THE COURT OF APPEALS – PRISHTINË/PRIŠTINA
Case: AC.nr.3560/2012
Date: 5th December 2013

THE COURT OF APPEALS - PRISHTINË/PRIŠTINA in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, Judge MUHAMED REXHA and Judge MUHARREM SHALA, as panel members;

In the civil case of the claimant JC from Suharekë/Suva Reka, now residing in Belgrade, Serbia, represented by Lawyer RB, against the respondents "B" L.L.C. - Suharekë/Suva Reka, represented by BK – Owner and Director, the MUNICIPALITY of Suharekë/Suva Reka, represented by SG - municipal public attorney, and GA from Suharekë/Suva Reka for "confirmation of right to apartment";

Having received the appeal filed by Lawyer RB on behalf of the JC, claimant in the first instance, appellant in the second instance, against ruling C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012;

After deliberation and voting in a closed panel session held pursuant to Article 190, paragraph 1, first hypothesis in conjunction with Article 208 of the Law No 03/L-006 on Contested Procedure (Official Gazette No. 38/2008), amended and supplemented by Law No 04/L-118 (Official Gazette No. 28/2012) ("LCP") on 5th December 2013;

Hereby pursuant to Article 209, paragraph 1, item d) LCP issues the following

RULING

The appeal of the claimant JC, from Suharekë/Suva Reka, now residing in Belgrade, Serbia filed by his authorized representative Lawyer RB on 28th June 2012 is hereby GRANTED and ruling C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 is ANNULLED with remittal of the case to the first instance court for retrial.

REASONING

I. PROCEDURAL BACKGROUND

1. On 11th February 2011, JC from Suharekë/Suva Reka, now residing in Belgrade, Serbia, as claimant filed against the Enterprise "B" - Suharekë/Suva Reka, represented by its owner BK, the MUNICIPALITY of Suharekë/Suva Reka and GA from Suharekë/Suva Reka as respondents a claim to the Municipal Court of Suharekë/Suva Reka. The claimant alleged of being the holder of occupancy right, i.e.

the right to possess the apartment in Suharekë/Suva Reka, "Car Dušan" Street nr.59, entrance 1, apartment nr.5, II floor, with a surface of 41 m^2, evidenced by Decision HPCC/D/233/2005/C, dated 16th December 2005 and Decision HPCC/REC/76/2006, dated 18th October 2006, issued by the Housing and Property Claims Commission ("HPCC"). After the building with this apartment was demolished in the spring of 2010, a new one was constructed on the same land plot. The claimant tried to inform the first respondent of his right to apartment in the new building based on the one he had in the demolished, but was refused any contact. He sent a written warning to the second respondent with no result. Meanwhile, such new apartment was allocated to the third respondent though he unlawfully used the old apartment and failed in the HPCC proceedings. Further the claimant refers to the *right to respect his home* guaranteed by Article 8, paragraph 1 of the European Convention of Human Rights and Fundamental Freedoms ("ECHR") and the lack of any reasons under Article 8, paragraph 2 ECHR for interference of the public authorities in the exercise of this right that could justify its denial. In *petitum* is requested the court to oblige the first and second respondents to provide the claimant with an apartment in the newly constructed building in Suharekë/Suva Reka, "Car Dušan" St. nr.59, with a surface of 41 m^2, or to compensate him with its market value, as well as to order the third respondent to endure the fulfillment of these obligations within 15 days after the judgment has become final. The claim was registered for adjudication in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka.

2. On 7th April 2011, GA filed his reply to the claim, fully contesting it with requests to the court to dismiss it as inadmissible or to reject it as ungrounded. The objections invoked are that the claimant is not legitimated to seek confirmation of the right on use over the apartment in Suharekë/Suva Reka, "Deshmoret e kombit" Street in the building of the ex post-office with a surface of 41.16 m^2 as the same right belongs to GA according to the final judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006.

3. On 13th April 2011, the MUNICIPALITY of Suharekë/Suva Reka filed its reply to the claim, entirely contesting it and requesting its rejection as ungrounded. This respondent pointed that before the demolition of the building in Suharekë/Suva Reka, "Car Dušan" Street nr.59 all available information for the owners and users of premises in it was collected. In this process GA proved his right on use over the contested apartment by the final judgment C.nr.100/2006 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006, whereas JC did not present any valid evidence. Therefore according to this respondent the dispute could not be twice

decided by the court, being resolved by the aforementioned final judgment, mandatory for all institutions, local and international.

4. On 19th April 2011, "B" L.L.C. replied to the claim denying its passive legitimacy since according to Article 6, paragraph 4 of the Agreement concluded on 27th August 2008, the MUNICIPALITY of Suharekë/Suva Reka had to determine the owners and users of apartments in the old building, and to allocate to them equivalent objects in the new building. "B" L.L.C. renounced any obligations regarding the return of the former residents, the issuance of allocation decisions in their name and the transfer of the ownership over the new apartments.

5. By ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012, the claim of JC was dismissed as inadmissible since the object of its statement has been already adjudicated (*res judicata*), ordering each party to bear its procedural expenses. In the reasoning, the course of the first instance proceeding was summarized. Reiterated was the explanation of the representative of the claimant in the preliminary hearing for the claim in C.nr.28/11 being filed for the same apartment as the one decided by judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006. In view of this clarification deciding the *res judicata* objection of the second respondent and also acting *ex officio,* the first instance court concluded that the claim should be dismissed as inadmissible pursuant to Article 166, paragraph 2 LCP as *"the issue – subject of contest had been decided by judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006, final as of 26th June 2006".*

6. Ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 was served pursuant to Article 110, paragraph 1, first sentence LCP to all parties, including to the claimant on 8th June 2012.

7. On 22nd June 2012, Lawyer RB sent by post an appeal on behalf of the claimant JC to the District Court of Prizren against ruling C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 challenging it on the grounds of substantial violations of the provisions of the contested procedure - Article 181, paragraph 1, item a) in conjunction with Article 208 LCP, erroneous and incomplete determination of the factual state - Article 181, paragraph 1, item b) in conjunction with Article 208 LCP, and erroneous application of the substantive law - Article 181, paragraph 1, item c) in conjunction with Article 208 LCP. The request to the second instance court is to annul the ruling with remittal of the case to the first instance court for re-adjudication.

8. In compliance with Article 187, paragraph 1 in conjunction with Article 208 LCP copies of this appeal were served to the appellates, but no replies were submitted within the 7-days deadline. Hence, pursuant to Article 188, paragraph 1 in conjunction with Article 208 LCP on 23rd July 2012 the appeal with the file was sent to the District Court of Prizren and registered as AC.nr.323/12. Being non-completed on 31st December 2012, pursuant to the transitional rule of Article 39, paragraph 1 of the Law No. 03/L-199 on Courts (Official Gazette No 49/11) this second instance civil case became on 1st January 2013 a case of the Court of Appeals, re-registered under a new file number – AC.nr.3560/12.

9. By Decision ref.nr.2013.OPEJ.0321-001 of the Vice President of the Assembly of EULEX Judges, dated 16th July 2013, AC.nr.3560/12 of the Court of Appeals was taken over by EULEX and assigned to a mixed three-judge appellate panel according to Article 5, paragraph 1, item c), paragraphs 4, 5 and 7 of Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. The Presiding EULEX Civil Judge was assigned by the President of the Assembly of EULEX Judges with Decision ref.nr.2013.OPEJ.0321-001, dated 16th July 2013. The Kosovo Judges – panel members were designated by the President of the Court of Appeals with Decision AGJ. I.nr.306/2013, dated 19th July 2013.

10. Being legally composed in conformity with the specific requirements of Article 5, paragraphs 1, 4, and 5 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, this panel of the Court of Appeals is empowered to decide AC.nr.3560/12 based on its general second instance competence in civil cases under Article 15, paragraph 2 LCP and Article 18, paragraph 1, sub-paragraph 1 of the Law No.03/L-199 on Courts.

II. ADMISSIBILITY OF THE APPEAL AND THE SECOND INSTANCE PROCEDURE

11. No procedural impediments exist for adjudication of the appeal. *At first place*, the challenged ruling being for dismissal of the claim as per Article 387, paragraph 1, item w), Article 166, paragraph 2 and Article 391, item d) LCP is appealable based on the general clause of Article 206, paragraph 1 LCP in so far there is no provision prohibiting this legal remedy against it. *At second place*, the appeal is not *belated* as per Article 186, paragraph 2 in conjunction with Article 210 LCP. Ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2006 was served to the representative of the claimant under Article 118, paragraph 1, first sentence LCP on 8th June 2012. His appeal was sent by post on 22nd June 2012 which date pursuant to Article 127, paragraph 2, first sentence LCP should be considered the one of its

filing to the court. In compliance with Article 127, paragraph 1 LCP it was lodged in due time prior to the expiry of the 15-day time period prescribed by Article 176, paragraph 1, first sentence in conjunction with Article 208 LCP on 23rd June 2012. *At third place,* it is not *impermissible* under Article 186, paragraph 3 in conjunction with Article 208 LCP. It was filed by Lawyer RB as representative of the claimant authorized by power of attorney, dated 6th March 2012. The appellant being party in the first instance has the procedural right and also the legal interest to challenge the ruling for its termination. No waiver of the right to appeal or withdrawal of the appeal under Article 177 in conjunction with Article 208 LCP was declared by this party. *At fourth place*, the appeal has the requisites of Article 178, items a) – d) in conjunction with Article 208 LCP; its content *is not incomplete* as per Article 179, paragraph 1 in conjunction with Article 208 LCP. Therefore, there are no grounds for inadmissibility of the appeal and the second instance procedure initiated by it.

