

AC.nr.531/2008

MINUTES OF VOTING AND DELIBERATION

After voting and deliberation the three-judge panel unanimously on 18 March 2009 renders the following:

JUDGMENT

1. With the approval of the appeal of the respondent Martin Krasniqi, the judgment of the Municipal court of Klina, c.nr.3/2007, dated 23.06.2008 is hereby **ALTERED**.
2. The claim of claimant Noz Ndue Berisha from Klina against the respondents Martin Krasniqi from village Meqeq, Gjakova municipality, Milivoje Vuqkoviq from Klina, Golib Vuqkoviq and Stojan Vuqkoviq, the last two living in Serbia confirming that Noz Ndue Berisha, based on the real-estate transaction with Martin Krasniqi, and based on holding, is owner of cadastral parcel No 234/2 surface 0.10.00 ha, described in possession list No81, Municipal Cadastral office Klina, which real estate is recorded on behalf of Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq, and the respondents Martin Krasniqi, Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq to be obliged to recognize his ownership rights, and to allow transfer of ownership right of this property on behalf of Noz Ndue Berisha by Directorate for property, geodesy and cadastral matters in Klina, is **REJECTED**.
2. The request of the claimant Noz Ndue Berisha for compensation of court expenses is **REJECTED** as ungrounded.

PCOCESVERBAL PËR VOTIM DHE VENDIMMARRJE

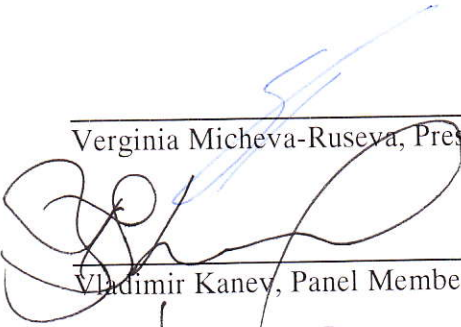
Pas votimit dhe vendimmarrjes trupi gjykues prej tre gjykatësve njëzëri me 18 Mars lëshon këtë:

AKTGJYKIM

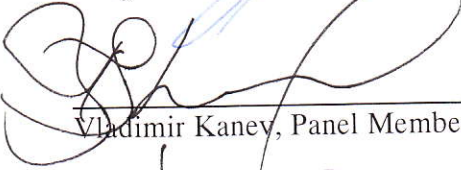
1. Me miratimin e ankesës se te paditurit Martin Krasniqi aktgjykimi i Gjykatës Komonale te Klinës C.nr. 3/2007 te datës 23.06.2008 **NDRYSHOHET**.
2. Padia e paditësit Noz Ndue Berisha nga Klina kundër te paditurve Martin Krasniqi nga fshati Meqe, Komuna e Gjakovës, Milivoje Vuqkoviq nga Klina, Golib Vuqkoviq dhe Stojan Vuqkoviq, dy te fundit me banim ne Serbi për te vërtetuar se Noz Ndue Berisha bazuar ne shitblerjen me Martin Krasniqin, dhe bazuar ne mbajtje, është pronar i parcelës kadastrave Nr. 234/2 me sipërfaqe 0.10.00 ha, e përshkruar ne fletën poseduese Nr. 81, te Zyrës Kadastrale te Komunës se Klinës, e cila patundshmëri është e regjistruar ne emër te Milivoje Vuqkoviq, Golib Vuqkoviq dhe Stojan Vuqkoviq te cilët obligohen qe te njohin te

drejtën pronësore, dhe të lejojnë përkthimin e se drejtës pronësore të kësaj prone në emër të Noz Ndue Berisha nga ana e Drejtorisë për Pronë, Gjeodezi dhe çështje Kadastrale në Kline, **REFUZOHET**.


3. Kërkesa e paditësit Noz Ndue Berisha për kompensim të shpenzimeve të gjykatës **REFUZOHET** si e pabazuar.



Virginia Micheva-Ruseva, Presiding Judge/ Kryetarja e Trupit Gjykes



Vladimir Kaney, Panel Member/ Anëtare e Trupi Gjykes



Muharem Shala, Panel Member/ Anëtare e Trupi Gjykes

DISTRICT COURT OF PEJA/ PEC
AC nr.531/2008

IN THE NAME OF PEOPLE

THE DISTRICT COURT OF PEJA/ PEC, through a panel composed of EULEX judge Verginia Micheva-Ruseva, presiding judge, EULEX judge Vladimir Kanev and local judge Muharem Shala, members, assisted by the court recorder Jacqueline Ryan and International interpreters in Albanian and Serbian language Agim Hajdini and Dominique Kolic, in the legal case of the claimant Noz Ndue Berisha from Klina against the respondents Martin Krasniqi from village Meqeq, Gjakova municipality, Milivoje Vuqkoviq from Klina, Golib Vuqkoviq and Stojan Vuqkoviq, the last two living in Serbia, on the verification of ownership, based on the appeal of the respondent Martin Krasniqi against the judgment of the Municipal court of Klina, c.nr.3/07, dated 23.06.2008, in the session held on 18.03.2009, renders the following

