BASIC COURT OF PRISHTINË/PRIŠTINA

C. no. 301/08

THE BASIC COURT OF PRISHTINË/PRIŠTINA, through EULEX Judge Franciska Fiser, acting upon decision of EULEX Judge delegated by the President of the Assembly of EULEX Judges, dated 26 December 2012, in the civil case of the claimant SR from Prishtinë/Priština, Dardania Street X, block X, part X, flat X represented by lawyer SH from Prishtinë/Priština against the respondents LjD from Prishtinë/Priština, now temporary residing in Serbia, represented by lawyer FSh from Prishtinë/Priština, KG, represented by MJ and MIA and jointly interested party NM from Prishtinë/Priština, Dardania Street X, part X, flat X represented by lawyer FSh from Prishtinë/Priština for confirmation of the right of use and annulment of sales contract, acting ex officio, following main trial session held on 25 November 2013, renders the following

J U D G M E N T

I.

The following claim request:

"It is approved as grounded the claim application of the claimant SR from Prishtina and it is verified that the ruling on allocation of the apartment for use, number 04, 360-82/121 dated 21 April 1998 is lawful, and due to this the claimant is entitled to become the barrier of the apartment's right in terms of use and permanent possession of the

apartment which is situated in Prishtina, quarter "Dardania" street X, block X, part X, apartment number X, in total size of 60.83 square meters (m2).

is dismissed.

II.

The following claim request:

All acts concerning the leasing of the apartment to the first respondent taken by third respondent, the contract on privatization, OV nr. 955/99 dated 21 May 1999 and the contract on purchase and sale Ver. Nr. 10835/2007 certified at the Municipal Court in Prishtina are null and unlawful.
The first respondent is ordered to hand over to the claimant the apartment for further use and possession in terms of 15 days from the day when this judgment shall be issued, or under forced execution.
The respondents are obliged in an unlimited solidary way to compensate the expenses of this contest to the claimant in amount determined by the Court."

is rejected.

III.

The claimant SR is ordered to pay the amount of 374,40 EUR in respect of procedural costs to the first respondent LjD, within the period of 15 days after the receipt of this decision under the threat of execution.

R e a s o n i n g :

The claimant filed a claim with the Municipal Court in Prishtinë/Priština on 14 February 2008 against the respondents requesting to approve his claim and to verify that the ruling on allocation of the apartment for use, number 04, 360-82/121 dated 21 April 1998 is lawful, and due to this the claimant is entitled to become the barrier of the apartment's right in terms of use and permanent possession of the apartment which is situated in Prishtina, quarter "Dardania" street X, block X, part X, apartment number X, in total size of 60.83 square meters (m2).

The claimant also requested to annul all acts concerning the leasing of the apartment to the first respondent – as unlawful acts, and to announce the purchase (privatization) contract for the said apartment signed between the first and second respectively the third respondent or other possible contract which has to deal with the transaction or alienation as null and unlawful likewise to order the first respondent to hand over to the claimant the apartment for further use and possession in terms of 15 days from the day when this judgment shall be issued, or under forced execution.

The claimant alleged in his claim that his employment was terminated by the MIA of Republic of Serbia in 1990. This was done in contradiction with the law and was on hegemony bases politically motivated and due to the objective circumstances, as it was war in Kosovo, the claimant had no opportunity and had no legal right until now to file the claim before the competent court to proceed with this issue.
The claimant stated that the apartment was given to him based on the legal grounds of the employment relationship to third respondent, and based on the ruling on allocation the apartment nr. 82/121 dated 21 April 1988.

When he was suspended by the existing authorities of Serbia at that time established in Kosovo and his employment was terminated, a notification nr. 03/1-392/1 dated 5 January 1991 was send to the BVI – Self-governing Association for the Interest of the

Employees upon which it was not allowed to sign and bound the contract on use of apartment.
Afterwards the contested apartment was given on rent for unlimited period to the first respondent, who later on signed the leasing contract with the Public Housing Enterprise in Prishtina, after also the contract of self-purchase and finally privatized it.
After the end of the war in Kosovo the claimant and his close family entered in the apartment and physically had it on use and factual possession.
The claimant also filed the application to recognize the right of use with the HABITAT based on UNMIK Regulation 2000/60. The Directorate of Housing and Property Issues in Prishtina with its decision and order HPCC/REC/92/2007 dated 26 March 2007 in consistency with the provision of article 22.9 of the aforementioned regulation, decided to send the issue to the local court for decision if the litigation parties has their own legal interest.

The claimant is convinced that the contract on purchase of flat concluded between first respondent and second, respectively the third respondent has the features of annulled contract according to the provisions of Article 103 item 1 of the Law on Contracts and Torts.

