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-14/12 **Prishtinë/Priština, 7 August 2012**

In the proceedings of:

M.F.

Appellant

vs.

M.T.

Claimant/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Anne Kerber, Presiding Judge, Elka Filcheva-Ermenkova and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/100/2011, dated 23 February 2011 (regarding case file registered at the KPA under the number KPA40258), after deliberation held on 7 August 2012, issues the following

JUDGMENT

1. **The appeal of M.F. is admissible.**
2. **The decision of the Kosovo Property Claims Commission KPCC/D/A/100/2011, dated 23 February 2011 (regarding case file registered at the KPA under number KPA40258), is annulled and case returned for reconsideration.**
3. **The costs of the proceedings shall be decided by KPCC.**

Procedural and factual background:

On 17 December 2007, M.T. (hereinafter "the claimant"), as family member of the property right holder (PRH) M.T. filed a claim with the Kosovo Property Agency (KPA) for confirmation of PRH's property right over parcel 381 of 65 acres and 96 square meters, described as 4th class field in Slatina, Vučitrn/Vushtrri, Gornje Polje. The claimant has "established" that the claim is related to immovable private property that was lost as a result of the armed conflict in 98/99 and the date of loss was 1 June 1999.

To support the claim he presented the following documents: possession list No. 22, issued in 1993 by the Municipal Geodesic Administration in Vučitrn/Vushtrri, showing that parcel 381 was registered under the name of M.T.; birth certificate of the claimant, establishing that M.T. is his father. There is no indication as to why the PRH did not submit the claim himself. According to the claim the PRH is dead, but death certificate was not presented.

On 27 March 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 file their response within 30 days. According to the notification report the land was found unoccupied.

2 years and 4 months later on 31 August 2010 a new notification was made, this time through publication in KPA Notification Gazette no. 7. The publication was displayed in the entrance and the exit of village Sllatinë/Slatina, Vučitrn/Vushtrri Municipality and Cadastre in the same building and also in the Municipal Court ibid and in the KPA regional office in Mitrovicë/Mitrovica. In addition List and gazette was distributed to UNCHR, RO, Ombudsperson FO, DRC, PAK, UNMIK, OSCE. The notification was considered to have been properly and correctly done.

No one responded to the claim.

Based on the presented documents, the database available and the procedural measures taken pursuant to section 11.3 (c) and (d) UNMIK/REG/2006/50, as amended by law No. 03/L-079 the KPCC established that the claimant had proven the PRH's ownership over the claimed property. In this regard a decision in favour of the claimant was granted – cover decision KPCC/D/A/100/2011, dated 23 February 2011 and decision for identification of the property dated 05 May 2011. The property was considered uncontested.

The decision was served to the claimant on 8 September 2011.

On 22 December 2011 M.F., hereinafter "the appellant" filed an appeal against the decision of the KPCC, only for 28 acres of the property, claiming that he has bought parcel 381 in 1979 – 1980 and at the same time transferred the ownership. Then they initiated a consolidation process in 1983-1985. He presents possession list from the Cadastral office in Vučitrn/Vushtrri. It is related to parcels with numbers 23 and 57. He presented an informal, undated, written, uncertified contract between M.F. as a buyer and J.K. as a seller, regarding the sale of a property with a surface of 54.90 acres. The text of the document says that the seller did not receive payment but he is going to receive one once the contract is legalized. He also presents a power of attorney, dated 20 August 2004 by Z.K. authorising his wife D.K. to sign a contract regarding the disputed property.

The claimant, now appellee did not respond to the appeal.

On 25 April 2012 the Appeals Panel of the SC has requested from the KPA to explain how exactly and when was the notification of the property made. Was the sign, dated 27 March 2008 put in parcel 381 or not and why was it necessary afterwards – in 2010, to make a notification by publication. The KPA responded with a "legal memorandum" explaining that according to a land consolidation decision, dated 01 June 1987 parcel 381 was transferred to parcel 53k. Parcel 53k, claimed by the appellant, has a surface of 92.34*a* while parcel 381, owned by the claimant, prior to the consolidation had a surface of 65.96*a*. One part of approximately 28*a* was transferred to parcel 57k owned by A.(M.)F. and the other part was transferred to parcel 56k owned by S.Z.K.. The factual conclusion is that the notification of parcel 381 through publication was based on old cadastral data before the land consolidation and that it does not match with the current status and location of the property.