JUDGMENT

1. With the approval of the appeal of the respondent Martin Krasniqi, the judgment of the Municipal court of Klina, c.nr.3/2007, dated 23.06.2008 is hereby **ALTERD**.
2. The claim of claimant Noz Ndue Berisha from Klina against the respondents Martin Krasniqi from village Meqeq, Gjakova municipality, Milivoje Vuqkoviq from Klina, Golib Vuqkoviq and Stojan Vuqkoviq, the last two living in Serbia confirming that Noz Ndue Berisha, based on the real-estate transaction with Martin Krasniqi, and based on holding, is owner of cadastral parcel No 234/2 surface 0.10.00 ha, described in possession list No81, Municipal Cadastral office Klina, which real estate is recorded on behalf of Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq, and the respondents Martin Krasniqi, Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq to be obliged to recognize his ownership rights, and to allow transfer of ownership right of this property on behalf of Noz Ndue Berisha by Directorate for property, geodesy and cadastral matters in Klina, is **REJECTED**.
3. The request of the claimant Noz Ndue Berisha for compensation of court expenses is **REJECTED** as ungrounded.

Reasoning

The Municipal court of Klina in its judgment c.nr.3/2007, dated 23.06.2008 approved as grounded the claim of the claimant Noz Ndue Berisha from Klina against the respondents Martin Krasniqi from village Meqeq, Gjakova municipality, Milivoje Vuqkoviq from Klina, Golib Vuqkoviq and Stojan Vuqkoviq, the last two living in Serbia, and confirmed that Noz Ndue Berisha, based on transaction with Martin Krasniqi, and based on holding, was the owner of cadastral parcel No 234/2 surface 0.10.00 ha, described in possession list No81, Municipal Cadastral office Klina, which real estate was recorded on behalf of Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq, and the respondents Martin Krasniqi, Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq were obliged to recognize his ownership rights, and to allow transfer of ownership right of this property on behalf of Noz Ndue Berisha by Directorate for property, geodesy and cadastral matters in Klina within 15 days from the day the judgment entered into force. The first respondent Martin Krasniqi was also obliged to pay the claimant 500 Euros for court expenditures.

Against this decision the respondent Martin Krasniqi lodged an appeal for revision of the judgment in due time on the grounds of wrong conclusion of the facts and wrong application of substantial law. The appellant suggests reversing the decision of the lower court and alternatively asks to remit the case back to municipal court for retrial or to reach a new decision on the merits. He brings the attention on the fact that the municipal court has disregarded documents and granted statements of witnesses without considering their family relation to the claimant. He alleges that the court should order an expertise to examine the signature on the contract for purchase of the disputed land as he states that the signature is not his. He also points out that there is no evidence supporting that the land was sold, such as a receipt from seller that he received the money for the transaction.

On the open session held on 18.03.2009 the appellant supports his appeal. He pleads that he never sold the disputed property, he does not know the claimant and the property belongs to his daughter to whom he donated it. He states that the signature in the contract for purchase of land dated 21.06.1989 is not his and the document is falsified.

The respondent to the appeal, the claimant, Noz Ndue Berisha, represented by his brother Nol Berisha opposes the appeal. In front of the appellate court Nol Berisha states that he has used the disputed land for more than 20 years,

that the money was paid to the respondent Krasniqi and that the contract was signed.

The second respondent to the appeal, Milivoje Vuqkoviq, states that he has sold the land to Martin Krasniqi long time ago. He also presents certificate that his brother Stojan Vuqkoviq is dead since 1991. Respondent Golib Vuqkoviq is informed about the trial by his brother Milivoje Vuqkoviq.

Competence of the court and applicable law

With a decision of the President of the Assembly of EULEX Judges, dated 22 January 2009, the case is assigned to EULEX civil judge Verginia Micheva-Ruseva in District court of Peja/Pec due to its complexity and interethnic element involved between the claimant and the respondents. The case is property related. It falls within the jurisdiction of the District court of Peja and meets the requirements set forth in art.5 par.1 item c) iii of the Law on Jurisdiction (Law No 03/L-053). With a decision of the President of the Assembly of EULEX Judges, dated 11 March 2009, EULEX civil judge Vladimir Kanev is assigned as a panel member, as Judge Micheva-Ruseva is assigned as a presiding judge. The third professional judge in the panel, Muharem Shala, is appointed by the president of Peja/Pec DC.