In final speech the representative of the claimant amended and specified the statement of the claim requesting from the court to declare the contract on privatization, OV nr. 955/99 dated 21 May 1999 and the contract on purchase and sale Ver. Nr. 10835/2007 certified at the Municipal Court in Prishtina as null and unlawful.

The first responded in his reply to the claim filed on 9 October 2013 contested the claim and statement of claim in its entirety alleging that the case concerned is *res iudicata.*
He stated that there has been going on a contested procedure at the Municipal Court of Prishtina in the case C no. 3139/04 on the same case – confirmation of the housing right, as per the claim of the claimant SR.

With the Ruling dated 23 January 2007 the court dismissed the claim since the statement of the claim was adjudicated before by the Housing and Property Directorate according to the Decision HPCC/D/D102/3003 dated 12 September 2003.

Since the first respondent sold the contested apartment to NM from Prishtina, NM as third person filed a submission pursuant to the Article 276 of the Law on Contested Procedure (hereinafter: LCP) as jointly interested party on the side of the respondent. He also opposed the claim in its entirety.

The representative of second and third respondent on the preliminary hearing held on 18 November 2013 objected the claim due to the absence of legitimacy. He also alleged that the procedure at the Habitat wasn't correct and just and not taken according to the law because Habitat didn't deal with the validity of the decision of the MIA by which the claimant was dismissed from the work.

In final speech the representative of second and third respondent proposed the court to annul both purchases contracts and to return the immovable property to the MIA in possession as legal and legitimate owner.

With the ruling dated 26 December 2012 issued by the Vice President of the Assembly of EULEX Judges the case has been taken over in EULEX Judges jurisdiction and assigned to the EULEX Civil Judge at the Mobile Unit at Basic Court Level according to the provisions of the Law No. 03/L-053 on Jurisdiction, Case Selection, Case Allocation of EULEX Judges and Prosecutors in Kosovo.

At the proposal of the litigants and in order to establish the factual situation, the court produced and read the following evidence:

- Decision on allocation of apartment in use no. 82/121 dated 21 April 1988;
- Notification no. 03/1-392/1 dated 5 January 1991;

- Photocopy of contract of joining financial means of construction of apartment dated 9 October 1985;
- Decision of Housing and Property Claims Commission no. DS001392 and DS000787 dated 28 September 2004;
- Decision on reconsideration request of Housing and Property Claims Commission no. DS001392 and DS000787 dated 13 April 2007;
- Examinations of case file C 3139/04 and Ruling of the MC in Prishtinë no. C 3139/04 dated 23 January 2007;
- The sales contract concluded on 12 September 2005 and certified with the court under VR. No. 10835/2007 on 28 December 2007.

The proposal for hearing the witness ShA filed by representative of second and third respondent was rejected as belated pursuant to the Article 428 paragraph 2 of the LCP.

Having assessed each and every piece of evidence separately and as a whole conscientiously and carefully pursuant to article 8 of the LCP, the court comes to its conclusion that the claim request cannot be approved.

During the evidence procedure the following factual situation was established.

By the Ruling on allocation to use the apartment no. 82/121 dated 21 April 1988 the claimant was allocated an apartment situated in Prishtina, quarter “Dardania” street X, block X, part X, number X, in total size of 60.83 square meters (m2).

It is not disputable that contract on use was never concluded. This fact is also proven by Notification no. 03/1-392/1 dated 5 January 1991 and sent to so called BVI (Self-Governing Association for the Interest of the Employees) notifying that a number of employees the working relations have been ceased and regarding this the contracts on use of flats could not be concluded in accordance to provision of Article 14 paragraph 4 of the Law on Housing Relations. In the attached list of employees also the claimant was indicated under point 10.

There is a discrepancy in number and date of decision on allocation the flat for use. The decision on allocation the flat submitted as evidence by the claimant has number 82/121 and date 21 April 1988.
In the list of employees attached to the Notification no. 03/1-392/1 dated 5 January 1991 different number of decision (no. 360/88) and different date (4 March 1988) are stated.

The parties couldn't explain the afore-mentioned discrepancy; nevertheless the court is of opinion that the number of the decision and the date are not so crucial since there is not disputable that the Decision on allocation of the flat was issued and that the contract on use of the same flat was never concluded since the working relation was ceased.

Later the same apartment has been allocated to the first respondent who through privatization process bought the apartment, concluded the purchases contract which was verified at the First Court in Belgrade on 21 May 1999.
In 2005 the first respondent sold the apartment to NM and concluded the contract on 12 September 2005 which was verified at the Municipal Court in Prishtina on 28 December 2007.

