

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

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

GSK-KPA-A-146/11

Prishtinë/Priština,

31 May 2012

In the proceedings of:

R.B.P.

Represented by **M.M.M.**

Claimant/Appellant

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Anne Kerber, Presiding Judge, Elka Filcheva-Ermenkova and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/AR/101/2011 (case file registered at the KPA under the number KPA47388), dated 23 February 2011, after deliberation held on 31 May 2012, issues the following

JUDGMENT

- 1- The appeal of R.P. is accepted as grounded.**

- 2- The decision of the Kosovo Property Claims Commission KPCC/D/AR/101/2011, dated 23 February 2011, in its part related to the claim filed on 30 November 2007 by M.M. on behalf of R.P., registered under No. KPA47388, is modified.
- 3- The claim filed on 30 November 2007 by M.M. on behalf of R.P., registered under No. KPA47388, is accepted.
- 4- R.P.'s ownership right over the parcel of land No. 1368, located at a place called "Pade-kodra/Pode-brdo", cadastral zone of Batllavë/Batlava in the municipality of Podujevë/Podujevo, with a surface of 0 ha 11 a 58 m², is confirmed.
- 5- R.P. is given possession of the claimed property.
- 6- Any person occupying the property shall vacate it within 30 (thirty) days of the delivery of the present judgment; in case of failure to comply with this order within the stated time, the person shall be evicted from the property through compulsory execution.
- 7- Costs of proceedings are to be borne by the court and paid from the budgetary resources.

Procedural and factual background:

On 30 November 2007, M.M. filed a claim with the Kosovo Property Agency (KPA) on behalf of his father in law, hospitalized and invalid, seeking for confirmation of ownership right and repossession over the parcel of land No. 1368, located at a place called "Pade-kodra/Pode-brdo", cadastral zone of Batllavë/Batlava in the municipality of Podujevë/Podujevo, a 5th class forest with a surface of 0 ha 11 a 58 m² (registered with the KPA as case file KPA47388, registered with the Supreme Court as GSK-KPA-A-146/11).

He asserted that his father in law was the owner of the said property, that he had lost possession on 15 June 1999 and that the parcel was occupied by an unknown person.

To support the claim, he provided the KPA with the decision R.br. 51/73 issued on 26 September 1985 by the Municipal Court of Podujevë/Podujevo stating on the division of different parcels and notably allocating the litigious parcel to R.P.. He also provided the decision No. 466-48/92 of the Municipality of Podujevë/Podujevo, dated 3 June 1993, granting to R.P. and to another person as well the right to access their property through the parcel No. 2495 situated in the cadastral zone of Batllavë/Batlava.

The Executive Secretariat of the KPA processed to the notification of the claim. On 23 June 2008, the KPA notification team put up a sign on parcel No. 1368, indicating that the property was subject to a claim and that interested parties should have filed their response within 30 days. The parcel was found not occupied. The notification was repeated on 23 April 2010, again the property was found not occupied. On 29 April 2010 the notification was checked based on GPS coordinates and orthophoto and found having been correct.

The verification report of the KPA ascertained the validity of the decision of the Municipal Court of Podujevë/Podujevo. The Executive Secretariat included ex officio in the case file the possession list No. 338 of the cadastral zone of Batllavë/Batlava, Municipality of Podujevë/Podujevo, showing that the parcel of land at hand was registered under the name of R.P..

At several times between July 2008 and April 2009, the Executive Secretariat unsuccessfully asked M.M. to submit a power of attorney given to him by the property right holder, R.P..

By its decision KPCC/D/AR/101/2011 of 23 February 2011, the Kosovo Property Claims Commission (KPCC) dismissed the claim for the reasons that M.M. was not a family household member as defined by section 1 of UNMIK Administrative Direction (AD) 2007/5 as amended by Law No. 03/L-079, and that he did not provide the KPA with a power of attorney from the property right holder although he was given numerous occasions to do so.

M.M. was served with the KPCC's decision on 28 July 2011 and filed an appeal with the Supreme Court against the aforementioned decision on 25 August 2011.

In his appeal, M.M. challenged the KPCC's decision on the grounds of erroneously and incompletely established facts and substantial violation of the law. He provided the Supreme Court with a power of attorney signed by R.P. and confirmed on 23 March 2011 – OV. II No. 20/2011 - by the Court of Prokuplje in Serbia. With this power of attorney R.P. authorized M.M. to submit requests for the

usurped property in Kosovo before the KPA and to take legal remedies and other legal and factual actions regarding the cases that are registered with the KPA.

