

**THE DISTRICT COURT OF
GJILAN/GNJILANE**

30th June 2011

AC.nr.195/2010

THE DISTRICT COURT OF GJILAN/GNJILANE in a panel composed of 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 FARI FETAHU from VITI/VITINA with an authorized representative Lawyer SHEMSEDIN PIRAJ from GJILAN/GNJILANE against the respondents MIRVETE SALIHU-FETAHU from VITI/VITINA, now residing abroad with unknown address there with an authorized representative Lawyer SAHIT MUSA from VITI/VITINA, HUMANE FETAHU, ARTON FETAHU, and ARIF FETAHU, the three of them now residing abroad with unknown addresses there, ARTA FETAHU, ADELINA FETAHU and BUJARE FETAHU, the three of them from village DROBESH/DROBEŠ, the Municipality of VITI/VITINA,

Upon a claim for confirmation of ownership under Article 254, paragraph 1 of the Law No. 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No. 38/2008) ("LCP"),

Having adjudicated the appeal of FARI FETAHU filed against judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 in the second instance proceedings under Article 185 - 205 LCP,

After deliberation and voting on the appeal above in a panel session under Article 190, paragraph 1, first hypothesis LCP held on 30th June 2011,

Hereby in accordance with Article 195, paragraph 1, item c) and Article 198, paragraph 2 LCP renders the following

RULING

The appeal of FARI FETAHU from VITI/VITINA with an authorized representative Lawyer SHEMSEDIN PIRAJ from GJILAN/GNJILANE is **APPROVED** as founded and judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 is **ANNULLED** with remittal of the case to the court of first instance for retrial.

REASONING

I. Procedural Background

1. By judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 it was rejected the claim of the claimant FARI FETAHU filed against the respondents MIRVETE SALIHU-FETAHU, HUMANE FETAHU, ARTON FETAHU, ARIF FETAHU, ARTA FETAHU, ADELINA FETAHU, and BUJARE FETAHU for confirmation of ownership on ½ ideal part of cadastral parcel nr.1474/4 with copy plan

nr.3/11 in the place called "RASULA", culture – 3rd class field, with a surface of 0.20.00 ha, CZ DROBESH/DROBEŠ, registered in the new Possession List in the name of the late ARIF FETAHU, inherited by the respondents according to inheritance decisions T.nr.50/2000, dated 12th December 2001 and 7th August 2002 in 1/7 ideal part.

2. On 28th April 2010, an appeal was filed by FARI FETAHU through his authorized representative Lawyer SHEMSEDIN PIRAJ from GJILAN/GNJILANE challenging entirely judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 for *substantial violations of the provisions of the contested procedure* as per Article 182, paragraph 2, items k) and n) 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 to the second instance court is to modify judgment C.nr.350/09 of the Municipal Court of VITI/VITINA, dated 20th April 2010 with approval of the claim or alternatively to annul this judgment with remittal of the case for retrial to the first instance court.

3. According to Article 187, paragraph 2 LCP on 4th May 2010 a reply was submitted by the respondent MIRVETE SALIHU-FETAHU contesting all the grounds indicated in the appeal and requesting confirmation of the challenged first instance judgment.

4. Since the appeal was not regularly administered by the court of first instance, this court of second instance pursuant to Article 176, paragraph 1, first sentence LCP served on 21st June 2011 its copies for reply within 7-days period to the respondents MIRVETE SALIHU-FETAHU, HUMANE FETAHU, ARTON FETAHU, ARIF FETAHU, ARTA FETAHU, ADELINA FETAHU, and BUJARE FETAHU.

5. The reply of the respondent MIRVETE SALIHU-FETAHU, dated 4th May 2010 was served by this court of second instance in accordance with Article 187, paragraph 2 LCP to the appellant FARI FETAHU on 21st June 2011, who on 24th June 2011 through his authorized representative Lawyer SHEMSEDIN PIRAJ from GJILAN/GNJILANE filed a submission objecting it as belated and unfounded.

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

6. This second instance civil case - AC.nr.195/10 of the DC of GJILAN/GNJILANE - was selected pursuant to 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") by ruling of EULEX Judge, dated 16th December 2010. The hearing under Article 5, paragraph 7, first sentence of the Law No. 03/L-053 on Jurisdiction was held on 23rd February 2011 by EULEX Judge appointed as Delegate of the President of the Assembly of the EULEX Judges according to Decision ref.nr.JC/EJU/OPEJ/2230/mgc/11, dated 28th January 2011. The same EULEX Judge based on Article 5, paragraph 7, second sentence of the Law No. 03/L-053 on Jurisdiction issued a ruling, dated 24th February 2011 for assignment of the case to a three-judge 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/2298/mgc/11

of the President of the Assembly of EULEX Judges, dated 3rd March 2011 under Article 5, paragraph 5 of the Law No. 03/L-053 on Jurisdiction by Decision Agj.nr.40/11 of the President of the District Court of GILAN/GNJILANE, dated 9th March 2011.

7. 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/GNJILANE is empowered to adjudicate AC.nr.195/10 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

8. 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 Article 186, paragraph 2 LCP. Judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 was duly served to FARI FETAHU on 14th April 2010. His appeal was filed to the Municipal Court of VITI/VITINA on 28th April 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 on behalf of the claimant in the first instance proceedings who have the right and legal interest to submit it and has not renounced or withdrawn it. The appeal is signed by Lawyer SHEMSEDIN PIRAJ, authorized by the claimant on the basis of a power of attorney, dated 15th October 2001 which is general in its scope of authorization and explicitly includes the right to use this legal remedy - Article 90, paragraph 2, item a) LCP. *At fourth place*, the appeal has the mandatory content required by Article 178, items a) – d) LCP and is not incomplete as per Article 179, paragraph 1 LCP. Therefore 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

9. On 17th October 2001 FARI FETAHU filed a claim against MIRVETE SALIHI, both of them from VITI/VITINA, registered as C.nr.118/2001 of the Municipal Court of VITI/VITINA. The allegations were that the claimant was brother of ARIF FETAHU who died on 3rd September 2000, while the respondent had out-of-marriage relationship with him. Until 1997 all of them and other relatives lived in one and the same household as a common family in village VĚRBAN/VERBAN, the Municipality of VITI/VITINA. With the means earned by cultivating the agricultural land – their joint possession, the deposited savings in hard currency of the father of FARI FETAHU and ARIF FETAHU from his work for decades abroad, and the profit of joint operation of the commercial company “ARTA-COMMERCE”, based on mutual agreement they bought properties, including cadastral parcel nr.147/4, copy plan nr.3/11, in the place called “RASULA”, culture – field of 3rd class, with a total surface of 0.20.00 ha, CZ DROBESH/DROBEŠ, registered in Possession List with new number in the name of ARIF FETAHU. However, after his death, MIRVETE SALIHU-FETAHU denied the contribution of FARI

FETAHU for the acquisition of this property. The claimant requested from the court to confirm the co-ownership on this cadastral parcel in equal parts of $\frac{1}{2}$ for each one of the litigants. The claim included also a similar statement for two apartments, in which part the lawsuit had been finally decided and at present is not pending as subject-matter of the proceedings.

10. On 9th August 2002, the respondent MIRVETE SALIHU-FETAHU signed power of attorney to Lawyer IDRIZ BAJRAMI from GJILAN/GNJILANE to represent her in the case and to file the necessary regular and extraordinary legal remedies.

11. On 12th August 2002, Lawyer IDRIZ BAJRAMI submitted a reply to the claim on behalf of the respondent MIRVETE SALIHU-FETAHU.