On the same date the Court has requested the appellant to explain why he did not inform the KPA that he wants to participate in the proceedings regarding the claimed property. The appellant did not respond the given 30 day period.

Legal reasoning:

The appeal is admissible. The appellant was not properly notified regarding the proceedings in front of the KPA, therefore his right of appeal has not been precluded.

Section 10.2 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 provides that any person other than the claimant who is purporting to have a right on the disputed property shall become party of the proceedings provided that such person has informed the Executive Secretariat of his/her intention to participate in the proceedings within 30 days of being notified of the claim. For this intention to be brought to the attention of the KPA the person in question has to be informed of the proceeding that had been initiated. Depending on whether such a person responds the procedure in front of the KPA could develop either as purely uncontested or it could develop into a kind of civil – adversarial proceeding, whenever there is a respondent who would challenge the initial claims – argument after section 10.1 UNMIK/REG/2006/50 as amended by Law No. 03/L-079.

In adversarial proceedings, the parties have to have the opportunity to know and to comment on the claims filed and evidence adducted by the other party. Whenever a person is deprived of this opportunity, his/her right of a fair trial is violated.

The peculiarity of the procedure in front of the KPA is that unlike within the conventional civil cases, the respondent is not known in advance, but the Law presumes that there might be one/ones and therefore demands the adjudicating body "to make reasonable efforts to notify any other person who may have a legal interest in the property".

As already noted the Law in section 10.1 *ibid* provides that the Secretariat shall "make reasonable efforts to notify any other person who may have legal interest in the property". It does not provide for a specific description of what "reasonable efforts" mean with the exception that "in appropriate cases, such reasonable efforts may take form of an announcement in an official publication". The grammatical interpretation of the text as well as the common logic and existing customs in serving documents and information to parties in adversarial proceedings invoke the conclusion that publication is an exception and it would be applicable only in certain cases, only if appropriate – one possibility would be if there are no other means to notify the interested person, for example in some civil proceedings it is acceptable to summon a person with a publication in the State gazette if the person has left his/her known address and did not provide a new one. However this solution would be completely unacceptable in the proceedings in front of the KPA as the respondent is not known in the beginning.

It is up until now accepted by the Court that by rule the notification is done by placing a sign (plate) with information regarding the claim in 3 languages (English, Albanian and Serbian) in/on the property in question and as long as the sign has been placed in/on the correct place/object – parcel, house, etc. the notification is considered correctly done and possible interested parties duly notified of the procedure in front of the KPA, unless there is a reason to believe otherwise.

In the current case it is not disputed that in 2008 the notification sign was not put in the right place. Afterwards, in 2010 a new notification was made, but through publication. As explained in the memorandum darted 22 May 2012 the notification by publication was based on old cadastral data and did not take into account that parcel 381 has been already transferred in new parcels: 53k, 56k and 57k. In this regard, because of the wrong cadastral data (even if the second notification was done correctly by putting a plate, instead of publishing a notification advertisement) it could not duly notify anyone and concretely the appellant, who had no idea that the parcel he is using is claimed by someone else under a different number and surface.

In this regard the appeal is admissible and so is the new material evidence presented by the appellant – argument after section 12.11 *ibid*.

As the appellant was denied the right to take part in the proceedings in front of the first instance – which is the KPA, the Court, in accordance with art. 197 LCP, to which UNMIK/REG/2006/50 refers in section 12.2, has to annul the decision and return the case for retrial/reconsideration by the KPA.

During the procedure the KPA has to take into account the following:

Section 11.1 ibid provides that the provisions of the Law on Administrative Procedures are applicable *mutatis mutandis* to the proceedings of the KPCC, except as otherwise provided in UNMIK Regulation 2006/50 as amended by Law No. 03/L-79 and in UNMIK/DIR/2007/5 implementing the Regulation.

