AC 5361/2012

COURT OF APPEALS OF PRISHTINË/PRIŠTINA, in the panel composed of EULEX Judge Franciska FISER as Presiding Judge, Kosovo Judge Isa KELMENDI and Kosovo Judge Kujtim PASULI as panel members, in the case of the claimant EA from Gjilan/Gnjilane, "R. P." no. 26 Street against the respondents JS and DS, represented by VP and EQ, both lawyers from Gjilan/Gnjilane in the claim of confirmation of ownership on immovable property with value of the subject matter in the amount of 250 EUR, on the appeal of the respondent DS dated 7 June 2011 against the Municipal Court of Gjilan/Gnjilane (now Basic Court of Gjilan/Gnjilane) Judgment C. no. 610/2002 dated 12 December 2002, after deliberation held on the 9 September 2013, delivers the following

R U L I N G

The appeal of respondent DS dated 7 June 2011 is **APPROVED** as grounded and the Judgment of the Municipal Court of Gjilan/Gnjilane (now Basic Court of Gjilan/Gnjilane) C. no. 610/2002 dated 12 December 2002 is **ANNULLED** and the case returned to the court of first instance for retrial.

R e a s o n i n g

The first instance court with the judgment C. no. 610/2002 under paragraph 1 of the enacting clause has approved the claim of the claimant EA and affirmed that towards the respondents JS and DS, the claimant EA is the owner of the cadastral parcel no. 457/1, place called "Gavran", of a culture field of the second class, of total surface area from 00.22.00 ha, registered on the Possession List no. 406, CM Gjilan and that this right was acquired on the grounds of caretaking. Therefore, the respondents were obliged to recognize this right to the claimant whilst the Directorate for Geodesy, Cadastre and Property of Gjilan/Gnjilane Municipality was obliged, on the basis of herein Judgment, to perform changes in the relevant cadastral books.

Then, under paragraph 2 of the enacting clause of the challenged judgment, the court decided that the expenses of the civil procedure would be borne by the claimant.

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Against this judgment an appeal was timely filed by the respondent DS due to substantial 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 annul in its entirety the judgment and to return the case to the first instance for retrial.

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

Pursuant to the Article 513 paragraph 1 of the Law no. 03/L-006 on Contested Procedure and Law no. 04/L-118 on Amending and Supplementing the Law no. 03/L-006 on Contested Procedure (hereinafter: LCP 2008) the provisions of the Law on Contentious Procedure ("Official Gazette of the SFRY" no. 4/1977, 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991 and "Official Gazette of the SRY no. 27/1992, 31/1993, 24/1994 and 12/1998) (hereinafter: LCP 1977) are applied in this second instance proceeding.

The Court of Appeals examined the files of the case, the challenged judgment, the allegations of the appeal, and after having them assessed, pursuant to article 366 paragraph 1 of the LCP 1977, finds the appeal to be grounded.

Initially the Court of Appeals pursuant to the Article 365 paragraph 2 of the LCP 1977 examined *ex officio* whether there exist substantial violations on the point of practice and procedure from Article 354 paragraph 2 of the same law and correct application on the point of law.

Regarding the existing substantial violations on the point of practice and procedure from article 354 paragraph 2 of the LCP 1977; also taking in consideration the allegations of appeal that first instance court has not in any way tried to serve the claim to the respondents and thus the respondents were denied the opportunity to respond to the claim; the Court of Appeals finds that the substantial violation of the provisions of the contested procedure has been done as stated in point 7 (8) since by the failure to serve the summonses and other documents to the respondents they were denied the opportunity to speak before the court.
The Court of Appeals finds from the case file that the claimant was never obliged by the first instance court to complete the claim with the current residence of the respondents as

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provided by Article 281 in conjunction with Article 109 paragraphs 1 and 2 of the LCP 1977.
Furthermore no summonses were ever sent by the first instance court to the respondents in order to verify officially that they could not be found out at their last registered address in Gjilan/Gnjilane.
Also no procedural actions were undertaken by the first instance court to obtain information of the actual addresses of the respondents as foreseen by Article 148 of the LCP 1977.

Likewise the substantial violation of the provisions of the contested procedure has been done as stated in point 10 (11) since the representative of the respondents did not have proper authorization to act. There was no ruling for appointment of a temporary representative as foreseen in Article 278 paragraph 1 of the LCP 1977. The court did not notify also the competent guardianship institution in order to initiate the appointment of their guardian as foreseen by Article 84 paragraph 3 of the LCP 1977.

In addition the first instance court did not establish some critical facts because of which exists also erroneous and incomplete determination of factual situation as foreseen by Article 355 of the LCP 1977.
There was only one hearing held in the first instance and two witnesses were heard. The first instance court did not asses their statements and did not compare them with the claimant's allegations in the claim. Likewise the first instance court did not asses their credibility since they were only 22 or 23 years old when allegedly the contract has been concluded.
The first instance court did not establish at least the following crucial facts: when exactly the contract has been concluded and when it has been realized, when the claimant got the property into factual possession, what was the contractual price, when it was paid by the claimant, who and when constructed the building which is situated at the property, when the respondents left Kosovo and if they left Kosovo after 1978 did they anyhow react when the claimant started to use the immovable property in 1978.

Since the factual situation was incompletely determined the erroneous application of substantive law was made by the first instance court pursuant to the Article 356 of the LCP 1977.

During the retrial, all above-noted has to be taken into consideration likewise two more issues as follows.

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Firstly the court has to pay regard to the fact that the respondent JS passed away on 30 December 2006. Thus in retrial the first instance court shall suspend the proceeding pursuant to the Article 277 of the LCP 2008 in conjunction with Article 513 paragraph 2 of the LCP 2008 in order to establish who are the inheritors of late JS since they have to be included in the proceeding too.
And secondly, pursuant to the Article 36 of the LCP 2008 the first instance court shall *ex officio* verify the accuracy of the value of the subject matter specified as stated in the claim in amount of 250 EUR and render an adequate decision to that effect.

From the above-mentioned it is decided as in the enacting clause of this ruling pursuant to article 366 paragraph 1 of the LCP 1977.

LEGAL REMEDY: No appeal is allowed against this ruling.

COURT OF APPEALS OF PRISHTINË/PRIŠTINA
Ac. no. 5361/2012
9 September 2013

Presiding Judge:

Franciska FISER

Drafted in English, as an authorized language.

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