

**MUNICIPAL COURT OF PEJA/PEC**

C.No.253/07

**THE MUNICIPAL COURT OF PEJA/PEC**, through presiding EULEX judge Verginia Micheva-Ruseva, assisted by court recorders Valentina Gashi and Svetoslava Savova and international interpreters in Albanian and Serbian language Agim Hajdini and Mario Rossini, in the case of the claimants Zivorad Otovic and Miljan Otovic from Brestovic, Municipality of Peja, against the respondents Ujup Smajli and Jakup Smajli from village Gornji Poterc, Municipality of Klina, on the claim regarding annulment of contract of real estate and possession of property, following a main trial session held on 19.01.2010, renders the following

**JUDGMENT**

With the **APPROVAL** of the claim of Zivorad Otovic and Miljan Otovic from Brestovic, Municipality of Peja, the contract of transaction signed in the name of Zivorad Otovic, Miljan Otovic and Bosiljke Otovic as sellers, represented by Agim Shala, from Peja, based on an authorization letter and with Ujup Smajli and Jakup Smajli from village Gornji Poterc, Municipality of Klina, as buyers authenticated on 20.12.2004 in Peja Municipal Court under Vr. No. 5515/04, is hereby **DECLARED NULL AND VOID**.

Ujup Smajli and Jakup Smajli are **ORDERED** to give up possession and leave from the real estate described in possession list 7, cadastral parcel 58 and 59 of the Cadastral Zone of Brestovik, Municipality of Peja, within fifteen (15) days from the date the present judgment is served to the respective person. If either Ujup Smajli or Jakup Smajli fails to do so, he shall be evicted from the said parcel.

The Municipality of Peja, the Cadastre and Geodesy Office, is **ORDERED** to alter its cadastral books in accordance with this judgment and to reverse the changes made in the cadastral books to the state it was before the registration of the transaction contract.

**REASONING**

### *I. Background*

The Claimants, who are brothers, together with their mother Bosiljka Otovic, owned property in Peja, two parcels described in possession list 7, cadastral parcels 58 and 59 of the Cadastral Zone of Brestovik, Municipality of Peja, with a total surface of 13 403 square meters (01.34.03 hectar) (hereinafter 'the Parcels'). The Parcels were transferred to the Respondents Ujup Smajli and Jakup Smajli through a transaction contract dated 23.11.2004 (hereinafter 'the Transaction Contract') and signed on behalf of the Claimants by Agim Shala, from Peja, on the basis of a general power of attorney. The transaction price for the Parcel was 140.000 € and 1.200 \$ and there is a statement that appears to be signed by the Claimants and their mother Bosiljka Otovic that verifies that payment was performed accordingly. The Transaction Contract was registered by the Peja Municipal Court under Vr. No. 5515/04 on 20.12.2004 and the transfer was registered in the Cadastral Books of Peja, making Ujup Smajli and Jakup Smajli the registered possessors of the Parcels.

### *II. The Claim*

On 16 April 2007, the Claimants filed a claim to the Court for annulment of the Transaction Contract. Furthermore, they claimed that the Respondents should be ordered to release the Parcels to the Claimants.

The ground for the claim is that the Claimants state that they never voluntarily have disposed of their property right to the Parcels and that the Transaction Contract therefore is null and void. As for their mother Bosiljka Otovic, she died in 1983 and thus did not participate in the transaction of the Parcels.

Ujup Smajli and Jakup Smajli have disputed the claim: first on the ground that the claim is not admissible since one of the parties to the Transaction Contract, Bosiljka Otovic, is not represented and there has not been presented any inheritance procedure that would allow the Claimants to represent her, secondly on the ground that the transaction has been conducted in a legal manner on the basis of regular documentation and thirdly on the ground that the Respondents have paid the transaction amount in full.

### *III. The Procedural History*

After the claim was filed in the Municipal Court of Peja on 16.04.2007, the case was assigned to a reporting Judge. The reporting Judge sent out a court order for the Claimants to hand in a translation of the claim in the Albanian language. No further action was taken.

Through a decision of a EULEX Judge acting on delegation of the President of the Assembly of EULEX Judges on 14.10.2009, the case was assigned to EULEX Judge Verginia Micheva-Ruseva since it was concluded that the case fulfilled the requirements of art. 5.1 item c (ii) and (iii) of the Law on Jurisdiction (Law No. 03/L-53).

The Court scheduled a preparatory hearing on 30.11.2009, and after a main trial hearing on 19.01.2010, the proceedings were concluded.

It can be noted that the Claimants filed a criminal report to the Public Prosecutor in Peja, which resulted in an indictment against the respondents regarding forgery of the aforementioned power of attorney (P.No. 11/07 at the Municipal Court of Peja). However, through a judgment delivered by the Municipal Court of Peja on 12.04.2007, the indictment was rejected.

