

DHOMA E POSAÇME E  
GJYKATËS SUPREME TË  
KOSOVËS PËR ÇËSHTJE QË  
LIDHEN ME AGJENCINË  
KOSOVARE TË MIRËBESIMIT

SPECIAL CHAMBER OF THE  
SUPREME COURT OF KOSOVO  
ON KOSOVO TRUST AGENCY  
RELATED MATTERS

POSEBNA KOMORA  
VRHOVNOG SUDA KOSOVA  
ZA PITANJA KOJA SE ODNOSE  
NA KOSOVSKU POVERENIÇKU  
AGENCIJU

**ASC-10-0081**

In the lawsuit of

[REDACTED], Klinë/Klina

*Claimant/Appellant*

vs.

**1. Privatization Agency of Kosovo (PAK)**  
address: Rr. Ilir Konushevci No.8, Prishtinë/Priština  
[REDACTED]  
Klinë/Klina

*Respondents*

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, Presiding Judge, Torsten Frank Koschinka and Mr.sc. Sahit Sylejmani, Judges, after deliberations held on this 01 December 2010 issues the following

### **DECISION**

**The appeal is rejected as ungrounded. The decision of the SCSC of 4 October 2010 in SCC-10-0062 is upheld.**

**The Appellant is obliged to pay € 40 as court fees to the SCSC for the appellate proceedings.**

#### **Procedural and factual background**

On 02 April 2010, the Claimant filed a claim with the SCSC requesting the recognition of his ownership right over the immovable properties recorded as land plot No1/8 with the area of 1.09.85 ha and land plot No 1/1 (now 1/18) with the area of 0.30.00 ha in Resnik village in cadastral zone of Dush, Klinë/Klina municipality, possession list No. 71006015-00103. He also requested the SCSC the same to be registered in the cadastral records.

## II

Further, the Claimant requested the SCSC to issue a preliminary injunction prohibiting the Respondents to alienate or to take any other action over the objects of this dispute until the SCSC issues a final Decision.

As a proof of his allegations the Claimant submitted a certificate for the immovable property rights and the Decision of the Municipality Commission o 26 February 1970.

On 13 April 2010 the SCSC requested the Claimant to submit the translations of the supplementing documents, proof that he has given notice of his intention to lodge a claim to the Agency and the proof of inheritance.

On 26 April 2010 the Claimant filed a death certificate concerning his alleged predecessor.

On 22 June 2010 the SCSC repeatedly requested clarification from the Claimant also targeting whether he wishes to submit additional evidence supporting his request for the issuance of the preliminary injunction.

On 8 July 2010 the Claimant responded but did not file any additional evidence.

On 19 July 2010 the SCSC served the request for a preliminary injunction on the Respondents.

On 29 July 2010 the 1<sup>st</sup> Respondent requested the SCSC to reject the request for a preliminary injunction.

On 4 October 2010 the SCSC rejected the request for a preliminary injunction as ungrounded. The Trial Panel argued that the Claimant failed to give credible evidence that immediate and irreparable harm would happen if the preliminary injunction is not granted.

On 27 October 2010 the Claimant filed an appeal requesting the Appellate Panel to quash the decision of the Trail Panel and to approve the request for the preliminary injunction. In his appeal the Appellant argues that he knows about several cases where the Agency has sold privately possessed land, and although there is no

### III

immediate danger of this happening he wishes his rights to be nonetheless safeguarded.

On 4 November 2010 the SCSC requested the Appellant to clarify his appeal concerning the legal arguments he bases his appeal on, quoting Section 60.1 lit c UNMIK AD 2008/6 and, in addition, Art.353-356 LCP.

The Appellant on 17 November 2010 filed a submission in which he argues that the Court should know that the LCP is no longer in force. He does not give any further explanation as to what are the legal arguments he arises to challenge the appealed decision.

#### **Legal Reasoning**

The appeal is admissible, but ungrounded. Based on Section 63.2 of UNMIK AD 2008/6 the Appellate Panel decided to dispense with the oral part of the proceedings.

The appeal is admissible but ungrounded.

The criteria as to when a preliminary injunction shall be granted are laid down in Section 55.1 UNMIK AD 2008/6, as stated above: A party shall give credible evidence that immediate and irreparable loss or damage would result if the request is not granted. These criteria are set in a way that if any of the above is missing the request shall be denied.

The requirement of the credible evidence comprises both, the *fumus boni iuris* (the probability that the claimed right exists) and the *periculum in mora* (the immediate danger for this right), as the immediate and irreparable loss or damage can only occur, if the claimed right in fact exists.

In other words: the claimant/applicant that asks for a preliminary injunction has to proof that it is probable, that 1. the right he claims to be endangered exists and 2. that this right is, if the requested preliminary injunction is not issued, under immediate risk of an irreparable loss or damage.

