SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA

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

GSK-KPA-A-220/11

Prishtinë/Priština, 4 June 2012

In the proceedings of:

A.S.

Appellant

vs.

B.M.

Claimant/Appellee

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/A/83/2010 (case files registered at the KPA under No. KPA17887), dated 2 September 2010, after deliberation held on 4 June 2012, issues the following

JUDGMENT

1. **The appeal of A.(S.)S. is accepted as grounded.**
2. **The decision of the Kosovo Property Claims Commission KPCC/D/A/83/2010, dated 2 September 2010, in the part where it relates to the case registered under the number KPA17887, is annulled and case returned for reconsideration.**
3. **The costs of the proceedings shall be decided by KPCC.**

Procedural and factual background:

On 26 January 2007, B.M. (the claimant) filed a claim with the Kosovo Property Agency (KPA) as family member of the property right holder, seeking repossession over parcel No. 69 with a surface of 3 He, 13Ar and 80m2, described as field located in the municipality of Vushtrri/Vučitrn in the cadastral zone of Hercegovë/Hercegovo. The claimant has "established" that his property right is related to immovable private property that was lost as a result of the circumstances in 98/99 in Kosovo and the date of the loss is 12 June 1999.

The claimant filed the claim as a child of the property right holder M.M..

To support his claim, the claimant provided the KPA with the following documents:

a) copy of Possession List No. 39, issued by the Republic of Serbia, Municipality of Vushtrri/Vučitrn, Cadastral Municipality of Hercegovë/Hercegovo, on 15 October 1997;
b) a hand drawn plan giving information about the location of the estate at the place of Hercegovo, signed by the claimant and a KPA officer;
c) Copy of ID the Card of B.M.;
d) a Death Certificate issued by the Republic of Serbia, Municipality of Vushtrri/Vučitrn, issued on 25 January 2008, showing that M.M., with permanent residence and address in Pantina Vushtrri/Vučitrn, had died on 22 May 1969 in Pantina Vushtrri/Vučitrn;

Facts regarding the procedure in front of the KPA:

In his claim, dated 26 January 2007, the claimant states that he does not know who has been using the estate and that the inheritance procedure has not been carried out.
KPA notification officers went to the claimed property on 6 March 2009 when they found the property as uncultivated land.

On 5 February 2010 KPA officers performed a second notification where the parcel was allegedly situated and put up a sign indicating that the property was subject to a claim and that interested parties should file their response within a month. In its notification report, dated 5 February 2010 the KPA noted that the litigious parcel was cultivated land – it is not explained how was this conclusion made, on 5 February 2010 the soil was covered with snow (as it is obvious from the picture made by the KPA officers when they have put the notification sign). The report states that the property was found based on KCA data and since the property was found used the notification team tried to identify the person who is using the property but unsuccessfully as local people were not so cooperative to tell the person who was using the property.

On 18 February 2010 the KPA issued a report to confirm that the notification of the claimed property was accurately based on cadastral data such as orthophoto and gps coordinates.

In the claim processing report to the KPCC from 21 June 2010, it is mentioned that no responding party had approached the Executive Secretariat to contest the claim prior to the expiration of the statutory 30 days deadline and that the death certificate and the ID card provided by the claimant have been positively verified. The Executive Secretariat is of the view that the loss of possession occurred between 27 February 1998 and 20 June 1999 related to the armed conflict in Kosovo.

With cover decision KPCC/D/A/83/2010 the KPCC has accepted that in 283 claims, identified in part E of an attached Schedule (not present in the current file), the claimant has established ownership. Following the cover decision on 10 December 2010, the Kosovo Property Claims Commission (KPCC) issued an individual decision in the name of the claimant for the identification of the claimed property. De jure the KPCC has decided that the claimant had established that M.M. (the claimant's father) is the owner of 1/1 of the claimed property and that B.M. (the claimant) was entitled to possession of the said property and that any person occupying the property had to vacate it within 30 (thirty) days of the delivery of the decision. The commission additionally decided that in cases in which there is more than one owner to the claimed property, the above decision and order do not affect the rights of any respective co-owners.

The KPCC's decision was delivered to the claimant on 15 March 2011.

On 17 November 2011, A.S. (hereinafter the appellant) filed an appeal with the Supreme Court against the aforementioned decision. He explained that he inherited this property form his father S.(H.)S., who bought it from M.M. in the 70s, and later this parcel, was subject to land consolidation, whereby the property was transferred to them. As a proof the appellant gave a copy of a plan which shows that parcel No. 69 is under land consolidation and a copy of a decision on allocation of land from land consolidation, dated from 4 April 1988.

