

**District Court of Prishtinë/Priština**, in the panel composed of EULEX Judge Franciska Fiser as Presiding Judge, EULEX Judge Cezary Dziurkowski, and local judge Mediha Jusufi as panel members, in the case of the claimant T.D from N Z, represented by Z J, lawyer from P against the respondents H.K, E.K and N.K., all from P., N.G. Str. 11 in the claim of annulment of contract of real estate, on the appeal of the respondents H.K, E.K and N.K dated 28 January 2011 against the Municipal Court of Prishtinë/Priština Judgment C.no. 2355/07 dated 15 December 2010, after deliberation held on the 13 December 2012, delivers the following

## R U L I N G

The appeal of respondents H.K, E.K and N.K, dated 28 January 2011 is **APPROVED** as grounded and the Judgment of the Municipal Court of Prishtinë/Priština C.no.2355/2007 dated 15 December 2010 is **ANNULLED** and the case returned to the court of first instance for retrial.

## Reasoning

The first instance court with the judgment C.no.2355/2007 under paragraph 1 of the enacting clause has approved the claim of the claimant T.D and declared the contract of transaction signed in the name of O.D and S.K as sellers, represented by N.A from S., based on authorization letter and with H.K, E.K and N.K from P., as buyers authenticated on 27 October 2000 in Prishtinë/Priština Municipal Court under Vr. No. 3030/2000, null and void in the part in which S. K., represented by N. A. sold the following real estates: ½ ideal part of cadastral parcel 4940/2 with total surface of 0.02.13 ha of the Cadastral Zone of Prishtinë/Priština and ½ ideal parts of cadastral parcels: 1814/2 with surface of 0.21.30 ha, 1818/2 with surface of 0.20.37 ha and 1819/2 with surface of 0.71.83 ha, all three parcels in V., Cadastral Zone of Prishtinë/Priština, all four parcels described in possession list 6633.

Then, under paragraph 2 of the enacting clause of the challenged judgment, the Municipality of Prishtinë/Priština, the Cadastre and Geodesy Office is ordered to alter its cadastral books in accordance with the challenged judgment and to reverse the changes made in the cadastral books to the state it was before the registration of the transaction contract in the annulled part.

And, under paragraph 3, the respondents are enforced to pay to the claimant 200 euros for reimbursement of procedural costs, as well as 250 euros court tax to the Municipal Court of Prishtinë/Priština.

Against this judgment an appeal was timely filed by all three respondents due to violation of provisions of contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law with a proposal to approve the appeal

and to modify the challenged judgment of first instance or to annul the judgment and return the case to the first instance for retrial.

A copy of the appeal has been sent to the authorized representative of to the claimant but no reply to the appeal has been filed in due time.

The District Court examined the files of the case, the challenged judgment, the allegations of the appeal, and having them assessed, pursuant to article 194 of LCP, finds the appeal to be grounded.

When the District Court pursuant to the Article 194 of the Law on Contested Procedure (hereinafter: LCP) examined *ex officio* whether there exists a violation of substantive law or violation of the provisions of contested procedure under Article 182 paragraph 2, points b), g), j), k) and m) of the LCP it has been determined there are no violations under points b), g), j) and m).

Regarding the violation of substantive law and the point k) of the Article 182 of the LCP; also taking in consideration the allegations of appeal that T.D was the claimant in the case although she did not have the authorization by the inheritors of the first legal line of S. K. and because of this she lacked the active legitimacy of the party in the procedure; the District Court decides the decision that T.D is entitled to act as a claimant in the said case has been reach to early and some additional facts have to be put to the test.

During the evidence proceeding the following factual situation has been determined:

The claimant T.D and S.K were the co-owners of following parcels: 4940/2, 1814/2, 1818/2 and 1819/2 each in ideal parts of  $\frac{1}{2}$ .

On 18 August 1994 T.D and S.K signed a gift contract according to which S.K. his  $\frac{1}{2}$  ideal part of parcel 1814/2 to T.D. The contract was verified in the court but not registered in the cadaster books.

On 10 March 2000 S.K authorized O.D in his name and on his behalf to “conclude a sales contract for a part of the house in “M. P.” Street No. 11 in P., built on the cadastral parcel 4940 as well as parcels no. 1814, 1818 and 1819.” The authorization was verified in the Municipal Court of K., M. under Vr.nr. 419/2000.

On 18 September 2000 O.D authorized N.A from Skopje to “use her real estate – cadastral parcel 4940 consisting of a house and a yard in total surface of 4.26 are, registered in possession list 2290, and the cadastral parcels 1814/1 and 1814/2 in V. with total surface of 42.50 are, parcels 1818/1 and 1818/2 with total surface of 40.75 are, parcel 1819/1 and 1819/2 in V. with total surface of 143.63 are, registered in possession list 2290 and 6633.” Furthermore, she authorized N.A on her behalf to “conclude, sign and certify a contract regarding buying and selling the above mentioned real estate with the third party.” The authorization was verified in Municipal Court B. P., M., under Vr.nr. 2508/2000.