III. APPELLATE REWIEW OF THE CHALLENGED FIRST INSTANCE RULING

12. Within the appellate review, the second instance shall examine the challenged ruling on the grounds indicated in the appeal, as well as *ex officio* for the violation(s) enumerated in Article 194 in conjunction with Article 208 LCP.

Substantial procedural violation of Article 166, paragraph 2 LCP

13. By the appealed ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 the claim of JC was *"dismissed as inadmissible having as an object of its statement an adjudicated issue"*. Article 166, paragraph 2 LCP was the only legal ground applied for dismissal of the claim as *res judicata* with termination of the proceedings without reliance to any other provision.

Res judicata – general characteristics, functions and limits

14. The protection against duplication of proceedings determinative for civil rights is one of the specific safeguards associated with the general guarantee of the *right to a fair hearing* under Article 6, paragraph 1, first sentence ECHR, directly applicable in Kosovo pursuant to Article 22 of the Constitution. The aim is to prohibit repetition of such proceedings that have been concluded by a final decision – one that has acquired the force of *res judicata* when irrevocable upon ordinary legal remedies because the parties have exhausted them or have permitted the time-limits to expire without availing themselves of their application (*Nikitin v. Russia*, no. 50178/99, § 37, ECHR 2004-VIII). The judgment becomes *res judicata*, when it is final, unappealable, and otherwise legally irreversible under the domestic law. On reverse logic, the judgment

is not final for the purposes of *res judicata* when it is being appealed or the time-limits for perfecting the appeal have not yet expired (*Blecićv Croatia*, no. 59532/00, ECHR 2004-VIII). The European Court of Human Rights ("ECtHR") has stated in its case-law that *the right to a fair hearing,* interpreted in the light of the fundamental principles of rule of law and legal certainty, encompasses the requirement where the courts have finally determined an issue, their decision not to be called into question (*Brumărescu v. Romania*, no.28342/95, § 61, ECHR 1999-VII; *Kondrashov v. Russia*, no. 2068/03, § 27, ECHR). The *repetitive* aspect of the trials and/or judgment(s) pronounced in them is central in this regard – there could be no violation of the *right to a fair hearing* or generally of *the right to a court*, where the two sets of proceedings *are not cumulative* on a single claim (*Nikitin v. Russia*, no. 50178/99, § 35, ECHR 2004 - VIII).

15. Indeed the *res judicata* is one of the main legal consequences produced by each non-appealable judgment, regardless of the type of claim and the outcome of the case. The principle dictates that where a civil dispute is examined on the merits by the courts, it should be decided once and for all. It synthesizes the protection granted and the sanction imposed in the contested procedure to safeguard the material subjective rights, affected by dispute. However, it does not create these rights, nor could it be equalized to law in the case. In line with the principle of legality enshrined in Article 2, paragraph 2 LCP, the *res judicata* itself is based on the law, subordinates to all its requirements, only restoring the regulatory effect it has on the litigious circumstances. Hence, the *res judicata* cannot transform the real state - no declaratory judgment under Article 254, paragraph 1 LCP makes a non-existent right or legal relationship existing and *vice versa*. The *res judicata* is not irrefutable legal presumption for truthfulness of what is stated in or determined by the judgment. Positively it obliges the parties and all public institutions to take into account and respect it; negatively it prohibits the court, if seized once again with the same dispute, to decide it on the merits (*non bis in idem*).

16. In line with the protective function the contested procedure exercises over the material right in litigation, the *res judicata* consists first and foremost in the obligation of the *parties* to cease the resolved dispute. Except by extraordinary legal remedies, if available, none of them could further officially challenge what has been become *res judicata*. However, it is *only the parties in the decided concrete case* that have this obligation – they are to respect this state of definitiveness and indisputability as it is set out *between them*, and not *erga omnes*. The final decision being binding for the *parties* is basis for their future concerted behavior on the *res judicata* issue, and *vice*

versa being non-binding for *third persons* is not eligible to produce this regulatory legal effect on them as non-participants in the finished litigation. These limits bear the next main component of the *res judicata* – the non-resolvability of the once resolved dispute. Being obliged not to contest the adjudicated issue both parties, but only the parties equally lose for the *material* right–subject of *res judicata* the *procedural* right to pretend it in new proceedings. Being *absolute negative procedural prerequisite,* it makes inadmissible any subsequent duplicating claim as it is *ex lege* extinguished by the *res judicata* formed with the finality of the court decision on the primary/original already resolved claim. Thus the *res judicata* constitutes a procedural impediment for any trial *de novo* between the same parties on the same dispute. This non-resolvability safeguards the *res judicata* from the danger of having a conflicting decision on the newly filed claim, overlapping in its essential elements the one already adjudicated.

17. The ECtHR jurisprudence has always recognized as compatible with Article 6, paragraph 1 ECHR the limitations existing in all national legal systems for the *res judicata* effect *ad personam* and as to the material scope *(Kehaya and Others v. Bulgaria, nos. 47797/99 and 68698/01, § 66, 12th January 2006; Esertas v. Lithuania, no.50208/06, § 22, 31st August 2012).* Consequentially, final judgments are considered preclusive only for re-examination of *the same dispute between the same parties.* Contrariwise, they are not conclusive for disputes on *the same subject between different parties* or *between the same parties on a different subject matter.* To sum up, the *res judicata*, regardless of its intensity, is far not *absolute* but *restricted* in its effect, having both a limited scope *ad personam* and a limited subject-matter scope (except for particular categories of judgments, such as those on civil status, binding *erga omnes*).

18. These *res judicata* limits are inherent to the Kosovo civil litigation. According to Article 2, paragraph 1 LCP the court in contested proceedings shall decide *within the scope of the claims submitted by the parties to litigation.* Pursuant to Article 166, paragraph 1 LCP a judgment that may not be appealed shall become final *only in respect of what has been decided by the judgment on the claim and counterclaim.* Based on Article 167, paragraph 1 LCP a *final judgment shall produce a legal effect only between or among the litigants,* except where due to the nature of the contested relationship or subject to a provision of the law it produces an effect against third parties. Article 167, paragraph 2 LCP extends the finality of the judgment to the *status of the legal relationship at the time of conclusion of the main hearing.* Article 166, paragraph 2 LCP has to be applied not isolated but systematically read with all these norms regulating the finality of the judgment and its consequences. Accordingly, the

Kosovo jurisprudence has been always non-controversial that the issue is *res judicata* only if *cumulatively* exist *subjective identity* – sameness of the parties to the litigation, and *objective identity* – sameness of the statement of the claim and sameness of its factual ground, as decided in the first case and as pending in any subsequent case.

19. ***Objective limits of the res judicata*** – this is the subject-matter for which the *res judicata* applies – the material right which the court has decided, granting or rejecting it as per Article 252 LCP. If the scope of the claim has been complied with and not exceeded with the judgment, its *res judicata* corresponds to the subject-matter of the case – thus *decided* shall be the *principal and ancillary matters* as per Article 166, paragraph 1 LCP, while the preclusion of Article 166, paragraph 2 LCP is valid for this *res judicata* issue – the contested material right, decided in the enacting clause as per Article 160, paragraph 3 LCP, and individualized in it by its content, titular, legal classification, size, etc. Article 166, paragraph 3 LCP sets out the only exception in this regard, extending *the res judicata* on the decision included in the enacting clause as per Article 160, paragraph 3 LCP on the respondent's right for compensation with the claimant's claim introduced by a *set-off objection* in the proceedings without a counterclaim. Beyond these objective limits no *res judicata* is formed, whereas the preclusion of Article 166, paragraph 2 LCP does not act.

20. ***Temporal limits of the res judicata*** – as explicitly stipulated by Article 167, paragraph 2 LCP the finality of the judgment shall be bound by the status of the legal relationship *at the time of conclusion of the main hearing* as per Article 436 LCP. This is the relevant moment as of which the court determines whether the contested right exists or not. This is why if it has been confirmed with *res judicata*, it could not be later challenged by facts that have occurred prior to this moment. While, *the res judicata* determines the legal relationship, it could not prevent its future development, and does not freeze its state. Both factually and legally all changes occurring after the date of completion of the main hearing could not be taken into account by the court, and hence the *res judicata* formed by its judgment cannot and does not prospectively cover them. Not extinguished by it, these newly occurred facts may serve as basis for a new admissible claim, referring to a period of the contested right, succeeding, and not preceding the *res judicata*.

