**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-2/09** **Prishtinë/Priština**

**5 May 2011**

**P.L.**

***Claimant/Appellant***

vs.

**I.B.**

***Respondent/Appellee***

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Antoinette Lepeltier-Durel, Presiding Judge, Anne Kerber and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/R/34/2008, (case file registered at the KPA under the number KPA10359), dated 19 December 2008, after deliberation held on 5 May 2011, issues the following

# JUDGMENT

1- **The appeal of P.L. is rejected as unfounded.**

2- **The decision of the Kosovo Property Claims Commission KPCC/D/R/34/2008 dated 19 December 2008 is confirmed.**

3- **Costs of proceedings determined in the amount of 80 Euros (eighty Euros) are to be borne by the appellant, P.L., and to be paid to the Supreme Court within 90**

**days from the day the judgment is delivered or otherwise through compulsory execution.**

**Procedural and factual background:**

On 18 November 2002, P.L. filed a claim with the Housing and Property Claims Commission (HPCC) seeking that his possession right over an apartment located at Stremska Street L-5, entrance 8, flat number 8, in Prishtinë/Priština, with surface of 90, 55 m2 be recognized.

By its decision issued on 18 June 2004, the Housing and Property Claims Commission rejected the claim for the reason that the claimant had not brought the evidence that he ever had possession of the litigious property.

On 27 October 2004, the claimant filed a request for reconsideration with the Housing and Property Claims Commission.

This Commission refused the request by decision dated 9 December 2004, considering that the requesting party had not produced any legally relevant evidence not considered by the Commission when it had originally decided the claim, nor had the reconsideration request disclosed any material error in the application of UNMIK Regulation 2000/60.

On 6 July 2007, the claimant filed a claim with the KPA, asking for the repossession over the above mentioned property.

He asserted that although the claimed apartment was allocated to him in accordance with the Law on Housing Relations, he could not take it into possession, firstly, until 24 March 1999, because the apartment was not yet technically accepted after its construction, then, after 14 June 1999, for the reasons that he feared ill-treatment due to his ethnicity in the context of the conflict and that the apartment was illegally possessed by the respondent and his family.

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

- Decision No. 360-2749 of the Secretariat of Communal and Residential Affairs of the Municipal Assembly of Prishtinë/Priština of 19 January 1999 allocating to him the apartment at hand on lease for indefinite period;
- Lease contract of the said apartment No. 68/1 passed on 19 February 1999 between him as lessee and the Public Housing Enterprise in Prishtinë/Priština as lessor;
- Contract on joining of means No. 02-1679/1 concluded on 9 September 1998 between the Public Housing Enterprise in Prishtinë/Priština and the Municipal Assembly of Prishtinë/Priština.

By its decision of 19 December 2008, the Kosovo Property Claims Commission (KPCC or the Commission) rejected the claim since the verification of the two first documents supporting the claim had not allowed finding them in the records of the relevant public offices and, with regard to the third one, had showed that the contract had never validly entered into force.

The claimant confirmed that he received the KPCC decision on 10 June 2009.

On 23 June 2009, the claimant (herein after the appellant) filed an appeal with the Supreme Court against the aforementioned decision.

In his appeal, he stated that the appealed decision was unclear, incomprehensible and contradictive, that it did not mention whether the session was held publicly or not, who were the members of the Commission, who was the Chairperson of the Commission and who signed it.

He also asserted that the name, the position and the ability to speak the language used in the claim of the reporting person from the KPA were not indicated in the contested decision.

He challenged the use of a cover decision by the KPCC, alleging that he had no relationship with the other claimants and that his claim was not grounded similarly as the other claims dealt with within the same decision.

He further argued that the decision was taken on wrong and incomplete determination of the facts, considering that the fact that the KPA did not get the same documents as the ones he submitted

could not justify a dismissal of his claim. He denied any value to the allegation according to which the appellee would have been granted the right to use the apartment by the Public Housing Enterprise, assessing such alleged decision as arbitrary and unable to set aside the validity of the previous decision in his favor.