12. After the initiation of the instant contested procedure by inheritance decision T.nr.50/01 of the Municipal Court of VITI/VITINA, dated 12th December 2001, verified with a final court stamp for its entry into force on 4th January 2002, MIRVETE SALIHU-FETAHU, ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, ARTON FETAHU, HUMANE FETAHU, and ARIF FETAHU were announced legal inheritors of the deceased ARIF FETAHU with $\frac{1}{7}$ in his property – subject of inheritance (point I of the enacting clause). MIRVETE SALIHU-FETAHU was appointed as a trustee of the inheritance of ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, ARTON FETAHU, HUMANE FETAHU, and ARIF FETAHU, all juveniles at that time, until they became adult (point II of the same enacting clause). By inheritance decision T.nr.50/2001 of the Municipal Court of VITI/VITINA, dated 7th August 2002, verified with a final court stamp for its entry into force on 7th August 2002, the initial regulation of inheritance of the deceased ARIF FETAHU was supplemented among the legal successors above for the same ideal parts of $\frac{1}{7}$ in cadastral parcel nr.147/4, in the place “RASULA”, CZ DROBESH/DROBEŠ, with a surface of 0.20.00 ha, registered in Possession List issued by the Directorate for Geodesy, Cadastre and Property (DGCP) – VITI/VITINA. In C.nr.118/2001 of the Municipal Court of VITI/VITINA, both judicial acts were collected as documentary evidence and the testimonies of the witnesses DELI FETAHU and KADRI FETAHU were heard in the main hearing on 24th December 2002 only with the participation of FARI FETAHU and MIRVETE SALIHU-FETAHU.

13. By judgment C.nr.118/2001 of the Municipal Court of VITI/VITINA, dated 24th December 2002, affirmed upon appeal by judgment AC.nr.79/2003 of the District Court of GJILAN/GNJILANE, dated 6th June 2003, it was confirmed the property of the claimant FARI FETAHU on $\frac{1}{2}$ ideal part of the contested cadastral parcel nr.147/4, and the respondent MIRVETE SALIHU-FETAHU was obliged to recognize this right and its cadastral registration by the DGCP – VITI/VITINA. By ruling Rev.nr.143/2003 of the Supreme Court of Kosovo, dated 18th December 2003 the revision of MIRVETE SALIHU-FETAHU was accepted - judgment AC.nr.79/2003 of the District Court of GJILAN/GNJILANE, dated 6th June 2003 and judgment C.nr.118/2001 of the Municipal Court of VITI/VITINA, dated 24th December 2002 were annulled in the part for cadastral parcel nr.147/4 and the case was sent to the first instance court for retrial. The Supreme Court of Kosovo reasoned itself with found infringement of Article 201 of the Law on

Contentious Procedure ("Official Gazette of the SFRY" No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 and "Official Gazette of the SRY" No.27/92, 31/93, 24/94, and 12/98) (LCP 1977) because of non-participation in the case of the six children of the deceased ARIF FETAHU in consolidated joint litigation with his wife MIRVETE SALIHU-FETAHU, all as legal successors entitled to 1/7 of his inheritance.

14. For its first retrial, the case was registered as C.nr.16/2004 of the Municipal Court of VITI/VITINA. On 6th May 2005 the claim was sent back to the claimant for correction until 21st June 2005 in conformity with ruling Rev.nr.143/2003 of the Supreme Court of Kosovo, dated 18th December 2003. Within the deadline on 20th June 2005 on behalf of the claimant FARI FETAHU his authorized representative Lawyer SHEMSEDIN PIRAJ filed a submission for amendment, completion and precision of the claim so that it should be considered filed against MIRVETE SALIHU-FETAHU, ADELINA FETAHU, ARTA FETAHU, BUJARE FETAHU, ARTON FETAHU, HUMANE FETAHU and ARIF FETAHU, all as respondents in their capacity of co-inheritors of the late ARIF FETAHU according inheritance decision T.nr.50/01 of the Municipal Court of VITI/VITINA, dated 12th December 2001. Regardless of this amendment of the claim, on 21st June 2005 the main hearing was held with the participation of the initial litigants only – FARI FETAHU as a claimant and MIRVETE SALIHU-FETAHU as a respondent, without summoning, presence and/or participation of the newly constituted respondents ADELINA FETAHU, ARTA FETAHU, BUJARE FETAHU, ARTON FETAHU, HUMANE FETAHU and/or ARIF FETAHU. In the same session the witness ENVER REXHEPI gave his testimonies that in 1995 he sold the contested parcel to ARIF FETAHU, who bought it for himself and personally fully paid its agreed price of 5 000 DM. The main hearing in C.nr.16/2004 of the Municipal Court of VITI/VITINA continued on 8th August 2005, in which session MIRVETE SALIHU-FETAHU participated for herself and also as a representative of all children of the late ARIF FETAHU.

15. The first retrial in the case was completed by judgment C.nr.16/2004 of the MC of VITI/VITINA, dated 8th August 2004, for rejection of the claim of FARI FETAHU for confirmation of his ½ ideal part in cadastral parcel nr.147/4. Appealed, it was affirmed by judgment AC.nr.300/05 of the District Court of GJILAN/GNJILANE, dated 24th March 2006. The revision filed by FARI FETAHU was approved by ruling Rev.nr.159/2006 of the Supreme Court of Kosovo, dated 20th May 2008 - judgment AC.nr.300/2005 of the District Court of GJILAN/GNJILANE, dated 24th March 2006 and judgment C.nr.16/04 of the Municipal Court of VITI/VITINA, dated 8th August 2005 were quashed and the case was returned to the first instance court for retrial. The Supreme Court of Kosovo found a substantial violation of Article 354, paragraph 1, point 11 LCP 1977, because of undue representation of the respondents ARTA FETAHU, ADELINA FETAHU and BUJARE FETAHU. Namely, it was taken into account that the custody of MIRVETE SALIHU-FETAHU for these juveniles established by Decision No. 79-1/2001, Decision No. 79-2/2001, and Decision No. 79-3/2001, all issued on 27th July 2001 by the Director of the Center for Social Welfare (CSW) - VITI/VITINA was terminated by Decision No. 1038-1/04, dated 6th September 2004, Decision No. 1038-2/04, dated 6th September 2004, and Decision, dated 17th March 2006 of the Director of CSW - VITI/VITINA and as their

new custodian was appointed FATIME FETAHU from VITI/VITINA based on Article 22, Article 210 and Article 237 of the Law on Marriage and Family Relations (LMFR) ("Official Gazette of SAPK No.10/1984). Therefore, MIRVETE SALIHU-FETAHU could not act as a legal representative of these respondents and could not give on their behalf a power of attorney to any authorized representative. Also it was pointed out that ARTA FETAHU, born on 1st April 1988, and ADELINA FETAHU, born on 30th June 1990, became adult in the course of the proceedings. The first instance court was obliged by the Supreme Court of Kosovo to eliminate in the retrial all these deficiencies.

16. After this remittal the case was registered as C.nr.205/08 of the Municipal Court of VITI/VITINA. On 30th December 2008 a power of attorney was presented to the file issued by the District Bureau for Legal Aid – GJILAN/GNJILANE on 24th December 2008 for Lawyer VISAR MUSA from VITI/VITINA to represent the beneficiary of legal aid MIRVETE SALIHU in the case for confirmation of ownership *in relation to Revision Rev.nr.156/06*. On 31st December 2008 a counterclaim signed by Lawyer VISA MUSA was submitted on behalf of "MIRVETE FETAHU and others" against FARI FETAHU, however without all its mandatory requisites, including an explicit proper statement. In this second retrial the main hearing was held on 9th January 2009 during which Lawyer VISAR MUSA acted as a representative of MIRVETE SALIHU-FETAHU, ARTON FETAHU, HUMANE FETAHU and ARIF FETAHU, ARTA FETAHU and ADELINA FETAHU participated in person, whereas for BUJARE FETAHU took part MITAT MISINI from CSW–VITI/VITINA. By judgment C.nr.265/08 of the Municipal Court of VITI/VITINA, dated 9th January 2009 the claim was rejected (point I of the enacting clause), whereas the counterclaim qualified as one for release of the contested cadastral parcel nr.147/4 was approved (point II of the enacting clause). By ruling AC.nr.76/09 of the District Court of GJILAN/GNJILANE, dated 28th September 2009 pursuant to Article 195, item c) LCP the appeal of FARI FETAHU was approved – judgment C.nr.265/2008 of the Municipal Court of VITI/VITINA, dated 9th January 2009 was annulled and the case was returned to the court of first instance for retrial because of substantial violations of the provisions of the contested procedure under Article 182, paragraph 2, items k) and n) LCP. Firstly, in the judgment FARI FETAHU was qualified as claimant–counter-respondent, MIRVETE SALIHU-FETAHU, ARTON FETAHU, HUMANE FETAHU and ARIF FETAHU as respondents–counter-claimants, though the counterclaim of 31st December 2008 was signed by Lawyer VISAR MUSA only for MIRVETE SALIHU - FETAHU, with incomprehensible and incomplete content that was not subsequently corrected or completed pursuant to Article 102, paragraph 1 LCP. Secondly, the District Court of GJILAN/GNJILANE pointed out that in C.nr.265/08 of the Municipal Court of VITI/VITINA the juvenile BUJARE FETAHU was represented by MITAT MISINI from the CSW – VITI/VITINA, without a decision for his appointment as a custodian for the proceedings enclosed in the case file contrary to Article 76 LCP. At the end, the District Court of GJILAN/GNJILANE gave instructions for the conduct of the retrial procedure.

