P. Nº. 66/2009

# IN THE NAME OF THE PEOPLE

On the 19th March 2010, the Municipal Court of Viti/Vitina, here represented by Eulex judge Vitor Hugo Pardal, appointed to this case by PAEJ on last 8th September 2009, pursuant articles 2.1, 3.6 and 5.1 of LoJ (Law 03/L-053), hereby issues the following

## JUDGMENT

in the above-referred case, on which

Claimant is **Municipality of Viti/Vitina**, from Viti/Vitina, which is represented by the Public Attorney Mr. Ibrahim Ramadani from Viti/Vitina; and

Respondant is **"Drenusha" hunting association**, from Viti/Vitina, which is represented by the attorneys of record, Mr. Shemsedin Pira from Gjilan/Gnjilane and Mr. Ekrem Pira from Viti/Vitina.

## Remaining Summary

This case is called by the Claimant as "certification of ownership of immovable property". It regards to a parcel identified as the cadastral plot no. 3259, possession list no. 546, in the place called "Selo Shkola" of a culture: building yard, CZ Viti, social property. The Claimant claims for the certification

of ownership over that parcel and also requested to the Court to oblige the Respondent to not obstruct the Claimant on performing its duties, freely and without obstacles.
The Respondent requested to the Court to reject the above-referred claim and to oblige the Claimant to compensate the Respondent for court costs related to this judicial dispute in a given period of time (15 days) under compulsory execution.
The material dispute is so restricted by the parties whether or not the ownership of the named parcel belongs to the Claimant.

To support its claim the Claimant alleged summarily: as the owner of the parcel 3259, in the name of the primary Scholl "Mladen Markovic", it was *given in use with trust* by Viti/Vitina municipality to "Jelen" hunting association before the war in Kosovo; then, the Municipality was a socio-political community as well as others (like the Respondent) to which the first had for obligation to shelter them in order to continue their activity; the legal owner retained however the inalienable right in its property which means the reversal right to terminate contracts on use at any moment, over any so owned parcel, including buildings on it; the Claimant refuses to admit the quality of heir between the Respondent and the above referred "Jelen" hunting association; the Respondent is now a NGO, of a private nature and with private interests, regarding to whom the Claimant (the Municipality as such) has not those obligations of sheltering them anymore; Municipal and State property remains as State property.

The Respondent replied to the above summarized claim and alleged summarily, to support its issue, the following: refusing the ownership to the Claimant, the Respondent states that parcel where the building was constructed was given *but not only on use* to "Jelen" hunting association since it was a lesser on several contracts regarding the disputable parcel an collected due taxes regarding to it; immediately after the war the disputed building was given to "Dreni" hunting association, represented then by Vebi Selmani; due to applicable registration regulations, the "Dreni"

association became "Drenusha" association on 17th October 2006; the Respondent states that "Drenusha" association is the sole owner of the immovable property and that the Respondent is the heir of the "Jelen" hunting association. Finally it is stated that even though the parcel is evidenced in the name of a primary school it cannot be considered as evidence enough to achieve the necessary legal basis in order to support the issue submitted by the Claimant.

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The value of the disputable facility in this case was determined on the amount of 60.000 €, pursuant to article 36 LoCP.

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The last session of the main trial was held on last 26th February 2010 during which, apart from the above-referred attorneys, was also present the authorized representative of the Respondent, Mr. Vebi Ejup Selmani.

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This court is absolutely competent and all procedural issues were raised and solved whilst on the preparatory session, that was held before the main trial. There is no material or procedural issues to be raised now in this case, as due impediment of the immediate judgment on its merits by this Court.

## Disposition

1. This Court decides hereby to **REJECT** the claim submitted on this case by the claimant Municipality of Viti/Vitina, as **ungrounded.**
2. Subsequently the Court also decides to **APPROVE** the request submitted by the respondent "Drenusha" hunting association, as grounded.