#### *IV. Factual and legal assessment*

##### *1. Admissibility of the claim*

Before starting the examination of the merits of the claim, the objection by the Respondents as regards the admissibility of the claim has to be addressed. The Claimants plead for annulment of the Transaction Contract on the base of art.103 of the Law of Contracts and Torts (OG 29/78) ('LCT') as lacking the consenting will of one of the contracting parties and thus contrary to compulsory regulations (art. 26 LCT). According to art. 109 LCT the court shall keep in view the nullity as his task in line of duty, while it may be claimed by *every person interested*. This provision thus states that the court ex officio has to consider whether or not the contract should be regarded as a nullity and that every person that has an interest in this issue is entitled to make a claim to this effect to the court. The law does not require the claimant to be the owner from which the property was transferred by the contract or even a party to the contract. The null contract does not transfer any rights or obligations and it does not in any way change the legal relations between the parties, it is simply a nullity. This is the reason why everybody with an interest in the issue can claim the nullity of a contract. The Claimants are parties to the

Transaction Contract and thus have an obvious interest in claiming annulment of it. For these reasons, there is no need for Bosiljka Otovic to be represented in the proceedings. Pursuant to art. 109 LCT, the Court therefore finds the claim admissible and the objection of the Respondents groundless.

## *2. Assessment on merits*

Through the historic documentation of the Parcels, which the Court has verified by requesting the appropriate documentation from the Directorate for Urbanism, Cadastre and Environment Protection in Peja, it has been clarified that the Parcels were first registered in the name of Nedeljko Otovic, the husband of Bosiljka Otovic and the father of the Claimants, after a reorganization of the cadastre that took place in 1956. Upon the death of Nedeljko Otovic, changes were made in the cadastre books following a ruling on inheritance by the Municipal Court of Peja (T.no.23/68 of 27.03.1968), and the Parcels were registered in the names of the Claimants and their mother Bosiljka Otovic. Through the registration of the Transaction Contract at the Municipal Court of Peja (Vr. No. 5515/04), the Parcels were thereafter transferred to Ujup Smajli and Jakup Smajli on 20.12.2004.

The Claimants claim that they were never aware of the Transaction Contract and that they never signed the power of attorney, authorizing Agim Shala to sell the Parcels on their behalf. As for Bosiljka Otovic, the Claimants have stated that she died already in 1983. The main question of the case is thus if the Claimants and Bosiljka Otovic voluntarily have disposed of their property right to the Parcels and more specifically, if they signed the power of attorney authorizing Agim Shala to conclude the Transaction Contract on their behalf.

Miljan Otovic has stated that he left Kosovo in 1970, and that the Parcels were thereafter used by his brother Zivorad and their mother Bosiljka. Apart from him and Zivorad, there is also one more brother in the family, Milorad, but he renounced ownership of the Parcels in order to be able to receive child allowance from the state. They found out about the transfer of their property after the return campaign had started, in 2005. They had decided to start repairs of their building, and when they went to the Cadastre Office they were told that the Parcels had been transferred. He has never heard of any Mileta Otovic.

He does not recognize the persons on the photos of the ID-cards attached to the Transaction Contracts, the woman is not his mother.

Zivorad Otovic has stated that after the death of their father in 1968, the whole property was transferred to him, Miljan and their mother. The Parcels were divided into three equal parts, and this was registered at the Cadastre Office at the Municipality. He does not recognize the persons on the photos of the ID-cards attached to the Transaction Contracts, the woman is not his mother.

Jakup Smajli has stated that a person named Mujo Rexha proposed that he should buy this land. He went to inspect the property where after he had a look at the property list and the plan of the Parcels. After having collected this information, he had extensive contacts with the sellers, Dragan and Mileta Otovic. They made a deal and he paid 140.000 € and 1.200 \$. In 2004, it was common practice not to accept money in Mitrovica because of security reasons. He therefore sent the money through a colleague, Xhafer Butiq; the others present at the meeting were Mujo Rexha and a lady called Dushica. He asked the sellers to sign their documents and he received the original of the possession list. The sellers identified themselves with proper documentation and valid ID-cards before the court. All documents had been verified in the Municipal Court of Mitrovica. He asked Agim Shala, a former colleague of his, to act as authorized representative through the power of attorney. The sellers presented their refugee cards and since neither he nor his brother knew the sellers from before, they purchased the land in a legal manner. They never used deception to gain material advantage. When they had verified all the documents, he called Mujo Rexha, Xhafer and Mileta Otovic and told them they had fulfilled all their obligations and at that moment he asked Xhafer Butiq to give the money to Mileta Otovic. He paid the full transaction amount. On 20 December 2004 the property was transferred to his and his brother's name. He has never seen the Claimants before the proceedings started. The Court issued a decision in case P.No. 11/07 through which they were considered not guilty to forgery.

The claimants have presented the originals of their ID-cards to the Court; Miljan Otovic ID-card with number CP18166272 Unique Master Citizen Number (hereinafter UMCN) 1404949710405 issued on 07.06.2008 and Zivorad Otovic with ID-card with number CP13334402 and UMCN 0707946710519 issued on 28.05.2001. These ID-cards do match, neither by number nor by UMCN, the ID-cards that are attached to the power of

attorney (Miljan Otovic CP14942686 UMCN 2306964930001 issued on 06.06.1999 and Zivorad Otovic CP14942685 UMCN 0308959930013 issued on 05.06.1999).

