

MUNICIPAL COURT OF LIPJAN/LIPLJANE

C.No.82/09

THE MUNICIPAL COURT OF LIPJAN/LIPLJANE, through presiding EULEX judge Verginia Micheva-Ruseva, assisted by court recorders Vlora Johnston and Nexhmije Mezini and international interpreters in Albanian language Edmond Laska and Gjergj Zimaj, in the case of the claimants Beqir Zeka from Pristina, represented by attorney Xhafer Maliqi, and Gani Zeka from Pristina, represented by attorney Xhevdet Rama from Pristina against the respondent Rexhep Zeka from Pristina represented by attorney Avni Vula, on the claim on verification of co-ownership and right of co-possession, following a main trial session held on 10.02.2011, renders the following

JUDGMENT

With the **APPROVAL** of the claim of Beqir Zeka and Gani Zeka against Rexhep Zeka it is **CONFIRMED** that the claimants Beqir Zeka and Gani Zeka are co-owners with 1/3 ideal part each of them of the following building: hotel administration premises, called "Galla Center", P+2, constructed under ruling on construction permit 9-351-204 issued by Municipality of Lipjan/Lipljan, dated 26.09.2005, situated on cadastral parcel No P-71409016-00003-4 with surface of 4051 square meters and cadastral parcel P-71409016-00078-2 with surface 1569 square meters, both located in the place called "Glllozhnje", registered in possession list 251, Cadastral Zone Vrelle e Goleshit, second construction zone (airport zone), the Lipjan/Lipljan Municipality, and the respondent Rexhep Zeka is **OBLIGED** to hand over to the claimants Beqir Zeka and Gani Zeka as co-owners the possession of this building according to their above mentioned ideal parts, within fifteen (15) days from the date the present judgment is served to him.

Rexhep Zeka is ordered to pay to Beqir Zeka and Gani Zeka 390 (three hundred and ninety) Euro each of them for reimbursement of procedural costs, as well as 500 (five hundred) Euro court tax to Municipal court of Lipjan/Lipljan.

If Rexhep Zeka fails to accomplish the judgment, it may be forcibly executed.

REASONING

I. Background

The claimants and the respondent are brothers. Together they are co-owners of cadastral parcels described in possession list 251 (hereinafter 'the Parcels') – No P-71409016-00003-4 with surface of 4051 square meters and cadastral parcel P-71409016-00078-2 with surface 1569 square meters (hereinafter No ¾ and 78/2) at "Gillozhnje", CZ Vrelle e Goleshit, Lipjan municipality. In 2005 the respondent submitted a request to Municipality of Lipjan/Lipljane to be allowed to construct business premises on the land. At the end of 2005 he received the permit and the construction started. Part of the premises was finalized in 2006, when the restaurant was open. The whole building was finalized in 2007 and consisted of a restaurant, a hotel, a shopping centre, an administrative part (offices) and parking place. The building is used for commercial purpose and the business is run only by the respondent as owner of "R-Galla", limited liability Company with settlement in Pristina, registered in the Ministry of trade and industry in 2005. He is managing the business including its security. There is no final decision on the construction permit of the building as the rulings of the Lipjan/Lipljane Municipality, in which the claimants were included as investors of the disputed building, were several times quashed and return back for retail by the Ministry of Environment and Spatial Planning upon Law on Administrative procedure (Law No 02/L-28, 2005). The last decision of Lipjan/Lipljane Municipality, dated 4 November 2009, was appealed by the respondent in front of the Ministry of Environment and Spatial Planning. The administrative procedure is still pending as the responsible Ministry still has not decided on the appeal, waiting for the court decision on the property contest. The contested building is not registered in the cadastre.

II. The Claim

The claimants Beqir Zeka and Gani Zeka filed a claim on 12.03.2009 asking the court to verify that they are co-owners together with the respondent of the constructed building in ideal parts of 1/3 each of them, and to oblige the respondent to hand over to them the possession of their ideal parts. They claimed to be co-owner with the respondent of the two parcels on which the disputed building is constructed and to have made joint investments in the building. Furthermore they stated that the respondent denied them any

access to the building and deprive them of sharing any profit. Moreover, he even appointed a private company "WDG" to secure the place.