17. After the remittal, the case was registered as C.nr.359/2009 of the Municipal Court of VITI/VITINA. On 20th January 2010 a letter was sent to the CSW – VITI/VITINA by the Judge assigned to the case for appointment by the Custodian Body of a representative

of the juvenile respondent BUJARE FETAHU for the proceedings since her custodian FATIME FETAHU being a spouse of the claimant FARI FETAHU could not represent her because of this conflict of interests. No official response was received to this request by the CSW-VITI/VITINA until C.nr.359/2009 of the Municipal Court of VITI/VITINA was completed. The court sessions on 22nd February 2010, 26th March 2010 and 6th April 2010 according to their minutes were conducted in the presence of FARI FETAHU as a claimant-counter-respondent and his authorized representative Lawyer SHEMSEDIN PIRAJ, MIRVETE SALIHU-FETAHU as a respondent – counterclaimant and also “*legal representative of the respondents – counterclaimants*” HUMANE FETAHU, ARTON FETAHU, and ARIF FETAHU, *all represented by Lawyer VISAR MUSA*, ADELINA FETAHU and ARTA FETAHU, both as respondents, and MITAT MISINI from CWS – VITI/VITINA “*as a representative of the respondent BUJARE FETAHU*”. The sessions on 22nd February 2010 and 26th March 2010 were adjourned upon a request of the parties in order to reach a settlement. The session on 6th April 2010 was held as a main hearing – in the course of which statements were made by the claimant-counter-respondent FARI FETAHU, Lawyer VISAR MUSA as a representative of MIRVETE SALIHU-FETAHU, HUMANE FETAHU, ARTON FETAHU, ARIF FETAHU as respondents-counter claimants, ADELINA FETAHU and ARTA FETAHU as respondents, as well as MITAT MISINI from CWS-VITI/VITINA as a representative of the respondent BUJARE FETAHU, based on their proposals as documentary evidence were read the testimonies of DELI FETAHU and KADRI FETAHI in the records of 24th December 2002 and of ENVER REXHEPI in the records of 21st June 2005 and inheritance decision T.nr.50/01 of the Municipal Court of VITI/VITINA, dated 7th August 2002. The main hearing on 6th April 2010 was completed with the final speeches of the above enumerated participants.

18. By judgment C.nr.359/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 the claim of the claimant FARI FETAHU against the respondents MIRVETE SALIHU-FETAHU, HUMANE FETAHU, ARTON FETAHU, ARIF FETAHU, ARTA FETAHU, ADELINA FETAHU and BUJARE FETAHU for confirmation of ownership on ½ ideal part of cadastral parcel nr.147/4 was rejected. The reasoning was based on decision T.nr.50/2001 of the Municipal Court of VITI/VITINA, dated 7th August 2002 by which the respondents were determined as its co-owners based on inheritance of the late ARIF FETAHU, as well as the statements of ENVER REXHEPI given on 21st June 2005 that in 1995 he sold the parcel to ARIF FETAHU, who on his own paid the full price. Hence, the court of first instance assumed that as the claimant had not participated in this legal transaction and had not contributed to the purchase of this real estate, he did not acquire any ideal part in its ownership.

V. 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

19. The first ground for examination of judgment C.nr.350/09 of the Municipal Court of VITI/VITINA, dated 20th April 2010 is under Article 181, paragraph 1, item a) LCP for *substantial violations of the provisions of the contested procedure* under Article 182, paragraph 2, item k) LCP related to *the procedural capacity and/or the representation of*

the litigants within the scope indicated in the appeal, as well as within the one subject *ex officio* of appellate review according to Article 194 LCP.

20. As stipulated in ruling Rev.nr.145/03 of the Supreme Court of Kosovo, dated 6th June 2003, all co-inheritors of the late ARIF FETAHU to whom the disputed cadastral parcel nr.147/4 has been transferred by inheritance represent a common undivided legal community. Due to the nature of this legal relationship, the dispute about the claimed co-ownership of FARI FETAHU in cadastral parcel nr.147/4 with ½ ideal part could only be resolved in the same manner with respect to all co-inheritors of the late ARIF FETAHU *in consolidated joint litigation* in which they are all considered a single party pursuant to Article 201 LCP 1977 (now Article 269, paragraph 1 LCP). Hence, the irregularities below as per the constitution of any these litigants in the case affect their joint procedural capacity of a single party. *At first place*, in the retrial following ruling Rev.nr.145/2003 of the Supreme Court of Kosovo, dated 6th June 2003, by submission, dated 20th June 2005 (not stamped for its acceptance by the court on that date) Lawyer SHEMSEDIN PIRAJ on behalf of the claimant FARI FETAHU requested amendment, correction and precision of the claim so it is considered filed against all co-inheritors of the late ARIF FETAHU declared by inheritance decisions T.nr.50/2001 of the Municipal Court of VITI/VITINA, dated 12th December 2001 and 7th August 2002. However, the submission did not have all mandatory requisites, in particular the ones related to the individualization of the juvenile respondents ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU – the dates of their birth as necessary to determine their procedural capacity and the corresponding regime applicable for their participation in the proceedings (Article 186, paragraph 1 in conjunction with Article 106, paragraph 2, first sentence LCP 1977), as well as the legal representative of those not having procedural capacity (Article 186, paragraph 1 in conjunction with Article 106, paragraph 2, second sentence LCP 1977). None of these deficiencies of the claim were subsequently corrected, nor its content was updated after ADELINA FETAHU and ARTA FETAHU indicated in it as juvenile respondents reached majority on 1st April 2006 and 30th June 2008, respectively. Thus the retrial in C.nr.350/2009 of the Municipal Court of VITI/VITINA was conducted though the passive procedural legitimacy of the respondents had not been duly identified by the claim or *ex officio* pursuant to Article 76 LCP as per the *procedural capacity* under Article 74 LCP of these joint litigants or their *legal representation* under Article 75 LCP. *At second place*, the claim was initially filed on 17th October 2001 against MIRVETE SALIHU-FETAHU, and was later expanded by the submission of Lawyer SHEMSEDIN PIRAJ, dated 20th June 2005 so that to include as *additional respondents* ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU. However, their *consent* explicitly required by Article 196, paragraph 2 in conjunction with paragraph 1, item a) LCP 1977 (now Article 264, paragraph 2 in conjunction with paragraph 1, item a) LCP) had not been expressed in any moment or form in the course of the proceedings. Thus the retrial in C.nr.350/2009 of the Municipal Court of VITI/VITINA was conducted though ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU have not given this mandatory consent and have

