

COURT OF APPEALS OF PRISHTINË/PRIŠTINA, in the panel composed of EULEX Judge Franciska FISER as Presiding Judge, Kosovo Judge Mediha JUSUFI and Kosovo Judge Muhamet REXHA as panel members, in the case of the claimant N.B from Ferizaj/Uroševac “B.K Street”, represented by lawyer Gani TIGANI from Prishtinë/Priština against the respondents MUNICIPALITY of Ferizaj/Uroševac, represented by Rrahman SHALA and B.K with former address in Ferizaj/Uroševac, now residing in Kraljevo, Serbia, represented by lawyer Miro DELEVIĆ from Mitrovicë/Mitrovica in the claim of authentication of the right to use the house with value of the subject matter in the amount of 2000 EUR, on the appeal of the respondent B.K dated 4 June 2011 against Judgment C. no. 757/2006 dated 26 March 2012 of the Municipal Court of Ferizaj/Uroševac (now Basic Court of Ferizaj/Uroševac) after deliberation held on the 18 October 2013, delivers the following

R U L I N G

The appeal of respondent B.K dated 4 June 2011 is **APPROVED** as grounded and the Judgment of the Municipal Court of Ferizaj/Uroševac (now Basic Court of Ferizaj/Uroševac) C. no. 757/2006 dated 26 March 2012 is **ANNULLED** and the claim dated 18 December 2006 which was amended on the hearing held on 20 January 2010, is **DISMISSED**.

R e a s o n i n g

The first instance court with the judgment C. no. 757/2006 has approved the claim of the claimant N.B and ascertains that he is the holder of the right to permanently use the house located in Ferizaj, “B.K str. No. 16 former “M.Z str.” No. 14, a house located on the constructed building on the ½ of the parcel No. 2245-0, Cadastral Zone of Ferizaj. Furthermore the first instance court nullifies the lease contract with Prot. No. 423, dated 27 June 1996, established between the Public Enterprise for Construction and Regulation and Use of Land in Ferizaj Municipality represented by director, as Lessor and B.K from Ferizaj as Lessee and purchase contract for the house which was established between the first respondent the Municipality of Ferizaj as Seller and the second respondent B.K as

Buyer, certified in the Municipal Court of Ferizaj, Certificated No. 2210/96 dated 22 September 1996. Finally the first instance court established that also the annex contract concluded between the first respondent - Municipality of Ferizaj, the Seller and the second respondent B.K as Buyer, dated 22 March 1999, allegedly certified in the Municipal Court of Ferizaj, Certificate No. 86/1999 is void. The respondent B.K was also obliged to pay for the expenses of the procedure to the Claimant in the amount of 2075,50 EUR in 15 days' time, following the final Judgment, and enforcing execution.

Against this judgment an appeal was timely filed by the respondent B.K 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 reject the aforementioned claim, or to annul the judgment in its entirety 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 512 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) the provisions of present law are applied also 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 195 paragraph 1 of the LCP, finds the appeal to be grounded.

Initially the Court of Appeals pursuant to the Article 194 of the LCP examined *ex officio* whether there exists a violation of the substantive law or a violation of the provisions of the contested procedure under Article 182 paragraph 2, points b), g), j), k) and m) of the present law.

After having examined *ex officio* whether there exists a violation of the provisions of contested procedure under Article 182 paragraph 2, points b), g), j), k) and m) of the LCP the Court of Appeals has determined that there are no violations under these points.

Regarding the existence of violation of the substantive law the Court of Appeals finds that the first instance court erroneously applied provisions of Law on Housing Relations

(Official Gazette of SAPK, No. 11/83, 29/86 and 42/86); likewise the first instance court did not applied UNMIK Regulation No. 1999/23 (hereinafter: UNMIK/REG/1999/23) and UNMIK Regulation No. 2000/60 (hereinafter: UNMIK/REG/2000/60) in this case.

While assessing the documents and evidence the following factual and legal situation has been determined:

The house located in the former "M.Z Street No. 14 (now "B.K Street No. 16) was provided to be used by claimant's father, the late I.B, since 1972. The afore-mentioned house was given to late I.B, by UN High Commissioner for Refugees, due to the refugee status he enjoyed. According to the claimant's statement his father died on 23 January 1976 and the claimant stayed in the house with his own family. In March 1991 he went to the western countries and when he returned to Kosovo in July 1999 the house was destroyed.