21. ***Subjective limits of the res judicata*** – they delineate the circle of persons that could not challenge the judicially confirmed right as existing or to pretend judicially denied right as non-existing, being obliged to conform their future behaviour with the legal state finally determined by the court. These are the persons bound by the *res judicata;* in respect to them *the res judicata* is valid; they are *the res judicata* legal

addressees. The circle of these persons, however, is not unlimited. The *res judicata* is not valid *erga omnes* – contrariwise, though very intensive, as a rule *its legal effect is produced between and among the litigants in the case.* Article 167, paragraph 1 LCP is explicit on that point without ambiguity. This is a just restriction. Only the *parties* have had the opportunity in the proceedings to present facts, to adduce evidence and to invoke legal arguments thus influencing the content of the judgment. In contrast, the *third persons* non-participating in the case have had zero procedural opportunity to exert any influence on its outcome. The judgment might be erroneously rendered – moreover, it might be a result of a simulative trial. If the third persons are subjected to its *res judicata*, they will be unjustifiably compromised, and simulative cases will be stimulated. Thus everyone willing to appropriate alien right may sue a freely chosen illegitimate respondent to obtain a judgment, that could formally enter into force as opposable to the real titular of the right. To avoid this fully unacceptable result Article 167, paragraph 1 LCP limits the legal effect of the final judgment to the *litigants* in the case only. By this term the norm means *the opposing parties* in the proceedings – claimant(s) *v.* respondent(s). Pursuant to Article 274, paragraph 1 LCP if the judgment must also apply to a *third party*, the latter is treated as a *consolidated joint litigant of the main party* it has joined to support as per Article 271, paragraph 1 LCP. To sum, the *res judicata* applies only between the parties having an antipode procedural status, being inapplicable between those standing on the same side of the proceedings. *Per argumentum ad contrario* from Article 167, paragraph 1 LCP *all third persons* that have not acquired the procedural status of a party in the case are not bound by the *res judicata* of the final judgment rendered in it and are not its addressees. Hence, any such third person remains entitled to file a new claim for the right already granted or rejected with *res judicata* between the parties in the finished case. In respect to such third person the *res judicata* does not even act as commonsensical assumption for compliance of the real legal state with the one determined in the trial held without his/her participation.

22. The *res judicata* is not to be equalized to the *legitimating effect* of the final judgment. The latter based on the public trust in it, upon errors in the facts or the law may produce fiction, detrimental to the actual titular of the contested right. If the former has missed to intervene in the trial for this right held in his/her *absentia,* he or she can still defend against the legitimating effect of this final decision by filing any type of claim (identical, similar or totally different) in new contested proceedings.

23. The *res judicata* produced by each final decision of competent jurisdiction is to be distinguished also from its *evidentiary effect.* Insomuch its reasoning contains

facts, established as proven or denied, these findings are only *circumstantial* evidence for the respective facts. Though contained in a public document, they can always be challenged for being *inaccurate* pursuant to Article 329, paragraph 3 LCP, do not have mandatory probative value and the court in subsequent proceedings can freely assess them as any other piece of evidence. Or, while the *res judicata* is valid only for the *contested right between the parties*, that may not be incidentally refuted, and is to be respected, the *evidentiary effect of the decision* for the facts in its reasoning can be opposed to third persons and impugned incidentally in next proceedings.

24. As noted , the *res judicata* impedes the renewal of the dispute by the institution of new judicial proceedings on it as Article 166, paragraph 2 and Article 391, item d) LCP imperatively oblige the court to dismiss *ex officio* any claim that repeat the one already adjudicated in a final form. However, such dismissal should be ruled after conscientious and careful comparison of the finished and pending case and found *full identity of the parties and the subject–matter* of the two sets of proceedings. *At first place,* the contest newly brought before the court must be the same in any aspect to the one decided. The right – subject of *res judicata* in the finished case must overlap the right – subject of the new case in its individualizing essential characteristics. This means both identity of the statement of the claim and identity in the factual situation. This duplication mandatory as per Article 166, paragraph 2 read in conjunction with Article 160, paragraph 3, Article 166, paragraph 1 and Article 167, paragraph 2 LCP is excluded if there is difference in the *ground* of the claim with *res judicata* and the one under adjudication in the new case, the *petitum* and/or the material *period of time*. *At second place*, for the *res judicata* to be a procedural impediment for a new trial, requisite is also *subjective identity* of the two sets of proceedings - the litigants in the second case must be addressees of the *res judicata* in the first case. It is not needed all persons – parties in the finished proceedings to be parties in the newly instituted ones – the participation of some of them suffices. On the other hand, the involvement in the new trial of a person–non-addressee of the *res judicata* does not extinguish it for the ex-litigants bound by it. The subjective identity may be only *partial* and not full for the *res judicata* to apply. Only where such duplication in terms of *parties, as well as subject-matter* is found between the current and the previous proceedings, the new claim is *res judicata*. Contrariwise, without such objective and subjective duplication, the two sets of proceedings could not be concurring, the decisions in them could not be conflicting – hence, the *res judicata* could not block as a procedural obstacle the new trial, while the claim in it being non-decided is admissible and as such falls outside of Article 166, paragraph 2 and Article 391, item d) LCP. It does not give rise

to the repetition envisaged in these two provisions as identity of the parties, identity of the statement of the claim and identity of the factual situation. If there is a difference of any of these elements, the *res judicata* of the final judgment in the first case could not be violated and hence is not to be protected by termination of the second case. The irrevocability entailing from the legal certainty principle remains guaranteed in the statutory limits of the formed *res judicata*, also based on law. In its consequences the finality of the judgment is far not absolute and the legitimate reliance upon its *res judicata* should not be misused.

25. The application of the *res judicata* effect of a final judgment within its statutory limits, objective, subjective and temporal, is emanation of the legal certainty principle itself. Its non-application beyond these limits does not constitute a departure from it, justifiable with circumstances of a substantial and/or compelling character (*Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX, *Salov v. Ukraine*, no.65518/01, § 93, ECHR 2005-VIII; *Protsenko v. Russia*, no. 13151/04, § 26, 31 July 2008). The legal certainty principle is not thus set aside but respected in proceedings, which although related, are not repetitive in objective, or subjective terms, while the interests of all parties involved are stuck in fair balance with the need to ensure proper administration of justice (*Nikitin v. Russia*, no. 50178/99, § 59, ECHR 2004-VIII, and *Kulkov and Others*, § 27).

Judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 vis-à-vis C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka

26. Turning to the circumstances of the present case, the claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka does not duplicate the one adjudicated by the final judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 as required by Article 166, paragraph 2 LCP.

Lack of objective identity under Article 166, paragraph 2 LCP

27. C.nr.100/06 to the Municipal Court of Suharekë/Suva Reka was initiated by a claim filed on 13th April 2006 by GA from Suharekë/Suva Reka as claimant against the MUNICIPALITY of Suharekë/Suva Reka as respondent. The facts alleged in it were that in 1984 GA was allocated a two-room apartment in the building of the old post office in Suharekë/Suva Reka at the II floor, nr.5, with a surface of 41.16 m^2 upon his request Nr.1493, dated 6th November 1984 to the Commission for Allocation of Apartments at the Secretarial for Internal Affairs-Suharekë/Suva Reka with non-signed handwritten resolution on it that "the *apartment was allocated on 23.11.1984*".

The lack of respective Decision for allocation of this apartment while admitted by GA in the claim was justified with its loss and non-availability in the archive of the Police Station-Suharekë/Suva Reka, kept for documentation after 1999 as per its Letter, dated 28th March 2006. Also alleged in the claim *was the usage of the apartment by GA after 1984* according to Verification Nr.66 issued by the Municipal Communal Enterprise-Suharekë/Suva Reka on 2nd April 2001, List Nr.135 of the users of socially -owned apartments in the Municipality of Suharekë/Suva Reka, dated 17th April 1990 with his name appearing under nr.85, payment receipt Nr. 342/12, dated 29th October 1985 for rent paid by GA for the months II – X 1985, and Conclusion 03 Nr. 360-380 of the Department for Urbanism, Communal-Residential and Housing Affairs - Suharekë/Suva Reka, dated 4th April 1995 permitting execution by empting from people and items the socially-owned apartment nr.5 in Suharekë/Suva Reka, "Car Dušan" Street nr.59, to be carried out against GA on 12th April 1995. The *statement of the claim* was the court to confirm that GA since 1984 has been the permanent user of the apartment in the building of the old post office in Suharekë/Suva Reka, II floor, nr.5, with a surface of 41.16 m^2 and to oblige the MUNICIPALITY of Suharekë/Suva Reka as respondent to recognize this right of permanent use.

28. C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka was tried in main hearing on 19th May 2006 without any precision, modification and/or amendment of the claim. The documents attached to it were administered in the probative procedure without any other new facts or evidence presented by the parties in the proceedings.