Together with the claim Beqir Zeka and Gani Zeka submitted a request to the court to order a temporary security measure against the respondent Rexhep Zeka not to alienate, hide or burden with a right the disputed property, not to use it, as well to terminate the presence of the security company in the property.

The respondent opposed the claim and the request for temporary measure stating that only he made the investments in the disputed property, invested only his own funds, he built the premises in his own 1/3 part of the land and thus it belongs only to him.

III. The Procedural History

After the claim was filed in the Municipal Court of Lipjan/Lipljane on 12.03.2009, the case was assigned to a reporting Judge. The reporting Judge held several sessions on 28.05.2009, 29.06.2009, 10.07.2009 and 30.07.2009.

On 28.09.2009 the court issued a ruling on interim measure, thus prohibiting the respondent to sell, hide or charge with burdens the business premises "R-Galla" and the land on which it is constructed.

On 08.10.2009 the claimant Gani Zeka submitted a request to the president of the Municipal Court of Lipjan/Lipljane asking for disqualification of the reporting judge. Along with the request to the court the claimant Gani Zeka submitted also a copy of a request, dated 24.09.2009, submitted to Kosovo anti-corruption agency to initiate investigation against the reporting judge.

With a ruling dated 13.11.2009 District court of Pristina quashed the ruling of the Municipal court of Lipjan/Lipljane and sent the case back to Municipal court for retrial.

With a ruling, dated 26.11.2009, the president of Municipal court of Lipjan/Lipljane considered the request for disqualification of the reporting judge as withdrawn, as the claimant Gani Zeka did not correct his submission in the prescribed time deadline.

With a ruling dated 21.07.2010 the Municipal Court of Lipjan/Lipljan ordered security measure on the contested business premises prohibiting the respondent Rexhep Zeka to alienate, hide or burden it until the end of the civil dispute.

The ruling was appealed by the claimants Beqir and Gani Zeka as the court did not fully decide on their request. The ruling was also appealed by the respondent Rexhep Zeka.

With a ruling dated 23.08.2010 District court of Pristina again quashed the ruling of the Municipal court of Lipjan/Lipljan and sent the case back to Municipal court for retrial, as again the first instance court had not decided on the complete request for security measure.

Through a decision of a EULEX Judge acting on delegation of the President of the Assembly of EULEX Judges on 16.09.2010, the case was assigned to EULEX Judges at District court of Pristina since it was concluded that the case fulfilled the requirements of art. 5.1 of the Law on Jurisdiction (Law No. 03/L-53).

The Court scheduled a main trial hearing on 11.01.2011, and followed by two hearings on 26.01.2011 and 10.02.2011, the proceedings were concluded.

Meanwhile with a ruling dated 1 December 2010 the Court partially granted the request of the claimants on issuing interim measure against the respondent forbidding him to alienate, hide or burden with rights the contested property until the court dispute is accomplished or until a new decision related to the measure of insurance is issued. The court rejected the request of the claimants to order a temporary measure forbidding the respondent to use the disputed property as well as to forbid him to leave the disputed property in the security care of the company for physical security WDG and to oblige him to remove the security guards from the building.

IV. Factual and legal assessment

1. Admissibility of the claim

Before starting the examination of the merits of the claim, the court shall observe the admissibility of the claim. The Claimants plead for verification of co-ownership rights over a building constructed on a land, co-ownership property of the claimants and the respondent, because the respondent as the constructor (the only holder of the construction permit) of the building denies their property rights over it and refuses them the right to hold and use it. This refusal of the respondent to recognize the property co-ownership rights of the claimants over the building established the legal interest of the claimants to submit the claim (art.2.4 of the Law on contested procedure, Law No 03/L-006, LCP). Additionally, pursuant to art.18.1 of the LCP the court considers ex officio that the dispute falls under the jurisdiction of Municipal court of Lipjan/Lipljane as the disputed

property is located on the territory of the court. The claim is admissible and competent to deal with it is the Municipal court of Lipjan/Lipljan.