On 27 June 1996 the lease contract has been concluded between Public Enterprise for Construction and Regulation and Use of Land in Ferizaj Municipality as Lessor and B.K from Ferizaj as Lessee, on 22 September 1996 the purchase contract for the house between the first respondent the Municipality of Ferizaj as Seller and the second respondent B.K as Buyer and finally on 22 March 1999 also the annex contract between the first respondent - Municipality of Ferizaj, the Seller and the second respondent B.K as Buyer.

The respondent B.K filed a claim with Housing and Property Claims Commission (hereinafter: HPCC) which was registered under the reference number DS302924. According to the HPCC Decision dated 27 June 2003 the possession of the claimed property has been given to the respondent B.K .

Upon the request for consideration filed by the claimant N.B.HPCC issued a decision on 19 October 2006.

Due to some irregularities the said decision has been corrected and replaced with decision dated 22 February 2007.

Pursuant to the Decision on Reconsideration Request dated 22 February 2007 the reconsideration request filed by claimant N.B. was granted and HPCC ordered that the possession has been given to the claimant (in this civil case it means to the respondent B.K.). The respondent (in this civil case it means the claimant N.B.) and any other person occupying the property had to vacate the claimed property and the determination of legal relief, if any, that might be given to the claimant N.B. under the applicable law as

a result of the allegedly irregular manner in which the claimed property was allocated to the respondent B .K. , has been referred to the competent local court.

The Court of Appeals in a session of the panel assessed the documents and evidence as listed in the minutes of the hearing dated 26 February 2010 and in the judgment and established in some points different factual state of affairs from the one contained in the judgment.

The first instance court concluded that the claimant's father I.B was granted the right to use the house based on the Decision No. 2610/162, dated 9 October 1967 issued by the Federal Secretariat and the Decision No. 21610/165, dated 9 October 1967 from the same authority; and since I.B used the house until 23 March 1976 when he died and after his death the house continued to be used by the claimant and his close family members until the date when the authorities evicted him, the claimant became a legal holder from the time when his father died pursuant to the Article 18 of the Law on Housing Relations. It can be seen from the judgment that the first instance court considered claimant's father I.B, and after he died, the claimant N.B.as a holder of right to use the house also from other documents as follows: Report prepared on 20 February 1989 by the Housing Department Committee, Statement of Joint Household and Support of Family Members no. 2725 dated 16 November 1988, Certificate C9 No. 360-7/61 dated 11 April 1973.

The second instance court finds that the conclusions made by first instance court are erroneous.

The claimant's father I.B, and after he died, the claimant N.B. cannot be considered as holder of right to use the house according to the provisions of Law on Housing Relations since none of them had acquired the right to use the house on the basis of the contract on usage as foreseen in Article 2 of the same law.

There is no single evidence that such a contract has been concluded and that such contract whenever existed.

The representative of the respondent Municipality of Ferizaj/ Urosevac on the hearing held on 4 May 2007 clearly stated that the house was not municipality's property, it was property of Refugees' International Fund and that the Municipality has carried out a few administrative services using refugees' fund means.

Also the claimant in his statement given on the hearing held on 20 January 2010 stated that his parents and three children were settled in Ferizaj/Urosevac in 1949. Up to 1972 they lived in many rented houses in Ferizaj/Urosevac, whilst in 1972 as political refugees

they were given a contested house which was bought by United Nations High Commissioner for Refugees in Geneva.

When assessing the evidence presented in first instance proceeding the second instance court concluded that claimant's father and the claimant did not acquire any right over the claimed property and they cannot be treated as occupancy right holders or holders of any other property right introduced by residential laws.

And the first instance court also violated the substantive law since did not apply UNMIK/REG/1999/23 and UNMIK/REG/2000/60 upon which the HPD and HPCC were mandated to process and adjudicate all housing and property claims related to property rights.

Pursuant to Section 2.1 of UNMIK/REG/1999/23 the HPCC (the "Commission") was an independent organ of the Directorate which should settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.

