IN THE NAME OF THE PEOPLE

DISTRICT COURT OF PRIZREN, in a panel composed of EULEX judge Vladimir Kanev as Presiding judge, EULEX Judge Klaus Huener and Kosovo Judge Edije Sezairi as panel members, in the civil case relating to the claim on confirmation of ownership of claimants G. A. S., A.S. and N.A.S. from village Bukosh/Bukoš, Municipality of Suharekë/Suvareka, represented by the authorized attorney S. Halite from Suharekë/Suha reka, against the respondent Municipality of Suharekë/Suvareka represented by the Municipal Public attorney S.Zeqiraj, and also the Ministry of Justice of the Republic of Kosovo in Prishtinë/Priština, deciding on the appeal of of the Municipal Public Attorney representative of the respondent, filed on 13.01.2010 against the Judgment of the Municipal court in Suharekë/Suvareka C.no. 81/08 dated 13.12.2009 in the panel session held on 29.07.2010, renders the following

J U D G M E N T

The appeal of the Municipal Public Attorney representative on the behalf of the respondent is **GRANTED** as grounded.

The Judgment of the Municipal court of Suharekë/Suha Reka Cno.81/2008, dated 03.12.2009 is **REVOKED**, and

The Claim request of claimants, G.A.S., A.A.S. and N.A.S. all from village Bukosh MA Suhareka, for ownership identification based on the inheritance, by 1/3 ideal part of the cadastral parcels no. XX, in an area of 0.42,14 ha, registered in the possession list no. XX C.Z. Savrova, which borders: in the north with cadastral parcel no. XX a property of S. S. B. from vill. Savrova, in the east with the cadastral parcel no. XX and XX a property of R. J. S. from village Bukosh respectively H. A. A. from vill. Savrova, in the east side with a public road, with these measures and dimensions in the north 120m, in the east 81,7m with a refraction of 9.5m in the direction of east-west, in the south-west 157,1m and the cadastral parcel no.XX/XX, in an area of 0.84,60ha, which is registered in the possession list no. XX CZ Savrova which borders in the south with the cadastral parcel no. XXX a property of I. H.Q. from vill. Savrova, the cad. no.XXX a property of B. H. U., from vill. Savrova the cad. parcel no.XXX and XXX a property of H. H. U., from vill. Savrova, in the west it borders with the cadastral parcel no.XXX a public property of MA Suhareka, in the

north with the cadastral parcel XXX while in the east respectively the direction south-north is borders with a public road with these measures and dimensions in the north 27,4m in the east respectively in the direction of north-south 157.0m in the south 152,7m and in the west 87.5m with a refraction at point 28, is **REJECTED** as ungrounded.

The procedural expenditures shall be burdened on the claimants.

R e a s o n i n g

Admissibility and Grounds of the appeal

The appeal is admissible as timely filed pursuant to Article 176.1 of LCP and the appellant is entitled to.

The representative of the respondent filed an appeal against the judgment C.no. 81/08 of the Municipal court of Suhareke/Suvareka dated 03.12.2009 for basic violation of provisions of contested procedures, erroneous and partial confirmation of the factual situation and erroneous application of the material rights. He proposes to quash the impugned judgment and return the case for retrial, since the claimant is missing the active legitimacy on the property. More specifically, the respondent alleges that the first instance court has violated the provisions of contested procedures contrary to Article 182.2, items g) and n) of the Law on Contested Procedure (hereinafter LCP) because:

- the claimants are missing the active legitimacy to be litigator; the Municipal court wrongly applied article 37 of Law on Basic Property relations;
- the judgment is in contradiction with the reasoning since this court did not act based on the remarks given by the Supreme court of Kosovo and the District court in Prizren;
- the deed (*tapia*) as evidence provided was not original but a copy; further Witness Mexhit Baraliu admitted that he told to the claimants that the contested property is a social property and it happened that only 1 year the claimants use to work on it and never again.
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The claimants in their reply propose to reject the appeal and to confirm the challenged judgment. The claimants submit that the judgment is based on a map which is reliable evidence. According to the witness statements presented, the claimants are the successors of the individuals under whose name the map is registered and they willingly sold these parcels to the claimants' predecessor (their grand father). The Municipal

court of Suhareke/Suvareka acted upon the recommendation of the District court of Prizren and accurately confirmed the contested facts pursuant to Article 7 of the LCP. Finally the claimants submit that they have the right to lodge an appeal pursuant to Article 37 of the Law on Basic Property Relations (hereinafter LBPR).

Procedural background

On 20.09.2000, the claimants filed a claim for confirmation of their ownership right on the contested property (agricultural land registered under the Cadastral no. 96, registered in the possession list no. XX C.Z., Municipal Assembly Savrovo/Savrovë, Suharekë/Suvareka, surface of 1.26,74 m2) based on the fact that their predecessor has gained the ownership right on these parcels pursuant to a purchase contract.

According to the claim, claimants' grandfather had sold these parcels to A. K., while later the claimants' father A. S. has bought the same land from A. K.. In 1970 the A. S. have entered into possession of the parcels and used them for three years. Later on, the possession of property was obstructed by Municipality, alleging that the parcels were public property registered as pasture land.