There is still a pending administrative procedure in Municipality of Lipjan/Lipljan regarding issuing the construction permit of the disputed building. However the court dealing with property rights dispute is not bounded with the results of the administrative procedure. The fact if the respondent had a construction permit or if the building was legally built is not relevant in the contested procedure on verification of ownership rights over the building. The legality of the building matters eventually in the administrative procedure regarding the registration of ownership right over the built structure, in which case will be required the construction permit.

Assessment on merits

Factual assessment:

The following facts are undisputed in this case: the claimants and the respondent are brothers. In 1991 the father of the parties divided his property among his six sons. The claimant Gani Zeka was a student in Poland and still lives there. The claimant Beqir Zeka worked together with his other brothers in Peja/Pec, while the respondent was living in Pristina, as he was a student. After the arm conflict of 1999 the claimants and the respondent decided to work together in a common business and they founded a company "RGB". It is disputed between them who invested and how much was invested in the common business, as well as who of them was running the business, but from the evidences in the case file (history of a bank account) it is evident that they had a common bank account on the name of Gani Zeka, and Rexhep Zeka was also authorized to withdraw money from it. The brothers run business with taxi services, with a restaurant, received rent from shops in Pristina, inherited from their father. As Gani Zeka lived abroad he had authorized his brother Beqir Zeka to represent him in front of the institutions in Kosovo (POA verified on 03.09.2003 under no 5718/03 of Municipal court of Pristina). In 2003 the brothers Beqir, Gani and Rexhep Zeka bought a land near the airport of Pristina, - 4 parcels of agricultural land with total surface of 4.90.70 ha, described in possession list 251, CZ Vrelle e Goleshit, Lipjan Municipality, for the price of 270 000 Euro. The transaction contract was verified in Municipal court of Lipjan/Lipljan under Vr.nr.2959/2003 on 03.11.2003 and the gaining of property rights

was registered in the cadastre office of Municipality of Lipjan/Lipljan, thus making the parties co-owners of a parcel 3/1 with surface of 2.94.42 ha, parcel 99/2 with surface of 0.08.26 ha, parcel 100 with surface 0.09.58 ha and parcel 102 with surface 1.78.44 ha, all in a place called Glozhnje. Meanwhile the airport of Pristina was expanded and a part of the road of the airport was constructed on the land of the parties. On 24.05.2005 UNMIK through its Pillar for economic reconstruction (UNMIK Pillar IV) and Kosovo Trust Agency signed an agreement with Rexhep Zeka, Beqir Zeka and Gani Zeka, the last one represented by Beqir Zeka, mentioned in the document as Zeka family, according to which 1 861.88 square meters land registered in possession list 251 of Municipality of Lipjan/Lipljan, Cadastral Zone Vrelle e Goleshit, being parcel 3/1, parcel 99/2, parcel 100, parcel 102 in the name of Zeka family was permanently allocated to UNMIK for civil aviation purposes. As a compensation, it was agreed, that Zeka family received parcel 78 with surface of 1569 square meters, part of possession list 221 of the Municipality of Lipjan/Lipljan, cadastral zone Vrelle e Goleshit, plus a payment of 15 000 Euro. This parcel was neighboring with parcel $\frac{3}{4}$, again owned by the three brothers, and was also neighboring with the airport of Pristina.

On 08.07.2005 the respondent Rexhep Zeka filed a request to Municipality of Lipjan/Lipljan, Department of Planning and Urbanism, to receive a permit to construct hotel administration premises "Gala Centre" in the location of cadastral parcels $\frac{3}{4}$ and 78/2. With a decision, dated 17.08.2005 the competent municipal body determined the technical urban criteria as to the location conditions of the building (see art.23 of the Law on Spatial planning, Law No 2003/14) and issued urban permit for the building (art.26 of the LSP) to the investor Rexhep Zeka. Under point 3 of the decision it was pointed out that the location planned for construction of the premises, in surface of 0.56.20 ares, is owned by Beqir Zeka, Gani Zeka and Rexhep Zeka with $\frac{1}{3}$ ideals parts each. According to construction papers the building was planned to be constructed starting at the border of parcel 78/2 with the airport of Pristina area, close to the premises of the Pristina airport.