On 27 October 2000 N.A signed a transaction contract with the three respondents for the total price 300.000 DM. According to said contract O.D as owner of cadastral parcel 4940/1 by culture a house and a yard with total surface 2.13 are, and cadastral parcels 1814/1, 1818/1 and

1819/1 located in V. with total surface of 1.13.38 ha and S.K as owner of ½ ideal part of cadastral parcel 4940/2 by culture a house and an yard, with total surface of 2.13 are and ½ ideal part of cadastral parcels 1814/2, 181/2 and 1819/2 with total surface of 1.13.50 ha were selling this property, through their representative, to the buyers; the respondents in said case. The contract was verified in Municipal Court of Prishtinë/Priština under Vr.nr. 3030/2000. On 28 May 2001 S.K revoked his authorization letter Vr.nr. 419/2000 to O.D; this revocation statement was verified in Municipal Court of A., S. under Vr.nr. 1591/2001. S.K died in 2004.

Taking into consideration above mentioned facts the subject of the contract of transaction dated 27 October 2000 was the real estate owned by O.D and ½ ideal part of real estate owned by S.K. also the parcel 1814/2 which was the subject of gift contract dated 18 August 1994.

When the first instance court observed the admissibility of the claim (see the page 4, point IV.1. of English version) the court recognized the legitimacy of the party in the procedure to T.D with reasoning she is co-owner of the parcels together with the respondents, she is also a sister of late S.K and as close relative to his heirs has an obvious interest in claiming annulment of the contract. The first instance court found the claimant T.D as “interested person” pursuant to the Article 109 Law on Contracts and Torts (hereinafter: LCT) and because of this the claim filed by her as admissible.

The factual and legal stance of the first instance court is not accepted by the second instance court since some additional decisive facts whether the claimant T.D should be entitled as an "interested person" according to the article 109 LCT or not should be put to the test. Only the facts she is the co-owner of the parcels together with the respondents and she is also a sister of late S.K and as close relative to his heirs do not entirely and reliably prove this stand.

The claimant T.D could be an “interested person” if she proves that; in case of her success in this claim for a declaration of invalidity of the transaction; she will gain the possibility that in the further proceeding she can assert a right or benefit as provides by law.

The claimant is not a contracting party; she is also not a successor of S.K of the first line. As a third person she could also be an “interested person” if the transaction contract has an indirect effect on her, and in order to be protected from such consequences, she may have an interest in establishing that a transaction contract is null and void.

According to this, and also taking into consideration the gift contract dated 18 August 1994, the claimant could be an “interested person” and entitled to act as a claimant concerning the parcel 1814/2, although this fact has to be further tested, but as regards to the parcels 4940/2, 1818/2 and 1819/2 the effect of transaction contract has not been established so far at all. The first instance court should examine some additional facts and assess them again and more carefully to establish if the claimant T.D has the active legitimacy of the party in the procedure and also to what extent.

Irrespective of before-mentioned the District Court examined also allegations of appeal regarding the violations of provisions of contested procedure from Article 182 paragraph 2 point i) of the LCP and erroneous application of Article 86 paragraph 2 of the LCT.

According to the allegations of the appeal the first instance court during the main hearing held on 15 December 2010 has made essential violation of the provision of contested procedure from Article 182 Paragraph 2 point i) of the LCP, due to the fact that it did not give the opportunity to the first respondent H.K to participate in the court hearing, without giving any explanation, and without stating in the minutes as to whether the said person had been summoned duly or not.

District Court finds that the respondent H.K was summoned properly pursuant to the Article 110 of the LCP. He received the summons sent to his address "N. G." Street nr. 11 Prishtinë/Priština on 23 November 2010. This is the same address that he had received all summonses before and there is no evidence in the case file he ever informed the court about change of address as provided by Article 116 paragraph 1 of the LCP. As it is stated in the minutes the court on the hearing held on 15 December 2010 checked the presence of the summoned parties according to the Article 423 paragraph 2 of the LCP. The court established: "... the respondent H.K is not here as according to the other respondents he lives in London but has not arrived due to the problems with bad weather." But the respondent did not inform the court why he was not able to attend, neither did not give some proofs he was not able to come due to the problems with bad weather.

Regarding the allegations that first instance court erroneously applied provision of Article 86 LCT the District Court finds that O.D was not entitled to transfer her authority to another pursuant article 86 paragraph 1 of LCT and the conditions pursuant article 86 paragraph 2 of the same law were not met. The reasons she has been hindered to the job herself as per the authorization due to the circumstances in Kosovo that time, in a post-war situation as alleged in the appeal are not acceptable.

During the retrial, all above-noted in regard to establishing if the claimant is entitled to act as a party pursuant to the Article 182 paragraph 2 point k) of the LCP has to be reviewed; to be established the decisive facts whether the claimant should be considered as "interested person" pursuant to the Article 109 of the LCT and consecutive regarding which parcels to be entitled as a claimant.

In the end it has to be also mentioned that according to the claim the claimant was seeking to declare null and void the sales contract of the real estate in the whole not only in regard to the parcels owned by S.K.. The first instance court with its judgment approved the claim and declared the contract of transaction null and void in the part in which S.K sold his own real estate but omitted to decide on the rest of the claim. In retrial also this fact has to be respected.

From the above-mentioned it is decided as in the enacting clause of this ruling pursuant to article 197 paragraph 1 sub item b) of LCP.

**LEGAL REMEDY:** No appeal is allowed against this ruling.

**PRISHTINË/PRIŠTINA DISTRICT COURT**

**Ac.no.262/2012**

**13 December 2012**

Presiding Judge:

Franciska FISER

Drafted in English, as an authorized language.