

**SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA**

**KOSOVO PROPERTY AGENCY (KPA) APPEALS PANEL
KOLEGJI I APELIT TË AKP-ës
ŽALBENO VEĆE KAI**

GSK-KPA-A-098/13

**Prishtinë/Priština,
17 December 2013**

In the proceedings of

B.S

Claimant/Appellant

vs

XH.R

Respondent/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo composed of Elka Filcheva-Ermenkova, Presiding Judge, Esma Erterzi and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/R/167/2012 dated 5 September 2012 (case file registered at the KPA under the number KPA 49180) after deliberation held on 17 December 2013, issues the following:

JUDGMENT

1. The appeal of B.S is grounded as to the jurisdiction of the KPCC over the dispute. The Decision of the KPCC/D/R/167/2012 dated 5 September 2012, regarding case file registered at the KPA under the number KPA49180, is amended as the KPCC has jurisdiction on the matter.
2. The claim of B.S in case file registered at the KPA under the number KPA49180 is rejected as ungrounded.

Procedural and Factual Background

1. On 29 November 2007, the claimant B.S filed a claim with the Kosovo Property Agency (KPA) alleging to be the property right holder of the residential apartment located at the address of Ulpijina 12, Object B, entrance 1, third floor Prishtinë/Priština, placed on parcel no 661. Claiming that the loss of possession of the apartment derived from the conditions of the armed conflict, she asked for the re-possession of the apartment. She alleged that she lived with her family in the above mentioned apartment until 19 March 1999. To support the argument on possession, she provided the copy of the records of Public Housing Enterprise, numbered 02-730/10, and dated 19 March 1999, on taking over the keys and the written statements of two witnesses bearing the date of 22 June 2000.

2. As for the alleged ownership right, she submitted a copy of a purchase contract made between the director of the Jugobanka A.D. (JSC) Kosovska Mitrovica and Branka Stanković for the apartment in Ulpjina, Building B, entrance I, floor III, apartment no 12, dated 26 February 1999; the Decision on allocation of apartment on lease issued by Jugobanka, dated 19 (month illegible) 1998, numbered 841; Contract on Lease between Jugobanka and B.S dated 26 May 1997, numbered VI-2/9555; the exchange contract made between Jugobanka and Public Housing Company dated 19 May 1998, numbered 842; authorization given by the director of Jugobanka dated 23 February 1999.

3. The Respondent XH.R, under whose possession the apartment was at the time of filing of the claim with the KPA, filed a notice of participation to the proceedings. He contested the validity of such purchase contract and the possession of the apartment. He maintained that the purchase contract provided by the claimant is a fake one as well as the witness statements; and that the claimant had never possessed the property. He relied on the Decision of HPCC in a previous claim filed therewith by which the claim of the claimant for the return of the possession of the said apartment was refused based on the conclusion of the

HPCC that she had never obtained the possession of the same (Decision of HPCC/D/154/2004 dated 22 October 2004 in relation to case no DS001231).

4. XH.R, on the other hand, as for the ownership right claimed that the property was never under the ownership of Jugobanka but Credit Banka (alternatively written Kreditna Banka) from Prishtina. He argued that Jugobanka has no right to sell the property to another person which does not belong to it. He provided the copy contract made between Public Housing Company and Kreditna Banka D.D (SC) Prishtina made in May 1991(the date is illegible); the letter of Public Housing Company addressed to XH.R dated 22 November 2007 stating that they never contested that Credit Banka is the owner of the mentioned bank (referring to Jugobanka). The respondent also submitted the copy of the claim filed by him which was registered with Municipal Court under case no (C no 1338/03); and the copy of the request filed by N.XH and J.XH in the name of the Organizational Council of the Bank Establishment with the same Court, dated 6 September 2001, asking for non-verification of the contracts for apartment transaction.

5. KPA, with the check made at Public Housing Enterprise, verified negatively the sale contract submitted by the claimant as well as the Decision on alleged allocation of the apartment numbered 841.

6. On 5 September 2012, with the decision KPCC/D/R/167/2012, Kosovo Property Claims Commission (KPCC) decided that the Commission's jurisdiction is excluded according to Section 18 of UNMIK Regulation No 2006/50 on the resolution of claims relating to private immovable property, including agricultural and commercial property, as amended with the Law No 03/L-079, due to the existence of a lawsuit with a competent court seeking for compensation filed by the property right holder prior to 16 October 2006.

7. The Decision was served on the claimant on 26 March 2013. She filed an appeal on 22 April 2013.

8. In her appeal, the appellant argued that she never filed a claim to any court before 16 October 2006. She challenged the application of Section 18 of the said UNMIK Regulation into her case.

9. The appeal was served on the Respondent on 24 June 2013. He filed a response on the same date.

10. Observing that it was not the claimant but the respondent alleging the existence of judicial proceedings started at Municipal Court in Prishtinë/Priština, the KPA Appeals Judge sent an order to the KPA, dated 31 October 2013, asking for *inter alia* further details of those proceedings and the outcome, if any.

11. On 19 November 2013, the KPA replied that the respondent had filed a claim on 2 July 2003 with the Municipal Court in Prishtinë/Priština (C no 1338/03) prior to the approval of the UNMIK Regulation No 2006/50 dated 16 October 2006. However, it confirmed that the claim of the respondent filed with Municipal Court had been dismissed on 8 November 2004 by the said Court since the plaintiff did not mention the address of the defendant. KPA also mentioned that such decision on dismissal of the previous claim in 2004 was submitted to the KPA on 6 November 2013.

