DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENSINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATISATION AGENCY OF KOSOVO RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU

22.11.2012

SCC-09-0009

CLAIMANTS

1. **D.K.,** XX
2. **S.K.,** XX

Both represented by lawyer XX, XX

Vs.

RESPONDENT

XX, SOE, XX

Represented by

1. Kosovo Trust Agency represented by UNMIK, TSS AHQ, Prishtinë/Priština
2. Privatization Agency of Kosovo, Ilir Konusheci Street, No. 8, Prishtinë/Priština

The First Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after hearing held on 1 November 2012, issues the following

Judgement

1. **The Claim is partially grounded.**
2. **The Claimants are owners of the immovable property P-71914042-01026-1, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/Priština, place "Cizmine te prroni", surface area of 2514 square meters.**
3. **The Respondent is obliged to consent that the Claimants are registered by the Cadastral Office of Prishtinë/Priština as owners of the immovable property P-71914042-01026-1, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/**

Priština, place "Cizmine te prroni", surface area of 2514 square meters.

4. **The Claim for compensation of 53.865,00 Euro for the immovable property P-71914042-01048-0, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/Priština, is rejected as ungrounded.**
5. **The Claimant is not compensated for his costs of the procedure, including the costs of the expert.**

Factual and Procedural Background

On 23 January 2009 the Claimants filed an ownership claim regarding cadastral parcel P-71914042-01048-0, with a surface of 0.35.91ha, and cadastral parcel P-71914042-01026-1, with the surface of 0.25.14ha, located in the Cadastral Zone Laplje Selo/ Lapnasellë, Municipality of Prishtinë/Priština.

As to the cadastral parcel P-71914042-01026-1 they request that the Respondent is obliged to recognize the Plaintiffs ownership and to consent that they are registered in the cadastre as owners.

As to the cadastral parcel P-71914042-01048-0 they ask for 53.865,00 monetary compensation.

The Claimants also request reimbursement of their procedural expenses.

By Decision No. 109/64 of 25 January 1964 of the Commission for Land Consolidation at the Prishtinë/Priština Municipal Assembly decided that the cadastral parcels no.1654 and 1649 that belonged to Z.K., the Claimants father, were transferred to the AIC XX as beneficiary in exchange for cadastral parcels no.1047, 1048 and 1026 which by the same decision were transferred to the Claimants' father. The AIC XX accepted the obligation to have the transfers registered in the cadastre. Z.K. agreed with the regrouping of the land in favour of the Respondent, but he protested against the compensation given to him, arguing that it was insufficient. However he did not appeal but used the new land transferred to him and without any interruption two his sons, the two Claimants, still use it today. As their use was till 1990 not disturbed and /or challenged by anybody the Claimants did not take any legal steps before. Only when privatization started they took legal action in this case to protect their use.

On 15 February 1979 Z.K. died and on 20 July 1983 the Municipal Court of Prishtinë/Priština issued a decision stating that the two claimants are his sole and exclusive inheritors after the other inheritors have not accepted their shares.

This decision names as immovable a house with agricultural land, but not the two plots which are the matter of this case. Also this decision has not been appealed.

The Land parcel P-71914042-01026-1 remained registered on the name of the Respondent, while the parcel P-71914042-01048-0 is registered as private property on the name of B.N.

On 27 August 2009 the Privatization Agency of Kosovo (PAK) was called in the suit as Respondent.

In defence to the claim of 1 October 2009 the PAK states that the claim should be rejected as ungrounded. The Claimants according to the Respondents opinion are not entitled to the claimed cadastral parcels no.1048 and no.1026 as this property was not included in the presented Heritage Decision. The Respondent states that the Claimants' predecessor never disputed the land consolidation decision, although he would have had the possibility to appeal before the competent administrative body and as an extraordinary remedy before the Supreme Court. The Respondent claims that the claim concerns the implementation of the decision on land consolidation, and the Claimants therefore should have initiated an administrative procedure. With reference to the cadastral parcel no.1048 in private ownership, according to the Respondents opinion the Claimants should have filed a claim at the competent court and not at the Special Chamber.

In defense to the claim of 5 October 2009 UNMIK on behalf of the Kosovo Trust Agency (KTA) states that the claim should be rejected as ungrounded. The KTA states that the ownership claim is not supported by the presented evidence. The Heritage Decision of 1983 would not bear any reference to the property described in the claim and the Claimants did not try to request an ownership over those parcels during the heritage proceedings. Further, the heirs that renounced the heritage in 1983 might now have interest regarding these properties as they were not part of heritage proceedings. The KTA states that pursuant to the 1964 land consolidation decision the claimant's father has in fact rejected the land he was given in exchange.