29. By judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 it was verified that GA since 1984 is the permanent user of a two-room apartment in the building of the old post office in Suharekë/Suva Reka, "Deshmoret e kombit" Street, II floor, nr.5, with a surface of 41.16 m^2 *(first sentence of the enacting clause)*. The Municipality of Suharekë/Suva Reka as respondent was obliged to recognize this right of permanent use to the claimant GA *(second sentence of the enacting clause)*. In the *reasoning* based on Verification Nr.66 of the Municipal Communal Enterprise - Suharekë/Suva Reka, dated 2nd April 2001 and List Nr. 135 of the users of socially-owned apartments in the territory of the Municipality of Suharekë/Suva Reka, dated 17th April 1990 it was established that GA had been using the apartment since 1984 without obstruction by anyone. Quoting Article 11 of the Law on Housing Relations (Official Gazette of the SAPK No. 11/83, 29/86 and 42/86) ("LHR") *that citizens shall acquire the occupancy right as of the day of lawful moving into the apartment*, the Municipal Court of Suharekë/Suva Reka found the 1984

settlement of GA in the aforementioned socially-owned apartment as sufficient for acquisition of the right to its permanent use.

30. Becoming non-appealable on 26th June 2006 and thus final as per Article 333, paragraph 1 of the Law on Contentious Procedure (Official Gazette of the SFRY No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 and Official Gazette of the SRS No. 27/92, 31/93, 24/94, and 12/98) ("LCP 1977"), judgment C.nr.100/2006 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 formed its *res judicata* only over this principle claim decided by it as per Article 187, paragraph 1 LCP 1977 by confirmation of the right to permanent use of GA over the two-room apartment in the building of the old post office in Suharekë/Suva Reka, "Deshmoret e kombit" Street, II floor, nr.5, with a surface of 41.16 m^2 pursuant to *Article 11 LHR based on his possession since 1984 of this social property.*

31. Non-likewise, the claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, as detailed in paragraph 1 above, contains allegations of JC for being *"the holder of the occupancy right, i.e. right to possession of the apartment in Suharekë/ Suva Reka, "Car Dušan" Street, I entrance, II floor, nr.5, with a surface of 41 m^2"* evidenced by Decision HPCC/D/233/2005/C, dated 16th December 2005 and Decision HPCC/REC/76/2006, dated 18th October 2006. The building with the said apartment was demolished in 2010 and a new one was constructed on the same plot by "B" L.L.C. based on Agreement with the Municipality of Suharekë/Suva Reka. JC considers himself entitled with *"the right to apartment in the new building based on the right to apartment in the destroyed one."* "B" L.L.C. and Municipality of Suharekë/Suva Reka, first and second respondents in the case, however, refused to recognize his entitlement; instead they treated GA, the third respondent, as holder of such right, though he unlawfully used the apartment and failed to legitimate himself in HPD/HPCC proceedings. Any eventual reference by the respondents in this regard to a decision of any other authority is challenged by the claim as ungrounded since JC based his right on Decisions of HPCC which being binding and enforceable according to UNMIK Regulation No. 1999/23 should not be subject to review by other judicial or administrative authority in Kosovo. The request to the court in the *statement of this claim* is to oblige the first and second respondents to provide the claimant with an apartment in the new building in Suharekë/Suva Reka, "Car Dušan" Street nr.59, with a surface of 41 m^2, or to compensate him with an amount equal to its market value, as well as to order the third respondent to endure the fulfillment of these obligations.

32. This juxtaposition exhibits *objective non-identity* of C.nr.100/06 and C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka. The disputes in these two civil cases are different. The question posed in C.nr.28/11 – *if JC is entitled to compensation with apartment in the newly constructed building based on possession of the apartment in the destroyed building in the period August 1995 – March 1999* does not repeat the question solved with *res judicata* in C.nr.100/06 that *GA used the apartment in the old building in the period November 1984 – April 1995*. The duplication in the subject-matter explicitly premised by Article 166, paragraph 2 LCP as a prerequisite for the *res judicata* inadmissibility under Article 391, item d) LCP is missing in C.nr.100/06 *vs.* C.nr.28/11; this by itself excludes the application of these provisions and makes legally non-based the *res judicata* dismissal of the claim in the second case. It is a stance non-controversially re-affirmed in Kosovo jurisprudence that the *res judicata* objection is grounded if there is *identity of the parties, identity of the statement of the claim, and identity of the factual ground*. The difference in any of these aspects of the two sets of proceedings – finalized *vs.* newly instituted ones - makes the *res judicata* objection ungrounded. C.nr.100/06 and C.nr.28/11 are in divergence with respect to all these elements.

33. ***Different factual situation.*** There is no objective identity of the two juxtaposed cases at first place for the lack of *sameness in the factual ground* of the claims – their subject-matter. Decisive is the difference in the factual situation in these proceedings as life events, objectively occurred in the past, regardless of their legal qualification. *Firstly*, in *C.nr.100/06* the facts alleged in the claim and determined by the judgment rendered by the Municipal Court of Suharekë/Suva Reka were that on 23rd November 1984 GA was allocated an apartment located in the building of the old post office in Suharekë/Suva Reka at the II floor, nr.5, with a surface of 41.16 m^2 by the Secretarial for Internal Affairs - Suharekë/Suva Reka upon his submission Nr.1493, dated 6th November 1984; this usage continued in the years after, evidenced by List Nr.135 of the users of socially-owned apartments in the Municipality of Suharekë/Suva Reka, dated 17th April 1990, Conclusion 03 Nr. 360-380 of the Department for Urbanism, Communal and Housing Affairs-Suharekë/Suva Reka, dated 4th April 1995 permitting eviction of GA on 12th April 1995; after interruptions non-identified in their duration he was again using this apartment at the time C.nr.100/06 was adjudicated. *Secondly*, in *C.nr.28/11* the facts of relevance alleged in the claim are the possession exercised by JC over the apartment from August 1995 till March 1999; the loss of this possession in the 1999 conflict and his reinstatement in it in 2007 based on Decisions HPCC/D/233/2005/C and HPCC/REC/76/2006; the demolition of the building in

2010; the construction of a new building on the same plot. The parallel manifests clearly non-identity of the facts established by judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 as per Article 160, paragraph 4 and Article 166, paragraph 1 LCP *vis-à-vis* the facts - basis of the statement of the claim filed in C.nr.28/11 as per Article 253, paragraph 1, item b) LCP.

34. ***Different petitum***. There is also no *sameness in the petitum of the two claims,* contrary to the duplication requirement of Article 166, paragraph 1 LCP. *Firstly*, in *C.nr.100/06* the request pretended by the claimant and granted by the enacting clause of the judgment as per Article 160, paragraph 3 LCP was to confirm that GA *since 1984 has been the permanent user* of the two-room apartment in the building of the old post office in Suharekë/Suva Reka, II floor, nr.5, with a surface of 41.16 m^2, *Secondly*, in *C.nr.28/11* the statement of the claim of JC under Article 253, paragraph 1, item a) LCP contains two alternative pretences for a *real compensation with an apartment* in the building in Suharekë/Suva Reka, "Car Dušan" Street nr.59, newly constructed after the demolition of the old building at this address in 2010, or *monetary compensation in amount equal to its market value*. Obviously, the first *petitum* the court to confirm the right on use over the apartment in the old building by issuing a declaratory judgment as per Article 252, second hypothesis and Article 254, paragraph 1 LCP in the adjudicated case (C.nr.100/06) *is not equal* to the second *petitum* the court to enforce non-fulfilled obligations for compensation with an apartment in the new building or its market value as per Article 252, first hypothesis LCP in the later instituted case (C.nr.28/11). The comparison exposes *non-identity of the statements of the claims* brought to the Municipal Court of Suharekë/Suva Reka in the two sets of proceedings. Different are the material rights in litigation and the legal protection sought in order to defend them - in C.nr.100/06 - only *res judicata* of a declaratory judgment for confirmation of the right on use over a socially-owned apartment; in C.nr.28/11 – *res judicata* and *executive power* of judgment for enforcement of alternative obligations for real or monetary compensation. Upon such discrepancy between the statements of the two claims the requirement for their full sameness under Article 166, paragraph 2 LCP has not been met – as *petitum* the lawsuit decided in C.nr.100/06 is not alike the lawsuit later laid for adjudication in C.nr.28/11.