Finally, he asserted that the appellee and his family had approached him in order to buy the apartment, and argued that this attitude proved that he was the legal right holder over it.

As a conclusion of these arguments, he asked the appealed decision be annulled, his appeal be accepted, the respondent be obliged to vacate the apartment under the threat of compulsory execution and the apartment be handed over to him in possession and in use.

According to the Executive Secretariat of the KPA, the appellee was served with the appeal and confirmed on 3 September 2010 that he had received a copy of the appeal. However he did not submit any reply.

**Legal reasoning:**

The first instance decision was served on the claimant on 10 June 2009. According to Section 12.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 on the resolution of claims relating to private immovable property, including agricultural and commercial property, a party may submit an appeal within thirty days of the notification of the decision. P. L. timely submitted his appeal on 23 June 2009 so that his appeal is admissible.

As a preliminary matter, the Supreme Court observes that the appellant's assumption according to which the decision of the KPCC would be "*unclear, incomprehensible and contradictive*" is not at all substantiated by any further argumentation and/or details. Such critic of the first instance decision is too general and appears to be more the description of an overall feeling subjectively perceived from the whole decision so that the Court cannot follow the appellant's assessment of this alleged lack of precision or consistency.

The other arguments raised by the appellant are on one hand related to the procedural regularity (II) of the first instance decision, on the other hand related to the merits of his claim (III).

However, first of all, the Supreme Court, taking into consideration that two first instance decisions were subsequently issued, has to verify whether the appealed decision was issued although the claim was already adjudicated by a previous final decision (I).

***I-Res judicata:***

The Supreme Court will examine the appealed decision on the grounds of the Law on Contested Procedure (LCP) 03/L-006 (Official Gazette of Kosovo No.38, 20 September 2008), which, according to its Article 538, entered into effect fifteen days after its publication in the Official Gazette, that is to say prior to the issuance of the appealed decision on 19 December 2008. As a consequence, it is applicable to the present case.

Pursuant to Article 194 of the LCP, the court of second instance shall examine *ex officio* whether there exists a breach of the provisions of contested procedure as defined by its Article 182.2.

Pursuant to Article 182.2 i) of the LCP, there is always a substantial violation of the provisions of contested procedure if a decision was rendered in relation to a case which had already been adjudicated by a final judgment.

This provision obliges the Supreme Court to verify whether there was a situation of *res judicata* when the KPCC issued its decision since the HPCC had already rendered a final decision on 9 December 2004. The principle according to which the *res judicata* must not be examined again by another court applies when the same claim about the same subject matter is filed a second time at the first instance by the same claimant against the same respondent.

In the present case, from the case files of the HPCC and of the KPCC, the following similarities appear: the claimant is P. L.; the claim is supported by the same documents and seeks the recognition of the possession right over the same apartment. In the case before the HPCC, the respondent was A.B. and before the KPCC, the claimant also indicated as current occupant of the litigious apartment A.B. to whom the claim was served but, then, the respondent was identified by the KPA as been her father, I.B..

Although the respondent was different, the Supreme Court has to take into consideration that the legislator has set up exceptional procedures to deal with the following exceptional matters: claims related to discrimination during the period of time from 23 March 1989 and 13 October 1999 before

the HPCC and claims related to the armed conflict that occurred in Kosovo between 27 February 1998 and 20 June 1999 before the KPCC. As to the respondent, the peculiarity of the provisions (Section 9 of UNMIK Regulation 2000/60 which regulates the proceedings before the HPCC and Section 10 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079) is that the claimant does not have the burden to determine his/her exact identity and that it is respectively to the Housing and Property Directorate (HPD) or to the Executive Secretariat of the KPA to notify the claim to any person who is currently exercising or purporting to have rights to the property or to make reasonable efforts to notify any other person who may have a legal interest in the property. Thus, the respondent can be identified along the proceedings when more information has been got about him/her by the administrative body, notably as a result of an announcement of the claim.