M.M. requests of the “KPCC” to revoke its decision and recognize the possession right of R.P. on parcel No. 1368.

Legal reasoning:

1. The request of M.M. has to be interpreted as an appeal with which he requests the Supreme Court to quash the KPCC’s decision and accept the claims.

The first instance decision was served on the representative of the appellant, M.M., on 28 July 2011. According to Section 12.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079, a party may submit an appeal within thirty (30) days of the notification of the decision. M.M. on behalf of R.P. timely submitted his appeal on 25 August 2011.

2. The Supreme Court considers that the KPCC has correctly applied the rules relating to the representation of a party. However, it finds that the appealed decision was based on a serious misapplication of procedural law (Article 182.1 LCP). The claimant’s representative was not formally requested to correct and complete the claim. To do this, a telephone call was not sufficient, but a written request attracting his attention on the consequences of a failure to comply with such request would have been necessary.

- a. As to the representation of a party, section 5.2 of AD 2007/5 as amended reads: *“In proceedings before the Commission, where a natural person is unable to make a claim, the claim may be made by a member of the family household of that person. A claimant may be represented by an authorized natural person with a valid and duly executed power of attorney. In exceptional cases, where the provision of a power of attorney is problematic the Executive Secretariat may certify an alternative document authorizing representation of a claimant.”*

According to section 1 of the same AD, *““member of the family household” means the spouse, the children and other persons whom the property right holder is obliged to support in accordance with the applicable law, or the persons who are obliged to support the property right holder in accordance with the*

applicable law, regardless of whether or not that person resided in the property together with the property right holder”.

In the present case, the KPCC has correctly decided that M.M. had to submit a proper power of attorney. The property right holder, R.P. is hospitalized and invalid. Such situation is sufficient to conclude that he is unable to file the claim by himself and therefore that he can be represented. M.M. is his son in law and, as such, he is not obliged to support his father in law according to the family law of Kosovo No.2004/32. Therefore, he is not a member of the family household. As a consequence, in order to be authorized to represent R.P., he has to provide a valid power of attorney.

- b. Nevertheless, the Supreme Court deems that the KPCC’s decision to dismiss the claim for failure to provide a power of attorney has not been issued in accordance with the provisions relating to the way to complete a claim.

Section 11.1 of UNMIK Regulation No. 2006/50 as amended by the Law No.03/L-079 foresees that the provisions of the Law on Administrative Procedures shall be applicable mutatis mutandis to the proceedings of the Commission. Article 39.1 of the Law No. 02/L-28 on the Administrative Procedure provides: *“If the request of the interested party to commence an administrative proceeding has not been prepared in accordance with the requirements set out in Article 38 of this law, the natural and legal persons requesting the action by the administrative body shall be requested to correct the inaccuracies contained in the request.”*

Amongst the requirements of Article 38 of this law, there is the obligation to file a request in writing, signed and dated by the person or by the legal representative of the person.

The Supreme Court is of the opinion that the words *“shall be requested to correct”*, in the context of a claim filed before a court, refers to a formal request including a mention about the consequences of the failure to comply with it as it is usually done during the instruction of cases in all proceedings before courts. This opinion also relies on the duties and responsibilities of the Executive Secretariat as they are described in Annex II of the AD 2007/5 as amended, particularly in sections 1.1 (a) and 4.1: the Executive Secretariat is asked to *“facilitate the collection of claims”* and, at the time of the resolution of the claims, *“to assist the parties to resolve claims”*.

In order to interpret those provisions of the AD, the Supreme Court, as foreseen by Section 13 of the same AD, ‘...*may take into account, with such modifications or qualifications as it considers necessary or appropriate in the given circumstances, the provisions of the applicable laws on the powers of the Supreme Court relating to civil procedures including mutatis mutandis the provisions in Administrative Direction No. 2003/13 of 11 June 2003 implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters?*’.

Section 28.4 of UNMIK AD No. 2008/6 amending and replacing UNMIK AD 2002/13 with regards to the admissibility criteria of a claim provides that where the trial panel determines that the admissibility requirements are not met, it shall issue an order to the claimant in which a reasonable period for the completion or correction of the claim shall be prescribed, that the order shall state in which way the claim fails to meet those requirements and that the order shall be served on the claimant.

At the light of this interpretation, the Supreme Court considers that the duty of the Executive Secretariat to “facilitate the collection of claims” which necessarily implies the collection of complete claims imposes to it an active and efficient role in the preparation of complete claims to be referred to the Commission.