35. ***Different temporal limits***. As noted, the *res judicata* is not indefinitely valid in time – its determines the existence/non-existence of the litigious right based on the facts invoked and proven in the proceedings as of the date of conclusion of the main hearing after which the judgment has been rendered and has become final - Article

167, paragraph 2 LCP. Having these temporal limits of its *res judicata,* judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 recognized GA as *user* of the apartment in the building of the old post office in Suharekë/Suva Reka, "Car Dušan" Street, II floor, nr.5, who moved in it on *23rd November 1984*, and was living in it on *19th May 2006*, the date of conclusion of the main hearing in C.nr.100/06. *Precluded* by the *res judicata* of this judgment are the facts based on which the Municipality of Suharekë/Suva Reka as the only respondent in C.nr.100/06 might have objected the aforementioned usage of the apartment by GA. Contrariwise, *non-precluded* by this *res judicata* remain: a) all facts occurred *till 19th May 2006* that any third person could oppose against the claim of GA in C.nr.100/06, e.g. the usage of the apartment in the old building by JC in period August 1995 – March 1999; and b) all facts *after 19th May 2006,* e.g. the finalization of the HPD/HPCC proceedings regarding the same residential property with the entry into force on 18th October 2006 of Decision HPCC/D/233/2005/C and Decision HPCC/REC/76/2006 of the HPCC; the HPD eviction on 20th February 2007; the conclusion of the Agreement on Usage of Construction Land in Social Ownership between the Municipality of Suharekë/Suva Reka and "B" L.L.C. on 27th August 2008; the destruction of the old building in 2010, the construction of the new building on the same plot in the years after, and the allocation of objects in this new building to the owners and right on use holders of premises in the demolished one. The *res judicata* as per Article 167, paragraph 2 LCP determines the status of the legal relationship in litigation at the time of conclusion of the main hearing but does not prevent its supervening development. The legal relationship is not petrified in its state at the moment the judgment has become final. Afterwards it could be changed at any time in any manner as a result of facts newly set in after the finality of the judgment. Following chronologically the formation of the *res judicata*, all such changes do not fall within its scope. If a dispute arises, it could be laid to the court by a claim that could not be inadmissible for the *res judicata* by which prior to these new facts the right, later altered by them, has been determined. The duplication envisaged in Article 166, paragraph 2 LCP is excluded as the new claim is for *another succeeding period* of the right, *not for the preceding period* for which the *res judicata* is valid. This time difference automatically preconditions difference in the subject–matter of C.nr.100/06 *vis-à-vis* the C.nr.28/11, and in the subject-matter of the *res judicata* formed by the final judgment in the first case *vis-à-vis* the one sought for issuance in the second case. Rendered on 19th May 2006, the judgment in C.nr.100/06 is without legal effect *for all facts after this date* related to the usage and possession of the apartment in Suharekë/Suva Reka, "Car Dušan" Street, II floor, nr.5. Its *res judicata* formed on 26th

June 2006, when judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 has become non-appealable and final, is *non-preclusive* for all post-date facts – basis of the claim in C.nr.28/11 with occurrence in the period *18th October 2006* (the date of entry into force of Decision HPCC/REC/76/2006) - *11th February 2011* (the date of initiation of C.nr.28/11). They all chronologically follow the conclusion of the main hearing in C.nr.100/06 on 19th May 2006, the issuance of the judgment in the same case on 19th May 2006 and its entry into force on 26th June 2006. The *res judicata* of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 does not spread over the above listed facts following its formation on 26th June 2006. The *temporal limits* of the *res judicata* of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 restricted up to 26th June 2006 do not coincide with the *temporal limits* of *the claim* in C.nr.28/11 spread out beyond 26th June 2006. The cases are in full *ratione temporis* incompatibility. This *time difference results* in *difference in the subject-matter of the two cases, excluding their objective identity* and making the appealed *res judicata* dismissal impermissible.

36. Concluding, *in objective terms* the issue brought for adjudication in C.nr.28/11 does not repeat the issue already resolved with *res judicata* in C.nr.100/06 – there is *neither identity of the factual ground of the claims in the two cases, nor identity of the statements of these claims* contrary to Article 166, paragraph 2 LCP. The *right on permanent use* of GA over the socially-owned apartment in the old building recognized with *res judicata* in C.nr.100/06 as per its possession as of 23rd November 1984 and 19th May 2006 *does not overlay* the *right to compensation* of JC with an apartment in the new building or its market value pretended in C.nr.28/11 as per his possession over this apartment handed over by HPD eviction on 20th February 2007 in execution of HPCC Decision HPCC/D/233/2005/C. These two material rights – the first already decided with *res judicata* and the second later laid for adjudication - *are distinct from one another in all their individualizing features – ground, content, titular, legal qualification, and time period of existence.* Having such discrepancies, the subject–matter of the *res judicata* in C.nr.100/06 is not alike the subject-matter of the claim in C.nr.28/11. Upon such *objective non-identity,* Article 166, paragraph 2 LCP is non-applicable - the new proceedings in C.nr.28/11 could not be considered initiated based on the claim that has already been determined by a final judgment in C.nr.100/06.

Lack of subjective identity under Article 167, paragraph 1 LCP

37. Subjective identity exists if the *parties* in the newly instituted proceeding are *addressees* of the *res judicata* of the final judgment in the already finished proceeding as per Article 167, paragraph 1 LCP.

38. The claim in C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka was filed by GA as *the claimant vs.* the MUNICIPALITY of Suharekë/Suva Reka as *the respondent.* There is no ambiguity in their individualization and/or procedural status indicated in this claim. By its submission on 13th April 2006 in the written form prescribed for its validity by Article 106, paragraph 1 LCP 1977, GA and the MUNICIPALITY of Suharekë/Suva Reka became *ex lege* litigants in the contested procedure initiated by it as per Article 185 LCP 1977. The claim was not *corrected* or *supplemented* - Article 109, paragraph 1 LCP 1977, neither was it *modified* - Articles 190–191 LCP 1977. Its subjective scope was not changed in the proceedings on any ground. Neither GA, nor the MUNICIPALITY of Suharekë/Suva Reka had ever been *substituted* in their procedural roles; they were not *joined* by new claimant(s) or new respondent(s) in joint litigation under Articles 196 – 197 LCP 1977. There was no *main interference* by any person pretending right(s) over the apartment as per Article 198 LCP 1977. No *third party* participated in the proceedings after *intervention on its initiative* - Article 206 LCP 1977, or after being *imploded by the claimant or the respondent* - Article 211 LCP 1977. Thus the subjective scope of the litigation remained as initially defined by the claim - the dispute was adjudicated with respect to GA as the only *claimant* and the MUNICIPALITY of Suharekë/Suva Reka as the only *respondent.* JC was not *de jure* constituted as a party; JC did not *de facto* participate in the trial; JC was not envisaged in any capacity in the introductory part, the enacting clause or the reasoning of judgment C.nr.100/06 of the Municipal Court of Suharekë/ Suva Reka, dated 19th May 2006.

39. The *res judicata* is not universally valid but restricted within its legally defined subjective limits. The *rule* is set out in Article 167, paragraph 1, first hypothesis LCP - a final judgment shall produce its legal effect *only* between the *litigants*. There are two explicitly provided *exceptions* of this rule – a final judgment shall produce its legal effect against *third persons* due to *the nature of the contested legal relationship* - Article 167, paragraph 1, second hypothesis LCP or *subject to a provision of the law* - Article 167, paragraph 1, third hypothesis LCP. Going back to C.nr.100/06, as the subjective scope of the claim was complied with, and not exceeded, the judgment rendered in the case becoming non-appealable and final on 26th June 2006 entered into force with respect to GA as claimant and the MUNICIPALITY of Suharekë/Suva

Reka as respondent. Its *res judicata* was formed *only between these two litigants in the decided case* as per Article 167, paragraph 1, first hypothesis LCP; they were the ones bound by this *res judicata* as its *only addressees*. Restricted in its legal effect to GA and the MUNICIPALITY of Suharekë/Suva Reka as parties in the resolved dispute, judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 *has not produced legal effect against any third person*. Non-included in the subjective limits of its *res judicata* is JC in particular. *Firstly*, judgment C.nr. 100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 could not be opposed to JC pursuant to Article 167, paragraph 1, first hypothesis LCP since contrary to the requirement of this provision *he was not a party* in the decided case. *Secondly*, there is no particularity of the *nature of the legal relationship in contest* extending the *res judicata* of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 to JC as per Article 167, paragraph 1, second hypothesis LCP. Such expansion could not be justified by *legal succession* since it has not occurred in any form during the proceeding between any of the parties in C.nr.100/06 and JC. In particular, the contested apartment was not alienated by any of the litigants in the course of the dispute in the hypothesis of Article 195, paragraph 1 LCP 1977 - judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva, dated 19th May 2006 could not have legal consequences on JC as acquirer of this litigious object - Article 195, paragraph 2 LCP 1977. Expanded *res judicata* could not derive from dependence of his legal state to that of GA or the MUNICIPALITY of Suharekë/Suva Reka, as they are not accessorial. Since there was *no consolidated joint litigation* for the right on use of the contested apartment between JC and any party in C.nr.100/06, judgment is not applicable to JC pursuant to Article 201 LCP 1977, regardless of his non-participation in the proceeding decided by it. The dispute in C.nr.100/06 is not on civil status and its resolution could not be on *erga omnes* basis for that reason. *Thirdly,* no provision applies the legal effect of a final judgment on the right on use dispute to third persons, non-participants in its adjudication. Summarizing, JC is not bound by the *res judicata* of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 - for the *lack of party's procedural status* as per Article 167, paragraph 1, first hypothesis LCP, for the *lack of particularities in the contested right* as per Article 167, paragraph 1, second hypothesis LCP and for the *lack of a legal provision extending the effect of this judgment to third persons* as per Article 167, paragraph 1, third hypothesis LCP. As this judgment does not apply to JC, without being an addressee of its *res judicata,* he remained *procedurally entitled to file any claim related to the destroyed apartment or its new equivalent against any person*, including the parties in C.nr.100/06 of the

Municipal Court of Suharekë/Suva Reka. The new contested procedure instituted in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka by JC is not inadmissible for *res judicata* as C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka was previously adjudicated *between* GA and the MUNICIPALITY of Suharekë/Suva Reka and *vice versa* was not adjudicated *with respect* to JC.