To analyze the discrepancies in the two sets of ID-cards it should be recalled that the Unique Master Citizen Number (hereinafter UMCN) is a unique identification number that was assigned at birth to every citizen of former Yugoslavia. It was introduced on 31.12.1976 with the Law on the introduction of the UMCN (OG of SFRY, No 58/76) and applied to all citizens born before then and alive at the time. The UMCN is made up of 13 digits formed in 6 groups, prescribed in details in art. 3 of the Law on the introduction of the UMCN, where the first two digits are the day of the birth, the second two digits – the month of birth, next three digits – last three digits of the year of birth, next two digits – political region of birth, next three digits – unique number that also identifies the person as male or female (000-499 are number for male, as 500-999 for female), and the last digit is a checksum that is calculated using a special formula.

As regards Miljan Otovic, the UMCN of the ID-card displayed to the court (1404949710405) reveals that he was born on 14 April 1949 in the Belgrad region, whilst the UMCN in the ID-Card attached to the power of attorney (2306964930001) would imply that he was in fact born on 26 June 1964 in the Peja region, Kosovo. From a simple inspection of the photos on the ID-cards it is obvious that the picture of the ID-card attached to the power of attorney does not portray Miljan Otovic. A similar examination regarding Zivorad Otovic reveals that the UMCN of his ID-card displayed to the Court (0707946710519 ) implies that he was born on 14 April 1949 in the Belgrad region, whilst the UMCN in the ID-card attached to the power of attorney (0308959930013) would imply that he was born on 3 August 1959 in the Peja region. Also in this case, it is blatantly obvious that the picture in the ID-card attached to the power of attorney does not portray Zivorad Otovic but another man.

There is also an ID-card attached to the power of attorney, allegedly belonging to Bosiljka Otovic, stating that she was born on 12.03.1938. However, the Claimants have claimed that she was in fact born in 1901 and they have stated that the person appearing on the picture of the ID-card is not their mother. The Claimants have presented a death certificate issued on 27.02.2006 that states that Bosiljka Otovic (born on 23.04.1901) died on 12.03.1983. However, this document was issued in Kragujevc by the parallel structure Pec Municipality and cannot be relied upon as evidence. The Court has therefore

contacted the Municipality of Peja to receive the death certificate of Bosiljka Otovic. The Municipality of Peja has replied that the Municipality does not have the death certificate of Bosiljka Otovic, since their records for births and deaths are incomplete because of events following the war of 1999. The Court has thus not been able to obtain conclusive written evidence regarding the death of Bosiljka Otovic. The oral statements of the Claimants will thus have to form the basis for the Court's assessments in this regard. There is nothing that contradicts these statements and the lack of proper legal documentation is understandable following the well known lack of documents of births and deaths in the Municipality of Peja. Based on the oral testimonies of the Claimants, and since the Respondents have not presented any evidence to the contrary, the Court will rely on the statements of the Claimants to conclude that Bosiljka Otovic was in fact deceased at the time of the signing of the disputed power of attorney.

When analyzing the collected evidence, in particular the obvious differences between the appearance of the Claimants and the photos of the ID-cards attached to the power of attorneys as well as the UMCN numbers, that do not match the Claimants' age or birth places, it is clear that these ID-cards did not belong to the Claimants, but were in fact falsified documents. From this follows that the persons signing the power of attorney were not the Claimants but in fact persons posing as the Claimants for the sake of concluding this transaction. This is also supported by the fact that Jakup Smajli has stated that he never saw the Claimants before the start of the proceedings. Furthermore, Bosiljka Otovic was deceased at the time and did not sign the power of attorney. The Court therefore concludes that Agim Shala was not 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 the Claimants and Bosiljka Otovic received the transaction amount from Respondents. Consequently, there is no evidence supporting that the Transaction Contract was concluded with the intent or participation of the Claimants and Bosiljka Otovic. It can therefore be concluded that the Transaction Contract was not a binding sale agreement of the Parcels, as it has not been proved that the Claimants and Bosiljka Otovic, as legal owners of the Parcels, were consenting parties 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 Respondents have presented evidence of their payments of the transaction amount. However, the fact that the Respondents have performed the payment in question and thus paid the price of the property is of no relevance for the property issue. The Respondents will have to seek redress from the persons who received this payment. It appears clear to the Court that the Respondents were victims in a criminal scheme that aimed to profit on them through fraud. The Transaction Contract is authentic as it is verified in the Court, but it does not have any legal effect as the person that signed it was not authorized by the Claimants and Bosiljka Otovic and he could not transfer property rights he never had. In common language the power of attorney was fake.

Since the Transaction Contract is hereby nullified, the Cadastral and Geodesy Office of the Municipality of Peja is ordered to reverse its cadastral books in accordance to this judgment to the state it was before the registration of the Transaction contract.

.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 Peja/Pec 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 Peja/Pec**

**C.No. 253/07**

**15.03.2010**

Drafted in English,  
an authorized language



Presiding Judge

Verginia Micheva-Ruseva