As regarding the question of applicable law it should be mentioned that as the appealed decision was rendered on 23.06.2008, and before the new Law on Contested Procedure entered into force (15.10.2008), the rule of art.533.1 of that Law should be considered, i.e. the provisions of the old LCP (OG 4/77) has to be applied in the current procedure.

Factual and legal assessment

Upon reviewing the appealed judgment as foreseen in art.365 of the LCP and pursuant to art.373 of the same law, the District court held that the appeal was grounded and the judgment of the first instance court should be reversed as the second instance court renders a new decision on the merits refusing the claim.

Review of the attached evidence reveals the following factual situation:

It is not disputed that the respondents Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq, brothers, were owners of the disputed property that represents a parcel of land of 1000 m² located in Klina. Through a contract dated 09.02.1980, they sold that land to the respondent Martin Krasniqi. The contract was not verified in the court and the change of ownership was not recorded in the registry of Cadastre and Geodesy Office in Klina. The respondents Vuqkoviq still appear to be owners of the land, according to the possession list.

It is disputed whether based on a contract dated 21.06.1989 Martin Krasniqi sold the land to the claimant Noz Ndue Berisha. According to that contract Martin Krasniqi sold the disputed parcel to Ndue Pashk Berisha from Klina on 21.06.1989 for the amount of 17 000 DM. The contract is signed by Uke Berisha as buyer, Martin Krasniqi as seller and Gjelosh Berisha and Nikolle Palaj as witnesses. The contract is not verified in court.

According to Nol Berisha, representative of the claimant Noz Ndue Berisha, he himself occupies the land and everybody in Klina knows that the land belongs to him.

According to the respondent Martin Krasniqi nobody currently uses the land as he and his family live in Austria. He donated the land to his daughter Mire Shala with a contract dated 20.08.1987. The contract is presented to the court and attached as evidence. The contract is not verified in the court.

The Municipal court of Klina examined two witnesses of the claimant.

Kole Berisha, living in Klina, stated that after the war Noz Berisha removed garbage from the parcel, cleaned the place and explained that he bought it from Martin Krasniqi.

Uke Berisha, a brother to the claimant, explains that he (Uke Berisha) is the owner of the disputed property since 1989 and he has used it peacefully and free for 20 years already and he has paid the transaction price. After the war the family communion was separated and the disputed land came into the holding of his brother Noz.

To render its decision in approval of the claim the Municipal Court of Klina considered that the claimant bought the property and he is its holder in an uncontested way for 29 years, which was proven by the testimonies of the two examined witnesses. Pursuant to art.28 par. 2 and 4 of the Law on Basic Property Relations the lower court considered the claimant the owner of the disputed property on the grounds of conscientious holding for more than 20 years.

The District court does not agree with the evaluation of the evidences nor does it share the legal conclusions of the lower court.

The claimant pleads to be the owner of the property on the base of a transaction dated 21.06.1989 and on the base of conscientious holding.

According to art.28 par.2 of the Law on Basic Property Relations (OG SFRY, No 6/80) the conscientious and legal holder of the real estate over which somebody else disposes of the property right, shall acquire the property right over such object through adverse possession after expiration of 10 years.

According to art.28 par.4 of the same Law the conscientious holder of the real estate over which somebody else disposes of the property right, shall

acquire the property right over such object by adverse possession after expiration of 20 years.

Consequently, to be successful, the claimant has to prove that he exercises the factual power over the disputed land based on a written contract able to make him an owner, he does not know that the seller is not the owner (conscientious and legal holder) and the holding exceeds 10 years (art.28 par.2 of the Law on Basic Property Relations). Alternatively if he is not a legal holder, than he conscientiously holds the property for more than 20 years. Conscientiousness regards to the lack of knowledge that the seller of the land was not owner of it. A legal holder is a holder that possesses a property on the base of a written contract verified in court. In the hypothesis of art.4 the holder exercises the factual power over the disputed land free of interference and believes that he is the owner of that land. The holder in art.4 is not a legal holder, but he can exercise the factual power over the disputed land on a base of a preliminary contract (in the meaning of art.45 of the Law on Torts and Obligations, OG 29/78).