3. Procedural costs are charged on the claimant – article 452.1 LoCP. (however, always having into consideration the claimant's exemption on judicial costs, as above referred).
4. This Court decides to order to the competent cadastral services in Viti the cancelation of the current registration entitling the Claimant as the owner of the above identified parcel.

## Justification

According to the submissions and evidences presented, and according with the findings and rulings detailed on preparatory session (described on respective recorded minutes) these are the relevant facts:

Undisputable (Accepted):

1. The disputable facility is a parcel identified as the cadastral plot no. 3259 in the place called "Sello Shkola" of a culture: building yard, CZ Viti.
2. The above identified disputable facility was transferred - before the war in Kosovo - by the Municipality of Viti/Vitina to "Jelen" hunting association:

   - *(Considered as so by both parties whilst the Preparatory Session)* -

Disputed (Contested):

A) (Conclusive fact:) The transfer above-referred on 2. was then taken place *only in use with trust*, preserving the transferor the inalienable right in its property which means the

reversal right to terminate contracts on use at any moment, over self owned parcel, including buildings on it?

B) (Conclusive fact:) The Municipality of Viti/Vitina was the sole legal owner of the parcel above-identified on 2. at the time of the above mentioned transfer, and at the present moment?

C) The "Jelen" hunting club was established in 1955 and as such has functioned in the previous building that has existed in the vicinity of the Municipal Court building in Viti/Vitina, where there was constructed the building type p+1, where continuously has performed its activity?

D) There was reached an agreement that the former SMCI for Housing and Municipal Utilities to enter on possession of "Jelen" hunting club in Viti/Vitina, in order to build a construction whereas the SMCI for housing and Municipal Utilities is obliged to provide location for construction of a new house in the exclusive center of residence of Viti/Vitina?

E) "Jelen" hunting club, as contractual party of the above referred parcel, gave it on use to different tenants and taxes were paid?

F) (Conclusive fact:) "Dreni" hunting association was the legal heir/successor of the first "Jelen" hunting association and the "Drenusha" hunting association is the legal heir/successor of "Dreni" hunting association?

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The produced exhibits are the following:

By the Claimant:

- Possession list 546, parcel 3259;
- Copy of plan issued by the Department of Geodesy and Cadastre of Viti/Vitina.
- Publishing of the tender on rent of hunting grounds in Viti Municipality;
- Tender on rent of hunting grounds in Viti Municipality;

- Notification on granting the rent to the winning bidder "Kakadku" hunting association in Viti;
- Decision no. 755/2008 dated 12th Nov 2008, issued by the Procurement body of Kosovo, for rejection of the "Drenusha" hunting association in Viti;
- Contract on service/renting of the hunting grounds in Viti to "Karadku" hunting association in Viti;
- Contract no. 03-16/5139, dated 17th Nov 2008, related to "Karadku" hunting association in Viti;
- Municipal Decisions no. 01-013/802, 01-013/3782 and 02-013/3790, dated respectively from 10th Mar 2008, 15th Jul 2009 and 15th Jul 2009;
- Historical description report, signed Fadil Hoxha, dated 08th Feb 2010;
- Municipal Decisions no. 01-014/802 and 01-013/4608, dated respectively from 06th Mar 2008 and 3rd Oct 2008.

By the Respondent:

- Picture of the former building of "Jelen" hunting association;
- Contract No. 01-130, dated 22nd July 1985;
- Contracts on lease Nos. 17 (24th Sep 1969), 50 (29th Sep 1975), 21 (13th Dec 1982), 118 (23rd Jan 1982), 112/-7 (4th Oct 1983), 20 (23rd Dec 1982), 12 (15th May 1987), 24 (26th May 1994), 35 (23rd Jun 1994), 150 (01st Nov 1995), and 6 (02nd Feb 1998);
- Decision on compensation No 33/8, dated 26th Jun 1997;
- Minutes 05 No. 433/95, dated 19th Feb 1988 and 05 No. 433-425, dated 27th Oct 1998;
- Registration certificate and decision upon changing name of association, dated 18th Feb 2000;

- Statement of 2 witnesses: Selim Musliu, from Verban, Viti/Vitina, and Izer Ramiqi, from Klokot, Viti/Vitina, as recorded on respective minutes of the main Trial;
- Copy of Official Gazette no. 40, dated 15th Nov 1985, pg. 1107

Having into consideration all exhibits produced until the procedural phase for final explanations had started now follows the **validated** relevant facts, coming out of all exhibits produced, directly related with the above mentioned disputable/contested facts.