Consequently, in the context of such exceptional procedure, the fact that the KPA was able to determine at the time of the second procedure that I.B. was finally the current possessor of the apartment at hand instead of his daughter who was only the occupant has not really changed the elements of the legal situation with regards to the status of the respondent. In other words, the true respondent is the current possessor of the apartment and his name does not change the parties of the lawsuit when it appears in the course of the proceedings that his identity is different from the one which had been trusted as the right one at the outlet of the same proceedings. In such a situation, the Supreme Court does not consider that the second claim was filed against a new respondent.

Therefore, the purpose of the claim and the parties of both proceedings before the HPCC and the KPCC were the same.

Nevertheless, to assess whether the subject matter of a case has already been adjudicated, not only the aim of the claimant has to be taken into account but rather the whole legal and factual situation which is presented to the court.

In the present case, it is not disputable that the claimant was clearly seeking to get repossession of the same apartment in both proceedings. However, in order to validly file a claim in the first procedure, Section 2.6 of UNMIK Regulation 2000/60 and Section 1.2 (c) of UNMIK Regulation No.1999/23 which is referred to by Section 7.1 of UNMIK Regulation 2000/60 require that the claimant be the possessor of residential real property prior to 24 March 1999. For the reason that P.L. was not in possession of the apartment prior to 24 March 1999 as it was indicated by him, the HPCC dismissed his claim.

Section 3.1 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079 defines the claims that the KPA has to receive and register as being ownership claims and claims involving property use rights in respect with private immovable property where the claimant is not now able to exercise such property rights. So stating, it does not mention any requirement of a previous physical possession of the real property as it is expressly read in the Regulation 2000/60.

Therefore, if the factual situation presented subsequently to the Commissions by the claimant was the same one, however the legal grounds upon which he based his claim allowed him to meet the requirements in the second procedure whereas he could not meet the legal requirements in the first one.

Consequently, the Supreme Court considers that there is no breach of the provision of the law on contested procedure hindering to adjudicate twice the same case.

***II-Procedural regularity of the decision of the KPCC:***

***1- The publicity of the KPCC's session:***

The appellant claimed that the first instance decision did not indicate whether the session of the Commission had been held publicly.

The proceedings before the KPCC are set up by Section 11 of UNMIK Regulation 2006/50 as amended by the Law No. 03/L-079 and by Annex I to the Law No. 03/L-079 (former Annex III of Administrative Direction (AD) 2007/5).

With regard to the way the KPCC examines the cases, in order to determine whether the proceedings should be public or not, Section 11.6 of UNMIK Regulation 2006/50 stipulates that, where the interests of justice so require, the Commission may hold a hearing. Pursuant to Section 1.1 of Annex III of AD 2007/5 as amended by the Law No. 03/L-079, the Commission sits in sessions or in Panels. Section 1.7 of the same provides that the deliberations of the Commission may take place through electronic means. Further, Section 5.1 reads: "*Proceedings before the Commission shall be based on written submissions and, where the interests of justice so require, oral hearings."* Section 5.2 foresees: "*An oral hearing shall take place in public*".

From all these provisions, it appears that as a principle, the proceedings before the Commission are only written. When a court examines a case through written proceedings, it holds necessarily its sessions out of the presence of the public. This explains that the requirement of public sessions is foreseen by the law only for oral hearings, meaning that they are not required when no oral hearing has been deemed necessary for the adjudication of the claim. The law also provides that holding oral hearings is at the discretion of the Commission in case it holds that the interests of justice so require.

In the present case, the Commission has examined the case through the Claimant's written submissions and the KPA's report without having decided to hold an oral hearing. Thus the challenged first instance decision of the KPCC could not contain the information that the session was held publicly since such publicity was not required.