The claimant and also first respondent filed claims with Housing and Property Directorate (hereinafter: HPD) which were registered under case no. DS001392 & DS000787. The claimant filed a claim as category A Claimant and first respondent as category C Claimant.

With the Certified Decision no. DS001392 & DS000787 dated 28 September 2004 and Order no. HPCC/D/102/2003/A&C dated 12 December 2003 the Housing and Property Claims Commission (hereinafter: HPCC) decided the above claims ordering that the category A claim (the claimant SR in this civil case) be refused and the category C claimant (the first respondent LjD in this civil case) be given possession of the disputed property.

Upon the reconsideration request filed by the category A claimant (the claimant in this civil case) the HPCC issued a Certified Decision on Reconsideration Request no. DS001392&DS000787 dated 13 April 2007 and Order no. HPCC/REC/92/2007 dated 26 March 2007.
With this decision the reconsideration request was granted, the Commission's decision No. HPCC/D/102/2003/A&C was overturned and new decision was issued upon which the category A claim (the claim filed by the claimant) was dismissed and the determination of legal relief, if any, that may be available to the category A Claimant under the applicable law as a result of the allegedly irregular manner in which the claimed property was allocated to the category C Claimant, has been addressed to the competent local court.
With the same decision the category C Claimant (the first respondent in this civil case) was given the possession of the disputed property.

The representative of second and third respondent in the preliminary hearing alleged that there is absent of their legitimacy as a party in this civil dispute. Since he in his final speech stated that the property, disputed apartment, is under ownership of the third respondent the court concluded that the conditions for their passive legitimacy are met.

Pursuant to the Article 160 paragraph 5 of the LCP the court at first emphasizes that according to the UNMIK Regulation No. 1999/23 (hereinafter: UNMIK/REG/1999/23) and UNMIK Regulation No. 2000/60 (hereinafter: UNMIK/REG/2000/60) 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") is an independent organ of the Directorate which shall 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.

Furthermore pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.

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 may be made to any court or tribunal in Kosovo except in accordance with UNMIK Regulation No. 1999/23 and the present regulation.

The Commission is entitled to refer issues arising in connection with a claim, which are not within its jurisdiction to a competent local court or administrative board or tribunal as foreseen in Section 22.1 of the UNMIK/REG/2000/60.

Also pursuant to the Section 2.5 of the UNMIK/REG/1999/23 the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not raise the issues listed in section 1.2.

The court determines that afore-mentioned UMNIK Regulations shall be applied in the present civil dispute.

With amended claim the claimant requested from the court to verify that the ruling on allocation of the apartment for use, number 04, 360-82/121 dated 21 April 1998 is lawful, and due to this the claimant is entitled to become the barrier of the apartment's right in terms of use and permanent possession of the apartment which is situated in Prishtina, quarter "Dardania" street X, block X, part X, apartment number X, in total size of 60.83 square meters (m2).
He also requested to annul all acts concerning the leasing of the apartment to the first respondent taken by third respondent – as unlawful acts, likewise the contract on privatization, OV nr. 955/99 dated 21 May 1999 and the contract on purchase and sale Ver. Nr. 10835/2007 certified at the Municipal Court in Prishtina.

When testing and deciding on such amended claim request the court has to emphasize two crucial facts.

The first one is a question does the claimant has a legitimacy of a party in this civil proceeding as regards to the second part of his statement of the claim.

Since the claimant's claim as category A claimant was refused by Decision on Reconsideration the court cannot find the claimant as "interested person" pursuant to the Article 109 Law on Contracts and Torts.
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 annul all acts concerning the leasing of the apartment to the first respondent taken by third respondent – as unlawful acts, likewise the contract on privatization, OV nr. 955/99 dated 21 May 1999 and the contract on purchase and sale Ver. Nr. 10835/2007 certified at the Municipal Court in Prishtina. Upon this request, if it be approved, the claimant would assert a right to confirm that he is holder of occupancy right of the flat.

But the court has to emphasize again that this claim; to confirm he is holder of occupancy right of the flat; has been decided and refused by HPCC by Decision on Reconsideration Request no. HPCC/REC/92/2007 dated 13 April 2007 issued by HPCC (hereinafter: Decision on Reconsideration).

And since pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of the Commission are binding and enforceable and cannot be reviewed by the court the claimant did not prove that he can assert a right or any other benefit in case the contract on buyout would be declared as invalid.

The second one is the question if the claim request filed by the claimant is in compliance with the Decision on Reconsideration.

The claimant's claim filed with HPCC was considered as category A claim according to the Section 1.2 of the UNMIK/REG/1999/23 and Section 2.2 of the UNMIK/REG/2000/60.

