

DHOMA E POSAÇME E
GJYKATËS SUPREME
TË KOSOVËS PËR
ÇËSHITJE 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 ODRNOSE NA
KOSOVSKU
POVERENIÇKU
AGENCIJU

SCC – 10 – 0133

January 2011

Privatization Agency of Kosovo (PAK)
No. 8 Ilir Konusheveci Street, Prishtinë/Priština

Claimants

vs

Municipality of Vushtrri/Vučitrn, Vushtrri/Vučitrn

Respondent

Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, the Sub - Panel composed by Laura Plesa as a Presiding Judge, and Sabri Halili, judge as delegated by the Trial Panel composed of Laura Pleša Presiding Judge, Anna Bednarek and Sabri Halili Judges with the order dated 15 September 2010, after deliberation held on this 17 January 2011 issues the following

J U D G M E N T

The claim of the Claimant Privatisation Agency of Kosovo is hereby approved in part.

The Respondent is obliged to return the possession of the part of the land included in the land parcel 2254/41 P.L.471 Cadastral Zone Vushtrri and not occupied by the school and the projected yard.

The part of the claim relating to the possession of the surface of the land of 1.79.00 ha situated in the parcel 2254/41 P.L.471 Cadastral Zone Vushtrri and occupied by the school and the yard and the restoration of this possession to the previous state is rejected as ungrounded.

Factual and Procedural Background

On 23 June 2010, the Claimant filed a request for inhibiting possession and a temporary injunction against the construction of a school on cadastral land parcel no. 2254/41 on possession list no. 471 in Vushtrri/Vučitrn.

The Claimant submits that the Socially owned Enterprise ██████████ in Vushtrri/Vučitrn (SOE) with commercial court registration no. fi – 832/89 is in liquidation, and as it is a Socially owned Enterprise it is under the administration of the Privatization Agency of Kosovo. The Claimant further submits that the SOE is the owner of the cadastral land parcel and the Claimant is pursuing the rights of the SOE under Article 29.2 of the Law on the Privatization Agency of Kosovo, Law No. 03/L-067.

The Claimant submitted the following documents (referred to as Attachment no. 1):

1. A copy of the Status Determination Request Form for the SOE (SDR 441)
2. A copy of the notice on commencement of liquidation & appointment of the first members of the liquidation committee of SOE [REDACTED] of 17 March 2006
3. Possession List no. 471, cadastral land parcel no. 2254/41 with a surface area of 04.28.04 ha, in cadastral zone Vushtrri/Vučitrn.

The Claimant states that on 15 February 2010, the Regional Office of the Claimant in Mitrovicë/Mitrovica requested the mayor of the Municipality of Vushtrri/Vučitrn for some information regarding two barracks located on cadastral land parcel no. 2254/41. The Claimant submitted a copy of the letter addressed to the chairman of the Municipality of Vushtrri/Vučitrn dated 15 February 2010 (Attachment no. 4).

The Claimant states that an officer of the Regional Office of the Claimant in Mitrovicë/Mitrovica visited the site on 24 March 2010 and found that the cadastral land parcel no. 2254/41 was fenced by an aluminium fence and there was construction going on at the site. The Claimant submitted a copy of an e-mail sent from the case officer to members of the Liquidation Committee of the SOE on 24 March 2010 and photos of the site visit (Attachment no. 5).

The Claimant submits that the chairman of the Liquidation Committee of SOE sent a letter to the mayor, [REDACTED], on 26 March 2010, requesting suspension of the ongoing works on the cadastral land parcel no. 2254/41 and attached a copy of the request (Attachment no 6).

The Claimant submits that on 29 March 2010, the Director for Cadastre, Geodesy and Property, [REDACTED], through the mayor, [REDACTED], presented a request for a land swap of cadastral land parcel no. 2254/41 of the SOE in Vushtrri/Vučitrn for cadastral land parcel no. 412 on possession list no. 198, with a surface area of 05.52.06 ha in cadastral zone Stanofcë i Ulët, owned by the Municipality of Vushtrri/Vučitrn. The Claimant submitted a copy of the request for the land swap dated 29 March 2010 (Attachment no. 7).

