SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA

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

GSK-KPA-A-052/13 **Prishtinë/Priština**

27 February 2014

In the proceedings of:

Xh. (Q) M.
V (C) Sh
H./E.
G./Đ.

Respondent/Appellant

vs.

R. K.
B. B. 34
21000 N. S.
S.

Claimant/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Elka Filcheva-Ermenkova, Presiding Judge, Dag Brathole and Sylejman Nuredini, Judges, on the appeal against the decisions of the Kosovo Property Claims Commission KPCC/D/A/163/2012 (case file registered at the KPA under the number KPA13879), dated 5 September 2012, after deliberation held on 27 February 2014, issues the following:

JUDGMENT

1- **The appeal of X. (Q.) M. and V. (C.) Sh.j is rejected as unfounded.**

2- **The decision of the Kosovo Property Claims Commission KPCC/D/A/163/2012 (case file registered at the KPA under the number KPA13879), dated 5 September 2012 is confirmed.**

Procedural and factual background:

1. On 1 November 2006 R. K. as a family household member of the property right holder J. (J.) K.[1] filed a claim for repossession over several properties with the Kosovo Property Agency (KPA) The claimant explained that the property right holder had already passed away in 2005 and that the successors are himself and his two brothers R. K. and Svetozar K.. The three of them have inherited the property right over the claimed properties in equal ideal parts.
2. Subject matter of the claim are parcels 164, 165, 166, 167, 168, 169 and 170, all in the area of village H./E./in accordance with the cadastral plan in force in 1998. The properties are listed in Possession list N0. 114, issued on 18 August 1998 by the relevant cadastral institution at the time (*i.e.* Republican geodesic institute, Centre for immovable property in G./Đ.). The possession list is issued under the name of the claimant's father V.K..
3. Further on the claimant explained that originally the properties belonged to his father V. K. (that is why the properties are registered under his name). V. K. was murdered on 6 August 1998[2]. He was then succeeded by the claimant's late mother J. K., who died on 27 April 2005[3] and was succeeded by the claimant and his two brothers.
4. The claimant asserted that his family had to abandon the properties on 11 November 1998.
5. To support his claim, the claimant provided the KPA with a copy of Possession list No. 114, issued on 18 August 1998 (mentioned above); death certificates for both parents, his mother

[1] In different document the name is written different ways: J., . J.. There is no argument however that this is one and the same person. In the death certificate, referred to further in the decision the name is J.
[2] Death certificate No. 13-203-1/1022 from 18 August 1998, issued in S., Municipality of G./Đ.
[3] Death certificate No. 05-203 from 11 May 2005, issued in K. for the Municipality of K.M.

and father, certifying the facts of their deaths; written statement by the claimant and his two brothers from 3 May 2011 declaring that neither of them had ever alienated any of the properties inherited from their parents. The KPCC positively verified the documents, presented by the claimant.

6. The KPCC acting *ex officio* established the existence of an inheritance decision O. br. 79/2002 dated 17 May 2005, issued by the Municipal Court in G./Đ. regarding the fact that J. K.inherited the properties in question from her husband V. K..
7. The notification of the parcels was done physically. They were found occupied by the respondent now appellant X. M. and the respondent C. S.. They both based their rights on a contract of purchase with J. (J.) Kn., dated 24 June 2005. Allegedly J. K. was represented by a person named D. J., to whom she allegedly gave a power of attorney on 27 April 2005 in K.[4], on the day she died, according to the death certificate.
8. The KPCC tried to verify the existence of this POA without any success. It was not found in the Municipal Court of K., where it was allegedly issued.
9. The respondent X. M.as well presented a certificate of immovable property issued on his name.
10. On 5 September 2012 the KPCC with the appealed decision granted the claim in the name of the claimant's mother,J. K..
11. The Commission accepted that prior to her death J. K. was the owner of the claimed properties.
12. With regard to the assertions of the respondents the Commission accepted that the contract of purchase, on which the respondents base their allegations, has not been valid, because it was concluded on the basis of invalid power of attorney. In that regard the Commission did not accept the certificate for immovable property as a document proving the right of property because it was issued on the basis of a transaction which was not valid.
13. The decision was served to the claimant on 18 March 2013.
14. The decision was served on the respondent X. (Q.) M. on 29 January 2013. There is no data in the file whether it was served to the other respondent.
15. On 27 February 2013 both respondents filed an appeal with the Supreme Court.

Allegations of the appellants:

[4] Power of attorney, allegedly signed by J. K. and certified by a judge in the Municipal Court in K. - case No 1935/2005

16. The allegations are that the decision was adopted in essential misapplication of the substantive and procedural law and was issued on the basis of erroneous and incomplete evaluation of evidence.
17. They allege that the dispute is not within the jurisdiction of the KPCC, as it does not originate from the conflict of 1998 and 1999. The respondents purchased the properties from the mother of the claimant and she received the payment. Thus the respondents/now appellants are not illegal occupants of the properties.
18. The ownership of the appellants is proved with the certificate on the immovable property rights UL-70705030-00114 CZ E./H.The respondents are registered in the Immovable Property Rights Register (LEIPRR). This public register creates the presumption of accuracy, authenticity and legality until corrected by procedures established in the Law (art.7.2 LLEIPRR). This means that the respondents are the registered owners and are protected by the status of the registration. They need not to prove their ownership rights until this registry is corrected, pursuant to the established procedures in the said Law. The KPCC should have instructed the claimant, now appellee, to request amendments of the register.
19. There has never been any occupation over the property until 2005 when the property was sold. Therefore the dispute is not within the jurisdiction of the KPCC. The claimant could have exercised his rights without any interference.
20. It is not true that the POA from 2005 was forged. This could have been verified with a graphology expertise.
21. The Commission does not have the authority to pronounce whether a certain transaction is invalid or not (regarding the transaction of the property that happened after the issuance of the power of attorney).
22. The appellants request the SC to either amend the decision or accept the appeal as founded or annul the decision and dismiss the claim.
23. The appellee, claimant in the first instance does not respond to the appeal.