***2- The indication of the composition of the Commission:***

The appellant asserted that the appealed decision did not indicate what the composition of the Commission was, who the Chairperson was and who signed the decision.

Concerning the composition of the KPCC, as asserted by the appellant, the Supreme Court observes that the first instance decision of the KPCC does not bear the mention of the names of the members of the Commission nor the name of the Chairperson whereas it clearly indicates that the Chairperson signed the decision.

Consequently, the Supreme Court has to examine the two first questions raised by the appellant related to the composition of the Commission and to the Chairperson's identity. However, the third question related to the identity of the member of the Commission who signed the decision is answered by the reading of the decision.

Pursuant to Section 11.1 of UNMIK Regulation 2006/50 as amended by the Law No. 03/L-079, the provisions of the Law on Administrative Procedure shall be applicable mutatis mutandis to the proceedings of the Commission.

Sections 109 and 111 of the Law No. 02/L-28 on the Administrative Procedure provide that the interested parties shall be served the administrative acts through which, amongst others, decisions regarding their claims are reached and that the notice shall contain the following information:

"*a) the full text of the administrative act;*

*b) the name of the person responsible for the act, and the date;*

*c) the name of the body vested with competence to receive appeals against the act and appropriate timelines".*

Moreover, Section 8.3 of UNMIK Regulation 2006/50 as amended by the Law No. 03/L-079 reads:

"*A member of the Commission shall be disqualified from participating in the proceedings where conditions for disqualification as set forth in Article 29 of the Law on Administrative Procedure exist."*

It derives from those provisions that the decisions of the KPCC should mention the names of the members who issue them. Firstly it is expressly provided by the aforementioned law that any administrative act, a fortiori a first instance decision, shall contain the names of its authors. Secondly, the mention of their names is needed in order to be able to check whether there is a cause of disqualification of any member of the Commission to adjudicate the case.

Nevertheless, the KPCC at the time of the appealed decision and at the present time as well, was and is still composed of a single Panel of three members whose names were easily and even publicly known since they appeared on its web-site. The Chairperson was also clearly indicated so that the appellant could not suffer from any impossibility to identify the responsible members of the adjudication of his claim.

Therefore, the Supreme Court holds that the appellant's right to know the composition of the Commission and the Chairperson's name has never been disregarded and concludes that the lack of the mention of the authors' names within the appealed decision has not altered its validity.

***3- The information concerning the reporting person from the KPA:***

The appellant also claimed that the name, the position and the ability to speak the language used in the claim of the reporting person from the KPA were not indicated in the contested decision.

The Supreme Court confirms that these data are not indicated within the appealed decision. However, it notes that the appellant did not bring the legal basis of such alleged requirement.

Pursuant to Section 6 of UNMIK Regulation 2006/50 as amended by the Law No. 03/L-079, the Executive Secretariat of the KPA has the responsibility to register the claims and the replies to claims, to notify the parties and to prepare the claims and the replies to claims for consideration by the Commission. Sections 4.1 and 4.5 of Annex II of AD No. 2007/5 as amended by the Law 03/L-079 foresee that the Executive Secretariat "*may investigate a claim*" and "*shall prepare claims including submissions and evidence, translations of evidence, and recommendations in respect of all claims,…, for the consideration of the Commission*."

None of these provisions provide that the name of the reporting person of the claim should be mentioned within the decision. Neither does the Law on the Administrative Procedure.

Articles 84 and 111 of this law, respectively related to the content of the administrative act and of the notice of the administrative act, foresee that the act and the notice shall contain the name of the public administration body that issued the act and the signature of the manager of the administrative body issuing the act or the manager of the collective body. However, such requirement is not demanded for the preparatory actions of an administrative act.

Nevertheless, the case file provided by the KPA shows that the staff members' names who proceeded to the verifications of the parties' submissions and who wrote the report for the Commission are clearly indicated in each document and that those documents are signed by them.