- the above referred as A, C, D, E and F -

No other facts were considered as relevant in order to issue the current decision.

## Reasoning

### FACT A) – the transfer (use or ownership)

The main disputable fact under this case is exactly the precise right transferred between the Municipality of Viti and "Jelen" hunting association, before the war in Kosovo, on 1985. Was it the use (as alleged by the Claimant)? Or was it the ownership (as alleged by the respondent)?

According to the Official Gazette of Kosovo autonomic region No. 40, dated 15th Nov 1985 (exhibit presented by the Respondent), it is there published a Decision on land swap of social ownership lands between "Jelen" and Viti/Vitina Municipality. The entire decision follows:

> Article 1: *For providing of construction land for the needs of constructing new residence building in Viti/Vitina, it is taking place land swap of social owned ownership of the user Hunting Association "Jelen" in Viti/Vitina and the land of social ownership of Viti/Vitina municipality.*

Article 2: *For the land of social ownership of the user Hunting Organization "Jelen" in Viti/Vitina in the cadastral plot number 2067/1 in a surface of 0.07.50 HA in the so called place "Kaajnshka-Bashte", municipality of Viti/Vitina, gives a swap of social ownership of the user Primary school "Mladen Markovic" in Viti and that the part with cadastral plot 3259 in a surface of 0.05.00 HA, in which the hunting organization will make construction of the new hunting house.*

Article 3: *Transfer of right of the leadership and usage of social land as per the article 2 of this decision by the current user will be transferred to the new user, in the cadastral records and in the operation unit of the municipal department of Geodesy in Viti/Vitina.*

Article 4: *Department of legal property issues, Inspection of the Municipal Assembly and Municipal Department of Geodesy in Viti/Vitina will be responsible for enforcement of this decision.*

Article 5: *This decision enters in effect on the day of approval and it will be published in the Official Gazette of SAPK.*

The correct exegesis of this text is not a simple issue, since concepts like social ownership, registration of social-ownership, leadership of social-owned property, right of permanent use, legal swap on social owned-lands, power to authorize, decide and enforce the swap operation, etc, must be hermeneutically integrated on its own time (1985) in the bounds of "*one party*" political and economical regime.

Analyzing properly the Law on Transfer of Real Property, as published on Official gazette No. 45/81, enforced at that time, it was allowed the transfer of real properties between social legal persons, and specially exchange for land in social-ownership, although subject of particular conditions (article 10), usually compensation (article 7). However, it is clear that "*the contract for the provision, transfer and alienation of the real properties in possession of a socio-political grouping shall be concluded by the competent person, based on the sociopolitical groups' or an administrative body's decision*" (article 15). It doesn't include, obviously the original acquisition of real properties.

Considering all this, we must conclude necessarily that mentioned article 3 is quite clear regarding the content of the transfer: nothing but the right of leadership and usage of social land was ever transmitted. The operated swap of premises had no effect on the original content of detained rights.

On the other hand, article 1 and 2 are both quite clear as well mentioning "Jelen" as social owner of swapped land. It is well known that even today a socially-owned property is subject to register (article 2.2.d) of Law 2002/5 on the establishment of the immovable property rights register, entered into force on 20th Dec 2002.

However, this would be an important issue if any counterclaim would be filled by the Respondent, in order to property recognition of the mentioned premises. But, in fact, it wasn't.

It must be stressed anyway that the simple transfer (swap) of use doesn't mean necessarily the transferor to be the owner of the mentioned parcel. Ownership must be proved in a legal and in a regular way.