Art. 39.2 of the Law on Administrative Procedure – Law No.02/L-28 prescribes that notwithstanding the provisions of paragraph 1 of the present article, the public administration body shall, if applicable,

correct the request of the interested parties, without prejudice to legal interest of the interested parties. This resolution is a manifestation of the principle of legality, as determined in art.3.1 *ibid*, according to which public administration bodies shall exercise their administrative activity in compliance with the applicable legislation in Kosovo, within the scope of competencies vested in them and for the purposes that such competencies were vested for. Art. 55 *ibid* also provides that the competent body **shall ask and shall be acquainted with all the facts necessary to reaching the final decision**, employing all the means of verification provided for by the Law. This resolution systematically follows from the principle of objectivity of the administrative process pursuant to art. 7.1 *ibid*: "During an administrative activity, public administrative bodies shall consider and weigh all the factors related to a specific administrative act". Along the same line, art. 53.1 *ibid* states that during an administrative proceedings, the official running the proceedings shall consider all relevant factors for the matter at hand, and shall duly evaluate every factor and the principle of objectivity as a basic principle.

As stated in KPA's "legal memorandum" dated 22 May 2012, parcel N 381 was included in the land consolidation of 1987 and after that it was absorbed by parcels NN 53k, 56k and 57k. Respectfully the right of property over parcel 381 has been transformed into a right of property *over* ideal parts of the new parcels.

In this regard the KPCC should explore the current cadastral situation (pursuant to the principle of objectivity), which includes the cadastral history of the land which was once individualized as parcel 381 and *ex officio* (pursuant to the principle of legality – art. 3.1 in relation with article 39.2 *ibid*) correct the claim so that it reflects the actual cadastral situation of the claimed property and the will of the claimant.

The decision as it is now has no identification of boundaries, no actual cadastral number to determine which piece of land the relevant third parties are supposed to vacate. In order the decision to be implementable/executable it should refer to a piece of land which is distinguishable from neighbouring pieces of land – with a unique number (actual number, reflecting the actual plan. In case of lack of clarity regarding the actual cadastre than boundaries and boundary points would be a necessity). In this regard the provisions of the cadastral legislation should be taken into account. *E.g*: according to section 2, para 2.9 of the Law No. 2003/25 on Cadastre (04 December 2003), as amended by Law No. 02/L-96 (26 Jan 2007, superseded by Law No. 04/-L-013 (29 July 2011), *i.e.* in force and applicable at the time of the proceedings before the KPA), the land parcel is an undivided land property formed by boundaries and boundary points, located within one cadastral zone and recorded in the Cadastre as a land parcel with a unique number.

The provision of art. 28.1 of the Law on executive procedure explaining what documents are suitable for execution, should also be considered in this regard – only documents that have object are suitable for execution – in cases of decision ordering an immovable property to be vacated, the object is the property itself and it has to be individualized.

In addition, the cadastral changes to which the "legal memorandum" refers create the impression that the dispute regarding the piece of land enclosed within parcel 381 prior to the consolidation of 1987 might have occurred long before the armed conflict of 1998/1999. It is unknown when within the time frame

between 1987 and 1998 has the cadastral change taken place and whether the possession was lost as a result of the land consolidation and/or the cadastral change, or as a result of the conflict some years later. As defined in UNMIK/REG/2006/50 (section 3.1) one of the conditions for the admissibility of a claim under this specific procedural mechanism, is that the claim is related to circumstances resulting from the armed conflict and not because of the occurrence of facts, non-related or not resulting from the conflict.
In summary:
During the new procedure the KPA should:

- explore (as appropriate, as much as it is possible) whether the possession of the property was lost as a result of the armed conflict or prior to that as a result of other sets of facts and circumstances;
- after that, if the jurisdiction is not an issue, explore the cadastral changes – if needed with a help of a cadastral expert, correct the claim so that it reflects the actual cadastral situation of the disputed property and the will of the claimant;
- perform a new notification, which corresponds with the actual cadastral situation (this includes putting a notification sign with the correct cadastral information on the right place/places);
- and finally analyse the merits of the claim and the assertions of the appellant (which is a respondent to the claim);

Cost of the proceedings:

Regarding the cost of the proceedings in front of the SC, as the appealed decision is annulled and the case is returned for reconsideration, the costs of the proceedings will be decided upon by the first instance (Art. 465.3 of the Law on Contested Procedure).

Legal Advice:

Pursuant to Section 13.6 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, this judgment cannot be challenged through ordinary or extraordinary remedies.

Anne Kerber, EULEX Presiding Judge

Elka Filcheva-Ermenkova, EULEX Judge

Sylejman Nuredini, Judge

Urs Nufer, EULEX Registrar