequences envisaged in Article 66b of the Law on Transfer of Land and Buildings – terminating *the private property on cadastral parcel nr.918* and *converting it into social ownership. At third place,* the Registry of Possession Lists (1962), the geodesy expertise, mentioned above, and Possession List nr.1750, dated 8th March 1963 *indirectly* prove a renouncement of the ½ ideal part of RAHIM MUHARREM NIMANI on cadastral parcel nr.918 in end of 1962. It was recorded as change with ordinal nr. 218/62, after which this real estate was transferred from Possession List nr.1755 into Possession List nr.1750, as social ownership of the Municipality of GJILAN/GNJILANE for ½ ideal part and of ISLAM DAUT ISLAMI for ½ ideal part. However, the respective file as part of the records of the DGCP–GJILAN/GNJILANE has been withdrawn by the Serbian authorities in 1999 and at present is not kept in the cadastral, court or general archive in GJILAN/GNJILANE. Under these circumstances, the transfer of the ½ ideal part of the property right of RAHIM MUHARREM NIMANI in cadastral parcel nr.918 to the benefit of the social community should be considered proven by Possession List nr.1750 of the DCGP-GJILAN/GNJILANE, dated 2nd October 2002 and 17th February 2003 and Certificate nr.P-70403013-00918-0 of the DGCP–GJILAN/GNJILANE, dated 20th April 2010 and 25th August 2011, which as public documents according to Article 329, paragraph 1 LCP with binding evidentiary effect prove *the establishment of social ownership on the whole cadastral parcel nr.918. At fifth place,* ungrounded are all the arguments for its non-existence invoked by ILMI BRAHIMI in the claim and in the course of the proceedings. Contrary to Article 319, paragraph 1 LCP, unproven are his allegations that the registration of cadastral parcel nr.918 as socially–owned was based on aerial photography on the occasion of decipherment of parcels. Neither the lack of specific urban/spatial development plan and regulation for the contested real estate according to the Law No. 2003/14 on Spatial Planning, nor its non-utilization for construction or other public needs do not exclude its property status as one under social ownership. The requirement of Article 4, paragraph 1 LBPR for realization of the property right in accordance with the nature and purpose of the object, and the public interest as defined by law, could not be equalized to mandatory usage. Pursuant to Article 3, paragraph 1 LBPR the owner

has the *right* to possess this object, use it and dispose of it. Since this is not obligatory, *the non-exercise of the ownership on cadastral parcel nr.918 could not result into its cessation under Article 44 – 48 LBPR.* Hence, irrelevant is the fact that the Municipality of GJILAN/GNJILANE has not entered in possession of this real estate – under Article 34, paragraph 1 LBPR *its delivery is a prerequisite for the acquisition of private property* and *vice versa* not for *public one.* This is why the *non-accomplished delivery* of cadastral parcel nr.918 to the Municipality of GJILAN /GNJILANE does not exclude the acquisition of the social ownership on it, since the cadastral registration suffices this result - Article 33 LBPR. As for the *non-possession* of this real estate by the Municipality of GJILAN/GNJILANE, it could not represent *abandonment* under Article 46, paragraph 1 LBPR-this cessation of property rights per argumentum ad Article 46, paragraph 3 LBPR is not applicable f*or public real estates.* Non-based is also the argument in the claim *that being surrounded only by private real estates, cadastral parcel nr.918 could not be socially owned*–despite of their location in one and the same zone and place, as well as their neighborhood, *they represent separate objects of property rights, independent as ownership status.* Concluding, after the transformation of the private ownership on cadastral parcel nr.918 under Article 66b of the Law on Transfer of Land and Buildings since 1963 it has been in social ownership. Pursuant to Article 29 LBPR *as an object under public property it could not be acquired though adverse reverse possession.* This prohibition is imperatively defined without any exceptions, including ones based on the boundary of cadastral parcel nr.918 with cadastral parcel nr.920/2 bought by ILMI BRAHIMI in February 1981. His non-knowledge for the registration of the contested real estate in the name of the Municipality of GJILAN/GNJILANE, as well its possession without obstruction and interruption for more than 20 years do not derogate the prohibition under Article 29 LBPR which excludes the application of Article 28 LBPR in all its hypotheses. Consequently, the cultivation of the fertile part of cadastral parcel nr.918 by ILMI BRAHIMI from June 1981 to August 2009 is *factually exercised possession, without legal effect for its acquisition under Article 21 LBPR which is unconditionally and imperatively excluded by Article 29 LBPR for all objects under social property.* As for his possession after the abrogation of Article 29 LBPR by Article 296 of the Law No.03/L-054 on Property and Other Real Rights (LPORR) on 29th August 2009, it is without the 20-years minimum duration required by its Article 40, paragraph 1 LPORR after that date without any retroactivity as per prior accumulated possession. Therefore for the period 1981 – 2009 *cadastral parcel nr.918 being an object under social ownership could not be acquired through positive prescription pursuant to Article 29 LBPR, whereas for the period 2009 – 2011 its possession is without the 20-years duration demanded by Article 40, paragraph 1 LPORR.*

26. Upon this analysis, the conclusion of the court of second instance is that ILMI BRAHIMI as a party bearing according to Article 319, paragraph 1 and Article 322, paragraph 2 LCP the exclusive burden to prove all facts for the existence of his ownership right on the contested immovable property *has failed to prove that he has*

acquired on any of the alternative grounds for its acquisition - by law itself, a valid legal transaction with a previous owner, registered in the cadastral books, inheritance or a decision of a competent government authority. Since his active legitimacy as the owner is not established, 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 rejected the confirmation of the claimed ownership on cadastral parcel nr.918 as non-existing, *without erroneous application of the substantive law* as per Article 184 LCP.

VI. Conclusion

27. Based on the foregoing considerations, the court of second instance shall reject the appeal of ILMI BRAHIMI as non-based and shall confirm judgment C.nr.559/02 of the Municipal Court of GJILAN/GNJILANE, dated 6th October 2010 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 with respect to the rejection of the claim under Article 254, paragraph 1 LCP or the responsibility for the procedural costs under Article 452, paragraph 2 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.35/2011 on 30.09.2011

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.

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 30th September 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.35/2011, dated 30th September 2011 in accordance with Article 140, paragraph 1, second sentence LCP.

THE DISTRICT COURT OF GJILAN/GNJILANE

AC.nr.35/2011 on 30.09.2011

ROSITZA BUZOVA

Presiding Judge

MUHAMET REXHA

Panel Member

ABDULLAH AHMETI

Panel Member

HENRIK BARRDAHL

EULEX Legal Officer

DAUT LATIFAJ

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.