The claimant, through his advocate submitted a written answer to the appeal, dated 19 December 2011 and received by the KPA on 7 February 2012, stating that the appellant failed to provide any evidence that he inherited the property form his father who bought the property in the 70s from M.M. and the "decision on allocation of the land due to land consolidation" would not contain either a stamp or a signature of the decision-maker in question. The proposition is to reject the appeal as ungrounded and to order the appellant to compensate for the expenses of writing the response to the appeal.

With an order dated 15 February 2012 the KPA Appeals Panel asked the appellant to present proof that he is a descendant (son) of S.(H.)S.; to provide information about his current address; to clarify whether he claims that parcel 13 (13k-0) under the current cadastral plan corresponds to parcel 69, claimed by the claimant/appellee and whether he was not informed about the claimant's claim and if he was notified for the claim of the claimant, what prevented him from answering to the claim within the 30 day period.

On 16 March 2012 the appellant submitted a written response, explaining that parcel 13k was derived from the former parcel 69 in surface of 2 hectares, whereas the other part of the parcel 69 would be owned by his cousin P.S. and that **he was never informed by anyone about a claim regarding a part of his entire parcel**. **He asserts that he did not see this claim on his land parcel as he does not live nearby and he did not seed or plant the parcel at all.** It was a surprise to him that his co-villagers did not see this information, neither his cousin P.S. who has been paying rent and working the parcel since 1999. The appellant also presents a certificate of residence issued by the municipality of Mitrovicë/Mitrovica, on 10 February 2009, a death certificate of S.S. issued by the municipality of Mitrovicë/Mitrovica, on 15 March 2012, a birth certificate, issued by the municipality of Pantina, Vucitrn on 5 February 2009, proving that he is the son of S.S. and a personal identification card from the same municipality issued on 26 August 1993.

The KPA was informed with letter dated 2 March 2012 from the advocate of the appellee that the appellee has initiated a procedure for establishing the property right against D.R. from Zvecan in the Municipal Court of Mitrovicë/Mitrovica (a copy of the claim, dated 1 March 2012, is attached) relating to a copy of an attached Possession List No. 126, issued by the Republic of Serbia, municipality of Vushtrri/Vučitrn,

Cadastral Municipality of Hercegovo, on 15 December 2011. This claim refers to parcel No. 97 with a surface of 62 ar and 76 m2, described as 3rd class field located at a place called Zare in the municipality of Vushtrri/Vučitrn in cadastral zone of Hercegovë/Hercegovo. This data and the described documents are irrelevant to the current dispute, therefore the Court does not make any assessment of them.

With the above mentioned court order, dated 15 February 2012 the KPA was asked to clarify:

a) whether the KPA has taken into account any possible changes in the cadastral situation of the disputed property for the period between 1988 and by the time the appealed decision was taken and
b) whether the KPS has verified in the current cadaster plan under whose name the disputed property is listed and
c) whether under the current cadastral plan the disputed parcel No. 69 with the surface of 3 hectares 13 acres and 80 square meters (as described in the possession list from 1997 and the possession list from 2008) corresponds to parcel 13/13k-0, with unknown surface and what is the surface of the latter.

On 20 April 2012 the KPA provided the following additional documents and clarifications:

a) legal memorandum from the cadastral expert referring to claim KPA17887, dated 29 February 2012 which says among other things that "The data submitted by A.S. and P.I. show that parcel 69 was included in the land consolidation. The decision dated 4 April 1988 shows that parcel 69 was included in the land consolidation and following this decision it was transferred to parcel no. 13k and 14k, which were contested by the respondents A.S. and P.(T.)I.. Parcel 13k has a surface of 1, 59.85 ar and parcel 14k has a surface of 2,13.80 ar, while parcel 69 before the land consolidation had a surface of 3, 18.80 ar, and also parcel 101 before the land consolidation had a surface of 3,67.70, owned by the Agricultural Cooperative in Vushtrri/Vučitrn; following the land consolidation the boundaries of those parcels were changed and parts of parcels 69 and 101 now belong to parcels 13k and 14k" and that "Based on the data and the survey done by the cadastral experts of Mitrovica RO and Pristhina HQ, **it was confirmed that the notification done on 05.02.2010 does not match with the status and current location of the claimed property"**;
b) cadastral plan from Kosovo Cadastral Agency;
c) web map including gps coordinates taken in the time of notification;
d) minutes on verification of the factual state on the name of P.T.S., dated 23 May 1984 where P.T.S. said that he bought parcel No. 69 under possession list No. 39 from the former owner M.S.(M.'s widow) and that he is not in possession of any contract for it and he was using it without obstruction since 1974;
e) minutes on verification of the factual state on the name of S.H.S., dated 21 May 1984 where S.H.S. said that he bought parcel No. 69 under possession list No. 39 from the former owner M.S.(M.'s

widow) and that he is not in possession of any contract for it and he was using it without obstruction since 1975;

f) Decision on land consolidation, dated 04 April 1988.