not duly acquired the status envisaged in Article 196, paragraph 3 LCP 1977 (now Article 264, paragraph 3 LCP) of additional respondents. Hence, the consolidated joint litigation of all co-inheritors of the late ARIF FETAHU under Article 201 LCP 1977 (now Article 269 LCP) was not regularly instituted as a basis for their *specific procedural capacity of a single party* envisaged in these provisions. *At third place*, ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU had not agreed to become additional respondents and hence did not accept the status of the case at the respective moment as previewed by Article 196, paragraph 1 LCP 1977 (Article 264, paragraph 1 LCP). Thus they were not bound by any of the procedural actions undertaken in the case prior that moment based on Article 196, paragraph 3 LCP 1977 (Article 264, paragraph 3 LCP). As for the ones afterwards, they were all conducted without *Lis Pendens* regularly established for these additional respondents in conformity with Article 194, paragraphs 1 or 2 LCP 1977 (now Article 261, paragraphs 1 or 2 LCP) through initial or subsequent service of the claim to each one of them for reply. Its delivery to the initial respondent MIRVETE SALIHU-FETAHU could not produce legal effect to the other co-inheritors of the late ARIF FETAHU based on the presumption of Article 201, paragraph 1 LCP 1977 (now Article 269, paragraph 1 LCP) since it is not applicable for the procedural actions of the court, including the ones foreseen by Article 284, paragraph 1 LCP 1977 (now Article 394 LCP). Without existing *Lis Pendens* under Article 194, paragraphs 1 or 2 LCP 1977 (now Article 261, paragraphs 1 or 2 LCP) the procedural relationships were not duly established with these legal successors of the late ARIF FETAHU and *they were not entitled to act as parties in the proceedings*. This is why their participation in C.nr.350/2009 of the Municipal Court of VITI/VITINA in this capacity should be qualified as a substantial violation of the provisions of the contested procedure in *the first hypothesis* of Article 182, paragraph 2, item k) LCP.

21. The retrial in C.nr.350/2009 of the Municipal Court of VITI/VITINA was held with the participation of Lawyer VISAR MUSA as a representative of MIRVETE SALIHU-FETAHU, as well as of her juvenile children HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU. However, *he did not possess the proper authorization for such representation in the proceedings*. On 31st December 2008 Lawyer VISAR MUSA presented a submission for attachment to the case of his power of attorney, issued on 24th December 2008 by SADULLA SALIHU - Legal Officer of the District Bureau for Legal Aid - GJILAN/GNJILANE to represent MIRVETE SALIHU from VITI/VITINA with UNMIK ID nr.1013219539, as legal aid beneficiary registered in DBLA-05, C.320/08-05 *in the case for confirmation of ownership right in relation to Revision Rev.156/2006*. Its validity was explicitly limited to the completion of the mentioned proceedings and its service for any other purposes was also explicitly prohibited. The document was signed by MIRVETE SALIHU in person, for herself only and *vice versa* not for her children HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU whose names were not at all indicated. Until the completion of retrial in C.nr.350/09 of the Municipal Court of VITI/VITINA, it was not amended or replaced by another one. Based on this document, Lawyer VISAR MUSA was not entitled to act as a representative of MIRVETE SALIHU -FETAHU, HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU in C.nr.350/09

of the Municipal Court of VITI/VITINA. *At first place*, the legal aid system established by UNMIK Regulation No. 2006/36 aims at improving the access to justice of qualified persons, financially eligible under its criteria, *inter alia* by providing *their representation before the courts* - Section 2, paragraph 1 and paragraph 2, item (b). Accordingly, each of the District Legal Aid Bureaux under Section 6, paragraph 1 of UNMIK Regulation No. 2006/36 is empowered: 1) to determine whether the applicant for legal aid is a qualified recipient, financially eligible for primary and secondary legal aid - Section 6, paragraph 2, items (b) and (c); 2) to determine whether the assistance applied for is within the scope of the legal aid services - Section 6, paragraph 2, item (d); 3) to decide the applications for legal aid - Section 6, paragraph 2, item (e); and 4) to ensure the delivery of legal aid in accordance with this decision by referring the applicant to an appropriate provider - Section 6, paragraph 2, item (g). In the instant case the act of the District Bureau for Legal Aid-GJILAN/GNJILANE, dated 24th December 2008 represents a *decision on the application for legal aid* of MIRVETE FETAHU-SALIHU registered in DBLA-05, C no.320/2008 under Section 13.10, items (a) – (c) of UNMIK Regulation No. 2006/36 including determination that she is a qualified person under Section 10, who is financially eligible as a legal aid recipient according to Section 11 and the assistance sought is within the range of the legal aid services available under Section 9. However, this entitlement is unlawfully rendered since contrary to Section 13.10, item (c) of UNMIK Regulation No. 2006/36 *the legal aid granted exceeds the scope of the authorized services*. In property related civil proceedings the primary and secondary legal aid are identically restricted by Section 9, paragraph 1, item (c) and paragraph 2, item (c) of UNMIK Regulation No. 2006/36, respectively, to *legal representation of claimants and respondents regarding the ownership, possession or occupancy of their primary, dwelling or flat*. In the case at stake this requirement is not met - the subject-matter of the retrial in C.nr.350/2009 of the Municipal Court of VITI/VITINA is the co-ownership of *agricultural land* (cadastral parcel nr.147/4 with culture – 3rd class field), which is out of the coverage of the *primary and secondary legal aid* in property related civil cases, *imperatively limited* by Section 9, paragraph 1, item (c) and paragraph 2, item (c) of UNMIK Regulation No. 2006/36 *only to residential properties*. The legal aid could not be considered provided beyond the scope of the primary and secondary legal aid fixed by Section 9, paragraph 3 of UNMIK Regulation No. 2006/36 - *firstly* this competence belongs to the Legal Aid Commission under Section 4.1 exclusively and not to the DBLA under Section 6.1, and *secondly* this exceptional legal aid could be granted only by partnership NGOs, student programmes, or legal aid clinics under Section 8.2, items (c) – (e) and *vice versa* not by members of the district service rosters under Section 8.2, item (a). Therefore the decision of the DBLA GJILAN/GNJILANE, dated 24th December 2008 to grant to MIRVETE SALIHU -FETAHU legal aid through representation in a lawsuit regarding co-ownership of *non-residential property exceeds its competence* limited by Section 13, paragraph 10, item c) of UNMIK Regulation No. 2006/36 to the delivery of the services available in the scope of the primary and secondary legal aid under Section 9, paragraphs 1 and 2. Hence, this decision on the application of MIRVETE SALIHU-FETAHU, dated 24th December 2008 in its part for *determination of legal aid entitlement* being issued by incompetent public

body is *absolutely invalid* pursuant to Article 92, item (b) of the Law No. 02/L-28 on Administrative Procedure (LAP). Based on it, *absolutely invalid* pursuant to Article 93, paragraph 5 LAP is the accessorial part of the same decision for *delivery of this legal aid* by referring the applicant MIRVETE SALIHU-FETAHU to a provider under Section 6, paragraph 2, item (g), sub-item (i) of UNMIK Regulation No. 2006/36 - Lawyer VISAR MUSA assigned from the district service roster as her representative. Therefore the decision of the DBLA-GJILAN/GNJILANE, dated 24th December 2008 being issued for the delivery of *legal aid beyond the scope of the primary and secondary legal aid* limited by Section 9, paragraph 1, item (c) and paragraph 2, item (c) of UNMIK Regulation No. 2006/36 without the competence for exceeding this scope, preserved by Section 9.3 only for the Legal Aid Commission under Section 4.1, as absolutely invalid under Article 92, item (b) LAP produced no legal consequences – Article 93, paragraph 1 LAP and should be incidentally ignored by the court-Article 93, paragraph 2 LAP. Hence, the assignment of Lawyer VISAR MUSA as a representative of the legal aid applicant MIRVETE SALIHU-FETAHU is not the *appointment by a competent state authority, rendered in accordance with the law, demanded by Article 75, paragraph 2 LCP*. Consequently, the participation of this lawyer in C.nr.350/2009 of the Municipal Court of VITI/VITINA as a representative of this party without such proper authorization constitutes a substantial procedural violation in the *fourth hypothesis* of Article 182, paragraph 2, item k) LCP. *At second place*, regardless of this absolute invalidity, the said decision of the DBLA – GJILAN/GNJILANE, dated 24th December 2008 could not legitimate Lawyer VISAR MUSA as a representative in the case. As his authorization is explicitly granted **only for Revision Rev.nr.156/06**, its scope is restricted to this extraordinary legal remedy and *per argumentum ad contrario* all other proceedings are beyond its limits. Based on this authorization for Rev.nr.156/06 of the Supreme Court of Kosovo, Lawyer VISAR MUSA could not act as a representative in C.nr.350/09 of the Municipal Court of VITI/VITINA. For the retrial of this first instance case he had no appointment as stipulated in Article 75, paragraph 2 LCP by any legal aid institution from the ones listed in Section 2, item (i) of UNMIK Regulation No.2006/36. Without being entrusted with the representation of a legal aid provider under Section 6, paragraph 2, item (g), sub-item (i) of UNMIK Regulation No. 2006/36 in C.nr.350/09 of the Municipal Court of VITI/VITINA, Lawyer VISAR MUSA could not conduct in this case any of the actions enumerated in Article 77, paragraph 1 LCP. Thus his participation as a representative of MIRVETE SALIHU-FETAHU without the assignment necessary for the acquisition of this legal capacity in the instant first instance case represents a next procedural infringement under Article 182, paragraph 2, item k) LCP. *At third place*, there is no act whatsoever in the case file for representation of HUMANE FETAHU, ARTON FETAHU and/or ARIF FETAHU by Lawyer VISAR MUSA. Their names are not mentioned in any context in the decision of the DBLA – GJILAN/GNJILANE, dated 24th December 2008. The latter is signed only by MIRVETE SALIHU-FETAHU *for herself and not for her children*. Since Lawyer VISAR MUSA had never been appointed for their representative by an act of competent state authority under Article 75, paragraph 2 LCP and has never been authorized by MIRVETE SALIHU-FETAHU as their mother pursuant to Article 89 in conjunction with