As regards the present case, the claimant Noz Berisha is not a legal holder of the land, because he did not sign the contract for purchase dated 21.06.1989. Not verified in the court this contract can be considered as a preliminary contract. His brother Uke Berisha signed the contract as buyer, although in the content of the contract another name is pointed out as a buyer – Ndue Pashk Berisha. In his statement, the witness Uke Berisha confirms that he is the owner of the parcel. In front of the appellate court the representative of the claimant and his brother Nol Berisha furthermore stated that Uke Berisha, who was present in the hearing in front of the panel of DC, bought the land. At the moment Nol Berisha uses the land, according to his statement. So all evidence, even provided by the claimant, establish that he, Noz Berisha, did not buy the disputed land and did not even use it. Even if the court accepts that he exercised the factual power over it, the period of time he used it does not exceed 20 years. The starting point for calculating the time for holding the land is 21.06.1989, when the preliminary contract was signed, as there is no evidence suggesting that the land was occupied before that date. The claim was filed on 05.01.2007. So the holding of the land could have been continued for no more than 17 years and 6 months. But upon the evidence the court even can not conclude that the claimant exercises the factual power over the disputed land. Upon the statements of his brothers given as witness and representative it is clear that the brother of the claimant Nol Berisha uses it. The claimant has not got active legitimacy to claim ownership. He did not buy the land in 1989 and he did not hold it until 2007. That is why his claim is ungrounded and has to be rejected. And because of the existing lack of the claimant's active legitimacy the court will

not examine if the contract was signed by the claimant Krasniqi, if the signature under his name as a seller is conducted by him or not, or if the contract was falsified. This examination can be done in another trial litigated by another claimant.

Pursuant to art.365 par.2 of the LCP, the court examined the appealed judgment ex officio and found that the lower court committed substantial violations of the procedural provisions. These procedural breaches of the law, although substantial, will not change the final legal assessment even if possible to be eliminated by first instance court; this is why the court decided not to remit the case back to MC for re-examination, but instead decided on the merits. Even if the lower court starts the procedure from the beginning and respects all the procedural provisions, at the end the result will be the same – the claimant is not actively legitimated to claim ownership of the disputed land. There is no justification for multiplying the costs and delays of litigation and for wasting judicial resources by starting the procedure from the beginning on a claim that is obviously ungrounded. But for full examination of the appealed judgment these breaches have to be pointed out.

On page 8 of the case file c.nr.3/07, attached to the claim, the claimant presented to the court an authorization letter dated 05.01.2007 according to which the claimant Noz Berisha authorizes the lawyer Zef Marleku to represent him in the case filed against the respondents Martin Krasniqi, Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq. Notwithstanding this, the judge appointed the same lawyer as a representative of the respondents Milivoje Vuqkoviq, Golib Vuqkoviq and Stojan Vuqkoviq. This is inadmissible because of the obvious conflict of interests – the lawyer Marleku cannot represent the interests of the claimant and of the respondents at the same time. And it is obvious that the lawyer Zef Marleku continued to be connected to the claimant because on 7.09.2007 he filed an authorization letter to the claimant Noz Berisha, as the stamp of the lawyer is put on the left upper end of the document. From the minutes of the first hearing held on 02.02.2007 it is obvious that the respondent Milivoje Vuqkoviq was present in the session, as he signed the minutes. Despite this, the judge appointed the forementioned lawyer Marleku as his temporary representative. Also from the same minutes it can be concluded that the respondent Martin Krasniqi was also present in the session as there is a statement coming from him, in which he accepts the claim. But his signature at the end of the minutes is missing. Asked by the appellate court this respondent denies being present in that session. Also no summonses were sent to the parties for this hearing. If they were not invited properly, then they obviously could not participate in the session. Furthermore, the

presiding judge did not examine the procedural legitimacy of the respondents Golib Vuqković and Stojan Vuqković. Without having any data that their addresses are unknown he appointed a temporary representative for them. It is notable that one of them, Stojan Vuqković, was dead since 1991. The right of the respondents to a fair and impartial trial is seriously breached. All parties have the right to know that there is a trial held against them (art.6 of ECHR). The first summonses found in the case are served to the parties, in fact only to the claimant and the first respondent Krasniqi, to deliver the court decision. There are no invitations to the parties for any of the five hearings held by the court. The court has also accepted as evidence a written declaration of a person (Nicolle Palaj) and based a decision on his statement. According to the provisions of the LCP witnesses should be examined in front of the court as every party has the full and fair opportunity to ask questions. In chapter XVIII of the LCP named 'Evidence and adduction of evidence', a written declaration from a person that potentially has some knowledge on the disputed facts, is not foreseen as a kind of evidence. The declaration cannot be considered as a document in the sense of art.230 of the same law. In conclusion, a written declaration can not be equalized to a witness statement and is inadmissible as evidence.

Court expenses

Since the claim is rejected the claimant has no right for reimbursement of expenses. The respondents do not plead for expenses neither in the first instance nor in the second instance, nor present evidences for any costs, hence they will not be compensated for such.

As stated above, pursuant to art.373 par.1, 2 and 3 on the Law on Contested Procedure, it is decided as in the enacting clause of this decision.

Legal remedy

The parties may request for revision of this judgment through the Municipal court of Klina to the Supreme Court of Kosovo within 30 days from the day the copy of the judgment has been served.

District court of Peja/Pec
AC.nr. 531/2008

Prepared in English,
an authorized language.

Presiding Judge

Verginia Micheva-Ruseva