Pursuant to the Section 2.2 of the UNMIK/REG/2000/60 any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right or compensation.

A category A Claimant who seeks restitution of a property right must show that:

- he or she had a property right to residential house or apartment;
- the property right is capable for restitution;
- the right was revoked or lost;
- the loss or revocation took place between 23 March 1989 and 24 March 1999; and
- the loss or revocation was a result of discrimination.

It is considered that the claimant has acquired an occupancy right if he or she:

- has a decision taken by the allocation right holder to allocate the apartment to him or her;
- has entered into a valid contract on use; and
- has moved into apartment lawfully.

With the Decision on Reconsideration Request no. HPCC/REC/92/2007/A&C dated 13 April 2007 the category A claim was dismissed and the determination of the legal relief, if any, that may be available to the category A Claimant (in this case the claimant) under the applicable law as a result of the allegedly irregular manner in which the claimed property was allocated to or otherwise acquired by the category C Claimant (in this case to the first respondent), be referred to the competent local court.

The court has to emphasize 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 for category A Claimant may take the form of restoration of the property right – restitution in kind or monetary compensation.

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 afore-mentioned provisions of the UNMIK/REG/2000/60 the claimant may request only a monetary compensation if all other conditions are met.

The representative of the claimant in the main hearing was of the opinion that the first respondent gained upon HPCC decision (as C claimant) only possession right and not also right of use which is now the subject of the claimant's claim request.

The court cannot agree with such a conclusion.

Pursuant to the Section 1.2(c) of UNIMK/REG/1999/23 and Section 2.6 of UNMIK/REG/2000/60 read with the definition of property right in Section 1 of the UNMIK/REG/2000/60 a category C claimant who seeks an order for repossession of the property must show that he or she:

(a) had a property right, that is a right of ownership, lawful possession of, right of use for or occupancy right to, the claimed residential property on 24 March 1999;
(b) has lost possession of the property; and
(c) has not voluntary disposed of the property right.

According to afore mentioned provisions it can be concluded that possession right is linked with the right of use and that the first respondent was given the possession right since HPCC established that he had right of use for the claimed residential property.

And since the decisions taken by Commission are binding and cannot be reviewed by court, the court cannot decide on right of use separately from possession right as it is requested in this civil dispute.

However the court has to emphasize that no new evidence were presented in this civil dispute by the claimant as the one there were already submitted in the proceeding at HPCC in view of the allegedly irregular manner in which the claimed apartment was allocated to the category C Claimant (in this case to the first respondent).

From all the above the court according to the provisions of UNMIK/REG/2000/60 and UNMIK/REG/1999/23, specially pursuant to Sections 3 and 4 of the UNMIK/REG/2000/60 has assessed that in this case legal conditions to approve the claim are not met and decided as in enacting clause of this judgment.

The court dismissed the claim in part where the claimant requested from the court to verify that the ruling on allocation of the apartment for use, number 04, 360-82/121 dated 21 April 1998 is lawful, and due to this the claimant acquired right of use and is entitled to permanent possession of the claimed apartment.
This part of the claim has already been adjudicated by HPPC which gave the possession over the apartment to the first respondent and as the court already stated 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.

The court rejected the second part of the claim, by which the claimant claimed annulment of the contract on privatization OV nr. 955/99 dated 21 May 1999 and the contract on purchase and sale Ver. Nr. 10835/2007 certified at the Municipal Court in Prishtina.
The court concluded that the claimant hasn’t produced any evidence that afore mentioned contracts are contrary to compulsory regulations, public policy or fair use pursuant to the Article 103 paragraph 1 of the Law on Contracts and Torts. Furthermore the court cannot find the claimant as interested person pursuant to the Article 109 of the same law.

The claimant and first respondent filed a request for reimbursement of the costs of the proceeding. The representative of second and third respondent did not request reimbursement of the costs.

Pursuant to the Article 452 paragraph 1 of the LCP the court decided that the claimant shall reimburse the costs incurred to the first respondent.

When appraising the expenses pursuant to article 453 paragraphs 1 and 2 of the LCP and Tariffs For the remuneration and compensation of expenses for the work performed by lawyers the court considered all circumstances and decided that the request filed by representative of first respondent in amount of 374,40 EUR; 104 EUR for compilation of the response to the claim and 135,20 EUR per each hearing; is founded.

Legal remedy:

The parties may file an appeal against this judgment in the Court of Appeals through the Basic Court of Prishtinë/Priština within fifteen (15) days of the day the copy of the judgment has been served to the parties.

Basic Court of Prishtinë/Priština
C. no. 301/08
25 November 2013

Drafted in English,
an authorized language

Presiding Judge
Franciska Fiser