On 10.07.2003, the Municipal court of Suharekë/Suhareka, in its Judgment C.no. 113/2000, confirmed the ownership of the claimants based on purchase of the disputed property.

On 09.12.2004, upon appeal of the respondent, the District court of Prizren in its ruling Ac.no. 355/2003 rejected the appeal as ungrounded and confirmed the first instance judgment.

On 03.02.2005, the respondent filed a proposal for revision before the Supreme court of Kosovo. On 25.01.2006, by Ruling Rev.no. 63/2005, the Supreme Court approved the request for revision and remanded the case to the first instance court for re-trial.

According to the assessment of the Supreme Court, the Second Instance Court failed to assess the appeal claims which deal with the essential violations of provisions of the contested procedure, that the Judgment has no grounds on the decisive facts, related to the contested parcels. The Supreme Court of Kosovo, has assessed the revision claims as grounded, because according to the assessment of this court, the judgments of the lower instance courts were taken in essential violation of provisions of the contested procedure foreseen under Article 354 par. 2 item 14 as read with Article 375 par. 1 of the LCP, because of these omissions the Judgment cannot be reviewed.

On 15.06.2007, the Municipal court of Suharekë/Suvareka (Judgment C.no. 69/2007) rejected the ownership claim considering that the claimants did not submit proper evidence on the property ownership.

The second instance court approved the appeal filed by the claimants on 06.03.2008 (Judgment Ac.no. 361/2007) and suggested to the first instance court on re-trial assess the statements of the witnesses and request from geodesy experts of Suharekë/Suha reka or from Cadastre and Geodesy Agency of Prishtinë/Priština a verification of the possession documents of the contested parcels.

The Municipal court of Suharekë/Suvareka, by judgment C.no. 81/08 dated 03.12.2009, entirely approved the claim and confirmed the claimants' ownership on the disputed property.

The respondent filed an appeal on 13.01.2010 before Prizren District court on against the Municipal court of Suharekë/Suvareka C.no. 81/08. The claimants submitted a reply to the appeal on 15.01.2010.

Legal assessment

In its Ruling Rev.no.63/2005 on 25 January 2006, the Supreme court of Kosovo considered that while the first and second instance judgments decided that the claimants had gained the ownership right based on the purchase contract of the immovable property, the claimants proved neither the existence of a purchase contract of their predecessor nor the identity of the immovable property in issue. In this respect SCK provided instructions to be followed in retrial. Present Panel takes into consideration evidence administered during two retrials that ensued revision procedure. Supreme Court instructions are not only guidelines for the retrial court, these also inform parties as to evidence they can propose and motions they can file in retrial. Having considered the two first instance proceedings that took place after revision present Panel is satisfied that parties have exhausted their procedural opportunities thus final decision shall be based on the evidence available.

Based on available evidence claims shall be rejected as groundless because of two findings – there is no written contract for ownership transfer of parcels and there is no conclusive evidence that sellers were rightful owners of the property.

Present Law on contracts and torts as well as law applicable in 1970's when alleged purchase took place require written form of contract over real estate ownership. Contracts of a kind lacking written form are null and void. This was why SCK in the revision proceedings instructed lower instances to verify if there was a contact dully concluded. Subsequent proceedings reveal no written contract existed.

Analysis of previous proceedings reveal that this void contract was mistakenly honored because of wrongful interpretation of Art. 73 of Law on contracts and torts. This provision reads :

> **Article 73**. ***In Case of Performing a Contract Lacking the Form***
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> A contract whose conclusion is made dependent on the written form shall be considered valid although not entered into in such form, after contracting parties have performed, entirely or substantially, the obligations arising from such contract, unless something else obviously results from the purpose of prescribing the form.

Wrong interpretation is twofold – as to the provision itself and as to a main principle of the civil law. When it comes to contracts over real estate ownership the prescribed written form has an obvious purpose that goes beyond will and performance of contractual parties. Only written contract can be registered with the Cadastre thus providing safety and stability of ownership record and transactions. So, strictly interpreted this provision can not take effect when contracts of a kind are in issue.

But even if a loose interpretation of Art. 73 is employed, a general principle prevents verbal and non-registered contracts over real estate ownership take effect on third party interests. This is because contracts take effect only on contractual parties. Only as exception that is explicitly provided for by the law can a contract take effect on person or entity that is not party to that contract. There is no such a provision for contacts that fall in the scope of art. 73 Law on contracts and torts. So, as the defendant in the case under consideration is a third party to alleged contact, the contract takes no effect versus defendant even if it was considered valid between contractual parties.

In addition the court finds no conclusive evidence that alleged assignor was actually the owner of property in issue. Document called tapi contains no enough data for positive conclusion in this respect.The evidence which have been offered by the claimants and in particular the possession paper no. XXX, which was interpreted also by the geodesy expert, is not a strong evidence on ownership.

Based on the aforementioned the Court assesses that the alleged claims are ungrounded and decides as per the enacting clause of this Judgment pursuant to Article 195.1 (b) of the LCP.

DISTRICT COURT IN PRIZREN
AC.no.37/2010 dated 29.07.2010

Presiding Judge

Vladimir Kanev

Legal remedy: No appeal is allowed against this ruling.