

<p style="text-align: center;">DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT</p>	<p style="text-align: center;">SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS</p>	<p style="text-align: center;">POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODOSE NA KOSOVSKU POVERENIÇKU AGENCIJU</p>
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**ASC-09-0059**

In the lawsuit of

1. [REDACTED], Prishtinë/Priština

*Claimants/Appellants*

2. [REDACTED], Prishtinë/Priština

both represented by [REDACTED],  
Lawyer from Prishtinë/Priština

vs.

[REDACTED]  
Publicly Owned Enterprise  
[REDACTED] n.n. Prishtinë/Priština

*Respondent*

represented by [REDACTED],  
lawyer from Prishtinë/Priština  
Dëshmorët e [REDACTED]

the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Eija-Liisa Helin, Judges, after deliberation held on 03 June 2010 delivers the following

## **DECISION**

1. **The appeal is grounded.**
2. **The decision of the Trial Panel dating 26 August 2009, SCC-08-0245, is set aside.**
3. **The case is returned to the Trial Panel for retrial.**
4. **The Appellants are – preliminarily - obliged to conjointly pay court fees in an amount of 60 Euros to the Special Chamber.**

**Procedural Background:**

On 7 August 2008 the Claimants filed a claim with the SCSC, requesting to verify that the Claimants have gained the right of ownership and permanent use of half of the former cadastral parcel [REDACTED], possession list no. [REDACTED] Municipality of Prishtinë/Priština, with a surface of 14903 square feet, now registered with the new number of the unit P-[REDACTED], and to oblige the Respondent to recognize and to provide the necessary documents for transferring the ownership rights and registering it in the names of the Claimants. In their supplementation of the claim of 22 September 2008 the Claimants argue that their predecessors have purchased the disputed land parcel and from that time the land parcel has been in their conscious and continuous possession for 42 years, so that the Claimants have gained the ownership rights over the parcel based on the adverse possession. Furthermore, in their response dated 26 December 2008, the Claimants once more stated that they have earned the ownership right based on adverse possession according to Section 28 of the Law on Basic Property Relations.

With the challenged decision of 26 August 2009, SCC-08-0245, the Trial Panel rejected the claim as inadmissible pursuant to Section 28.1 in connection with Section 28.3 of UNMIK Administrative Direction (AD) 2008/6, on the grounds that the SCSC does not have jurisdiction over the claim, since the matter is under the jurisdiction of the administrative authorities according to the provisions of the Law on Expropriation (Official Gazette of SAP Kosovo No 21/78 as amended). The Trial Panel referred to Article 40 of the Law on Expropriation of Immovable Properties (Law No. 03/L-139) which stipulates that the expropriation procedures that were initiated prior to the entry into force of the named law shall be governed by the provisions of the law applicable on the day such procedures were initiated, thus applying the Law on Expropriation. Furthermore, the Trial Panel concluded that the return of the property decided by a conclusive decision of the administrative body cannot be pursued within a contested civil procedure, because this decision lies by law in the competences of the

administration. "Decision making, appeal, as well annulment of the decision on expropriation under the jurisdiction of administrative body." The Trial Panel does not mention the question of adverse possession in its reasoning, at all.

On 18 September 2009 the Claimants filed an appeal against the aforementioned decision, requesting the Appellate Panel of the SCSC to amend the decision and to verify the Claimants' ownership rights, or to set aside the decision and to return the case to the Trial Panel for retrial. The Claimants argue that the SCSC has primary jurisdiction over all claims against socially and publicly owned enterprises, which are currently under the administrative authority of the Agency.

In its response to the appeal, the Respondent proposes to reject the Claimants' appeal and to uphold the challenged decision. It further states that the expropriation procedure has been completed by the municipal authorities of Prishtinë/Priština.

### **Legal Reasoning:**

The appeal is admissible and grounded. The SCSC has subject matter jurisdiction over the Claimants' claim.