Article 77, paragraph 1 LCP, all his actions conducted in C.nr.350/09 of the Municipal Court of VITI/VITINA on behalf of HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU *were non-authorized*. Undertaken by Lawyer VISAR MUSA without the duly acquired status of a representative of these juvenile litigants, his actions in the case on their behalf are all invalid, non-binding for them and without legal effect in the instant proceedings. These irregularities in the representation of HUMANE FETAHU, ARTON FETAHU and ARIF FETAHU by Lawyer VISAR MUSA without any authorization to act in the case for these parties is also a procedural breach within Article 182, paragraph 2, item k) LCP.

22. The representation of BUJARE FETAHU in C.nr.350/09 of the Municipal Court of VITI/VITINA was with essential procedural omissions too. Born on 1st April 1993 as officially verified by Decision No. 1038-2/04 of Director of the CSW-VITI/VITINA, dated 6th September 2004, she was juvenile during the entire course of the proceedings - from its initiation by ruling AC.nr.76/09 of the District Court of GJILAN/GNJILANE, dated 28th September 2009 for remittal of the case to the first instance court for retrial till its completion by judgment C.nr.350/09 of the Municipal Court of VITI/VITINA, dated 6th April 2010. As minor who had not attained the full capacity to act on her own under Article 74, paragraph 1 LCP, BUJARE FETAHU had the procedural capacity to act *only within the acknowledged limits of her capacity to act* pursuant to Article 74, paragraph 3 LCP. Per argumentum ad contrario, she had no procedural capacity to act out of the same limits and should have been represented by a legal representative according to Article 75, paragraph 1 LCP. This is the hypothesis. The lawsuit adjudicated in C.nr.350/09 of the Municipal Court of VITI/VITINA – co-ownership right of immovable property inherited by BUJARE FETAHU with the other legal successors of the late ARIF FETAHU – was *not within the limits of her capacity to act* acknowledged by Articles 136 and 217 of the Family Law of Kosovo (Law No. 2004/32) (“Official Gazette of the PISG of Kosovo” No. 4/2006) for legal transactions, labour relations, possession and disposal of personal income and property acquired with her work. Thus in the first instance case BUJARE FETAHU could not have the partial procedural capacity under Article 74, paragraph 3 LCP recognized only within these limits and not out of their scope. Hence, her status in C.nr.350/09 of the Municipal Court of VITI/VITINA was of *a minor litigant without procedural capacity*, who could not act personally and should have been represented for all actions in its course by a legal representative according to Article 75, paragraph 1 LCP. This requirement was not met. *At first place*, after the death of ARIF FETAHU on 3rd October 2002, by Decision of the CWS – VITI/VITINA nr.79-3/2001, dated 27th July 2001 and inheritance decision T.nr.50/01 of the Municipal Court of VITI/VITINA, dated 12th December 2002 (point II of the enacting clause) MIRVETE SALIHU-FETAHU was appointed as a custodian of the juvenile BUJARE FETAHU, until she became adult. By Decision No.1038-2/04 of the CSW-VITI/VITINA, dated 6th September 2004 based on Article 22 of the Law of Marriage and Family Relations (LMFR) (“Official Gazette of SAPK” No.10/1984) this custody was terminated as of 6th September 2004 and for a new custodian of BUJARE FETAHU as a child without parental care was appointed her aunt FATIME FETAHU, born on 22nd February 1960, residing in VITI/VITINA. As her *level*

of authorization was general, in its scope the legal representation of BUJARE FETAHU by her custodian FATIME FETAHU was also included based on Article 225, paragraph 1 LMFR. The latter was valid for *all substantive law actions* of this minor except the ones under Article 253, paragraphs 1 and 2 LMFR and for all procedural actions except the appeal envisaged in Article 254 LCP. However, the exercise of this representation in the civil proceedings was *limited* by the requirement for approval of the Custodian Body in the hypothesis of Article 255, point 4 LMFR, and *excluded* in the conflict of interest hypotheses under Article 268 LFPR when a special custodian should be appointed. This custodian status of FATIME FETAHU established on the basis of the LMFR after the entry into force of the Family Law of Kosovo (Law N. 2004/32) (FLK) ("Official Gazette of PISG of Kosovo No. 4/2006) with its promulgation by UNMIK Regulation No.2006/7 on 16th February 2006, from this date onwards was regulated by this new law pursuant to the explicit transitional rule of its Article 353, and its precedence as applicable law under Section 1.1 (a) of UNMIK Regulation 1999/24 over the LMFR as applicable one under Section 1.1 (b) of UNMIK Regulation 1999/24. In particular, after 16th February 2006 FATIME FETAHU remained custodian of BUJARE FETAHU with entrustment under Article 243 FLK including the *legal representation* foreseen by Article 246, paragraph 1 FLK of this minor child under no parental care (Article 216, paragraph 1 FLK). As long as FATIME FETAHU could not represent BUJARE FETAHU in the lawsuit – subject of C.nr.350/09 of the Municipal Court of VITI/VITINA between FARI FETAHU - the spouse of this custodian and this juvenile under custody in view of the prohibition under Article 247, paragraph 4 FLK, the latter did not terminate the custody (Article 221 FLK), nor it lead to discharge or release of the custodian (Article 259 and Article 260 FLK, respectively). Moreover, this legal representation under Article 246, paragraph 1 FLK remained unlimited since it was not replaced by appointment under Article 75, paragraph 2 LCP of another legal representative of this juvenile party rendered in any of the legally previewed alternatives. Even though, FATIME FETAHU was not summoned for any of the trial sessions in C.nr.350/09 of the Municipal Court of VITI/VITINA (Article 107 LCP), did not participate in them (Article 428 - 431 LCP) and did not undertake any of other actions in the proceedings (Article 77, paragraph 1 LCP). Therefore, *the juvenile BUJARE FETAHU was not represented in the case by her custodian* under Article 210, paragraph 1 LMFR (Article 236, paragraph 1 FLK) *as a legal representative with general authorization* under Article 225, paragraph 1 LMFR (Article 246, paragraph 1 FLK). *At second place*, in view of the prohibition set forth by Article 247, paragraph 4 FLK and the necessity for appointment a special custodian of BUJARE FETAHU for the dispute pursuant to Article 230, paragraph 2 FLK, the Municipal Court of VITI/VITINA had the competence to appoint her *temporary representative* pursuant to Article 79, paragraph 1 LCP, while informing the CSW–VITI/VITINA in accordance with Article 79, paragraph 3 LCP in conjunction with Article 265, paragraph 2 FLK. However, these powers were not used by the Municipal Court of VITI/VITINA - no ruling for such appointment was rendered pursuant to Article 387, paragraph 1, item q) LCP. Hence, in the first instance proceedings BUJARE FETAHU had no temporary representative – this form of legal representation under Article 82, paragraph 1 LCP was not utilized for protection of the