The Supreme Court cannot follow the appellant's concern about the ability of the KPA's staff members to understand the Serbian language he used in his claim. This aspect of the proceedings has been obviously taken into account by the legislator by expressly giving to the Executive Secretariat, amongst others, the task to translate the evidence for the Commission.

Moreover, pursuant to Section 3 of AD No. 2007/5 as amended, "*the languages which may be used by the KPA in all proceedings pursuant to UNMIK Regulation No. 2006/50 shall be Albanian, Serbian and English*."

In compliance with those provisions, the KPA as a whole body is equipped with translators and/or staff members ensuring that the three languages are spoken and understood.

***4-The cover decision:***

The appellant claimed that there were no grounds to issue the cover decision, because he had no legal relationship with the other claimants and the claims were not grounded on similar legal basis.

However, section 8.8 of Annex III of AD 2007/5 as amended by the Law 03/L-079 enables the Chairperson, if the number of claims decided in a session is high, to sign a cover decision approving all individual decisions identified in the cover decision. If it occurs, an individual decision shall be certified by a senior designated by the Commission or by the Director of the Executive Secretariat.

Though, issuing a cover decision is at the discretion of the KPCC when it has to deal with a high number of claims at its session. The legislator has set up a mass claims processing and has foreseen the possibility to combine groups of claims for a consolidated or a joint decision. This exceptional procedure takes into consideration the necessity to individualize the decision by the issuance of an individual certificate.

The inexistence of relationship between the claimants and/or the similarity of legal grounds of the claims are not legal requirements for the issuance of a cover decision.

Therefore the Court does not follow this argument against the regularity of the appealed decision.

***III- The merits of the claim:***

The rather simple undisputed facts of the case were not wrongly and incompletely determined by the report of the Executive Secretariat to the KPCC and, through, by the first instance decision which expressly refers to it in its paragraph 8.

They are as follows: the litigious apartment is occupied by I.B.'s family since 1999. Its construction was still ongoing at the beginning of 1999 so that the appellant could not enter into it before it was occupied by the appellee. It can also be considered as a fact that the well-known circumstances of the post-conflict period in Kosovo might have hindered the appellant to come to Prishtinë/Priština to take over the apartment in possession.

Not these facts but the fact alleged by the appellant that he was the property right holder over the apartment at stake since the beginning of 1999 is disputed.

To challenge the decision concerning the assessment of this fact and though the analysis of the documents he submitted, the appellant raised three arguments that the Supreme Court has now to examine.

Firstly, the appellant asserted that the impossibility for the Executive Secretariat to find in the records of the administrative bodies any track of the documents he submitted could not lead the KPCC to conclude that those documents could not validly bring the proof of his possession right.

To prove his possession right, the appellant submitted the three documents described in the part of this Judgment related to the procedural and factual background. The responsibility of the KPA through its Executive Secretariat was to verify these documents as it is foreseen by the Law: pursuant to section 4.2 of Annex I of AD 2007/5 as amended by the Law No. 03/L-079, the Executive Secretariat of the KPA has the responsibility to investigate the claims, to obtain evidence relevant to the claims from any record held by a public body, corporate or natural person and to process to any verification of the supporting documents of the claims.

According to this verification, it appears that the contract on joining means dated 9 September 1998, concluded between the Municipal Assembly of Prishtinë/Priština and the Public Housing Enterprise never entered into effect since the Municipal Assembly of Prishtinë/Priština did not pay the amount of money stipulated by Article 5 of the contract within the deadline of three days from the day the contract was concluded. With this contract, the Municipal Assembly of Prishtinë/Priština was supposed to invest financial means in the project of a building construction in order to obtain the ownership right over two apartments of this building, amongst them the litigious apartment.

The appellant did not bring any document leading the Supreme Court to deny this verification.

Therefore, it considers that the KPCC has correctly assessed that it is not any more disputable that this contract was never executed.