40. The subjective identity required by Article 166, paragraph 2 LCP here does not exist as *the litigants – the parties with opposite procedural status are not one and the same* in C.nr.100/06, having GA *vs.* the MUNICIPALITY of Suharekë/Suva Reka, *vis-à-vis* C.nr.28/11, having JC *vs.* GA, "B" L.L.C. and the MUNICIPALITY of Suharekë/Suva Reka. Due to this non-coincidence, the *res judicata* in the *first decided case* formed between GA *vs.* the MUNICIPALITY of Suharekë/Suva Reka as its only addressees could not be reproduced by the *res judicata* of the future judgment in the *second non-decided case* as when rendered and final it would become binding for JC *vs.* GA, "B"LLC and the MUNICIPALITY of Suharekë/Suva Reka. This is why the subjective identity demanded for Article 391, item d) in conjunction with Article 167, paragraph 1 LCP to apply could not be justified with the participation of GA and the MUNICIPALITY of Suharekë/Suva Reka in the two sets of proceedings – the *res judicata* in C.nr.100/06 applies *between* them due to their *opposing* procedural capacities of *claimant and respondent* respectively; however, *no res judicata* will be produced *between* them in C.nr.28/11 where they are constituted as *respondents* in joint litigation under Article 264 LCP, having one and the same side of the procedural legal relationship without *Lis Pendens* under Article 262, paragraph 1 LCP against one another. Such subjective identity is in principle excluded if the *claimant and respondent* in the decided case are *both respondents* in the new case – in this personal configuration the *res judicata* formed in the first proceedings could not be re-enacted and thus violated by the *res judicata* pending for formation in the second proceedings since their *ad personam* scope of addressees does not overlay. At the end, since JC did not participate as a party in C.nr.100/06 according to Article 167, paragraph 1 LCP, though final, judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 did not produce any legal effect against him as a third person. Its *res judicata* does not cover JC in subjective terms and being *de jure* non-opposable to him does not make inadmissible his claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka as per Article 166, paragraph 2 LCP.

41. After this juxtaposition of C.nr.100/06 and C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, the second instance court holds that none of the conditions cumulatively required for *res judicata* dismissal has been met – *there is no identity of*

the statement of the claims, there is no identity of their factual grounds and there is no identity of the litigants between these two cases. In the absence of this mandatory sameness, the court of first instance has used Article 166, paragraph 2 LCP to dismiss the *claim filed in C.nr.28/11* even though it does not duplicate *the claim determined by the final judgment in C.nr.100/06* of the Municipal Court of Suharekë/Suva Reka. This *erroneous application* of Article 166, paragraph 2 LCP has resulted in rendering the unlawful *res judicata* dismissal ruling and constitutes a substantial procedural violation under Article 182, paragraph 1 in conjunction with Article 208 LCP – a legal ground under Article 181, paragraph 1, item a) in conjunction with Article 208 LCP to grant the appeal according to Article 209, paragraph 1, item d) LCP.

Decisions of the Housing and Property Claims Commission in DS 602221 vis-à-vis C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka

42. The *res judicata* dismissal by the appealed ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 is equally non-justifiable with the final HPCC Decision HPCC/D/233/2005/C and Decision HPCC/REC/76/2006.

43. On 15th November 1999, UNMIK Regulation No.1999/23 on the Establishment of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) came into force. Its Section 1.2 provides that as an exception of the jurisdiction of the local courts, HPD shall receive, register and refer to HPCC for resolution the claims listed in the provision, *inter alia*: a) claims of natural persons whose ownership, possession or occupancy right to residential real property have been revoked subsequent to 23rd March 1989 on the basis of legislation discriminatory in its application or intent; c) claims by natural persons who were the owners, possessors or occupancy right holders at residential real property prior to 24th March 1999, do not enjoy its possession, where the property has not voluntarily been transferred. Section 2.5, first sentence of UNMIK Regulation No.1999/23 further states that HPCC shall have exclusive jurisdiction to settle the categories of claims listed in Section 1.2.

44. On 8th July 2002, JC filed a claim (No DS602221) under Section 1.2 (c) of UNMIK Regulation No.1999/23 to the HPD/HPCC with factual allegations that he was the *occupancy right holder* of the apartment in Suharekë/Suva Reka, "Car Dušan" Street Nr.59, II floor, nr.5 based on allocation decision issued by the Secretary of Internal Affairs - Suharekë/Suva Reka in May/June 1995 and the contract on use concluded later the same year. These documents, however, were not presented by JC being unavailable for him; instead he submitted payment slips for rental and utilities (telephone and water), issued in his name at the address of the aforementioned

apartment to prove that his family lived in it from August 1995 till March 1999, when they left Kosovo during the conflict and it was later occupied by a third person. The *request* to HPCC was *to return the lost possession of this apartment.*

45. Claim No. DS602221 was granted by HPCC in the first instance by Decision No. HPCC/D/233/2005/C, dated 16th December 2005 issued in terms of Section 22.9 of UNMIK Regulation No. 2000/60 by ordering the claimant JC to be given possession of the apartment, and by obliging any person occupying it to vacate it within 30 days under the threat of eviction in case of failure to comply. The repossession was decided based on Section 1.2 (c) of UNMIK Regulation No 1999/23 and Section 2.6 of UNMIK Regulation No. 2000/60 - HPCC found that even though JC *could not legitimate himself as occupancy right holder* given the lack of allocation decision and contract on use, the documents provided by him for paid rent and utilities suggested *his property right over the claimed apartment at least in the form of possession that was not manifestly unlawful.* In this regard HPCC applied the special definition for *"property right"* in Section 1 of UNMIK Regulation No. 2000/60 introduced only for the purposes of this regulation as including *ownership, lawful possession, right of use or occupancy right.* In accordance with this alternative, reflected also explicitly in Section 1.2 (c) of UNMIK Regulation No.1999/23, claim No DS602221 was granted by HPCC as being filed by JC neither as *owner*, nor as *occupancy right holder*, but as *possessor* of the apartment prior to 24th March 1999, not enjoying its possession any more. GA participated in the HPCC proceedings as respondent who opposed claim No. DS602221 as occupancy right holder of the apartment who lived in it from 1985 till his eviction in 1990 and produced payment slips for rent and utilities. By Decision No HPCC/D/233/2005/C, dated 16th December 2005 (paragraph 19) after verification at Public and Housing Enterprise - Suharekë/ Suva Reka that GA had left the apartment long before 24th March 1999, HPCC found all his objections and documents invalid defence to claim No. DS602221.

46. On 31st March 2006, GA submitted a request for reconsideration of its Decision No HPCC/D/233/2005/C, dated 16th December 2005. It was rejected by Decision No HPCC/REC/76/2006, dated 18th October 2006 for the lack of presented new evidence as per Section 14.1 (a) of UNMIK Regulation No.2000/60 and no material error found in the application of this regulation as per its Section 14.1 (b) – paragraph 5 of the reasoning. Thus the reconsideration procedure was completed as foreseen by Section 25 of UNMIK Regulation No 2000/60. In the absence of further legal remedies provided by UNMIK Regulation No 1999/23 and UNMIK Regulation No 2000/60, Decision No. HPCC/D/233/2005/C, dated 16th December 2005 and Decision No.

HPCC/REC/76/2006, dated 18th October 2006 became final. They were executed by HPD through eviction carried out on 20th February 2007.