interests of this juvenile party in the litigation involving her co-ownership right in the contested immovable property. *At third place*, as pointed out above on 20th January 2010 the Municipal Court of VITI/VITINA sent a letter to the CSW – VITI/VITINA to appoint as Custodian Body a representative of the juvenile respondent BUJARE FETAHU for the proceedings since her custodian FATIME FERAHU being a spouse of the claimant FARI FETAHU could not represent her because of conflict of interests. Without any official response, in the trial sessions on 22nd February, 26th March and 6th April 2010 took part MITAT MISINI from CWS–VITI/VITINA, recorded in the minutes “*as a representative of the respondent BUJARE FETAHU*”. However, there is no document presented to the case file to prove the said procedural legitimacy in compliance with Article 77, paragraph 2, first sentence LCP. There is no decision whatsoever issued by the Custodian Body with the CSW–VITI/VITINA based on the competence under Article 232 in conjunction with Article 6 FLK for the appointment of MITAT MISINI as a *special custodian* of BUJARE FETAHU for C.nr.350/09 of the Municipal Court of VITI/VITINA according to Article 230 FLK. On this occasion this Custodian Body did not define in any form and in any moment the scope of authorization, rights and obligations of MITAT MISINI for the special custody of dispute assessment taking into consideration the circumstances of the case pursuant to Article 231, paragraph 1 FLK. Without this individual assignment he was not entitled also with the other, normatively defined elements of the status of special custodian – the rights, obligations and responsibilities under Article 331, paragraph 2 in conjunction with Article 215, paragraphs 2 and 3 FLK. In this connection Article 243, paragraph 1 and Article 266, paragraph 1 FLK state that the decision of the Custodian Body is mandatory for the *appointment of a custodian, including the special one*, as well as for the entrustment with the *obligations* defined in the scope of the granted authority - Article 266, paragraph 1 FLK. As such an act of CSW – VITI/VITINA has not been submitted to the case, it is to be concluded that MITAT MISINI has not been appointed as special custodian of BUJARE FETAHU for C.nr.350/2009 of the Municipal Court of VITI/VITINA. This non-assignment excludes automatically also his status of a legal representative under Article 246, paragraph 1 FLK because the second one is accessorial to the first one. Since the decision of appointment of a custodian by the competent body under Article 6 FLK according to Article 75, paragraph 2 LCP is the source of procedural legal representation, without such a mandatory act, the authorization ensuing from it was not instituted in C.nr.350/2009 of the Municipal Court of VITI/VITINA. Therefore in the case the participation of MITAT MISINI was only *factual* since *legally* he was not entitled to represent the juvenile BUJARE FETAHU. As the duly granted capacity of a legal representative is a condition for the validity of all procedural actions undertaken on behalf of the parties (Article 77, paragraph 2 and Article 78, paragraph 2 LCP), the ones conducted in C.nr.350/09 of the Municipal Court of VITI/VITINA by MITAT MISINI for BUJARE FETAHU were all invalid, without legal effect. Through him this juvenile party, lacking the capacity to act, was not represented in the case, since without decision of CSW–VITI/VITINA for his appointment as a *special custodian ad hoc* under Article 231 FLK for the case, he never acquired the status of a legal representative of BUJARE FETAHU envisaged in Article 75, paragraphs 1 and 2 LCP and Article 246, paragraph 1

FLK. Thus the participation of MITAT MISINI in C.nr.350/09 of the Municipal Court of VITI/VITINA did not neutralize the non-representation of BUJARE FETAHU by a duly determined representative as a procedural error within Article 182, paragraph 2, item k) LCP. The court of first instance only *initiated* the procedure for her assignment pursuant to Article 78, paragraph 2 LCP and Article 265, paragraph 2 FLK by its letter sent to the CWS-VITI/VITINA on 20th January 2010, but at no later stage in the proceedings did not consider *ex officio* according to its duty under Article 76 LCP whether its was finalized by the appointment of a special custodian as a legal representative *ad hoc* of the juvenile BUJARE FETAHU in the case. The respective instructions explicitly given by ruling AC.nr.76/2009 of the District Court of GJILAN/GNJILANE, dated 28th September 2009 were not complied with by the court of the first instance after the remittal of the case for retrial. In the case file as pointed out in ruling AC.nr.76/2009 of the District Court of GJILAN/GNJILANE, dated 28th September 2009, beside the Decision No. 1038-2/04 of CSW –VITI/VITINA, dated 6th September 2004 for termination of the initial custody of MIRVETE SALIHU-FETAHU and appointment of FATIME FETAHU as a custodian, no other act exists for special custody or other custodian measures with respect to BUJARE FETAHU. The Municipal Court of VITI/VITINA once more in the retrial of C.nr.350/09, exactly like in the previous retrial of C.nr.265/2008, did not fulfill its duties under Article 76 LCP to ensure that this juvenile litigant has a legal representative regularly determined by CSW–VITI/VITINA, to require from MITAT MISINI to prove his entitlement with this capacity in the case according to Article 77, paragraph 2 LCP or to take all the other actions needed for a fair representation of this party lacking full procedural capacity as foreseen by Article 78, paragraph 2 *in fine* LCP. Until these mistakes were corrected, the Municipal Court of VITI/VITINA should have conducted only *urgent* procedural actions for which there was danger in delay pursuant to Article 78, paragraph 3, second sentence LCP. Contrary to this requirement, the proceedings in C.nr.350/09 were fully completed by the Municipal Court of VITI/VITINA though the legal representation of the juvenile BUJARE FETAHU was not duly determined and evidenced in the case. *At fourth place*, the same refers to the possibility for *custody directly exercised by the custodian body*. There is no decision of CSW–VITI/VITINA issued on the basis of Article 240, paragraph 1, first sentence FLK not to appoint a custodian but to fulfill this obligation directly. Moreover, this solution would have been legally possible only after the designation of FATIME FALIHU as a custodian of BUJARE FETAHU had been revoked through annulment of Decision No.1038-2/04 of CSW–VITI/VITINA, dated 6th September 2004. However, no such evidence is to be found in the case file. Further, in the absence of a decision for custody directly exercised by the Custodian Body (Article 240, paragraph 1, first sentence FLK), there is also no decision for appointment of a representative of the Custodian Body to conduct the tasks of a custodian on its behalf (Article 240, paragraph 1, second sentence FLK), as well as no decision for delegation of these obligations to other professionals who can act on its behalf and under its supervision (Article 242 FLK). Finally, CSW–VITI/VITINA did not represent BUJARE FETAHU through one of its representatives or other professional personnel since the authorization mandatory for this representation under Article 246,