On 4 August 2005 Zeka brothers approached the board of the airport of Pristina to present the proposition for hotel construction (see letter of Bjorn Hauksson, acting managing director of Pristina airport, dated 22.08.2005, addressed to the director of Urbanization Department, Lipjan/Lipljan Municipality). The airport board did not object the proposal.

On 23.08.2005 Rexhep Zeka, again in his capacity of an investor, requested from Municipality of Lipjan/Lipljan construction permit for hotel administration premises in parcel ¾ and 87/2 and on 26.09.2005 personally received the decision of the Municipality of Lipjan/Lipljan, Department of planning and construction, dated the same date 26.09.2005 permitting him, as investor, to construct the hotel administration premises P+2 on parcels ¾ and 78/2 in Gilloxhinje, registered in possession list 251, owned equally by Beqir, Gani and Rexhep Zeka.

After the construction permit was issued, the construction of the premises started. It is also not disputed between the parties that in 2006 the construction of the restaurant (as a part of the building) was finalized and it was opened.

On 30 January 2006 Rexhep Zeka and Beqir Zeka signed a credit contract with ProCredit bank Pristina Nr. 4-20119 and received a credit of 700 000 Euro for business purposes of NPSH R- Gala.

On 23 April 2007 Rexhep Zeka and Beqir Zeka signed a second contract with ProCredit bank Nr. A-34530 and received a credit of 708 734 Euros with the same business purposes. Additionally both of them signed a mortgage contract in favor of the bank guarantying the credit with their property described in possession list 251. The mortgage contract was verified in the MC Pristina under Vr.nr.1618/07. According to the attached payment plan the last installment of the credit shall be paid on 1 May 2017.

The parties also do not dispute that Rexhep Zeka was the manager of the company R-Galla, and Beqir Zeka was working in the company in different positions. In December 2008 Beqir Zeka was released from his job by Rexhep Zeka who after that hired a security company and did not allow Beqir Zeka and Gani Zeka to enter the property.

On 9 February 2009 Gani Zeka and Beqir Zeka objected the construction permit of the disputed building in front of the Municipality of Lipjan/Lipljan insisting on amending it and including them both also as co-investor. As stated above, the administrative procedure regarding the construction permit is still pending.

Each of the parties gave statements in front of the court.

According to the claimant Beqir Zeka he and his wife and children lived together with his parents until 1996 when he moved to another house. His brother Rexhep also moved from the family community at the same time. After 1999 Beqir moved with his family to Pristina. The three brothers Beqir, Gani and Rexhep started running business together.

The initial investment was done by Gani Zeka who brought from Poland 120 000 DM, they developed the business and started receiving profits. According to him in 2004 they had already 300 000 Euros. They bought the land at the airport together and started the construction together. At that time Beqir was the managing director of all the companies they owned, and Rexhep was managing the papers. According to the claimant the three of them applied for construction permit of the building. The building was constructed with the money received as credit from the bank and the installments plus the interest were paid by the turnover of the restaurant that was operating at the airport. In 2006 Rexhep did not have money to pay the monthly obligation to the bank and Beqir sold his apartment, later also his shop to pay the credit back. In 2008 his brother Rexhep fired him and he is still jobless, his brother Gani Zeka is supporting his family.

According to the claimant Gani Zeka most of the money for purchasing the land at the airport was brought by him. The decision to buy the land was taken by the three of them Beqir, Rexhep and himself as they wanted to invest. They together decided to build a hotel. They had a common bank account and his brother Rexhep was authorized to withdraw money from it. According to him the three of them submitted the request for construction permit of the building, and after that he did not check the documents but when they decided to divide the property it came out that the documents were only on the name of Rexhep.

According to the respondent Rexhep Zeka he bought the land with his own money, as he was a successful businessmen working since 1999. He included the names of his brothers Beqir and Zeka in the transaction contract only because he wanted to show power to the "people from Pristina", as according to him it was not accepted if somebody from Peja/Pec bought a land in Pristina. His brothers knew that the construction permit was issued only on his name; they also knew details about the project. According to him he was supplying his two brothers with money all these years. But when Beqir made loans because of gambling he decided to fire him. According to him his brothers now are misusing the fact that their names are in the land purchase contract and want something that does not belong to them.

