

**SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA**

**KOSOVO PROPERTY AGENCY (KPA) APPEALS PANEL
KOLEGJI I APELIT TË AKP-ës
ŽALBENO VEĆE KAI**

GSK-KPA-A-125/12

**Prishtinë/Priština,
10 December 2013**

In the proceedings of

S. M.

Claimant/Appellee

vs

S. Sh.

Appellant

The KPA Appeals Panel of the Supreme Court of Kosovo composed of Elka Filcheva-Ermenkova, Presiding Judge, Esma Erterzi and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/119/2011 dated 7 September 2011 (case file registered at the KPA under the number KPA13616) after deliberation held on 10 December 2013, issues the following:

JUDGMENT

The Decision of the KPCC/D/A/119/2011, dated 7 September 2011, regarding case file registered at the KPA under the number KPA13616, is annulled and sent back to the KPCC for reconsideration.

Procedural and Factual Background

1. On 4 October 2006, K.M. filed a claim with the Kosovo Property Agency (KPA) alleging that S.M. is the property right holder of the cadastral parcel no 1799 located in the place “Mushtist/Musutiste”, in the Municipality of Suharekë/Suva Reka. Claiming that the loss of possession of the parcel derived from the conditions of the armed conflict, she asked for the re-possession of the claimed property. She alleged that S. M. inherited the property from his late father T. M. She further claimed that M. family used this property until the mid-June 1999 when they were forced to leave due to safety reasons.

2. To support the claim, she provided a copy of possession list no 674 issued by the Republic of Serbia, the Republic Geodesy Office, the Immovable Cadastral Service of Suharekë/Suva Reka issued on 27 January 2003. The possession list indicates that the parcel no 1799 is registered under the name of T. S. M.. She provided the marriage certificate of 28.11.1993 referring to her marriage with S. M.; power of attorney given by S. M. dated 17 September 2007 (under ID number 253205); Death certificate of S. M. indicating the date of death as 20 December 2002; copy of the contract on division of estate among D.T.M., S. T.M., S.T. M. and C. T.M. dated 13 December 2002 showing that, among them, M. T. S. is entitled to receive parcel no 1799.

3. On 21 October 2008, K.M. filed a submission stating that she claimed that her late father in law S. T. is the owner of property. She also mentioned that she provided the documents showing that T. is her father in law while she cannot present the death certificate of late grandfather M.T. M.

4. The possession list and the power of attorney, certified before the 5th Municipal Court of Belgrade under number OV No 27620/07 granted by S.M. to K. M., were verified by the KPA.

5. KPA initially carried out an incorrect notification of the property. Accordingly, the Kosovo Property Claims Commission (KPCC) stamped its previous Certified Decision with regard to claim no KPA13616, dated KPCC/D/A/25/2008 of 23 October 2008, made based on wrong notification as invalid.

6. Another notification of the property was carried out by the KPA by means of notification through publication in the gazette without placing a sign on the correct cadastral parcel claimed. This was confirmed by the notification and confirmation report dated 30 August 2010.

7. No notice of participation to the proceedings was filed.

8. On 7 September 2011, KPCC with its second Cover Decision granted the claim. In the Certified Decision dated 25 November 2011, it was concluded that the claimant K. M. had established that S.M.is the owner of the claimed property and K. M. is entitled to the possession of the said property. The KPCC also ordered the eviction of any person occupying the land, if any.

9. The Decision was served on K. M. on 2 April 2012 whereas it was served on S. Sh. on 23 August 2012 with a note ordering him to vacate the property within 30 days.

10. On 6 September 2012, S. Sh. filed an appeal against the Decision of the KPCC.

11. The appeal of S. Sh. was served on K. M. on 11 October 2012. No response to appeal was filed.

12. On 13 March 2013, the Judge of the KPA Appeals Panel of the Supreme Court issued an order to the claimant 'S. M.' represented by 'K. M.' giving them the opportunity to reply to the appeal, especially to the allegations of the appellant who asserted that the litigious parcel was bought by the father of the respondent and that respondent's family was in the possession of the parcel since 1981-1982. In the same order, the claimant was also instructed to provide the power of attorney for K. M. given by S.M. and a copy of his actual ID card and the birth certificate of S. M.in order to establish his position as the family household member of the property right holder. It was also noted that the Court clarifies -provided that power attorney is submitted- the party is not K. M. but her husband S. M.

13. On 17 October 2013, the KPA informed the KPA Appeals Panel that the order was served on K. M. on 12 July 2013; however, they did not receive any reply.

Arguments of the Parties

14. The claim is filed by K.M. who later on clarified that the property right holder is her father in law S. T. M. She stated that she represents her husband S. M. She also claimed that the M. Family used the property till June 1999 and the possession of it was lost due to the fact they left Kosovo because of security reasons. She mentioned that the property was occupied by the neighbors of M. family.

15. The appellant S. Sh. challenged the allegations of that the claimed property was being used by M. family till 1999. He alleged that the inheritors of the property right holder sold the parcel no 1799 to Gj. Sh. his father, in 1981-1982 with an internal contract. He alleged that the purchase contract was burnt during the armed conflict. He further alleged that the claimed property was being used by his family since 1981-1982. He provided the names of witnesses M.S. Sh. and I. A. Sh. to prove his allegations.

