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-147/11 **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 number KPA47389), 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 KPA47389, is quashed and the case returned to the KPCC for reconsideration.**

3- **The costs of proceedings will be decided upon by the KPCC.**

Procedural and factual background:

On 30 November 2007, M.M. filed two claims 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. "1367/" [correct: 1367/1], at a place called "Pade-Kodra/Pode-Brdo" cadastral zone of Batllavë/Batlava in the municipality of Podujevë/Podujevo, a 4th class pasture with a surface of 0 ha 24 a 15 m² (registered with the KPA as case file KPA47389, registered with the Supreme Court as GSK-KPA-A-147/11).

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 parcels 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. 1367/1, 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. On 21 June 2010, the KPA renewed the notification. This time, however, they did not put up a sign on the parcel but notified of the claim through publication in the KPA Notification Gazette No. 2. The Gazette was left with the Head of the Village of Batllavë/Batlava as well as several other official institutions and placed at the entrance and exit of Batllavë/Batlava.

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 the parcel 1367/1.

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., given that, as the KPCC stated it, there is no exceptional situation making problematic the provision of a power of attorney in this case, 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, refer 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. However, the Supreme Court is prevented from issuing a new final decision. The conditions of a final decision are not fulfilled as the notification of the claim has not been done properly.

   Section 10.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 prescribes: "*Upon receipt of a claim, the Executive Secretariat shall notify and send a copy of the claim to any person other than the claimant who is currently exercising or purporting to have rights to the property which is the subject of the claim and make reasonable efforts to notify any other person who may have a legal interest in the property*". Here, however, the Supreme Court finds that the efforts of the KPA to notify have not been sufficient, which provides a serious misapplication of the :

- The notification of the year 2008 (putting up of a sign on the location where the parcel allegedly was located) has not been considered valid by the KPA itself, which repeated the notification in the year 2010.

- In 2010, however, the KPA restricted itself to publishing the claim and distributing the Gazette in the village and to other institutions. This alone cannot be considered as "reasonable efforts" in the sense of Section 10.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 (see already the decision of the Court of 1 March 2012, GSK-KPA-A-60/11). The KPA should have put up a sign on the litigious parcel as well, as this would have considerably heightened the probability of an interested party taking notice of the claim. Putting up a sign also would have been no more than the necessary "reasonable effort". The Court noted that this kind of notification has been chosen by the KPA in the majority of the cases, the notification by publication usually is done as an additional measure. Moreover, in 2008 the KPA did the notification of the litigious parcel in this manner.

The Court cannot exclude that with a proper notification of the claim somebody possibly occupying the parcel would have responded to the claim. In this case, the respondent would have been entitled to being heard not only by the Supreme Court, but also by the first instance of the proceedings, the KPCC. Therefore, not only the notification has to be repeated in a correct way, but also decision of the KPCC has to be quashed and the case has to be sent back to the KPCC for reconsideration to prevent a serious misapplication of the material law (also see the Court's decision mentioned above).

Costs of the proceedings:

As the decision of the KPCC is quashed and the case is returned for reconsideration, the costs of the proceedings will be decided upon by the KPCC as the first instance (Art. 465.3 LCP).

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 Nufer, EULEX Registrar