paragraph 2 FLK had never been presented in the case. Without an act of CSW-VITI/VITINA for such individual designation, duly evidenced in the proceedings, in view of the requirements of Article 77, paragraph 2 and Article 92, paragraph 1 LCP, MITAT MISINI participated *de facto* in C.nr.350/09 of the Municipal Court of VITI/VITINA without being *de jure* representative of this Custodian Body, legal or authorized. At no stage of the proceedings this person did legitimate himself as per his position in CSW-VITI/VITINA, his appointment as its representative under Article 240, paragraph 1, second sentence FLK, his delegation under Article 242 FLK and/or his authorization under Article 246, paragraph 2 FLK to act in the instant civil case on behalf of this Custodian body. None of these requirements is derogated by any of the provisions of the Law No. 02/L-17 on Social and Family Services (Official Gazette of the PISG of Kosovo No. /2006) – on the contrary, its Article 7, paragraph 2 affirms their application stipulating that the Custodian Body constituted with the respective CSW will perform the duties required by this function as set out in the relevant Kosovo statutes - FLK and LCP. Summarizing this analysis, in C.nr.350/09 of the Municipal Court of VITI/VITINA the juvenile BUJARE FETAHU was not represented by: 1) *the general custodian* FATIME FETAHU under Article 236, paragraph 1 FLK as a legal representative under Article 246, paragraph 1 FLK; 2) a *temporary representative* under Article 79, paragraph 1 LCP as a legal representative under Article 82, paragraph 1 LCP; 3) by a *special custodian* under Article 230 FLK appointed because of the conflict of interests envisaged in Article 247, paragraph 4 FLK as a legal representative *ad hoc* under Article 246, paragraph 1 in conjunction with Article 231, paragraph 1 FLK; and/or 4) *the Custodian body* with CWS – VITI/VITINA as a legal representative under Article 6, paragraph 2 FLK through its authorized representative under Article 246, paragraph 2 FLK. The majority reached by BUJARE FETAHU on 1st April 2011 has legal effect *ex nunc* and does not neutralize *ex tunc*, retroactively the procedural mistakes above made as per her representation in the first instance retrial completed on 6th April 2010, prior to the date her adulthood. For that reasons all procedural actions undertaken on her behalf or with respect to her in the case remain invalid. Thus legally relevant for the appellate review remains the fact that this minor who lacked the full procedural capacity to act in C.nr.350/2009 of the Municipal Court of VITI/VITINA had no legal or authorized representative with due appointment and/or proper authorization in the case. This constitutes a next substantial violation of the provisions of the contested procedure under Article 182, paragraph 2, item k) LCP, which suffices by itself the approval of the appeal.

23. The challenged judgment C.nr.350/09 of the Municipal Court of VITI/VITINA, dated 6th April 2010 is rendered with errors that could not be examined as per Article 182, paragraph 2, item n) LCP. In its summary part, enacting clause and statement on the grounds FERI FETAHU was ascertained as a *claimant*, whereas MIRVETE SALIHU-FETAHU, HUMANE FETAHU, ARTON FETAHU, ARIF FETAHU, ARTA FETAHU, ADELINA FETAHU and BUJARE FETAHU – as *respondents*. This individualization reflects only their procedural capacity pertaining from the *claim* and *vice versa* not the one from the *counterclaim* submitted on 30th December 2008, though in this second part the proceedings could not be considered terminated. *At first place*, in the main hearing on

6th April 2010 Lawyer VISAR MUSA withdrew the statement of the claim in relation to the release of the contested property. No explicit withdrawal of the counterclaim under Article 261, paragraph 1 in conjunction with Article 256, paragraph 1 LCP was declared or recorded. *At second place*, as pointed out above the assignment of Lawyer VISAR MUSA as a legal aid provider of MIRVETE SALIHU-FETAHU was limited to Revision Rev.nr.156/2006 of the Supreme Court of Kosovo. Therefore, he was not authorized to make any kind of procedural motions on her behalf in C.nr.350/2009 of the Municipal Court of VITI/VITINA, including withdrawal statements under Article 261, paragraph 1 in conjunction with Article 256, paragraph 1 LCP. *At third place*, as a counter-respondent FARI FETAHU did not give his *consent* with the withdrawal of the counterclaim neither *explicitly* pursuant to Article 261, paragraph 2, first sentence in conjunction with Article 256, paragraph 1 LCP, nor *tacitly* pursuant to Article 261, paragraph 2, second sentence in conjunction with Article 256, paragraph 1 LCP. *At fourth place*, no ruling was issued by the Municipal Court of VITI/VITINA that the counterclaim had been withdrawn as previewed by Article 261, paragraph 3 in conjunction with Article 256, paragraph 1 LCP. *At fifth place*, the counterclaim was filed with incomprehensible and incomplete content, as set out in Article 253, paragraph 1 in conjunction with Article 99, paragraph 2 LCP. Though the deficiencies explicitly were identified in ruling AC.nr.76/2009 of the District Court of GJILAN/GNJILANE, dated 28th September 2009, in C.nr.350/09 the Municipal Court of VITI/VITINA did not give any instructions for correction and completion of the counterclaim in accordance with Article 102, paragraph 1 LCP. Consequently, it could not be considered withdrawn as uncorrected or uncompleted within the prescribed period of time based on Article 102, paragraph 3, first sentence LCP, or rejected based on Article 102, paragraph 3, second sentence LCP. Therefore, by the appealed judgment the adjudicated *dispute* and *the procedural capacity of the parties* were determined only upon the *claim*, though as per the *counterclaim* the proceedings were not terminated - respectively it was not excluded from the subject-matter of the case and the litigants had still the status of counter - claimant(s) – counter-respondent(s) pertaining from it. As a result of these procedural inadequacies, the *scope of adjudication* in C.nr.350/2009 of the Municipal Court of VITI/VITINA encompassing according to Article 2, paragraph 1 LCP all claims submitted by the parties to litigation *does not correspond* to the *scope of the judgment* under appeal defined by its enacting clause according to Article 160, paragraph 3 LCP.

24. Judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 contains other errors excluding its examination as per Article 182, paragraph 2, item n) LCP. In particular, its statement under Article 160, paragraph 4 LCP includes the facts related to the purchase contract of the contested immovable property and the contribution for its acquisition based on the statements of DELI FETAHU and KADRI FETAHU given in the records of 24th December 2002 and on the statements of ENVER REXHEPI given in the records of 21st June 2005, however, with no reasoning and no grounds why they were considered eligible as *evidence*. The court of first instance did not fulfill its obligation under Article 8 LCP to admit and consider in the retrial in C.nr.350/2009 of the Municipal Court of VITI/VITINA *only admissible evidence with probative value in*

the specific proceedings, as well as to exclude from processing in the trial and from examination in rendering the judgment *all evidence obtained contrary to the provisions of the contested procedure as inadmissible*. Due to these omissions, the factual findings, crucial for the outcome of the dispute, were established on improper evidentiary basis, non-assessed duly for its admissibility. *At first place*, DELI FETAHU, KADRI FETAHU and ENVER REXHEPI were not summoned according to Article 339, paragraph 1 and Article 346, paragraph 1 LCP as *witnesses* in C.nr.350/2009 of the Municipal Court of VITI/VITINA in order to testify in this capacity in this case. They were not informed of their right to refuse testimonies under Article 342, paragraph 1 LCP and were not notified of their right to refuse answers of individual questions under Article 343 LCP within the specific proceedings. DELI FETAHU, KADRI FETAHU and ENVER REXHEPI did not appear in none of the public court sessions held in C.nr.350/2009 of the Municipal Court of VITI/VITINA on 22nd February 2010 and 26th March 2010. Respectively, none of the procedural actions legally foreseen for their examination under Article 347, paragraph 1 LCP were conducted in C.nr.350/09. They were not informed by the first instance court in this case for the duty to speak the truth without withholding anything and were not warned for the consequences of giving false testimony in compliance with Article 347, paragraph 2, first sentence LCP. Their identity was not determined with the personal data enumerated in Article 347, paragraph 2, second sentence LCP. DELI FETAHU, KADRI FETAHU and ENVER REXHEPI were not examined in C.nr.350/2009 as witnesses – *no questions were posed orally to any of them* according to Article 347, paragraph 1, second sentence *by the parties in this case and the court* in the sequence set forth by Article 348, paragraphs 1 - 2 LCP. They *were not confronted* for conflicting testimonies as foreseen by Article 349 LCP, as well as *were not re-examined* for clarifications of certain facts in compliance with Article 350 LCP. Summarizing, none of the requirements laid down by Articles 339 – 355 LCP mandatory for examination of witnesses in the civil proceedings were fulfilled in C.nr.350/2009 of the Municipal Court of VITI/VITINA with respect to DELI FETAHU, KADRI FETAHU and ENVER REXHEPI. In violation of Article 425, paragraph 1, item d) LCP in the main hearing on 6th April 2010 they were not examined orally and their testimonies were not presented directly in front of the first instance court as demanded by Article 427 LCP. The result of the non-compliance with these mandatory requirements is that the testimonies of DELI FETAHU, KADRI FETAHU and ENVER REXHEPI as witnesses *had not been collected as evidence* in the C.nr.350/2009 of the Municipal Court of VITI/VITINA and *could not be used in rendering the judgment* in this case. *At second place*, the statements of DELI FETAHU and KADRI FETAHU, given on 24th December 2002, and of ENVER REXHEPI, given on 21st June 2005, *being inadmissible* should had been excluded by the first instance court as per their *collection* in the course of the main hearing under Article 425, paragraph 1, item e) LCP, as well as per their *examination* under Article 8 LCP in deciding the lawsuit. They *could not be legally qualified as testimonies of witnesses* as they were not obtained from DELI FETAHU, KADRI FETAHU and ENVER REXHEPI after summoning in that procedural capacity in C.nr.350/2009 of the Municipal Court of VITI/VITINA and after *direct oral interrogation* in the main hearing held on 6th April 2010, contrary to Article 427 LCP.