"*Nemo dat quod non habet*" (one cannot give what one does not own). The simple transfer of use may lead to a judicial presumption of ownership, however it can't be considered itself, necessarily, as sufficient prove of ownership. And this will be the next issue.

**FACT B) – the ownership**

This case regards to a certification of ownership of an immovable good as requested by the Claimant, and nothing else.

Procedurally speaking, the general burden of prove is defined as follows:

According to article 319.1 LoP, "*each party at court has to prove its request and claims*". And, pursuant to article 322.1 LoCP, "*if the court is not so sure in a fact based on evidence collection (article 8), rules on proof weight will be applied, if the law does not foresee something else, the party that insists in a fact should prove it*".

However, regarding immovable property, rules the principle of register. Registering real state rights became a basic and unavoidable action in all civilized countries that admit property right as a structuring principle of an organized state.

*"The principal ambition of registration of title is to facilitate the security of land ownership and transfer. Under the unregistered system, when selling land, the seller has to give a convincing historical account of his right to sell it. This entailed an inspection of the title deeds to prove, so far as possible, that the purchaser's right to enjoy the land would not, subsequently, be disturbed by others".* – Mark P. Thompson, Modern Land Law, Oxford Univ., Oxford, UK, III Ed., 2006, pg. 95.

The principle of the Register establishes some material and procedural corollaries. There is necessarily a natural presumption of correspondence between the material reality and the registered fact - otherwise it would lead to complete useless of such legally required activity and state service. On the other hand, assigns to the beneficiary of the inscription the legal presumption on prove of the registered fact as it is. It means the beneficiary of a registered fact does not need to follow the above mentioned articles 319 and 322 of LoCP in order to prove such a fact.

In deed, pursuant to article 7.2 of Law 2002/5 on the Establishment of the Immovable property rights register, entered into force on 20th Dec 2002, *"entries in the Register of immovable property rights enjoy the presumption of accuracy, truthfulness, and legality until and unless corrected by means of the procedures established by this law"*.

However, as perfectly understandable, *presumption of truthfulness* and *truthfulness itself* are different realities and only implies on different procedural effects: on one hand, the party who alleges a registered fact don't need to prove its correspondence with reality; on the other hand, the opposite party is allowed (we would say, burdened) to prove the lack of correspondence between the registered fact and the real fact itself in order to put aside the legal presumption, as *juris tantum* it is. Procedurally speaking, the beneficiary of the register only needs to prove the regularity of the register in order to be transfered the burden of prove to the counterparty. However

if that regularity of the inscription is somehow objected in its materiality by the counterparty, material proof will be again needed, regarding that regularity, in order to produce the presumptive effect legally as previewed. This means only a registered fact in valid terms shall result in the legal presumption as so.

The law expressly previews the legal means of acquisition of property. On 1985 was applicable article 20 of Law on Basis of Ownership and Proprietary relations, Official Gazette SFRY 6/80, 36/90, entered into force on 1st Sep 80, pursuant which, *the ownership right shall be acquired on the basis of the very law, legal transaction and inheritance. The ownership right shall also be acquired by the decision of government authority, in the manner and under the conditions prescribed by law.*

Per article 37.2 of the mentioned law, *an owner shall, in order to establish his/her right to request restitution of his/her property from a person who possesses it, prove his/her ownership rights and the defendant's dominion over the same.*

However, the already above mentioned Law 2002/5 on the establishment of the immovable property rights register, entered into force on 20th Dec 2002, defines as subject to register the *rights of use of socially owned property and state owned property* (article 2.2 d)). Its article 3.7 also says, *without prejudice to Section 1.2 (b), UNMIK Regulation No. 1999/23 (on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission) the MCO shall only register an immovable property right in the register if the competent court has issued the appropriate documents in writing to the MCO for the registration of the immovable property right in the Register.*

Per article 31.1 of Law 03/L-154, on property and other real rights, on force on 10th July 2009, also registration of a transfer is a requirement to its legal validity, as well as a valid contract, as a valid mean of acquisition concerning immovable property.

