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-9/10 **Prishtinë/Priština**

24 August 2011

In the proceedings of:

H.G.

Appellant

vs.

J.I.

Claimant/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/A/22/2008 (case file registered at the KPA under the number KPA38731), dated 28 August 2008, after deliberation held on 24 August 2011, issues the following

JUDGMENT

1- **The appeal of H.G. is accepted as grounded.**

2- **The decision of the Kosovo Property Claims Commission KPCC/D/A/22/2008, dated 28 August 2008, as far as it relates to the case registered under the number KPA38731, is quashed and the case returned to the KPCC for reconsideration.**

3- **The costs of the proceedings will be decided upon by the KPCC.**

Procedural and factual background:

On 16 July 2007, J.I. filed a claim with the Kosovo Property Agency (KPA) seeking for repossession of the parcel No. 1417, located at a place called "Karacica", cadastral zone of Sllovi/Slovinje, in the municipality of Lipjan/Lipljan, consisting of a 2nd class field of with a surface of 0.13.17 ha and a 3rd class field of with a surface of 0.16.13 ha, in total 0.29.30 ha. He asserted that he and his brother owned the land as co-owners, that the property was lost on 16 June 1999 due to the circumstances in 98/99 in Kosovo and that the parcel "most probably" was unlawfully occupied by an unknown person.

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

- Possession List No. 107 of the Municipality of Lipjan/Lipljan, cadastral zone of Sllovi/Slovinje, dated 3 October 2002, showing that the claimed parcel was registered under the name of S.M.I.;
- Decision of the Municipal Court of Aleksinac (O.no.77/03), issued on 17 November 2003, by which it was decided that the claimant and his brother N.I. were amongst others heirs to and owners of the claimed parcel each to ½ ideal part;
- Death Certificate issued by the Municipality of Aleksinac, dated 8 October 2003, showing that M.I. had died on 5 October 2003 in Aleksinac.

On 3 April 2008, KPA officers went to the place 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 have filed their response within a month. In its notification report, the KPA noted that the litigious parcel was grassland, without buildings and occupied by an unknown person.

On 23 February 2010, the KPA checked the notification based on ortophoto and GPS coordinates. In his report the KPA officer noted as follows:
"*This is to confirm that the notification of the claimed property is accurate based on:*
Cadastral data: Ortophoto, GPS coordinates;
Comment: The notification of property was done properly based on GPS Coordinates and Ortophoto. This confirmation was done by […]. *Distance between claimed property and notified point is 1 m*" (emphasis added by the Court).

The ortophoto displays the parcel and its neighbourhood, an added arrow shows that the point where the sign of the KPA was situated lies outside the parcel.

The KPA could verify the submitted documents. As nobody replied to the claim within the deadline of thirty (30) days prescribed by Section 10.2 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079, the claim was considered as uncontested.

On 28 August 2008, the KPCC with its decision KPCC/D/A/22/2008 decided that the claimant "*has established ownership over the claimed property, or such part thereof as specified in the respective individual decision*" and ordered amongst others that he be given possession of the claimed property.

The claimant received the KPCC's decision on 21 July 2010 and filed a request for repossession on the same day.

The KPCC's decision was served on H.G. on 29 September 2010.

On 27 October 2010, H.G. (henceforth: the appellant) filed an appeal with the Supreme Court against the aforementioned decision which, according to him, involved a fundamental error and serious misapplication of the applicable procedural or material law due to the fact that he was not involved in the proceedings. He stated that the decision was based on insufficient facts and an erroneous assessment of evidence.

He explained that he had bought the claimed property on 6 May 1977 from the predecessor of the claimant, M.I.. He stated that the parties had signed a written contract which had been signed by witnesses as well. That contract, however, had been burned on 15 April 1999 when the house of the appellant was burned down by Serbian forces. The appellant furthermore stated that he had paid the price in full to M.I. in the presence of his spouse D. and his son N., the brother of the claimant. He alleged that he had paid every year from 1977 until 1999 property taxes concerning the disputed parcel to M.I. and that the bills as well as the contract could be found with the family I.. He went on that since that time he had possession of the property and used it. To sustain his statements the appellant added two written statements of witnesses, who confirmed his statements at least in part.

The appellant explicitly challenged the notification of the claim, stating that no sign was put up on parcel No. 1417 where he had built his house and which is surrounded by a wall. The appellant continued that the photographs of the sign of the KPA would show not parcel No. 1417 but another one and that the KPA officers would have easily been able to notify him if the notification would have been done correctly.

The appeal was served on the claimant (henceforth: the appellee) on 13 May 2011, however, he did not respond.

Legal reasoning:

The appeal is admissible and grounded. Thus the KPCC's decision has to be quashed and the case sent back to the KPCC for reconsideration.

The appellant has filed his appeal within the deadline prescribed by Section 12.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079. The Court considers that the appellant became aware of the claim and of the KPCC's decision when he was served with that decision. Therefore, the Court concludes that he timely filed his appeal on 27 October 2010.

The decision of the KPCC has to be quashed and the case sent back for reconsideration as the Court has to note a serious misapplication of the applicable procedural law.

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". Here, however, the case file shows that the notification of the claim has not been done correctly. The check of the notification done by ortophoto and GPS data yielded that the notification sign was put not on the litigious parcel, but 1 m away from it. Whereas the wording of the memorandum of the KPA which is quoted above might be considered quite ambiguous, the ortophoto and the added arrow show this fact clearly without ambiguity.

As consequence of the insufficient notification, the appellant was not aware of the claim. He could not participate in the proceedings before the KPA, he could not present his opinion and the facts important to him but was obliged to present these facts only to the appellate instance.

A party, however, usually is entitled to be heard not only by one (in this case: the appellate) instance, but to be heard by at least two instances. If a party is deprived of this right by a fundamental mistake of the first instance, this has to be considered a substantial violation of the procedure. Also the Court finds a substantial violation of the provisions of contested procedure as mentioned in Article 354.7 of the applicable Law on Contentious Procedure (Official Gazette 4/77-1478, 36/80-1182 in connection with Section 13.5 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079). By the failure of the KPA the appellant has been prevented from speaking before the KPCC. Consequently, the case has to be sent back for retrial (Art. 366 paragraph 1 of the applicable Law on Contentious Procedure, Official Gazette 4/77-1478, 36/80-1182 in connection with Section 13.5 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079), even though the Court is aware that the proceedings of the KPA and KPA Appeals Panel should be expeditious.

In the new proceedings, the KPCC will have to consider the arguments of the appellant.

Costs of the proceedings:

As the decision of the KPCC is quashed and the case is returned for retrial, the costs of the proceedings will be decided upon by the KPCC as the first instance (Art. 166.3 of the Law on Contentious Procedure).

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.

Antoinette Lepeltier-Durel, EULEX Presiding Judge

Anne Kerber, EULEX Judge

Sylejman Nuredini, Judge

Urs Nufer, EULEX Registrar