The testimonies of witnesses could be only oral and should be collected in the specific case in conformity with the imperative requirements of Articles 339–355 LCP. Otherwise they do not represent testimonies of witnesses and could not serve as evidence under Article 319, paragraph 2 LCP in civil litigation. For these reasons, the above mentioned statements of DELI FETAHU, KADRI FETAHU and of ENVER REXHEPI legally are not testimonies of witnesses and lack the corresponding probative value. Being *written declarations of third persons, who are not parties in the case, they are private documents with no evidentiary effect* - Article 329, paragraph 1 LCP. The facts mentioned in them had to be duly proven in C.nr.350/09 of the Municipal Court of VITI/VITINA since they could not be considered established in previous court proceedings. This exemption under Article 321, paragraph 1 LCP is applicable only for proceedings completed by *final court decisions*, since under this condition the procedural actions in them remain with legal effect, including the one related to the establishment of the respective facts. In the instant hypothesis through extraordinary legal remedies (revisions) judgment C.nr.118/2001 of the Municipal Court of VITI/VITINA, dated 24th December 2002 was annulled by ruling Rev.nr.143/03 of the Supreme Court of Kosovo, dated 18th December 2003, whereas judgment C.nr.16/2004 of the Municipal Court of VITI/VITINA, dated 8th August 2005 was annulled by ruling Rev.nr.159/2006 of the Supreme Court of Kosovo, dated 20th May 2008. As a consequence, all procedural actions in the proceedings completed by these first instance judgments, including the ones for collection of evidence, retroactively were invalidated. Thus the examination of DELI FETAHU and KADRI FETAHU as witnesses in C.nr.118/01 of the Municipal Court of VITI/VITINA on 24th December 2002, as well as the examination of ENVER REXHEPI as a witness in C.nr.16/2004 of the Municipal Court of VITI/VITINA on 21st June 2005 were also invalidated and hence the testimonies obtained through them *ex lege* lost probative value. They could not serve as evidence in any of the subsequent retrials for this lawsuit and the respective facts had to be proven through new direct oral examinations of DELI FETAHU, KADRI FETAHU and ENVER REXHEPI in the C.nr.350/2009 of the Municipal Court of VITI/VITINA according to Article 319, paragraph 1 LCP, without recourse to the exemption set forth in Article 321, paragraph 1 *in fine* LCP as non-applicable. Additional argument in this respect is the lack of identity as per the litigants and their representation in C.nr.118/2001, C.nr.16/2004 and C.nr.350/2009 of the Municipal Court of VITI/VITINA – DELI and KADRI FETAHU testified in the first case on 24th December 2002 before ARTA FETAHU, ADELINA FETAHU, BUJARE FETAHU, HUMANE FETAHU, ARTON FETAHU, and ARIF FETAHU, were constituted as new additional respondents, whereas ENVER REXHEPI testified in the second case on 21st June 2005 in the presence of MIRVETE SALIHU as a legal representative of ARTA FETAHU and ADELINA FETAHU, though her custody for them was terminated on 6th September 2004. Due to this non-participation or undue presentation these statements have no legal effect, binding for all litigants in C.nr.350/09. Despite of all these procedural deficiencies, in rendering the judgment under appeal they were not excluded from examination as inadmissible but taken into account as element of its evidentiary basis. These inconsistencies between what is stated in the reasoning to the judgment on the content of the records with these statements and their actual content as

lack of probative value of these documents are procedural violations under Article 182, paragraph 2, item n) LCP.

25. Contrary to Article 160, paragraph 4 LCP and Rev.nr.143/03 of the Supreme Court of Kosovo, dated 18th December 2003 the statement on the grounds of judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 *provides no reasoning* in relation to such crucial material fact for adjudicated property dispute as is the *cadastral registration of the contested parcel* in the name of the late ARIF FETAHU and/or his co-inheritors and its legal basis. This incompleteness of the judgment under appeal is its next procedural defect under Article 182, paragraph 2, item n) LCP.

26. Based on the analysis above and within the limits of the appellate under Article 194 LCP, the court of second instance concludes that the violations of the provisions of the contested procedure under Article 182, paragraph 2, items k) and n) LCP, indicated in the appeal and controlled *ex officio*, exist. Their substantiality as affecting the issuance of a lawful and right judgment is normatively presumed and the annulment of the appealed one is justified on these procedural grounds as per Article 181, paragraph 1, item a) LCP.

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

27. As pointed above the factual situation in the dispute was determined by the first instance court on the basis of evidence collected with procedural infringements excluding their admissibility and probative value. This by itself *undermines the correctness of its factual findings as unduly proven*. Further, the first instance court *failed to establish facts decisive for the lawsuit*, such as the cadastral registration of the contested parcel, the existence/non-existence of family community at the moment of its purchase, as well as the participation/non-participation of its members in the acquisition of this real estate in joint property. Summarized all this indicates an erroneous and incomplete determination of the factual situation as per Article 183 LCP.

Erroneous application of the substantive law - Article 184 LCP

28. In judgment C.nr.350/09 of the Municipal Court of VITI/VITINA, dated 6th April 2010 *there are no provisions of the substantive law* indicated as applied in deciding on the allegations of the parties as imperatively demanded by Article 160, paragraph 5, first sentence LCP. Namely, Articles 326 – 331 LMFR regulating *the property relations of the members of the family community* in 1995, the year of purchase of the contested parcel, and Article 18 of the Law on Basic Property Relations (Official Gazette of SFRY, No. 6/1980) were not quoted in the appealed judgment in any context. This failure for their implementation constitutes erroneous application of the substantive law as per Article 181, paragraph 1, item c) LCP in the first hypothesis of its legal definition under Article 184 LCP.

VI. Conclusion

29. Based on the foregoing considerations the court of second instance shall approve the appeal of FARI FETAHU – judgment C.nr.350/2009 of the Municipal Court of VITI/VITINA, dated 6th April 2010 shall be annulled pursuant to Article 195, paragraph

1, item c) LCP as unlawfully rendered with the grounds for its challenging under Article 181, paragraph 1, items a) – c) LCP invoked in the appeal and the ones identified *ex officio* in the appellate review. The case shall be returned to the court of first instance for procedurally regular retrial pursuant to Article 198, paragraph 2 LCP.

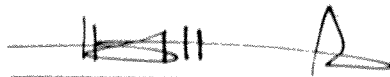
In view of the aforementioned reasoning it is decided as in the enacting clause.

LEGAL REMEDY: No appeal is allowed against this ruling.

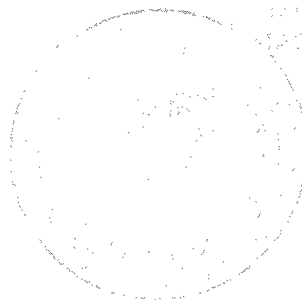
THE DISTRICT COURT OF GJILAN/GNJILANE

AC. nr.195/2010 on 30.06.2011

PRESIDING JUDGE



ROSITZA BUZOVA



PROSTOR ZA
STAMP
DNEVNIK
KRAJNOST 01/11