Legal reasoning:

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".

Section 11.3 (c) and (d) ibid provide that the KPCC may take any other procedural measures it considers appropriate to expedite it decision making.

Section 11.1 ibid provides that the provisions of the Law on Administrative Procedures are applicable mutatis mutandis to the proceedings of the KPCC, except as otherwise provided in UNMIK Regulation 2006/50 as amended by Law No. 03/L and in UNMIK/DIR/2007/5 implementing the Regulation.

Section 12.1 ibid provides that the appeal against a decision of the KPCC should be submitted within 30 days of the notification done by the Kosovo property Agency.

In the current case the appellant was not notified of the above mentioned decision, because he was not constituted as a respondent party in the proceedings in front of the KPA under the provisions of section 10.1 ibid. This happened because the appellant was not aware of the proceedings before the KPA, as he asserts. This assertion is accepted by the Court as grounded as the appellant does not live nearby the property, he does not seed it or plant. **Consequently the 30 days term under section 12.1 ibid for the submission of an appeal cannot be considered to have had expired for the appellant, therefore his appeal is admissible.**

Section 13.2 ibid provides that the Supreme Court of Kosovo as a rule decides on the appeal based on the facts presented to and considered by the Commission.

Section 12.11 ibid provides that new facts and material evidence presented by any party to the appeal shall not be accepted and considered by the Supreme Court unless it is demonstrated that such facts and evidence

could not reasonably have been known by the party concerned. If such facts and material evidence are accepted, the Supreme Court may request the Commissions' evaluation and observations thereon.

As long as the appellant did not take part in the proceedings in front of the KPA the evidence presented by him in front of the Supreme Court should be considered admissible under section 12.11 ibid (first sentence). Under same section, sentence 2, the Commission has given its evaluation and observations.

Art. 39.2 of the Law on Administrative Procedure – Law No.02/L-28 prescribes that notwithstanding the provisions of paragraph 1 of the present article, the public administration body shall, if applicable, correct the request of the interested parties, without prejudice to legal interest of the interested parties. This resolution is a manifestation of the principle of legality, as determined in art.3.1 ibid, according to which public administration bodies shall exercise their administrative activity in compliance with the applicable legislation in Kosovo, within the scope of competencies vested in them and for the purposes that such competencies were vested for. Another manifestation of the principle of legality which is relevant to the current case is the one formulated in art. 3.2 ibid which states that public administration bodies shall ensure the implementation of their administrative acts, mutatis mutandis decisions, as are the acts of the KPCC named.

Art. 55 ibid also provides that the competent body shall ask and shall be acquainted with all the facts necessary to reaching the final decision, employing all the means of verification provided for by the Law. This resolution systematically follows from the principle of objectivity of the administrative process pursuant to art. 7.1 ibid: "During an administrative activity, public administrative bodies shall consider and weigh all the factors related to a specific administrative act". Along the same line, art. 53.1 ibid which states that during an administrative proceedings, the official running the proceedings shall consider all relevant factors for the matter at hand, and shall duly evaluate every factor and the principle of objectivity as a basic principle.

In the current case the KPCC has taken its decision in violation of the principle of objectivity, without considering all the factors related to the issuance of its decision.

As stated in its "legal memorandum" dated 29 February 2012 the KPA explains that "The data submitted by A.S. and P.I. show that parcel 69 was included in the land consolidation. The decision dated 4 April 1988 shows that parcel 69 was included in the land consolidation and following this decision it was transferred to the parcel no. 13k and 14k, which were contested by the respondents A.S. and P.(T.)I.. Parcel 13k has a surface of 1, 59.85 ar and parcel 14k has a surface of 2,13.80 ar, while parcel 69 before the land consolidation had a surface of 3, 18.80 ar, and also parcel 101 before the land consolidation had a surface of 3,67.70, owned by the Agricultural Cooperative in Vushtrri/Vučitrn; following the land consolidation the boundaries of those

parcels were changed and parts of parcels 69 and 101 belong to parcels 13k and 14k". Parcel 101 is not subject of the current dispute but obviously the information related to it is relevant to the current case because the new parcels 13k and 14k are adjacent to each other, as it can be seen from the cadastral data. The only factual conclusions that can be made are that the numbers 69 and 101 do not reflect the current cadastral situation and that after the consolidation of 1988 new parcels were created (either through amalgamation or subdivision); i.e. what were in 1988 parcels 69 and 101 have been transformed in new cadastral units with new numbers – as the KPA explains part of 69 and 101 now belong to 13k and 14k. The legal conclusion of that is that the right of property over parcel 69 has been transformed into a right of property over either a new parcel in its entirety or in ideal parts of other parcels, contingent on the fact whether 69 has been only given new name or whether it has been "absorbed" (which is what the "legal memorandum" implies) into two or more different cadastral units (the implication mentioned derives from the statement that part of 69 belongs now to 13k). In addition the KPA accepts that "the notification done on 05 February 2010 does not match with the status and current location of the claimed property".