Upon request of the claimants the court took the statements of the witness Beke Zeka, brother of the parties.

Upon request of the respondent the court took the statements of the witness Bujar Demjaha, a friend of the respondent.

The witness Zeka confirmed that in 1991 their father divided his property between his six sons. According to him Beqir, Gani and Rexhep decided to work together and they always told him that they were very successful. They told him that they bought the land together at the airport. When they started the foundation of the building they invited him and his family, together with friends and business partners. Beqir, Zeka and Rexhep were three together at the event. Beqir even told him that now their company was bigger than his own company and they had 700 000 Euros ready. Later he understood that this money was received as credit. According to the witness the three brothers opened the restaurant together. Before 3-4 years they approached him and told him that they want to split. They acted in accordance to the tradition and asked elderly people to divide them. Several meetings were maid but Rexhep and Gani did not accept the proposals for division. Even Gani became so angry that he went at the airport building and broke the windows of the restaurant. After this event Rexhep hired security at the building and did not allow to the other two brothers Beqir and Zeka to enter in the building. The witness remembered that Rexhep came and asked for a loan of 20 000 Euros as he did not have money to pay the credit to the bank. Later they sold Beqir's shop in Pristina to him and he kept the loan money form the price of the shop. According to the witness from the three brothers Rexhep was the "main man", the director, he was dealing with the administrative work.

The witness Bujar Demjaha, a professor in architecture, stated that he knew the parties since 20 years. Rexhep Zeka entrusted him to prepare the project for the building. He did it. He admitted that he discussed the project also with Beqir, but regarding the work at the building he contacted only Rexhep and Rexhep paid him for his job. He also remembered that during the negotiations with UNMIK regarding the compensation of the land Rexhep was the one who conducted the meetings, and sometimes Beqir was present. The witness knew Rexhep Zeka as the investor of the building. Beqir was present at the construction of the building and the witness saw him mainly there. Later the witness was involved as a mediator between the parties in dividing their property, but his participation was unsuccessful.

The statements of the witness are not contradictory with the written evidence collected by the Court, they are not in contradiction with each other and also to the statements given by the parties, and thus the Court fully credits them.

Legal assessment:

Applicable material law:

The property rights of the co-owners are regulated in the Law on Basic property relations (LBPR, Official gazette, SFRY, No 6/80) applicable at the time when the land was transferred on the name of the parties (2003 – when the transaction contract was verified, and 2005 when the extortion and compensation was done) and when the construction of the building was done in 2005, 2006 and 2007. The new Law on property and other real rights (Law No 03/L-154) was published in the Official gazette No 57 on 4 August 2009 and entered into force on 20 August 2009 (see art.297 of the law), thus it can not be applied in the current contest on verification of co-ownership rights over a property built in 2006-2008. The claim was filed on 12 March 2009, also before entering the new law into force.

Legal conclusions:

It is not disputed between the parties, and it also in accordance to the written evidences (written transaction contract verified in the court, and possession list) that Beqir Zeka, Gani Zeka and Rexhep Zeka are the co-owners of parcels $\frac{3}{4}$ and 78/2 at “Glllozhnje” in the airport of Pristina area. Only one of the co-owners Rexhep Zeka received a construction permit as an investor of a business premises to be built on the two parcels. The building was finished and is used in accordance to its functions as a restaurant, hotel, offices and shopping centre. In all the papers referring to the construction of the building Rexhep Zeka appears to be the only investor. There is not written consent from the other two co-owners Beqir and Gani that the third co-owner Rexhep can build premises in the common property. Regarding the question if only Rexhep Zeka invested money in the construction of the building or the funding was shared between the parties, it is not relevant to the current property dispute. But from the credit contracts, mortgage contracts, statements of the both witnesses it can be concluded that the three brothers were involved in the construction of the building – Rexhep Zeka was the investor (the person who had

the right to built on the land, see art.19.1 of the Law on construction, Law No 2004/15) and the leading person, but Beqir Zeka was also co-borrower of the two credits together with Rexhep Zeka and the money were invested in the construction of the building and running the common business, Beqir Zeka paid part of the credit with his own shop in Pristina, he was seen very often at the construction and thus later he was also working in the company "R-Gala". As far as Gani Zeka is concerned, obviously because of his absence from the country, his physical presence at the construction of the premises was not obvious, but he shared his bank account with Rexhep, who withdrew money from it, he was involved in the common business financially and with personal efforts, he was also seen at the foundation of the building construction.