47. HPCC was established by Section 2.1 of UNMIK Regulation No 1999/23 as an independent organ of HPD to settle private non-commercial disputes for residential property referred to it by the HPD till the Special Representative of UN Secretary - General determines that the local courts are able to carry out these functions. HPCC is to be acknowledged as a *tribunal* in the meaning of Article 6 (1) of the ECHR, having the main characteristics defined in the jurisprudence of ECtHR (*Bellios v Switzerland* A 132 (1988), 10 EHRR 466; *Cyprus v Turkey* 2001-IV, 35 EHRR 731; *H. v Belgium,* A 127-B (1987) 10 EHRR 339). It was established on the basis and in compliance with the applicable law in Kosovo. It was entrusted with *judicial functions*, taken temporarily from the local courts until transferred back after the end of its mandate. HPCC met the requirements for independence – Section 2.1 of UNMIK Regulation No 1999/23, impartiality-Section 17.12 of UNMIK Regulation No 2000/60, members terms of office–Section 17.3 of UNMIK Regulation No 2000/60, guarantees afforded by its procedure – Sections 18 and 19 of UNMIK Regulation No 2000/60. HPCC had the statutory power *to resolve private disputes* on residential properties *by legally binding decision* on the basis of rules of law and after proceedings conducted in a prescribed manner (*Benthem v Netherlands* A 97 (1985) EHRR 1 PC). This was a substantive litigation on justiciable disputes that could be only settled through judicial resolution. The HPCC decisions could not be set aside by any administrative body (*Cooper v UK* 2003-XII 39 EHRR 171GC), while their enforcement could not be suspended by another public institution based on law (*Van de Hurk v Netherlands* A 288 (1994) 18 EHRR 48). Therefore, being rendered by jurisdiction, upon finality they formed *res judicata* (judgment of the Constitutional Court in Case No. KI.104/10 *Arsić Draža vs. Karacevo* of 23rd April 2012). As any other *res iudicata*, it impedes the renewal of the dispute settled by HPCC by institution of judicial proceedings on it as Article 166, paragraph 2, and Article 391, item d) LCP obliges the court to dismiss *ex officio* the claim duplicating the one finally determined by HPCC in compliance with Section 2.7 of UNMIK Regulation No 1999/23, as well to respect its exclusive jurisdiction under Section 2.5 of UNMIK Regulation No. 1999/23. However, this *res judicata is not extraordinary* - it hinders the next trial only between the same parties on the same subject to allow the final HPCC decision to remain effective, avoiding duality with conflicting decisions of other national jurisdictions.

48. In HPCC proceedings on claim No. DS602221, JC was granted repossession of the apartment in Suharekë/Suva Reka, "Car Dušan" St. Nr.59, II floor, nr.5 as its

possessor in the second hypothesis of Section 1.2 (c) of UNMIK Regulation No 1999/23. According to the basis of this reinstatement, Decisions No HPCC/D/233/ 2005/C and No HPCC/REC/76/2006 while being *res judicata* were determinative for the *possession JC* had over this apartment on 24th March 1999 and *its later loss without voluntary transfer* as per Section 1.2 (c), second hypothesis of UNMIK Regulation No 1999/23 and Section 2.6, first sentence of UNMIK Regulation No 2000/60. These were the only issues that Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006 made adjudicated, defined, beyond dispute, excluding their further re-adjudication or other direct or indirect review as per Section 2.7 of UNMIK Regulation No. 1999/23. Contrariwise, *any other issues,* though related to the apartment in Suharekë/Suva Reka, "Car Dušan" St. Nr.59, II floor, nr.5, *were not determined by HPCC and remained non-precluded for future adjudication.* Namely, Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006 are not *res judicata* on any other property right of JC which is *different from possession* under Section 1, second hypothesis or UNMIK Regulation No 2000/60 in is within the other alternates defined by Section 1, first, third and fourth hypotheses of UNMIK Regulation No 2000/60 - *ownership, occupancy right* or *right on use.* No *res judicata* was formed on the *possession over the apartment after 18th October 2006* when the reconsideration procedure against Decision No HPCC/D/233/2005/C was completed by Decision No HPCC/REC/76/2006. No *res judicata* covers the HPD eviction on 20th February 2007, the conclusion of the Agreement between the Municipality of Suharekë/Suva Reka and "B"L.L.C. on 27th August 2008, the demolition of the old building in 2010, the construction of a new one afterwards and any other fact after 18th October 2006 – the borderline for the temporal limits the *res judicata* of Decisions No. HPCC/D/233/ 2005/C and No. HPCC/REC/76/2006 has. In other words, neither the dispute over the *occupancy right* pretended by JC as acquired over the apartment in the old building prior to 24th March 1999, nor the dispute for its derivative *right to compensation* with apartment in the new building constructed after 2010 have been solved by HPCC. Hence, the claim of JC in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka *based on facts not tackled by HPCC does not restore the dispute settled by HPCC* and is not procedurally barred. The *res judicata* of the Decision No HPCC/D/233/2005/C and Decision No HPCC/REC/76/2006 formed on the claim No DS602221 of JC for *repossession of the apartment in the old building based on pre-24th Match 1999 possession lost in the conflict* according to Section 1.2 (c) of UNMIK Regulation No 1999/23 does not coincide in material and temporal terms with his claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka for *compensation with same size apartment in the new building based on the lost "right to apartment" in the destroyed*

building. This correlation is not the repetition requisite for Article 166, paragraph 2 LCP to apply. The dispute brought in 2011 to the Municipal Court of Suharekë/Suva Reka does not revive the one previously solved by HPCC in 2006. No sameness exists in the factual grounds of the two claims and their statements. The issue solved by HPCC *for reinstatement of JC in possession of the apartment in the old building lost as its possessor till 24th March 1999* is different from the issue now sought for adjudication by the court for compensation *of JC with apartment in the new building constructed after 2010 as a right on use holder of apartment in the old building destroyed in 2010*. Without duplication – material and temporal, the *res judicata* produced by the final HPCC Decisions No. HPCC/D/233/2005/C and No HPCC/REC/76/2006 is not a procedural obstacle under Article 391, item d) LCP the court to resolve the dispute in C.nr.28/11 on the merits without violating the non-resolvability "*non bis in idem*" rule.

49. Therefore, C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka is not a dual trial instituted after the completion of the HPCC case No DS602221 on the same subject-matter. Hence, the first instance judicial proceedings could not be considered lawfully terminated pursuant to Article 166, paragraph 2 LCP for being a prohibited replica of the HPCC proceedings in DS602221. The claim in C.nr.28/11 is not *ex lege* precluded by the *res judicata* of the HPCC Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006; when rendered on it the judgment of the Municipal Court of Suharekë/Suva Reka *could not be impermissible re-resolution of the claim resolved by HPCC* as per Article 182, paragraph 2, item l) LCP. Thus the non-review prohibition of Section 2.7 of UNMIK Regulation No. 1999/23 could not be violated.

50. Summarizing the foregoing, the claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka is not *res judicata* as it has not been finally determined neither by judgment C.nr.100/06 of Municipal Court of Suharekë/Suva Reka, dated 19th May 2006, nor by HPCC Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006. The *requirement for cumulative identity of parties, identity of the factual grounds and identity of the statement of the claims in these proceedings is not fulfilled*. Without such full duplication, the adjudication of the newly brought dispute will not constitute review, rehearing and/or re-examination of any previously solved dispute. C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka does not re-launch any finished set of proceedings, nor is a disguise reopening for re-adjudication of adjudicated issue. In view of all objective, subjective and temporal differences set out above, there could not be controversial decisions, concurrently in force on the same contest. Due to this divergence, the claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka is

not *res judicata;* it has not been decided by any competent jurisdiction in the past; its adjudication does not undermine the irrevocability of any final decision in breach of the legal certainty principle, inherent in Article 6 (1) ECHR.

51. Based on all these considerations, the second instance court finds Article 166, paragraph 2 LCP erroneously applied by the first instance court without the identity prerequisites, needed for its application. This procedural violation is *substantial* as per Article 182, paragraph 1 in conjunction with Article 208 LCP as it has resulted in the issuance of unlawful ruling for dismissal as inadmissible of admissible claim contrary to Article 166, paragraph 2 LCP.

Other grounds invoked in the appeal

52. Unfounded are the other grounds invoked in the appeal not related to Article 166, paragraph 2 LCP. *At first place*, ruling C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 being a procedural decision under Article 142, paragraph 5 LCP *does not contain factual findings and legal conclusions on the merits of the dispute* which automatically excludes its challenging *for erroneous or incomplete determination of the factual situation* as per Article 183 LCP, as well as for *erroneous application of the substantive law* as per Article 184 LCP. *At second place,* the allegations in the appeal regarding the allocation, usage and possession of the apartment are facts – basis of the statement of the claim in C.nr.28/2011 of the Municipal Court of Suharekë/Suva Reka as per Article 253, paragraph 1, item b) LCP. They do not constitute grounds for challenging the legality of ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2013 as per Article 181, paragraph 1, items a) – c) in conjunction with Article 208 LCP and therefore shall not be examined within the appellate review. *At third place*, it is not true that the HPCC Decision No HPCC/D/233/2005/C has confirmed *the right on use* or *the occupancy right* of JC over the socially-owned apartment in Suharekë/Suva Reka, "Car Dušan" St. Nr.59, II floor, nr.5. As JC presented only payment slips for rental and utilities and not allocation decision and/or contract use, HPCC, as explicitly stated in Decision No HPCC/D/233/2005/C (para 19), recognized him *only as possessor* of this apartment *with possession on 24th March 1999 not manifestly unlawful* as per Section 1.2 (c), second hypothesis of UNMIK Regulation No 1999/23. On the contrary, neither in first instance, nor in the reconsideration phase HPCC recognized JC as *occupancy right holder* of the apartment as per Section 1.2 (c), third hypothesis of UNMIK Regulation No 1999/23. *At fourth place*, impermissible in the present appellate review of ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 are