#### *Subject matter jurisdiction of the SCSC over the Claimants' claim*

Without any prejudice to the following reasoning on the basic jurisdiction of the SCSC concerning the whole claim, the SCSC would in any case have jurisdiction about the claim, at least with regards to the alleged legal basis of adverse possession under Section 28 of the Law on Basic Property Relations. This question is legally not connected with the question of the validity of the challenged acts of expropriation and could thus be scrutinized by the SCSC even if the argumentation of the Trial Panel concerning the jurisdiction of the SCSC with regards to administrative acts of expropriation would be correct. The Trial Panel in its decision did not take into

consideration that the subject matter jurisdiction of a court may be determined by the legal basis a claim is pleaded on. There might be different legal arguments which all might lead to the same effect desired by a claimant, but falling under the jurisdiction of different courts. In the case at hand, the Claimants primarily based their claim on the legal principle of adverse possession, and only in addition based it also on the alleged invalidity of the expropriation itself.

But also concerning the jurisdiction of the SCSC with regards to the acts of expropriation the Trial Panel's argumentation cannot be followed. It is within the SCSC's jurisdiction to scrutinize the validity of any act of expropriation which is contested within a law suit against a socially owned or publicly owned enterprise.

The Respondent is a publicly owned enterprise (POE). According to Section 4 lit c) of UNMIK Regulation (REG) 2008/4 the Trial Panels of the SCSC shall have primary jurisdiction for (all) claims and counterclaims in relation to the claims, including creditor or ownership claims brought against an enterprise or corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such enterprise or corporation is or was subject to the administrative authority of the Agency. According to Section 5.1 of UNMIK REG 2002/12 the Agency shall have the authority to administer publicly owned enterprises that are registered or operating in the territory of Kosovo. Pursuant to Sections 4.1 lit c) of UNMIK REG 2008/4 and 5.1 of UNMIK REG 2002/12 the SCSC has primary jurisdiction of the claim of the Claimants.

The SCSC when deciding on the claim of a claimant may also assess what is the legal validity of an earlier decision of the administrative authority, as well as the validity of decisions or judgments of courts, which may have legal significance in the matter, thus defining the extent of the legal force of the former decision. Even if, wrongfully, the Trial Panel would have come to the conclusion that the expropriation decision taken by the administration was legally binding and thus determined the status of the parcel in question

with regards to the question of ownership, this would be a decision on the merits, not a decision on admissibility.

Apart from that, restraining from exercising jurisdiction over cases like the one at hand would leave those who were subject to acts of expropriation before 1999 without any proper legal remedy. It can be assumed that acts of expropriation might have been connected with discrimination before 1999. This has to be scrutinized on a case by case basis and it also has to be scrutinized, if those whose property was subject to expropriation by then had proper means – within the framework of the then applicable law – to raise their objections against the expropriation. For the time being, the applicable law in Kosovo does not foresee a proper legal remedy to challenge those expropriations outside of the regular courts, including the SCSC. Based on those considerations, the Appellate Panel does not see any reason to deviate from the clear wording of the – without any question applicable – provisions of UNMIK REG 2008/4, which grant the SCSC jurisdiction over all claims brought against a POE or SOE, regardless of their legal nature.

Besides, it has to be noted that the Trial Panel did not give a justification for its assumption that the “Law on Expropriation of Immovable Properties” (Law No. 03/L-139) is applicable in Kosovo. Apart from this lack of legal reasoning (see Section 9.3 lit (b) UNMIK REG 2008/4 and Section 48.1 UNMIK AD 2008/6), the conclusion that the Trial Panel draw from the assumed applicability of that law is also unfounded: When the expropriation in question took place, the Law on Expropriation (Official Gazette of SAP Kosovo No.21/78 as amended) was not yet applicable.

*Return the case for retrial*

Taking into consideration that the Trial Panel only decided on the admissibility of the claim and according to Section 65 lit c UNMIK AD 2008/6 - to not absolve the Claimants access to two full instances - the case has to be returned to the Trial Panel for retrial. The Trial Panel shall follow