The Claimant submits that pursuant to Article 5.1 (a) of the Law on the Privatization Agency of Kosovo, Law No. 03/L-067, it has the authority to administer:

- (i) *Socially-owned Enterprises, regardless of whether they underwent a Transformation; and*
- (ii) *any assets located in the territory of Kosovo, whether organized into an entity or not, which comprised socially-owned property on or after 22 March 1989, regardless of whether they underwent a Transformation though subject to Article 5.1(b) below; and*
- (iii) *Minority Stakes, regardless of whether the relevant legal entity underwent a Transformation.*

Furthermore, the Claimant submits that pursuant to Article 29.2 of the Law on the Privatization Agency of Kosovo, Law No. 03/L-067:

The Agency shall have legal standing to pursue any rights of an Enterprise in a competent court on behalf of the Enterprise concerned.

The Claimant submits that pursuant to Section 4.1 of UNMIK Regulation 2008/4, the trial panels of the Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to: *(h) Enforcement, upon application of the Agency, of the powers of the Agency exercised pursuant to Regulation No. 2002/12.*

The Claimant submits that pursuant to Section 52.1 of UNMIK Administrative Direction 2006/17: *Upon application by a party, the Special Chamber may issue a preliminary injunction if the party gives credible evidence that immediate and irreparable injury, loss, or damage will result to the party if no preliminary injunction is granted. The request for a preliminary injunction is to be submitted together with a claim or subsequent to a claim that has been filed referring to that claim.*

The Claimant provides that the Municipality of Vushtrri/Vučitrn, by starting the construction of a school building on cadastral land parcel no. 2254/41 on possession list no. 471 with a surface area of 04.28.04 ha in cadastral zone Vushtrri/Vučitrn hinders the peaceful possession of the property by the SOE, represented by the Claimant. The Claimant states furthermore that the ongoing construction will result in immediate and irreparable loss to the SOE, as the cadastral land parcel no. 2254/41 is intended to be sold in liquidation and thus no longer represents an attractive investment and has caused considerable financial loss to the creditors of the SOE.

The Claimant therefore requests the Special Chamber to issue a preliminary injunction against the ongoing construction on cadastral land parcel no 2254/41; and to find that the Respondent has inhibited the peaceful possession of the SOE; and to oblige the Respondent to return the property in its original state, as it was prior to the start of the construction works.

On 7 July 2010, the judge in charge of the case served the Claim and supporting documents and the request for a preliminary injunction filed by the Claimant on the Respondent by an Order dated 7 July 2010, and providing that the Respondent could file a response to the request for a preliminary injunction with 14 days of the service and a defence to the Claim within 1 month of the service.

The Claim and request for preliminary injunction was served on the Respondent on 14 July 2010.

On 28 July 2010, the Respondent filed a response to the request for a preliminary injunction, within the legal time limit, wherein it submits that request for a preliminary injunction is unfair, as the property on which the school is being built is public property. The Respondent submitted that Municipality of Vushtrri/Vučitrn is facing a lack of land for building premises of public interest such as school premises, facilities for culture and health so the Municipal Assembly of Vushtrri/Vučitrn in its meeting held on 27 March 2008 proclaimed the cadastral land parcel 2254/41 with a surface area of 04.28.04 located in Selishte on possession list no. 471, real estate of public interest and the director of the Cadastre through the mayor offered the Claimant a land swap on 29 March 2010 based on Article 4, paragraph 2 and Article 5 of the Law on Circulation of Real Estate. The Respondent submitted the decision of

the Municipal Assembly of Vushtrri/Vučitrn, no. 209/08 in its meeting held on 27 March 2008 and the letter of the director sent through the mayor no. 17/10 dated 29 March 2010 and requested that the request for a preliminary injunction be suspended until an agreement was reached between the parties.

On 9 August 2010, the Respondent filed a response to the claim and provided that the claim was not fair, as the contested property is public property. The Respondent submitted that the Municipality of Vushtrri/Vučitrn has a great deficiency of real estate for building premises of public interest, for the same reasons as mentioned above.

On 15 September 2010, the conduct of the proceedings was delegated to a sub panel composed of Laura Plesa and Sabri Halili pursuant to Section 8.2 of UNMIK Regulation 2008/4 and Section 11 of UNMIK AD 2008/6.