After the hearing of 18 May 2012 the court on 3 August 2012 issued an order for clarification to the Kosovo Cadastral Agency requesting information about who and when requested that B.N. was registered as owner of parcel no.01048. By the same order the court also requested the submission of any such written request and any further declaration or contract which in the context of the registration of B.N. as Possessor has been submitted to the Cadastral Agency or it's predecessor (Page 96, 97 of the court file). The Kosovo Cadastral Agency

answered that they had not such information and the request should be addressed to MCO of Prishtinë/Priština or MCO of Gracanica/ë (Page 114 of the Court file). The Request then had been addressed to the MCO Gracanica/ë. It has not been answered yet.
Also after the hearing of 18 May 2012 the court issued an order asking the Juridical Expert Eng. XX for an assessment of the value of parcel 01048. In his response of 8 October 2012 he assessed the value as being 53955 Euro (Page 136 till 139 of the court file).

In the hearing of 1 November 2012 scheduled for 11:00 the Privatization Agency of Kosovo appeared without a registered Lawyer, although it had been warned by court order of 8 August 2012 that it needs to be represented by a registered Lawyer. The Kosovo Trust Agency appeared with a Lawyer, however left the court before 11:55 when the case has been called for hearing. This call was delayed because the preceding case needed longer hearing than anticipated.

Legal Reasoning

I Regarding immovable property P-71914042-01026-1, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/Priština a Default Judgment against the Respondent had to be pronounced.

The respondent was not duly represented in the final hearing of 1 November 2012 and therefore has to be regarded as not having appeared (Article 52.1 Annex of the Law No. 04/L-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters (in the following: Annex SCL), the claim is admissible and the facts alleged by the Claimant support the claim (Art 52.Section 1 Annex SCL). Different from Art 151.1b Law on Contested Procedure, Law No.03/L-00, a Default Judgment against the Respondent may be issued even if the Respondent had filed a submission opposing the claim.

1.
The Privatization Agency of Kosovo could not validly represent the Respondent, because it appeared in the hearing without a registered Lawyer.

Before the Special Chamber every party, except for natural persons, must be represented by a lawyer (Annex Art 24 SCL 04/L-033). This also applies to SOEs represented by PAK. The wording of this provision lacks any indication why it should not apply. Art 73, 74, 85 and 86 Code of Contested Procedure (Law No03/L-006, CCP), regulating who can be party, which actions can a party take and who can represent a party allows that parties and representatives who are not registered lawyers act in court but in relation to these provisions Annex Art 24 SCL is Lex Posterior and Lex Specialis. The Legislator issued

Annex Art 24 SCL when the CCP already existed and he regulated by the Annex Art 24 SCL a special procedure in a special court, different from other Kosovo courts. The Annex Art 24 SCL supersedes also Art 29 Law on the PAK (04/L-034, PAKL) because it is issued later and regulates not representation generally, as does the PAKL but specifically representation in front of the SCSC. This also applies to Art 29.2 PAKL which regulates the Agency's "Legal standing" to pursue any rights of an enterprise in a competent court on behalf of the enterprise concerned.

The Legal regulation that natural persons do not need a lawyer but all others need a lawyer does not violate Art 73 and 74 CCP. This is not possible because Art 73 and 74 do not apply. They are superseded by Art 24 Annex SCL.

The requirement to be represented by a lawyer is not a violation of the constitutional right of Equality before the Law. It may remain open whether PAK as a "public body" (Art1.1 PAKL) can plead for the fundamental right of equality, which is historically and in its constitutional context a right of natural persons and private legal entities against the state, not a right for a state organ against the state. The Respondent has a right to be treated equal, but constitutional Equality does not mean that everybody is treated equally regardless if they are reasonably and non-discriminatory aspects of differentiation. It is neither unreasonably nor discriminatory to privilege natural persons in front of the court in relation to legal entities (or a public state authority). Often, if not even regularly natural persons do not have the financial means to afford a lawyer. This under constitutional aspects is a sufficient reason for their privilege to appear before the SCSC without a lawyer.

As result it may be stated that the Respondent as everybody except for natural persons must be represented before the Special Chamber by a lawyer who is member of a bar association or a chamber of advocates. As the Respondent was not represented by a registered Lawyer it has to be regarded as not having appeared in court.

The Kosovo Trust Agency also did not represent the Respondent because its representatives left before the case was called for hearing. This call was 55 Minutes after the scheduled time, but parties and their representatives always have to take in account that hearings may be called later because the preceding case needed more time than anticipated. They have to wait. As the Kosovo Trust Agency did not appear in the hearing the court needs not to decide in this case whether Kosovo Trust Agency still has the mandate and responsibility to represent the Respondent or whether this mandate and responsibility has been terminated by Article 1 and 31 of the Law No.04/L-034 on the Privatization Agency of Kosovo.