The Supreme Court notes that, in the present cases, the files show that M.M. was informally contacted on 13 May 2009 and 13 August 2009 on the phone, requesting him to provide a power of attorney of the property right holder or a family member of the property right holder. He was given a deadline of 30 days. At least on 13 August he also was informed that otherwise the claim would be dismissed.

Taking into consideration the consequences of a dismissal of the claim for a procedure which cannot be any more resumed since, according to section 8 of AD 2007/5 as amended, the claim intake period elapsed on 3 December 2007 for claims before the KPCC, the Supreme Court finds that only a written request with a mention about the consequences of a failure to meet the requirements with regard to the admissibility of the claim, served on the party, can lead to the dismissal of the claim.

In the case at hand, such formal request was not done. Thus, the claimant’s

representative could not be aware with the required certitude that the claim might be dismissed due to the lack of power of attorney. When he understood the impact of this lack while receiving the KPCC's decision, he submitted a proper, certified and valid power of attorney with his appeal.

3. As a consequence of the above given reasoning, pursuant to section 13.3 (a) of UNMIK Regulation 2006/50 as amended by the Law No. 03/L-079, the Supreme Court shall accept the appeal and make a new decision.

With the submission of the valid power of attorney, the Supreme Court considers that the claim is complete and thus admissible. The Supreme Court has consequently to examine the claim on the merits.

Pursuant to section 3.1 of UNMIK Regulation No. 2006/50 as amended by the Law No.03/L-079, the KPCC and, at the second instance level, the Supreme Court has the competence to resolve the conflict-related ownership claims with respect to immovable property, including agricultural and commercial property, involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999, where the claimant is not able to exercise such property rights.

In the present case, the subject matter of the claim is a forest which constitutes agricultural immovable property. The appellant explained that the loss of possession of the said parcels occurred on 15 June 1999, due to the overall security situation and to his personal fear.

Those elements and the time of the loss of possession in the well-known circumstances of the situation of Kosovo in June 1999 justify considering that the claim falls under the jurisdiction of the KPA Appeals Panel of the Supreme Court.

In order to be granted repossession, the appellant has to prove his ownership right over the parcel at hand. In that purpose, he submitted the decision R.br. 51/73 issued on 26 September 1985 by the Municipal Court of Podujevë/Podujevo stating on the division of different parcels and notably allocating the litigious parcel to him. In addition, the Executive Secretariat submitted the possession list No. 338 of the cadastral zone of Batllavë/Batlava, Municipality of Podujevë/Podujevo, showing that the parcel of land at hand was registered under the name of R.P..

According to Article 20 of the Law on Basic Property Relations (Official Gazette SFRY No. 6/80), “*the property right can be acquired by the law itself, based on legal acts and by inheritance...*”.

The above mentioned decision of the Municipal Court of Podujevë/Podujevo refers expressly to the final inheritance decision O. No. 31/69 issued on 7 November 1969 by the Municipal Court of Podujevë/Podujevo as well, which declared the sons of the late B.P. as the sole inheritors. Among them is R.P.. Then it processed to the division of the immovable property and allocated the parcel at hand in the present case to R.P.. The outcome of this decision was registered accordingly in the cadastral records as evidenced by the possession list submitted to the proceedings.

Therefore, the Supreme Court is satisfied that these documents constitute proof of the claimed right and concludes that the appellant has established ownership over the claimed property. As a consequence, the Supreme Court shall grant repossession of the said property to him and shall order any person who is unlawfully occupying the property to vacate it within 30 days of the delivery of the present judgment. Failure to comply with this order within the time stated shall lead to the eviction from the property.

Costs of the proceedings:

Pursuant to Article 8.4 of Annex III of Administrative Direction (AD) 2007/5 as amended by the Law No. 03/L-079, the parties are exempted from costs of proceedings before the Executive Secretariat and the Commission.

However such exemption is not foreseen for the proceedings before the Supreme Court.

As a consequence, the normal regime of court fees as foreseen by the Law on Court Fees (Official Gazette of the SAPK-3 October 1987) and by AD No. 2008/02 of the Kosovo Judicial Council on Unification of Court fees are applicable to the proceedings brought before the Supreme Court.

Since the appellant wins the case and since there is no appellee, these court fees are to be borne by the court.

Legal Advice

Pursuant to Section 13.6 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, this judgment is final and enforceable and cannot be challenged through ordinary or extraordinary remedies.

Anne Kerber, EULEX Presiding Judge

Elka Filcheva-Ermenkova, EULEX Judge

Sylejman Nuredini, Judge

Urs Nuffer, EULEX Registrar