

MUNICIPAL COURT OF KLINA

C.No.48/04

IN THE NAME OF THE PEOPLE

THE MUNICIPAL COURT OF KLINA, through presiding EULEX judge Verginia Micheva-Ruseva, assisted by court recorder Vlora Johnston and international interpreters in Albanian and Serbian language Shqipe Cavdarbasha and Mario Rossini, in the case of the claimant Vladimir Radosavljevic from Klina represented by attorney Zhivojin Jokanovic from Prishtina against the respondent Tahir Morina from the village of Globare, Municipality of Gllogovc, represented by attorney Xhafer Maloku from Klina, on the claim regarding annulment of contract of real estate, following a main trial session held on 02.04.2009, renders the following

JUDGMENT

With the **APPROVAL** of the claim of Vladimir Radosavljevic, the contract of transaction signed in the name of Vladimir Radosavljevic as seller and Tahir Morina as buyer, authenticated on 21.11.2002 in Klina Municipal Court under VR. No. 1478/2002, is hereby **DECLARED NULL AND VOID**.

Tahir Morina is **ORDERED** to give up possession and leave from the real estate described in possession list 791, cadastral parcel 533 of the Cadastral Zone of Klina with address street Car Dushani, No. 8 Klina, within fifteen (15) days from the date the present judgment is served to him. If Tahir Morina fails to do so, he shall be evicted from the said parcel.

The Municipality of Klina, the Cadastry Office, is **ORDERED** to alter its cadastral books in accordance with this judgment and to reverse the changes made in the cadastral books, thus registering the parcel described in possession list 791, cadastral parcel 533 of the Cadastral Zone of Klina in the name of Vladimir Radosavljevic.

The request of Tahir Morina for compensation of court expenses is **REJECTED** as ungrounded.

REASONING

I. Background

Upon the events following the NATO air campaign in 1999, Vladimir Radosavljevic left his property in Klina, a parcel described in Possession List 791, cadastral parcel 533 of the Cadastral Zone of Klina (hereinafter 'the Parcel'). The Parcel was transferred to Tahir Morina through a transaction contract dated 19.11.2002 (hereinafter 'the Transaction Contract') and signed on behalf of Vladimir Radosavljevic by Bujar Morina, the respondent Tahir Morinas son, on the basis of a general power of attorney (registered at the Basic Court of Ulqin in the Republic of Montenegro on 18.11.2002, VR. No. 3842/2002). The transaction price for the Parcel was 200.000 E and according to a written statement (registered at the Basic Court of Ulqin on 18.11.2002, VR. No. 3843/2002) Vladimir Radosavljevic received the amount in connection with the sale. The Transaction Contract was registered by the Municipal Court of Klina as VR. No. 1478/2002 on 21.11.2002 and the transfer was registered in the Cadastral Books of Klina, making Tahir Morina the registered owner of the Parcel.

II. The Claim

On 23.02.2004 Vladimir Radosavljevic filed a claim to the Court for annulment of the Transaction Contract. Furthermore, he claimed that the respondent should be ordered to release the Parcel under the threat of execution and that the cadastral office of Klina should be ordered to alter their cadastral books regarding the Parcel in accordance with the judgment. In addition, he proposed a temporary measure prohibiting the respondent to alienate, burden, possess or undertake any other judicial or factual changes on the Parcel up until the completion of the proceedings. The ground for the claim is that Vladimir Radosavljevic never voluntarily has disposed of his property right to the Parcel and that the Transaction Contract therefore is null and void.

Tahir Morina has disputed the claim on the grounds that the transaction has been conducted in a legal manner on the basis of the aforementioned power of attorney signed by the claimant and registered by the Basic Court of Ulqin. Furthermore, the respondent argues that the claim has been filed too late, as more than one year has passed from the

date the claimant became aware of the transfer and the date the claim was filed. The claim for temporary measures has also been disputed on the ground that these types of measures are not legally grounded as such measures could only be introduced in executive procedures and in contest of prohibition of possession.

III. The Procedural History

The first main trial hearing was held at the Municipal Court of Klina on 27.01.2006 and after the fourth hearing was completed on 06.06.2006, the panel of the Court, consisting of judge Rafet Haxhaj and lay judges Binak Sylja and Elmi Krasniqi, deliberated and came to the conclusion that further evidence was needed to reach a fair ruling of the case. Following this, the Court was informed that the State Prosecutor of Ulqin had filed an indictment on 17.04.2007 against defendants Tahir Morina and Bujar Morina (Kt.No. 35/05) regarding counterfeiting documents and certifying untrue content and that a similar investigation by the Special Prosecutor of Kosovo had resulted in an indictment on 09.06.2008 against Bujar Morina (PP.No. 76/07) regarding certification of untrue content (article 334 paragraph 2 of the PCPCK) in connection with the sale of the Parcel. Following the discoveries of the parallel criminal proceedings, the Court on 10.07.2008 delivered a ruling to stay the civil proceedings awaiting the results of the indictment in Montenegro and the indictment by the Special Prosecutor, all in accordance with article 213 paragraph 2 of the Code of Civil Procedure (OG 4/77).