On 20 September 2010, the sub panel issued a decision rejecting the request for preliminary injunction as ungrounded. The legal reasoning provided was:

“The fact of building the school on the land that belongs to the SOE isn’t contested. In general, the owner of the land has the right to ask for any infringement of his property rights to be stopped. But in this case the juridical relations between the parties are regulated by the special provisions of the UNMIK Regulation 2006/5. The Respondent is in the situation of the Municipal Administration which asks for an allocation of the land asset currently under the administrative authority of the PAK, for public benefit purposes (as UNMIK Regulation 2006/5 foresees that may be done). The statement of the Claimant – PAK is that the Respondent didn’t send any documentation supporting its request for allocation. But the Agency, exercising its administrative competences didn’t ask for any documentation and didn’t issue any decision upon Municipality request. When the procedure of verifying the request for allocation starts there could be the moment for PAK to file a submission for Preliminary Injunction with this object. The PAK is the authority that has the obligation to start this procedure. That is why at this moment, until a decision with juridical consequences is not taken by PAK, in the urgent procedure of Preliminary Injunction a verification of the lawfulness of the actions of the Municipality cannot be made. A decision of the Court on the status quo of the land would be a burden too big on the subject who started the administrative procedure – presumed that in good faith - but didn’t receive any response.”

By order of 15 November 2010 the judge in charge ordered the parties to clarify if the building of the school affects only the contested parcel and if this parcel is under the administration of the PAK. Further the parties were ordered to provide information on what is the ground area of the building and what is the area within the disputed land affected by the building.

On 25 November 2010 the respondent informed the court that according to their knowledge the cadastral parcel no. 2254/41 is under PAK administration. Further it was stated that the other parcel mentioned in the decision no.209/08 does not affect the building of the school. The respondent also submitted copies of photos of cadastral parcels no.2254/1 and no.2254/41.

During the hearings that were held on 4, 11 and 25 November 2010:

The representatives of the claimant explained that no formal decision was issued by the Agency in relation to the request of Municipality of Vushtrri for land swap filed with the RO of Mitrovicë/Mitrovica due to the fact that the Municipality was obliged to file a request with the civil department and not with the agency. Further they stated that the request of the municipality for land swap was submitted together with a copy of a notice issued by the Ministry of Education and a copy of a contract for construction of the building of the school. But according to them it was not attached the decision of the Municipality with which the contested parcel was announced with the general interest. They also admitted that they had three meetings with the representatives of Municipality and that they saw the decision of 27 March 2008 in one of the meetings.

The respondent requested from the Special Chamber to reject the claim as ungrounded. The respondent maintained that the claim was filed by Kosovo privatisation Agency and in particular by Liquidation Committee of enterprise [REDACTED] while the contested property is evidenced in the name of confection factory [REDACTED]. According to the respondent the immovable property of former Socially owned Enterprise was a socially owned property, that was used by the SOE – but only with the approval of Municipality- and to prove this the respondent already submitted to the court the decision that SOE [REDACTED] paid taxes for the property in this case. While the contract of 1971 for transfer of right of use submitted by the claimant is in contradiction with the decisions of 1979 and 1980 for payment of taxes.

The following documents were submitted by the Claimant:

1. Copy of contract on transfer of right of use Ov.br 213/71 concluded between the Agriculture Commbine from Vushtrri/Vucitrna and Enterprise [REDACTED] on 7 June 1971;
2. Copy of contract on transfer of rights of use of immovable property no.464 concluded between enterprise [REDACTED] and Municipality of Vushtrri/Vucitrna on 8 July 1976;
3. Copy of District Economic Court in Prishtinë/Priština registration Fi-832/89;
4. Copy of District Economic Court in Prishtinë/Priština registration Fi-2830/93;
5. Copy of District Economic Court in Prishtinë/Priština registration Fi-569/96;
6. Copy of application for provisional Business registration of [REDACTED] within UN Interim Civil Administration;
7. Decision of supervisory Board of 2 november 1999 about the name of [REDACTED];
8. Copy of possession list no.471 Cadastral Municipality of Vushtrri/Vucitrna of 6 January 1977;
9. Copy of copy of the plan of cadastral parcel no.2254/1;
10. Copy of the response of Directorate of cadastre and geodesy municipality of Vushtrri/Vucitrna addressed to head of the KTA RO Mitrovicë/Mitrovica
11. Copy of the Decisions of the Housing Self Government Association no.1281/6 of 9 May 1980 and no. 1281/51 – 244 of 14 September 1980, regarding payment of taxes for use of the urban land

Legal reasoning

The claim raises the conflict between 2 interests: the interest of PAK in privatizing the land and the interest of Municipality in building a school on the same land.