In this regard the KPCC should explore the current cadastral situation (pursuant to the principle of objectivity), which includes the cadastral history of the land which was once individualized as parcel 69 and ex officio (pursuant to the principle of legality – art. 3.1 in relation with article 39.2 Law on Administrative Procedure – Law No.02/L-28) correct the claim so that it reflects the actual cadastral situation of the claimed property and the will of the claimant. As this was not done during the proceeding in front of the KPA, the KPCC has taken a decision which cannot be implemented, which is another violation of the principle of legality (see art 3.2 ibid). I.e. in the part where the decision of the KPCC states that third parties should vacate the property the decision is not executable, there is no identification of boundaries, there is no actual cadastral number to determine which piece of land the relevant third parties are supposed to vacate. In order the decision to be implementable/executable it should refer to a piece of land which is distinguishable from neighboring pieces of land – with a unique number (actual number, reflecting the actual plan. In case of lack of clarity regarding the actual cadaster then boundaries and boundary points would be a necessity). In this regard the provisions of the cadastral legislation should be taken into account. E.g.: according to section 2, para 2.9 of the Law No. 2003/25 on Cadaster (04 December 2003), as amended by Law No. 02/L-96 (26 Jan 2007, superseded by Law No. 04/-L-013 (29 July 2011), i.e. in force and applicable at the time of the proceedings before the KPA), the land parcel is an undivided land property formed by boundaries and boundary points, located within one cadastral zone and recorded in the Cadastre as a land parcel with a unique number.

In addition, the consolidation of lands that took place under the Law on consolidation of lands (OG SAPK 31/1987) and the cadastral change to which the "legal memorandum" refers create the impression that the

dispute regarding the ownership of a piece of land enclosed within parcel 69 might have occurred long before the armed conflict of 1998/1999. What is known so far is that there was a land consolidation in 1988 and that there was a cadastral change. It is unknown when the cadastral change has taken place and whether the PRH lost possession as a result of the land consolidation and/or the cadastral change, or as a result of the conflict in 1998/1999 years later. As defined in UNMIK/REG/2006/50 (section 3.1) one of the conditions for the admissibility of a claim under this specific procedural mechanism, is that the claim is related to circumstances resulting from the armed conflict and not from facts non-related or not resulting from the conflict.

The decision of the KPCC being not implementable in its nature resembles an invalid administrative act (art 91 in relation to art 92 (d) ibid), it is issued in contradiction to the procedure set out by the Law on administrative procedure, in contradiction with general principles of the administrative procedure. An invalid administrative act in the hypothesis of absolute invalidity does not generate any legal consequences and does not need to be revoked – argument after art. 93.1 Law on Administrative procedure. It suffices that such an act is declared invalid – argument after article 93.3 ibid. However, considering that the Court applies the procedural instruments provided in UNMIK/REG/2006/50 as amended by Law No. 03/L-079 and mutatis mutandis the Law on Contested Procedure, the Panel annuls the decision and sends it back to the KPA for reconsideration.

During the new procedure the KPA/KPCC should:

- explore (as appropriate, as much as it is possible) whether the ownership dispute is a result of the armed conflict or prior to that as a result of other sets of facts and circumstances;
- correct the claim so that it reflects the actual cadastral situation of the disputed property and the will of the claimant;
- assess whether the property right holder has been in possession (because repossession has been requested, according to the claim) of the disputed land and if yes
- whether the predecessor of the respondent party had acquired the same property in 1988, as result of the land consolidation process, which was undergone under the Law on Consolidation of Lands (OG SAPK 31/1987), in other words what was the legal effect of the consolidation regarding the right of property over the lands, which were subject to the consolidation;

Cost of the proceedings:

Regarding the cost of the proceedings in front of the SC, as the appealed decision is annulled and the case is returned for reconsideration, the costs of the proceedings will be decided upon by the first instance (Art. 465.3 of the Law on Contested Procedure).

Legal Advice:

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

Anne Kerber, EULEX Presiding Judge ***Sylejman Nuredini, Judge***

Elka Filcheva-Ermenkova, EULEX Judge ***Urs Nufer, EULEX Registrar***