12. Before deliberating the case, the Supreme Court will discuss the appropriate title of the applicable law in force as to referring to the UNMIK Regulation No 2006/50 on the resolution of claims relating to private immovable property, including agricultural and commercial property, as amended with Law No 03/L-079. Noting that Article 18 of the latter states that ‘the present Law shall supersede any provision in the applicable law’ and ‘a reference in an annex hereto UNMIK Regulation No 2006/50 shall be deemed to refer to the present Law, where so required’, the Supreme Court decides that any reference to the UNMIK Regulation 2006/50 shall be replaced with Law No 03/L-079. This Law will be abbreviated as ‘Law 03/L-079’ hereinafter in this and future Judgments.

Admissibility of the appeal

13. The appeal is admissible. It is filed within the deadline prescribed by Law 03/L-079.

Merits of the appeal

14. The appeal is grounded. The decision of the KPCC is to be quashed as the Supreme Court notes a serious misapplication of the applicable procedural law.

15. According to Section 3.1 of the Regulation, the KPCC has the competence to resolve conflict related claims involving circumstances directly related to or resulting from the armed conflict that occurred in Kosovo between 27 February 1998 and 20 June 1999. Thus, a claimant is not only to provide an ownership title over a private immovable property but also to show that he or she is not now able to exercise such property rights by reason of circumstances directly related to or resulting from the armed conflict. Both conditions are to be met. The first condition is related to the jurisdiction of the KPCC whereas the second one on the burden of evidence and the merits of the claim.

Jurisdiction

16. The KPCC relied on its assumption of the existence of a judicial proceeding filed by the claimant to another court prior to filing of the claim with KPA. Supreme Court notes that it was not the claimant but the respondent who initiated such proceedings. Furthermore, the outcome of those proceedings had not been checked before KPCC decided on the claim. It turns out that the proceeding initiated by the respondent before the Municipal Court was not pending at the time of filing of this claim at hand by the claimant with the KPA. The conclusion of KPCC dismissing the claim because of exclusion of jurisdiction based on Section 18 of Law 03/L-079 cannot be upheld by the Supreme Court. The purpose of the legislator with that provision is to avoid *litispence* and/or vesting concurrent jurisdiction to two courts. More importantly, according to the response of KPA, dated 19 November 2013, the Municipal Court seemingly did not decide on the merits of that claim but dismissed it based on procedural rules. A party whose claim was dismissed due to procedural shortcomings cannot be deprived of filing of a corrected and complete claim to a court with competence unless the time limit expires.

17. In the case at hand, the respondent challenges the claimant's assertion on the possession of the apartment, accordingly the jurisdiction of the KPCC. He claims that she never possessed the apartment as HPCC concluded in a previous case. In this new claim filed by the claimant with the KPA after the adoption of the afore-mentioned UNMIK Regulation, the KPCC should have checked its competence and jurisdiction pursuant to Section 3.1 of the said law but not to Section 18 of the same. Furthermore, it should have had a standing on whether it considers the previous decision of HPCC as *res judicata* or not.

18. The Supreme Court notes that the Respondent maintained that HPCC refused the first claim of her based on the argument that she never possessed the apartment. However, according to the copy of the claim he submitted to the Municipal Court in Prishtinë/Priština against B.S, he requested from the said court to verify that the latter was given the apartment unfairly. This is an indication of that the matter between the parties is related to the conditions of the armed conflict in Kosovo. As to the argument of the respondent that the previous claim was refused by the HPCC, the Supreme Court emphasizes that the HPCC dismissed the claim due to lack of jurisdiction. That is to say the merits of that claim were never examined by the HPCC which does not constitute *res judicata* between the parties at hand. In this new claim filed with the KPA, regardless of their validity, the claimant presented documents and arguments that she held it under her possession during the conflict. Accordingly, the KPCC had jurisdiction over this new claim at hand. The Decision of the KPCC is to be quashed and the claim is to be examined on its merits.

Merits of the claim

19. In general, a party is entitled to be heard not only by one instance, but by at least two instances. If a party is deprived of this right by a fundamental mistake of the first instance, this is to be considered a substantial violation of the procedure.

20. The Supreme Court has in several cases, where the claim was treated as uncontested and the appellant was unaware of the claim, found it necessary to annul the decision of the KPCC and return the case for reconsideration. The Court refers to case no GSK-KPA-A-14-2012. This procedure allows the appellant to take part in the proceedings before the first instance, and allows the losing party to appeal a decision that has been made after a full review of all relevant aspects of the case.

21. However, in this particular case, the Supreme Court finds it unnecessary to send the case back to the KPCC since a decision on the claim can be made based on the evidence already collected up to now. Further examination by the first instance would not bring a new feature to the proceedings in this dispute.

22. The Supreme Court establishes that the claimant, in any case, could not prove her right of use or the ownership right over the claimed apartment. It observes that the Sale Contract and the Decision on the allocation of the apartment to her were negatively verified by the KPA (*see paras. 2 and 5 above*). Accordingly, the claim of B.S is to be rejected as ungrounded.

23. Based on the facts and interpretation of the Supreme Court mentioned above, the Decision of the KPCC is to be amended and the claim is to be rejected as in the enacting clause.

Legal Advice

24. Pursuant to Section 13.6 of Law 03/L-079, this judgment is final and cannot be challenged through ordinary or extraordinary remedies.

Elka Filcheva-Ermenkova, EULEX Presiding Judge

Sylejman Nuredini, Judge

Esma Erterzi, EULEX Judge

Urs Nufer, EULEX Registrar