According to art.13 of the LBPR more persons can hold the right of co-ownership over an individual object when a part for each of them is determined in proportion to the whole (ideal part). If the co-ownership rights are not defined, then they are considered to be equal. The parties bought the parcels described in possession list 251 together without defining their ideal parts of land, hence their property rights shall be considered equal and each of them has 1/3 ideal part of the land. Their rights over the land they have received as compensation, parcel 78 with surface of 1569 square meters, are again equal as the compensation agreement, signed between UNMIK, KTA and the parties, did not define otherwise.

The rights and the obligations of the co-owners are foreseen in art. 15 of the LBPR – the co-owners have the right to manage the object jointly, for undertaking works of regular management of the object it is necessary to have the agreement of the co-owners whose part in total make more than half of the object value (see art.15.2), but for undertaking works that exceed the frame of regular management (alienation of the whole object, change of the object's purpose, letting the whole object for rent, establishment of mortgage for the whole object, establishment of the "real usufruct rights", major repairs, etc) it is necessary to get the agreement of all the co-owners (art.15.3). The construction of a building over a land is a change of the purpose of the land and thus all co-owners shall agree on it. There is no written consent of Beqir Zeka and Gani Zeka as co-owners allowing the third co-owner Rexhep Zeka to build a business premises on the common property. Consequently Rexhep Zeka built the contested object without the permission of the all co-owners. The availability of such consent enables the constructor who builds on

somebody else's land to become owner of the building and to use the land that is necessary for the regular use of the building.

The main question here is if Rexhep Zeka acquired the property rights over the building or the building is co-ownership between the co-owners of the land on which the building is constructed.

A basic principle in property law is that the building shares the destiny of the land – *superficies solo credit*. This understanding is changed with a different approach imposed by art.21 of the LBPR which regulates that by constructing on somebody else's land the ownership over the construction can be acquired.

If a co-owner of a construction land builds a new building, it is accepted that he builds on somebody else's land and the rules on acquiring ownership rights over a building built on somebody else's land are applied – art.24-26 of the LBPR.

The law defines three different hypotheses depending on the conscientiousness or unconscientiousness of the builder and the owner of the land, value of the constructed object, possible objection of the owner of the land, etc.

According to art.24 of the LBPR if the builder was not aware that he built on somebody else's land he/she will acquire ownership rights over the building as well as over the land on which the building is erected as well as on the land that is necessary for the regular use of the construction, if the owner of the land knew about the construction and did not object immediately. The constructor is conscientious when he did not know or it was not possible for him to learn that he was building on somebody else's land.

According to art. 25 of the LBPR if the builder was aware that he/she is building on somebody else's land, or he/she was not aware, and the owner of the land objected immediately, the owner of the land may request alternatively: first, to acquire the ownership right over the building; secondly, the constructor to demolish the building and bring back the land to its previous state; or third, the constructor to pay the value of the land.

According to art.26 of the LBPR if both the constructor and the land owner are conscientious:

- the builder will acquire the property right over the land , if the value of the building is considerably higher than the value of the land, but he has to compensate the owner of the land with the market value of the land;

- the owner of the land will acquire the property right over the building if the value of the land is considerably higher than the value of the building, but he has to compensate the constructor with the average building price of the building in that location;
- if the value of the land and the building are about the same, the court shall award the building and land to the builder, or the building to the owner of the land depending on their needs or housing situation. Again compensation shall be awarded.

The law foresees preclusive deadline for exercising the right to claim in the different hypotheses.

To answer to the main question, if Rexhep Zeka has acquired property rights over the building constructed on a land of which he was co-owner and did not receive the permission of the other two co-owners, the court shall carefully assess all the facts that are relevant to the conscientiousness of the constructor and the behavior of the owners of the land during the construction works.