Parallel to the civil and criminal proceedings in the courts, the Kosovo Property Agency ('KPA') has dealt with the contested matter following a claim for repossession of the Parcel (DS301044) submitted on 26.07.2001 by Vladimir Radosavljevic. The claim was processed against the respondent Bujar Morina, as he was occupying the land. Through a decision on 18.06.2005 (HPCC/194/2005/C), the Housing and Property Claims Commission (HPCC) ordered that Vladimir Radosavljevic as a category C claimant was given repossession of the Parcel since he had provided evidence supporting that he had a property right to it prior to the events following the commencement of the NATO air campaign on 24.03.1999, that he thereafter had lost possession of the property and that he had not voluntarily disposed of the property right. Following a request from Bujar Morina for reconsideration of the decision, the HPCC upheld the first instance decision on

18.06.2007 (HPCC/REC/100/2007). Vladimir Radosavljevic collected his keys after regaining repossession of his property on 22.11.2007 and as of this date the Kosovo Property Agency no longer has jurisdiction over the property.

Through a decision of the President of the Assembly of EULEX Judges on 26.02.2009 the case was assigned to EULEX Judge Verginia Micheva-Ruseva in the Municipal Court of Klina since there was a grounded suspicion of a serious violation of the fairness of the proceedings in accordance with the requirements of art. 5.1 item c (iii) of the Law on Jurisdiction (Law No. 03/L-53).

On 09.03.2009 the Court issued a ruling to continue the proceedings in the case in accordance with art. 280.3 and 278.2 of the Law of Contested Procedure (Law No. 03/L-006) (LCP) and following a hearing on 02.04.2009, the proceedings were concluded.

IV. Factual and legal assessment

The following facts are undisputed in the case. Vladimir Radosavljevic was the uncontested owner of the Parcel until 17 June 1999, when he fled Klina and took refuge in the town of Trstenik in Serbia proper. From exile, Vladimir Radosavljevic filed a claim for restoration and found that the land was occupied by Bujar Morina, who claimed that his father Tahir Morina was the owner of the property following the Transaction Contract. As a consequence of the Transaction Contract, Tahir Morina has been registered as owner of the Parcel in the Cadastral Register of Klina Municipality.

The main question of the case is thus if Vladimir Radosavljevic voluntarily has disposed of his property right to the Parcel and more specifically, if he signed the power of attorney authorizing Bujar Morina to conclude the Transaction Contract on his behalf and if he signed the statement that the payment of 200.000 E had been completed. It is common cause that the photograph that appears on the identity card attached to the disputed power of attorney is indeed a photograph of Vladimir Radosavljevic.

Bujar Morina has stated that he at first rented the Parcel by an illegal occupant and subsequently through a payment of 80.000 E secured occupation of the property in February 2002. A month or two later he was telephoned by Vladimir Radosavljevic, whom he knew since before, who asked whether or not he wished to purchase the Parcel. They agreed on a price over the phone and agreed to meet in Ulqin to prepare the written

contract. When they met in Ulqin, Vladimir Radosavljevic had already prepared the written contract and they proceeded to the Basic Court of Ulqin to sign and register the necessary documents. Initially, Bujar Morina would be the purchaser, but since Bujar Morinas UNMIK identity card was not accepted by the court officials, they instead altered the agreement so as to insert Tahir Morina as purchaser and Bujar Morina as authorized by a power of attorney. Once the Transaction Contract was signed, the transaction amount was handed over and Vladimir Radosavljevic went alone to the Basic Court of Ulqin to register the power of attorney and the statement.

Tahir Morian has stated that he accompanied his son Bujar Morina to the meeting with Vladimir Radosavljevic in Ulqin. After Vladimir Radosavljevic had prepared the necessary documentation in the court, he handed over the money to Bujar Morina who in turn counted them and handed over the amount to Vladimir Radosavljevic.

These statements are contradicted by Vladimir Radosavljevic, who has consistently denied all knowledge of Tahir Morina and Bujar Morina prior to his discovery of the occupation of the Parcel. He further denied ever having been in Ulqin prior to 2005, when he went there to inquire about the fraudulent transaction which deprived him of his property. He has also pointed out that he never would return to Klina if he had sold his property.

In the KPA proceedings, a commissioner of the HPCC interviewed the court official of the Basic Court of Ulqin responsible for registering the power of attorney and the statement as well as the head of administration of the court. The court official could not recall the specific occasion, but insisted that he would have checked the identity card of the person delivering the documents. Upon inspection of the HPCC, it was found that the courts register from 2002 was purportedly signed by a 'Vladimir Radosavljevic' in Latin Script. However, the register from Vladimir Radosavljevics visit in 2005 as well as the original claim sent to the KPA was signed by him in Cyrillic script. Photographs of all these signatures, sample signatures from Vladimir Radosavljevic in Cyrillic and in upper case Latin letters as well as copies of the power of attorney and the statement was sent to a qualified handwriting expert, based in Sofia, Bulgaria, who examined the evidence and provided the KPA with an expert analysis.