As we may verify according to the produced exhibits, the registered fact in this case is strictly based on articles 1 to 4 of an administrative decision (01-013/4608, dated 03rd Oct 2008) on which the returning of the owner previous title holder is determined by the Municipality itself (article 1); also the same Municipality declares *its right to ownership (...) of immovable properties* (article 2); *re-establishes its rights on immovable property* (article 3), declaring them as of *general public interest* (article 4).

From the information provided by the head of Directorate for Geodesy, Cadastre and Property, Fadil Hoxha, dated 08th February 2010, "*we do not possess in our Directorate any written evidence that this property was ever in the ownership except that it was on the name of the schools*".

So, we are able to conclude that the only title that could justify the current cadastral inscription entitling the Municipality is, at the end, its own administrative decision on reversal to the owner previous title holder. On one hand, there is no legal basis for acquisition of property based on decisions of such a nature; on the other hand, never the Municipality submitted any evidence in order to prove that the Municipality was, as alleged, "*the owner previous title holder*". The administrative reversal decision is legally ungrounded, as well as any cadastral register based on it.

Since a valid cadastral register entitling the Claimant was not found on this case, there is no possible presumption of truthfulness based on such a register. Since no other proper evidence was submitted by the Claimant in order to prove and judicially certify its ownership, its request must be necessarily rejected.

Moreover, a register inscription, which is found as legally ungrounded, must be *ex officio* ordered to be canceled, through a Court order.

**FACTS C). D) and E)**

These facts were all considered as validated based on the documents submitted by the Respondent attached to its initial Respond to the Claim, specially the picture, contracts on lease, minutes 05

regarding tax payment, registration certificate and decision upon changing name of association. dated 18th Feb 2000 (all them not subjected to counterproof and not materially objected) and the statement of the witnesses Selim Musliu and Izer Ramiqi, that personally confirmed these facts, knowing them personally. An integral and whole analysis of the mentioned evidence must lead to the conclusion, (regarding these facts), on one hand for its validation; on the other hand, for its irrelevance concerning the main decision herein issued.

**FACT F) – relationship Jelen/Dreni/Drenusha**

Persuant article 1 of Municipal decision no. 01-014/802, issued on 6th March 2008, "*on destination of municipal building (...) for allocation of Department of Education and Culture, the Municipality of Viti expressly recognizes that "the current user Hunting Association "Jelen" (after 1999 "Dreni")*".

Admiting so, we must consider as well admitted by the Claimant that "Dreni" association is the heir of "Jelen". On the other hand, considering the documents approached by the Respondent they plenty satisfy the conclusion of the heir relationship between "Dreni" and "Drenusha" following the precisely alleged change of social designation.

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Having into consideration the lack of valid, proper and sufficient evidence, in order to prove the alleged ownership – an essential element at the claim *sub judice* – it must be so rejected as ungrounded.

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All remaining exhibits above listed were considered as irrelevant for the proper decision of this case.

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Procedural Costs: Shall be on charge of the Claimant – acc. to article 452.1 of LoCP. However, Municipalities in Kosovo are exempted of judicial expenses (Official Gazette of SAPK No. 2/89 and No. 5/88).

As stated above, pursuant to article 143.1 LoCP, it is herein decided in accordance with the enacting clause of this decision.

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**Legal remedy:** article 176.1 LoCP, *the complaint of the parties against the decision of the 1st level court can take place within 15 (fifteen) days starting from the day a copy of the verdict is handed.* Article 185 LoCP, *the complaint will be presented to the court that issued the decision of the first degree (...)*

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This judgment was draft in English, an authorized language, and shall be followed by official translation to Albanian.

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The parties will be regularly notified of herein decision through regular means of MC Viti/Vitina.

MUNICIPAL COURT IN VITI/VITINA
On the 19th March 2010

Vítor Hugo Pardal
Eulex judge