With regard to the two other documents submitted by the appellant, the Executive Secretariat has noted that they could not be found neither in the archives of the Municipal Assembly of Prishtinë/Priština for the reason that the documentation before 1999 was taken away outside

Kosovo, nor in the records of the Public Housing Enterprise which explained that the construction of the building was not finished in 1999.

The Supreme Court considers that the KPCC correctly assessed that, due to the lack of documents in the records of the administrative bodies in charge of allocating an apartment and concluding a lease agreement over it for an indefinite period of time, the repossession claim filed by the appellant should be rejected.

It observes that the administrative decision allocating the apartment, dated 19 January 1999, and the lease agreement, dated 19 February 1999, were issued during the conflict at a time when the building construction was not finished. It notes that the decision allocating the apartment to P.L., also signed by P.L. as secretary of the Secretariat for Municipal Housing Matters of the Municipal Assembly of Prishtinë/Priština, has been issued although the Municipality of Prishtinë/Priština was not the owner of the future apartment of the building in construction since the contract on joining means had not entered into effect. Moreover, the appellant failed to bring any evidence challenging the outcome of the verification of the documents he submitted.

Having regard to all these factors, the Supreme Court concludes that the appellant failed to bring the evidence of his possession right.

With his second argument, the appellant denied any validity to an eventual further allocation of the same apartment to the appellee.

The Supreme Court cannot follow the appellant in this argumentation. The alleged lack of validity of any other possible contract concerning the property right over the litigious apartment was not taken into consideration by the appealed decision. In other words, the validity of the documents submitted by the appellant was not denied on the basis of the validity of a later contract over the same property. Thus, any discussion about the validity of the appellee's right to possess the apartment has no relevance to assess the validity of the documents supporting the claim and the appeal.

Finally, the appellant claimed that the try of the appellee's family members to obtain from him an agreement for the purchase of the apartment brought the proof that he was the legitimate property right holder.

This argument cannot be retained as well by the Supreme Court since such eventual discussion between the parties is not at all evidenced by any appellee's statement or by any document. Moreover, even if such negotiation between the parties took place, it could maybe allow the parties reaching an amicable settlement but it could not bring in itself the proof that the documents submitted by the appellant were valid.

Based on the above considerations and in accordance with Sections 12.3 and 13 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, the Supreme Court decides as in the enacting clause of this Judgment.

***Costs of the proceedings:***

Pursuant to Article 8.4 of Annex III of Administrative Direction (AD) 2007/5 as amended by the Law No. 03/L-079, the parties are exempted from costs of proceedings before the Executive Secretariat and the Commission.

However such exemption is not foreseen for the proceedings before the Supreme Court.

As a consequence, the normal regime of court fees as foreseen by the Law on Court Fees (Official Gazette of the SAPK-3 October 1987) and by AD No. 2008/02 of the Kosovo Judicial Council on Unification of Court fees are applicable to the proceedings brought before the Supreme Court.

Thus, the following court fees apply to the present appeal proceedings:

- court fee tariff for the filing of the appeal (Section 10.11 of AD 2008/2): 30 €
- court fee tariff for the issuance of the judgment (Sections 10.21 and 10.1 of AD 2008/2), considering that the value of the property at hand could be reasonably estimated as being comprised between 5.001 and 10.000 €: 50 €.

These court fees are to be borne by the appellant that loses the case.

According to Article 46 of the Law on Court Fees, the deadline for fees payment by a person with residence or domicile abroad may not be less than 30 days and no longer than 90 days. The Supreme Court decides that, in the current case, the court fees shall be paid by the appellant within 90 days from the day the judgment is delivered to him.

***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.

**Signed by: Antoinette Lepeltier-Durel, EULEX Presiding Judge**

**Signed by: Anne Kerber, EULEX Judge**

**Signed by: Sylejman Nuredini, Judge**

**Signed by: Urs Nufer, Eulex Registrar**