The question is then if this expert analysis can be used in the present proceedings, or if another expert examination needs to be provided to the court. Initially, it must be emphasized that the HPCC case file DS30144, and therefore the relevant paras. 16-17 of decision HPCC/REC/100/2007, has been accepted as evidence in the case. The need for further expert evidence must be examined in the light of the doctrine of *collateral estoppel*, or issue preclusion. This doctrine prevents a person from relitigating an issue of fact or law that has already been determined by a court of law. The preclusion is only appropriate if the precluded party had a full and fair opportunity to litigate the issue in the first action. The KPA procedure is a quasi judicial procedure outlined in the relevant UNMIK regulations. The final decision of the HPCC is legally binding and enforceable according to Section 2.7 of UNMIK regulation 1999/23. Even though Bujar Morina was the responding party in the HPCC proceedings and Tahir Morina is respondent in the present proceeding, the circumstances and similarity of these proceedings makes it evident that they are parallel in scope and content. Section 14.2 of UNMIK Regulation 2000/60 also stipulates that a third party who did not participate in the first instance decision, may request reconsideration after 30 days of learning of the decision but no later than one year from its date of issuance. The respondent could use the legal remedy, but did not. The Court therefore finds that the doctrine of *collateral estoppel* can be used analogously to the present case, preventing a reexamination of the signatures of Vladimir Radosavljevic and acknowledging the conclusions of the HPCC on the facts relating to the expert examination. The facts established by the expert examination of decision HPCC/REC/100/2007, see paras. 16-17, are therefore accepted.

In summary, the handwriting expert concluded *that* due to differences in the letters most likely the 2002 Latin signatures and the 2005 Cyrillic signatures in the register of the Basic Court of Ulqin were not subscribed by the same person, *that* according to his opinion the sample upper case letters provided by Vladimir Radosavljevic to the HPCC in 2007 and the upper case letters in the power of attorney and the statement were not written by the same person and *that* the Latin script in the power of attorney and the statement was indeed written by the same person as the Latin signature in the 2002 register at the Basic Court of Ulqin. The overall conclusion of the expert was that the power of attorney and the statement had not been subscribed by Vladimir Radosavljevic.

Against the background of this expert analysis the court cannot rely on the power of attorney to conclude that Bujar Morina was duly authorized to sign the Transaction Contract in accordance with article 89 of the Law of Contracts and Torts (OG 29/78) ('LCT'). According to the same reasoning, the statement cannot be relied on to conclude that Vladimir Radosavljevic received the transaction amount from Tahir Morina. There is no other evidence supporting that the Transaction Contract was concluded with the intent or participation of Vladimir Radosavljevic. Moreover, the signatories of the Transaction Contract were father and son, and this means that there are no neutral or impartial witnesses able to testify to the validity of the agreement. In sum, it can therefore be concluded that the Transaction Contract was not a binding sale agreement of the Parcel, as it has not been proved that Vladimir Radosavljevic, as legal owner of the Parcel, was a consenting party to the contract in question. The Transaction Contract therefore lacks the consenting will of one of the contracting parties and no binding agreement was concluded (art. 26 of the LCT). The Transaction Contract is therefore declared null and void in accordance with article 103 par.1 of the LCT.

The respondent has argued that the claim to annul the contract has been presented too late as article 171(1) of the LCT stipulates that a claim for nullity of a contract shall be filed within one year from the date that the claimant became aware of the ground for annulment. However, the above referred article is only applicable to rescindable contracts, see article 111 LCT. The present claim does not fall into this category, it is not a rescindable contract but it is a contract that has never been concluded by one of the parties and is therefore null and void in accordance with article 103 LCT. According to art.110 LCT the right to claim nullity is unlimited. In conclusion, the Court finds the argument of the respondent groundless.

Since the Transaction Contract is hereby nullified, Tahir Morina is ordered to give up his possession and leave from the Parcel. The Cadastral Office of the Municipality of Klina is ordered to reverse its cadastral books and thus reinstate Vladimir Radosavljevic as the legal owner of the Parcel.

V. Court Expenses

Since the claim is approved, the respondent has no right to reimbursement for expenses and the respondents claim for reimbursement is therefore rejected. The claimant does not claim reimbursement for expenses and will therefore not be compensated for such.

As stated above, pursuant to article 143.1 in the Law on Contested Procedure, it is decided in accordance with the enacting clause of this decision.

LEGAL REMEDY

The parties may request revision of this judgment through the Municipal Court of Klina to the District Court of Peja/Pec within fifteen (15) days from the day the copy of the judgment has been served to the respective party.

Municipal Court of Klina

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Drafted in English,
an authorized language

Presiding Judge

Verginia Micheva-Ruseva