The respondent Rexhep Zeka knew that he is building on a land that is owned by him and his two other brothers, the claimants, and he also knew that he did not have their consent that he can construct on the land. In the statement he gave to the court he admitted that he did not have the consent of his brothers as the competent municipal body did not required him to present any when requesting for construction permit. Thus the court accepts that Rexhep Zeka was unconscientious builder.

What was the behavior of the co-owners of the land, the claimants, during the construction works? They knew about the construction, and supported the investor. According to the witness Beke Zeka they were working together on the construction, the three of them were at the party when the foundation of the construction was celebrated, Beqir Zeka paid the bank debt by selling his own property (apartment and shop), and the three of them opened the restaurant. The witness Bujar Demjaha has seen Beqir Zeka at the construction of the premises and they have both discussed the construction project. By the written evidence it appears that Beqir Zeka was a co-borrower together with Rexhep Zeka of a credit used for the construction of the building, the second credit is still pending. When in January 2009 (see minutes form a meeting organized in accordance to the tradition (Dukagjini Kanun) the brother decided to separate the common property it

became clear that the construction papers are only on the name of Rexhep Zeka and he claimed ownership over the whole building. On 9 February 2009 the respondent Gani Zeka objected the construction permit issued on the name of his brother Rexhep Zeka by the Municipality of Lipjan/Lipljan on 26.09.2005, alleging that there was a technical mistake as per the name of the investor and claiming that he and his brother Beqir Zeka should be also included as investors in the construction permit. The behavior of the claimants during the construction indicates that they did not know that Rexhep Zeka was constructing the building only for himself, their understanding and believe, according to the Court, was that Rexhep Zeka was constructing on behalf of the three of them. It was well known that Rexhep Zeka was the "leading person" between the three of them; he was managing the paper work, conducting the compensation agreement with UNMIK and KTA, representing the three of them in front of the institutions. The ruling on the construction permit, dated 26.09.2005 was not served to the claimants and there are no indications or proofs that they knew that the respondent was constructing the building for himself. The explanation of the respondent that the claimants did not have any involvement in the construction and he did everything with his own means and funds, can not be accepted by the court. Beqir Zeka paid some part of the credit, invested in the construction, by his own property.

Thus the Court accepts that the constructor was unconscientious builder and the co-owners of the land were not aware that he is building only for himself, and when they understood, checking the construction permit, they objected immediately. In the law there is not legal definition on the phrase "objects immediately". So, it is a factual question and depends on many circumstances. The court accepts that "immediately" in this case will refer to the moment when Beqir Zeka and Gani Zeka became aware that Rexhep Zeka was constructing the building for himself. This happened after Beqir Zeka was fired from his job in the company (December 2008), during the meetings to divide the property, conducted in accordance with the tradition (January 2009), and was confirmed when reading the construction permit in the Municipality. It is not clear when the claimants had access to the construction permit as it was never officially served to them, but having in mind that the objection against it was submitted on 09.02.2009 indicates that the claimants objected immediately.

According to art.25.1 of the LBPR the claimants as co-owners of the land may request allocation of property rights over the building.

The court finds that their claim is admissible, as submitted within the deadline foreseen in art.25.5 of the LBPR (the construction was finished in 2007 and the claim is submitted to the court on 12.03.2009, hence the 3 years period after finalizing the building had not been expired).

The claim shall also be granted as the claimants, as conscientious co-owners of the land, are entitled by the law to acquire property rights over the building, constructed on their land by the unconscientious co-owner. The property rights over the building will be 1/3 ideal part for each of the co-owners of the land.

In accordance to art. 25.4 of the LBPR the respondent has the right to received compensation for the building in the amount of the average construction price of the object. The compensation issue, if initiated by the respondent, will be decided in another contest, considering the participation of the parties in the construction and following the movement of funds and accumulation of profits.

The fact that the respondent is an investor of the building does not give him automatically the property rights over it. Or, with other words, the construction permit can not replace the consent of the co-owners to build on the land. The construction permit is an administrative act issued in performing administrative authority, but it is not a disposing act. Third persons that contest the right of the builder of ownership right or right to use the construction land, or contest that the construction disturbs some of their rights or interests, have status of a party in the administrative procedure of issuing the construction permit and can appeal it.