all the arguments in the appeal that the claim in C.nr.100/06 should have been dismissed *ex officio* by the Municipal Court of Suharekë/Suva Reka as falling within the exclusive jurisdiction of HPCC under UNMIK Regulation No 1999/23. Since this constitutes a substantial procedural violation under Article 354, paragraph 2, sub-paragraph 3 LCP 1977 in issuance of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006, its review would have been permissible only in deciding an *appeal* against the same judgment as per Article 365 LCP 1977, or extraordinary legal remedy – *revision* as per Article 386 LCP 1977 or *protection of legality* as per Article 408 LCP 1977. This legal ground for challenging judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 could not be subject of appellate review in AC.nr.3560/12 since pursuant to Article 194 in conjunction with Article 208 LCP it is limited to ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012. This panel being empowered to decide *only the legality of the ruling appealed in the present second instance proceedings* as per Article 206 – 210 LCP, is *without any competences for review, incidental or direct, of any other court decision.* This is why the panel shall not consider the appeal filed against ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 in the part in which it is an appeal in disguise against judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006. *At fifth place*, in the HPCC proceedings on claim No DS602221 of JC, GA participated as *respondent* with objections corresponding to the legal qualification of the claim Section 1.2 (c) of UNMIK Regulation No. 1999/23. Based on the admission of GA and after verification at the Public and Housing Enterprise - Suharekë/Suva Reka, HPCC held his defence invalid *not for illegal occupation* of the apartment, but *for the loss of its possession long before 24th March 1999* (Decision No HPCC/D/233/2005/C, para 19). *At sixth place*, on 19th January 2007 GA filed a second reconsideration request to the HPCC, presenting a certified copy of the final judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006. It was refused by HPD letter, dated 5th February 2007 on *procedural grounds* with reasoning that since Section 14.1 of UNMIK Regulation No. 2000/60 allows for *only one* reconsideration request from a party to a claim, GA had exhausted this legal remedy with his first request, dated 31st March 2006, and his additional request, dated 19th January 2007 may not be further processed. *At seventh place*, indeed pursuant to Section 2.7 of UNMIK Regulation No. 1999/23 the final decisions of HPCC are binding and enforceable, and not subject to review by any other judicial or administrative authority of Kosovo. These legal effects however are strictly restricted to the dispute finally solved between the parties in the HPCC

proceedings and *vice versa* are not produced beyond these limits. Section 2.7 of UNMIK Regulation No. 1999/23 does not grant universal legal or evidentiary value of the final HPCC decisions, nor does it establish their supremacy over the acts of all the other national public bodies and jurisdictions. Accordingly, the HPCC Decisions No. HPCC/D/233/2005/C and No. HPCC/REC/76/2006 are binding and enforceable and not subject to review by other authority *only with respect to the repossession granted to JC as a person who had the apartment in his possession on 24th March 1999, and lost it subsequently* according to Section 1.2 (c), second hypothesis of UNMIK Regulation No. 1999/23. Contrariwise, this *repossession entitlement* was *not recognized to him as occupancy right holder of the apartment* as per Section 1.2 (c), third hypothesis of UNMIK Regulation No. 1999/23. HPCC Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006 did not resolve the dispute on the ownership, occupancy right or right on use over the said apartment and are with zero legal effect under Section 2.7 of UNMIK Regulation No. 1999/23 in this regard. Hence, non-substantiated are the arguments in the appeal that the said two HPCC Decisions *are the only evidence with exclusive probative value* that could serve as a proper legal basis for resolution of the dispute in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka.

IV. CONCLUSIONS. COSTS OF THE PROCEEDINGS

53. Based on the foregoing considerations, the court of second instance shall grant the appeal – ruling C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka, dated 30th May 2012 shall be annulled for a substantial procedural violation of Article 182, paragraph 1 in conjunction with Article 166, paragraph 2 LCP with remittal of the case to the first instance court for retrial pursuant to Article 209, paragraph 1, item d) LCP.

54. The claim in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka is not *res judicata* and has to be examined and decided on the merits in regular first instance proceedings, incorporating a full array of procedural guarantees for all parties. *At first place,* in compliance with Article 5, paragraph 1 LCP the claimant must be provided the opportunity requested but not granted in the session on 30th May 2012 to present in writing his counter-arguments to the replies of the respondents, served to him in the same session. *At second place,* the claimant must be requested to correct and complete the claim according to Article 102, paragraph 1 LCP by specifying *the ground for acquisition* of the occupancy right pretended over the apartment in Suharekë/Suva Reka, "Car Dušan" Street Nr.59, II floor, nr.5 as concrete allocation decision and

contract on use; Decisions No HPCC/D/233/2005/C and No HPCC/REC/76/2006 are not provided by law as such acquisitive ground. Concretization is also needed of the type(s) of *damages* caused by the 2010 destruction of the building and *the ground for their compensation* – the law itself, an act of a competent public institution or a legal transaction. Article 8 ECHR quoted in the claim as it basis guarantees in paragraph 1 *"the right to respect for home"* against interferences of the public authorities, save for the exceptions listed in paragraph 2, but *does not foresee compensation for unjustified intrusions, including through destruction of a home.* Also, no real compensation with a same size apartment could be justified with Article 8 ECHR as according to ECtHR this provision does not guarantee neither "*the right to be provided with a home",* nor "*the right to enjoy a home of a particular standard*" (*Chapman vs. UK* 2001-I; 33 ECRR 399). *At third place,* when the right pretended is derived or otherwise depends on another right determined in previous proceedings, the court in the pending contest is obliged to accept as its own determination this *res judicata* and to proceed from its basis in respect to the persons – its addressees without re-examination or re-resolution of the prejudicial issues – its subject–matter. This recognition (respect) due to the *res judicata* premises and safeguards it, but is not to be equalized to the *res judicata* itself. Furthermore, in so far the *res judicata* is valid only in certain objective and subjective limits, *its recognition is permissible upon identity of its subject-matter and addressees with the prejudicial legal relationship* under Article 13, paragraph 1 LCP. Here the *right to compensation* with equivalent apartment in the new building pretended by JC in C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka is *prejudicially* extracted from *occupancy right* over the apartment in the demolished building. Given its limits, the *res judicata* of judgment C.nr.100/06 of the Municipal Court of Suharekë/Suva Reka, dated 19th May 2006 could not be taken into account for *the holder of the occupancy right/right on use over the demolished apartment* because it has no legal effect against JC according to Article 167, paragraph 1 LCP. Equally, no such recognition is possible for the *res judicata* of HPCC Decisions No. HPCC/D/233/ 2005/C and No. HPCC/REC/76/2006, formed on the lost pre-24th March 1999 *possession* of JC over the apartment and not formed *on the occupancy right/right on use over this property.* Therefore, in the adjudication of C.nr.28/11 of the Municipal Court of Suharekë/Suva Reka after its remittal to the first instance court all parties must be effectively given an equal opportunity to adduce all their available relevant evidence; *inter alia,* JC and GA to submit the respective allocation decisions and contracts on use as per *the occupancy right* over the socially-owned apartment in the demolished building as prejudicial for *the right of its holder to be compensated* with apartment in the newly constructed building. The court shall then conscientiously and

carefully examine each and every piece of collected evidence, separately and as a whole in compliance with Article 8 LCP, and shall apply the burden of proof rules under Article 322 LCP for the facts not proven with certainty.

55. Since the appealed ruling is annulled with remittal of the case for retrial, the costs of the proceedings conducted on this appeal according to Article 465, paragraph 3 LCP shall be determined in the final decision.

In view of the aforementioned reasoning it is decided as in the enacting clause.

LEGAL REMEDY: No appeal is permitted against this ruling according to Article 206, paragraph 1 *in fine* in conjunction with Article 176, paragraph 1, first sentence and Article 210 LCP.

THE COURT OF APPEALS – PRISHTINË/PRIŠTINA
AC.nr.3560/2012 on 05.12.2013

PRESIDING JUDGE ROSITZA BUZOVA

Done in English as official language according to Article 17 of the Law No 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo

NOTE OF DELIBERATION AND VOTING

THE COURT OF APPEALS in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, Judge MUHAMED REXHA and Judge MUHARREM SHALA, as panel members, in a close session held on 5th December 2013 deliberated and voted unanimously as in enacting clause.

The present note is added to ruling AC.nr.3560/12 of the Court of Appeals, dated 5th December 2013 pursuant to Article 140, paragraph 1, second sentence LCP.

THE COURT OF APPEALS - PRISHTINË/PRIŠTINA

AC.nr.3560/2012 on 05.12.2013

PRESIDING EULEX JUDGE

ROSITZA BUZOVA

JUDGE MUHAMED REXHA

PANEL MEMBER

JUDGE MUHARREM SHALA

PANEL MEMBER

ANDRES MORENO

EULEX LEGAL OFFICER

DAUT LATIFAJ

EULEX TRANSLATOR/INTERPRETER (ENGLISH/ALBANIAN)

Prepared in English as an official language of the court according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and signed by the Kosovo Judges after translation by the above referred translator/interpreter.