Both of those are equal. It cannot be argued that building the school should give to Municipality the right to occupy the land invoking the public interest. In the meantime the interest of PAK is also partly public – privatization being a public procedure and not in the private interest of PAK.

The conflict arose when the Municipality started to occupy the land. First, the Municipality declared the land as being of public interest. That decision is with no effect on the right of the land against PAK. Moreover the decision was not served on PAK (the PAK stated so and the respondent did not prove the contrary). The decision dated 2008 has the sole effect as if the Municipality obtains the right on the land it can use it for the purpose declared in the decision.

The Municipality tried to obtain the right by asking the allocation of the land. The PAK answered (in the actual proceedings) that no documents were attached to the request – at the moment of filing the claim – and that it has no competence in allocating the land, pointing the UNMIK Regulation 2006/5 – at the moment of filing the appeal against the decision rejecting the preliminary injunction request-.

The next question is: are the relationships of the parties governed by the general provisions regulating the property rights?

The intention of UNMIK Regulation is to give the municipality the right to ask for allocation of the land in the conditions prescribed by the regulation, special provisions that override the common rules of property rights.

That is why in this case the court found that the special rules for regulating the situation of the need of municipalities are applicable.

That is why at this moment the Court finds that the absence of the right on the land is not yet to be decided since the Municipality has the right to start the procedure for requesting the allocation. Of course that the abuse of starting the building of the school in absence of the right can lead to the payment of damages. But taking into consideration that the possession of the land is justified by the purpose that can lead to allocation of the land and the PAK did not exercised its administrative competences in this case, no measure against the possession of the land can be taken at this moment.

The Court took into consideration its competence to decide upon the claim solving the administrative aspects before doing that. The respondent sent its request and the Claimant did not take the decision on the competence or on the merits as the Law on Administrative procedure prescribes. The Court can not solve the administrative issue like a preliminary matter (since no decision was taken and challenged). There are different juridical consequences deriving from the administrative decision so the PAK has to exercise its competence as the Administrative Law prescribes it – to issue a decision on the initiated administrative proceedings.

Since the area of 1.79.00 ha is occupied by the school the legal interest in possession is proved and the principle of secured civil relationships asks for this decision. The difference in the regime of the 2 areas – the occupied one and the rest of the parcel – is that on the occupied area the Municipality – presumed in bona fide- started the transformation of the land on its own risk. Reading the decision dated 2008, the Court could not find the proof of mala fide since the decision only affirms the situation as it is written in the registration documents. That is why on this area there are strictly

direct consequences deriving from the Administrative competences of PAK. The Court finds no reasons for occupation of the rest of the land whereas on the occupied land the balance of the compensations would become too complicated if restitution would be decided until the administrative procedure is finished.

As for the rest of the land unoccupied by the school (and the yard) with this decision the court will decide the restitution. Since the occupation is found causing the payment of the damages at this moment -even if those might be compensated because of the lack of the answer from the Claimant – the Court considers that there is no reason to keep the uncertainty concerning this part of the land. The unoccupied area will be the subject of the administrative proceedings but no reason for giving the possession to the Respondent is found at this moment.

As for the defense of the respondent, the Court rejected it. The contract from 1971 proves the right of PAK to administer the land as an asset of the SOE. Under the applicable law at the time of the contract the real property in social ownership means only the right to use the immovable property. With the creation of the KTA the regime of the property was set in such a way that the right of property – kept at that time by the municipalities – was transferred on KTA since the right to dispose of the assets was given to KTA. The decisions exhibited by the Respondent- dated 1979 and 1980-prove only the obligation of the SOE to pay local taxes (the sums written as debts of the SOE to the Municipality are contributions for use of land as fiscal debts not as a price for use of the land).

As for the name of the SOE the Court verified that all the documents prove that Clothing Manufacturing Enterprise ██████ (as it is written in the contract from 1971 and in the possession list from 2004) it was renamed ██████ (as it is proved by the decision of the Supervisory Board dated 1999).

As decided with the decision taken in the case file ASC 09-0020 the Claimant is exempt from court fees. Thus, a decision on court fees was not to be taken.

Laura Plesa, EULEX Presiding Judge

Sabri Halili, Judge

Tobias Lapke, EULEX Registrar