Since the respondent is the only user of the building, the claim of the claimants based on art.37 of the LBPR is grounded. The respondent shall be obliged to hand over the possession of the building also to the claimants, so they can hold and use it according to their ideal parts and in accordance with the rules of art.14 and art15 of the LBPR (already explained above, see page 11 of this judgment).

Arguments of the parties brought out at the final speeches:

The court does not share the opinion of the claimants that they acquired the property rights over the building on base of art.272 of the Family law of Kosovo (Law

Nr.2004/32). First, the law was not applicable at the time when the construction of the building started in 2005 (the law entered into force on 16 February 2006, see art.355 of the law in connection to Regulation No 2006/7 on the promulgation of the Family Law adopted by the Assembly of Kosovo, dated 16 February 2006, of the Special Representative of the Secretary –General); and second, the parties can not be considered as a family community, and hence all the property acquired during their union to be considered as joint property. According to art.271 of the law the family community consists of the spouses and their immediate family – the children and the parents of the spouses. Other family related person can be considered as member of the family if he lives in a common household with the spouses or is substantially dependant economically of them. The parties and their wives and children did not live together in 2003 – 2008, so they can not be considered as family community and the acquired by them property, as joint property.

The respondent argues that the claimants did not present any evidences that they invested money in the contested building and thus they can not claim acquisition of property rights over it. As the Court already mentioned above, the fact who funded the construction is of no relevance to the property rights over the construction that was built without the consent of the co-owners. The amount of the investments will be considered within a compensation claim that the respondent may initiate based on art.25.4 of the LBPR.

Additionally, the allegation of the respondent that he built the premises on his own part of the land can not be accepted. The land was never divided by the parties and each of them has the right to use it together with the other co-owners. It is also without relevance to the acquisition of property rights who paid the price of the land. It is possible that only one of the co-owners pays the price or they all pay but in different shares or even a third person pays, for example with the intention to make a gift. The important for the property right is what is stated in the transaction contract and registered in the cadastre books (see also art.20 and art.33 of the LPBR). If the claimants are registered as co-owners of the land they have the rights foreseen in art.14 and art.15 of the LBPR, including the rights to acquire property rights over a new object created on their property (art.21 of the LBPR).

The court already made comments on the applicable material law.

Procedural costs:

Pursuant to art.452.1 of the Law on contested procedure (OG 38/2008, LCP) and based on the outcome of the proceedings, the respondent shall be obliged to reimburse the claimants with all the costs incurred by them. The claimants made costs only for legal representatives. The lawyers requested reimbursement according to the Lawyers tariff, and they did not present evidences about the price of their legal representation in this case. Pursuant to art. IV.2.7 of the Tariff and taking in account the number of the held sessions (on 28.05.2009, 29.06.2009 (adjourned), 10.07.2009, 30.07.2009, 11.01.2011, 26.01.2011 and 10.02.2011) the claimants shall be reimbursed with 390 Euros each of them.

The claimants did not pay the court tax when filing the claim in the court, in violation to art.253.4 of the LCP. In the claim the claimants pointed out that the value of the claim was 5 000 000 Euro. According to art.10.1 of the Administrative instruction 2008/02 for unification of court taxes the tax for the claim with value of 5 000 000 Euro is 500 Euros. According to art.253.4 and art.452.1 of the LCP the court tax is paid by the claimant when the claim is submitted and, if the claimant is successful, the respondent will reimburse his/her court expenses. In this case, to avoid several payments, the court deems that the respondent shall be ordered to pay the court tax to the bank account of MC of Lipjan/Lipljan.

.As stated above, pursuant to article 143.1 of 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 Lipjjan/Lipljan to the District Court of Pristina within fifteen (15) days from the day the copy of the judgment has been served to the respective party.

Municipal Court of Lipjan/Lipljan

C.No. 82/09

14.03.2011

Drafted in English,
an authorized language

Presiding Judge

Verginia Micheva-Ruseva