16. In his appeal, he further argued that KPCC, neither in the enacting clause of Decision nor in the reasoning clarified the status of the claimant in relation to the property right holder. He maintained that she did not provide evidence to show her link with the property right holder and she cannot be considered as authorized person to claim the property. He claimed this is serious breach of the procedure.

Legal Reasoning

Admissibility of the appeal

17. The appellant was not a party to the proceedings before the KPCC. He was deprived of being a party to the proceeding before the first instance due to the wrong notification of the property. According to the well-established jurisprudence of the KPA Appeals Panel, the notification through the KPA Notification Gazette and UNHCR Bulletin is not a “reasonable effort” to notify the claim as foreseen by Section 10.1 of UNMIK/REG/2006/50 as amended by Law No. 03/L-079 (hereinafter Law 03/L-079). Supreme Court could not conclude that the appellant had been informed of the claim properly (see GSK-KPA-9/2010, 28/12, 103/2012, 105/2012, 130/2012 etc.) He filed the appeal within 30 days after being served with the Decision by which he become aware of the claim, as well. His right to appeal cannot be precluded. The appeal, submitted within the deadline prescribed by Law 03/L-079, is admissible.

Merits of the appeal

18. The appeal is grounded. The decision of the KPCC is to be quashed and the case is to be sent back for reconsideration as the Supreme Court notes a serious misapplication of the applicable procedural and substantial law.

19. In general, a party is entitled to be heard not only by one instance, but by at least two instances. If a party is deprived of this right by a fundamental mistake of the first instance, this is to be considered a substantial violation of the procedure. The Supreme Court has in several cases, where the claim was treated as uncontested and the appellant was unaware of the claim, found it necessary to annul the decision of the KPCC and return the case for reconsideration. The Court refers to case no GSK-KPA-A-14-2012. This

procedure allows the appellant to take part in the proceedings before the first instance, and allows the losing party to appeal a decision that has been made after a full review of all relevant aspects of the case.

20. In the case at hand, the appellant was deprived of presenting his arguments on the merits of the claim and even contesting the jurisdiction of the KPCC due to the improper notification of the claimed property as discussed above. This requires a full adjudication of the claim before the first instance.

21. Furthermore, according to Section 3.1 of Law 03/L-079, a claimant is entitled to an order from the Commission for repossession of the property if the claimant proves ownership or use right with respect to private immovable property and if he or she is now unable to exercise this right by reason of circumstances directly related to or resulting from the armed conflict that occurred in Kosovo between 27 February 1998 and 20 June 1999. Both conditions are to be met.

22. The appellant, first of all, challenged the assertion on the possession of the claimed property by M. Family until 1999. In his appeal, he wished to prove his possession since 1982 through witnesses' statements. These witnesses could not have been heard in the first instance since their names could only be presented in the appeal. Accordingly, the jurisdiction of the KPCC is at stake, if the appellant could prove that it was not the claimant's family but the appellant who possessed the land since 1982 as he alleges, which would mean that the loss of possession does not derive from the conditions related to the armed conflict but another dispute between the parties. In this regard, Supreme Court notes that the representative of the claimant did not reply to the allegation of the appellant neither when the appeal was served on her nor upon the order of the KPA Appeals Panel Judge of the Supreme Court. This is an indication that she may not contest the allegation of the appellant as to the possession of the claimed property during and even long before the conflict regardless of its lawfulness.

23. Second, the KPCC granted the claim to K. M.. In the wording of the Certified Decision, she was considered as the claimant and she was acknowledged as the owner of the claimed property. It is further stated that she is entitled to the possession of the said property. KPCC disregarded that K.M. was neither the property right holder nor the claimant as a member of the family household of the property right holder. S. T. M. is the registered owner in the possession list no 674 who was identified as her father in law. As Supreme Court noted in its order of 13 March 2013, she did not claim the property as a family household member but as the representative of her husband S. M. KPCC wrongly granted the claim in favor of herself.

24. Third, the arguments of the appellant are correct that she did not submit any evidence to prove her family membership with the registered owner. She neither presented any evidence to prove her title over the

property claimed nor the title of S. M. as the KPCC maintained in its Decision. She did not present inheritance decision acknowledging the inheritance right of the claimant S.M. over the property of the deceased S. T.M., either. The link between those two is still missing.

25. Furthermore, despite receiving the clear instruction of the Supreme Court during appeal proceedings, the representative of the claimant did not provide any evidence to show that S. M. is one of the inheritor of the registered owner S. T. M..

25. The Decision of the KPCC is to be annulled and the case is to be sent back to the KPCC. The Supreme Court finds it necessary that KPA and KPCC clarify whether the claim is related to circumstances resulting from the armed conflict or to the occurrence of facts, non-related or not resulting from the conflict. In case that the Commission concludes that it has jurisdiction over the claim pursuant Section 3.1 of Law 03/L-079, and then the arguments of the parties on the merits of the claim are to be examined by the KPCC. Evidence to prove the title of the claimant is to be requested and verified by the KPA and examined by the KPCC. A new decision is to be made by the first instance. Therefore, it is decided as in the enacting clause.

Legal Advice

26. Pursuant to Section 13.6 of Law 03/L-079, this judgment is final and cannot be challenged through ordinary or extraordinary remedies.

Elka Filcheva-Ermenkova, EULEX Presiding Judge

Sylejman Nuredini, Judge

Esmā Erterzi, EULEX Judge

Holger Engelmann, EULEX Registrar