Pursuant to Section 3.1 of the UNMIK/REG/2000/60 no claim for restitution of residential property lost between 23 March 1989 and 24 March 1999 as a result of discrimination might be made to any court or tribunal in Kosovo except in accordance with UNMIK Regulation No. 1999/23 and afore-mentioned regulation.

And the most important provision that shall be observed is Section 2.7 of the UNMIK/REG/1999/23 which provides that final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.

As the court already mentioned, according to the HPCC Decision dated 27 June 2003 the possession of the claimed property was given to the respondent B.K. . With the Decision on Reconsideration Request dated 22 February 2007 the reconsideration request filed by claimant N.B. has been granted and HPCC ordered that the possession has been given to the respondent B.K. and the claimant N.B. and any other person occupying the property had to vacate the claimed property. With the same decision the determination of legal relief, if any, that might be given to the claimant N.B. under the applicable law as a result of the allegedly irregular manner in which the claimed property was allocated to the respondent B.K. , has been referred to the competent local court.

The claimant filed with the court the claim with claim request as stated in the beginning of this reasoning. Such formed claim request cannot be approved. The claimant cannot request from the court to ascertain that he is the holder of the right to permanently use the house on which HPCC has already decided and the possession over the same house has been given to the respondent B.K.

The second instance court has to emphasize the fact that the restitution of occupancy rights to socially owned apartments lost as a result of discrimination is regulated in the Sections 3 and 4 of the UNMIK/REG/2000/60 which specifies that restitution may take the form of restoration of the property right – restitution in kind or monetary compensation.

All evidence submitted by claimant N.B. in this case were presented also in the request for consideration to the HPCC. The HPCC assessed them and if the HPCC would have found them substantiated its decision would have been in favor of the claimant.

Since the claimant's claim for restitution of a property right was refused by the HPCC Decision, and the said decision is final and cannot be reviewed by the court, according to Sections 3 and 4 of the UNMIK/REG/2000/60 the claimant may request only a monetary compensation if all other conditions are met. Only such formed claim would be in compliance with the Decision on Reconsideration.

Finally, in the part of the claim upon which the first instance court nullified the lease contract, the purchase contract and annex contract, the second instance court cannot find the claimant as "interested person" pursuant to the Article 109 Law on Contracts and Torts (hereinafter: LCT).

He could be an "interested person" if he proves that; in case of his success for a declaration of invalidity of the transaction, he can assert a right or benefit as provides by law.

The claimant requests from the court to nullify the lease contract with Prot. No. 423, dated 27 June 1996, established between the Public Enterprise for Construction and Regulation and Use of Land in Ferizaj Municipality represented by director, as Lessor and B.K from Ferizaj as Lessee and purchase contract for the house which was established between the first respondent the Municipality of Ferizaj/Urosevac as Seller and the second respondent B.K. as Buyer, certified in the Municipal Court of Ferizaj/Urosevac , Certificated No. 2210/96 dated 22 September 1996.

Since the claimant's request to confirm that he is the holder of the right to permanently use the house located in Ferizaj/Urosevac , "B.K str " No. 16 former "M.Z str." No. 14, a house located on the constructed building on the ½ of the parcel No. 2245-0, Cadastral Zone of Ferizaj/Urosevac has already been decided and refused by HPCC by Decision on Reconsideration Request dated 22 February 2007, the claimant cannot be consider as "interested person" pursuant to the Article 109 LCT.

And once more, pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of HPCC are binding and enforceable and cannot be reviewed by the court. Such a conclusion is evident also from Judgment of Constitutional Court of Kosovo adopted in the case No. KI-104/10 dated 23 April 2012.

From the above-mentioned the second instance court, pursuant to the Article 198 paragraph 1 of the LCP, found that the appeal is grounded and therefore decided to annul the Judgment of the Municipal Court of Ferizaj/Uroševac (now Basic Court of Ferizaj/Uroševac) C. no. 757/2006 dated 26 March 2012 and dismiss the claim dated 18 December 2006 which was amended on the hearing held on 20 January 2010.

LEGAL REMEDY: No appeal is allowed against this ruling.

COURT OF APPEALS OF PRISHTINË/PRIŠTINA

Ac. no. 3500/2012

18 October 2013

Presiding Judge:

Franciska FISER

Drafted in English, as an authorized language.