2.

The claim is admissible and the facts alleged by the Claimants support their claim regarding immovable property P-71914042-01026-1, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/Priština (Art 52.3 Annex SCL).

If one party after being duly summoned does not appear to the hearing or does not appear duly represented the court has to adjudicate the case not on the base of any evidence or proof but exclusively on the base of what the other party alleges (Art 52.3 Annex SCL). The mere allegation suffices. Whether the alleged facts are proved is of no relevance. Therefore the court had not to evaluate whether the Claimants have proved that they heirs of their father, the late Z.K. and whether the expertize of the Juridical Expert Eng. Dip. XX is a valid proof that the immovable 01048 has a value of 53955.00 Euro.

By decision of the Commission for Regrouping of Agricultural Land of the Municipality of Prishtinë/Priština (page 14 and 15 of the court file) Z.K. became owner of the immovable property P-71914042-01026-1. This decision should have been implemented by registering Z.K. as the new owner of the property and the Combine "XX" had taken over the burden of doing so, but this did not happen. However the valid change of ownership was effected by act of local government, the Commission for Regrouping of the Municipality of Prishtinë/Priština did not depend on the change of the Cadastre. It was valid without.

The fact that the Claimants father protested against giving him for compensation this parcel is irrelevant. He took possession of it and took no legal action against the transfer of the parcel P-71914042-01026-1 to him. Also now his heirs are not challenging the Decision of regrouping but request that it be fully implemented by registering them in the cadastre.

The putting up to date of the cadastre has no constitutive, but only declaratory effect. There are no reasons why putting up to date of the Cadastre should not be done now. It is the obligation of the Respondent who wrongly is registered as owner to consent to the change of Cadastre. The Decision on regrouping of land of 25 January 1964 obliges him to do so.

The Claimants did not forfeit their right to be registered as owners.

A holder of a right forfeits this right if he does not claim it for a very long period and the respondent therefore could have justified confidence that the right also in future will never be claimed.

It is true that the father of the Claimants and the Claimants for about 40 years did not request registration in the cadastre. But the reason was that they used the

immovable property undisturbed. The Respondent could never assume that they did not request for registration because they do not insist on their ownership right.

They have to be registered as owners now.

II Regarding monetary compensation for immovable property P-71914042-01048-0, cadastral zone Llapllasellë/ Laplje Selo, Municipal Cadastral Office Prishtinë/Priština

This claim is rejected as ungrounded, not based on Default of the Respondent, but on the basis that the Claimants did not allege sufficiently facts which support the claim (Article 52.3 SCL).

It is true that also this parcel by the Regrouping Decision of 25. January 1964 was transferred into the ownership of the Claimants father and this means that the Claimants could have inherited it. But to hold the Respondent liable for monetary compensation would request to establish an action or omission of the Respondent violating the Claimants or their father's rights. The claimant did not allege such action or omission. He just states that the immovable now is transferred to B.N. This fact alone does not make the Respondent liable. Insofar the facts alleged by the Claimant do not sufficiently support his Claim.

Claimant's costs

Claimants's costs are not compensated.

As far as the Claimant paid costs for the expert he is not compensated because these costs just have to be assigned to the claim for monetary compensation of parcel no.1048 which is rejected. Further costs of the Claimant are not compensated because they are not specified.

Court costs

The court does not assign court costs as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph2 Special Chamber Law). This means that till now there is no sufficient legal base to impose costs.

Legal Advice

Against this decision, as far as it is a **Default Judgement** against the Respondent (Nr 2 and 3 of the enacting clause), the Respondent may file an **application with the Special Chamber to nullify the Default Judgment.** Such application must be made within one month of the date of service of the

Default Judgement. The application shall be served to the other parties within 21 days.

Against Nr.4 and 5 of the enacting clause of this **Judgement** the Claimants may appeal. **Such Appeal can be submitted within 21 days to the Appellate Panel of the Special Chamber.** The Appeal shall also be served to the other party and submitted to the Trial Panel by the Appellant, all within 21 days. The Appellant shall submit to the Appeals Panel a proof that he has served the Appeal also to the other party.

The prescribed time limit begins at midnight of the day, when the Appellant has been served with the decision in writing.

The Appellate Panel shall reject the Appeal as inadmissible if the Appellant has failed to file it within the prescribed period.

The Respondent may file a response with the Appellate panel within 21 days from the date he was served with the appeal, submitting the response also to the appellant and the other party.

The appellant then has 21 days after being served with the response to its appeal, to submit to the Appellate panel and to serve the other party its own response. The other party then has 21 days after being served with the appellant's response to submit to the Appellant and to the Appellate panel its counter-response.

Alfred Graf von Keyserlingk
Presiding Judge