#### IV

This proof that is required to be brought by the claimant/applicant is not to be understood as a full proof (*probatio plena*) in the sense of the one he has to provide to be successful with his main claim. If he wants, and if he is in the position to bring this full proof, this would definitely be highly recommendable. But to grant a preliminary injunction it is sufficient, if the Claimant only proves in the sense of a *probatio semiplena* a high probability that his claim is grounded, respectively, that the claimed right exists. To ascertain this state of high probability it is sufficient to recourse for example to documents from which, their authenticity presumed in this stage of the procedure, the claimed right may arise. In those cases, also the burden of proof has to be taken into consideration. If the Claimant is able to produce the required documents which verify the claimed right at a certain point in time (or if it even is uncontested), the burden of proof for a later change in this right might lie with the Respondent. In any case, the a-priori-ascertainment of those facts from the viewpoint of the required high probability does not prevent the court to come to a different conclusion later on during the main trial. The court, ascertaining certain facts for the purpose of the proceedings concerning a preliminary injunction, is in no way bound by this ascertainment for the following proceedings, as can easily be followed from the preliminary nature of such an injunction. If no specific other reason adds to this pure procedural ascertainment, a bias of the court towards one of the parties cannot be deducted from the decision on a preliminary injunction.

Concerning the *periculum in mora* it has to be noted in principle, that no "irreparable" damage can derive to the party – *per definitionem* – as a consequence of the failure of the other party to pay a debt, which can be always compensated *per equivalentem* (i.e., with the payment of the same sum of money, plus interests, after the final judgment), because the damage itself is "reparable" with compensation, unless – in exceptional cases, to be strictly proved by the Claimant – the debtor clearly has not sufficient financial means to fulfil its obligations (that can happen, for example, to a company went into bankruptcy, to an unemployed person, etc.). Insofar it has to be clearly stated that the legal institution of the preliminary injunction is not aimed to ensure the enforceability of a possible future decision of the court granting damages, but only to avoid an irreversible change in the legal or factual status of a right or a possession which is subject to the main claim the court has to deal with. Thus, monetary claims by their special nature, as a general rule, cannot be considered to be subject to irreparable loss or damage (ASC-09-0035). When it comes to the above mentioned exceptions from this general rule, no preliminary injunction granting a "preliminary

satisfaction" of the applicant can be issued, but only a freezing of certain specified assets of the respondent can be ordered, naturally only if a sufficient deposit according to Section 55.4 UNMIK AD 2008/6 is made by the applicant (ASC-10-0017).

The Claimant did not give any evidence in support of his request. He did not indicate at all that at this given moment in time his possession would be endangered by the actions of the Respondents. He did not present – and he did not even allege - any indications, for example of a planned liquidation or privatization of the SOE, that could have been understood as a significant change which might lead to the necessity to issue such a preliminary injunction.

Apart from the above mentioned considerations, the probable loss or damage would have to be irreparable, which in the case at hand does not seem to be the fact. The (possible) loss of possession is not to be considered as irreparable.

Concerning the *fumus boni juris*, the Claimant only alleges that he has the undisturbed possession of the land but he does not give any evidence (in the above described sense) concerning his ownership title.

Concluding the above listed arguments, since none of the criteria necessary to issue a preliminary injunction set forth by the quoted provision of the law is fulfilled, the decision of the Trial Panel rejecting the requested preliminary injunction is upheld.

#### Costs:

According to Section 11 REG 2008/4 and Section 66 AD 2008/6, the Trial Panel has to decide on the allocation of costs of the proceedings in first instance, and the Appellate Panel – when deciding a case finally - on the allocation of costs of the proceedings in both instances.

Based on Section 57.2 of UNMIK AD 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees, in force from 10 March 2010. They read as follows:

## VI

Section 10 of Administrative Instruction No. 2008/2 on Unification of Court Fees of the Kosovo Judicial Council of 27.11.2008, concerning "The Court Fee Tariffs", is hereby – with the following specifications - declared to be applicable for the court proceedings in front of the SCSC.

Section 10.9 till Section 10.23 are – mutatis mutandis – applicable for the appeals procedure in front of the Trial Panel and in front of the Appellate Panel.

As a clarification, Section 10.11 is also applicable for the procedure governing the appeal against 2<sup>nd</sup> instance decisions of the Trial Panel.

(...)

These Additional Procedural Rules enter into force on 10 March 2010 and are valid until 31 December 2010.'

The court fees in both instances consist on the one hand of a fee for the filing of submission(s), on the other hand of a fee for the issuance of (a) decision(s).

As the decision in first instance was rendered before the day of entry into force of the above mentioned rules, only court fees for the appeals procedure are to be dealt with here:

The amount of the fee for the filing of the appeal as governed by Section 10.11 of the Administrative Direction of the Kosovo Judicial Council No.2008/2 on Unification of the Court Fees ("ADJ") is 30 Euros.

The amount of the fee for issuing a decision as governed by Sections 10.17, 10.12 and 10.1 of ADJ has to be determined according to the value of the claim. The value of the claim is € 2.000. The fee for a first instance decision for claims between €1.000 and €2.500 is € 20. The court fee regarding a preliminary injunction is 50% of the amount which would be payable for the first instance decision.

Pursuant to the above the Claimant shall pay € 40 in total (based on the value of his claim € 2.000).

## VII

In general court fees have to be paid by the party that loses the case, with the exception of those cases in which the case has to be retried by the Trial Panel (or, when the Appellate Panel acts as third instance, by either the Municipal Court or the Trial Panel). In those cases the costs have to be borne on a preliminary basis by the Appellant and the final allocation of costs is up to the Trial panel in its new decision. In cases like the one at hand, in which the Appellate Panel finally rejects a request for a preliminary injunction, the costs have to be paid by the one who requested the preliminary injunction.

Richard Winkelhofer, Presiding Judge  
EULEX

Torsten Frank Koschinka, Judge  
EULEX

Mr.sc. Sahit Sylejmani, Judge

Tobias Lapke, Registrar  
EULEX