Legal Reasoning

24. The appeal is admissible. According to Section 12.1 of the UNMIK Regulation No. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property as amended by Law No. 03/L-079 (hereinafter Law 03/L-079), a party may submit an appeal "*within thirty (30) days of the notification to the parties by the Kosovo Property Agency of a decision of the Commission on a claim*". The decision was served to the first

appellant on 29 January 2013 and it has not been served to the other. Both appealed on 27 February 2013. *I.e.* within the 30 days provided for by the law in the case of the first appellant. The 30 day term has never started for the second appellant as he was never served with the decision. Therefore his appeal is also considered admissible.

25. The appeal is unfounded.
26. The decision of the KPCC neither involves fundamental error or serious misapplication of the applicable material or procedural law {grounds for appeal under section 12.3 (a) of Law 03/L-079}, nor does it rest upon an erroneous or incomplete determination of the facts {grounds for appeal under section 12.3 (b) *ibid*}.

Jurisdiction:

27. It is not arguable that the family of the claimant left Kosovo in 1998 because of the armed conflict at this time. The appellants have alleged that the claimant or his family could have come back and used the property before 2005. Given the political climate and ethnic tension following the armed conflict in Kosovo in 1998/1999, the Supreme Court finds it quite clear that this would not have been possible for the claimants, and that they have been unable to exercise their property rights up to now. The case accordingly falls within the jurisdiction of the KPA Appeals Panel and the KPCC pursuant to section 3.1 of Law 03/L-079.

Merits (relevant facts and applicable law):

28. It is not disputed that prior to 1998 the properties belonged to the father of the claimant V. K.. It is not disputed that after his death in 1998 his successors were his wife J. K. and his children, the claimant and his two brothers. Another undisputed fact is that after the death of J. K. the only successors are the latter three- the claimant and his brothers. Thus the properties subject of the claim were prior to 2005 ownership of J. K. and after her death they became property of the claimant and his brothers. For the purposes of this decision it is irrelevant to explain how the inheritance has occurred since the inheritance itself has never been disputed.
29. It is not disputed that J. K.died on 27 April 2005 (the death certificate was issued later – on 11 May 2005, but as long as there is no data for the opposite it has to be accepted that the date of death is the one in the certificate).

30. It is established positively by the first instance – the KPCC, that the Power of Attorney *(hereinafter the POA)* allegedly signed by J. K. on that same day in K. has never been found in the registry of the court over there.
31. The allegation that the authenticity of the POA could have been established with a graphology expertise is technically correct. However even if the POA had been signed by J. K. in K.on 27 April 2005, that according to the death certificate is the day of her death, it would still be considered invalid for the following reasons:
32. The POA was never found in the Court in K. and there is no indication that it was ever certified in front of a judge over there. This equals to the nonexistence of this POA. For a POA to have a legal effect it has to be done in the form prescribed by the law for the legal transaction this authorization has been given.
33. For a transfer of immovable property the POA has to be made in the same form as the contract of the transfer of property. Meaning written form with signatures certified/verified by a court {argument after art. 90 of the Law on obligations and torts of 1978 (Official gazette of SFRY nr. 29/1978)[5], *hereinafter the Law on obligations* and art. 4 (2) of the Law on trade of immovable property (Official gazette of SRS nr. 43/1981)[6] both applicable at the time of the POA and the following transaction – 2005}.
34. The Court notes that under the current legislation in Kosovo the requirement for a written from and certification still exists, but it is obsolete for the purposes of the current decision to refer to it.
35. The form of the contract, respectively the form of the POA is a form for the existence of the legal transaction itself – it is a form *ad substantiem*. If the form is violated the legal action is considered void or a legal nothing. The POA had to be certified by a court, meaning as well that a copy of it would have been kept in the registry books of this same court if it was done there. If the document (POA) was not found in the registry of that court, as was the case, than it should be accepted that the POA was never certified in K., therefore it never existed. Thus the alleged authorized person was not an authorized one.
36. An unauthorized person does not have the right to undertake any legal transactions whatsoever, *per argumentum a contrario* after art 91 (1) Law on obligations and torts[7].

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[5] Art. 90 of the Law on obligations: *"The form prescribed by law for a contract or some other legal transaction shall apply also to the authorization for concluding such contract, namely engaging in such transactions"*

[6] Art. 4 (2) of the Law on trade of immovable property: "*Contracts on the transfer of rights to immovable property between ownership right holders as we as contracts for …shall be concluded in writing; the signatures of the contracting parties shall be certified by the courts"*.

[7] Art. 91 (1) of the law on obligations and torts: "*An authorized person (proxy) may undertake only those legal transactions which fall within the scope of his authorization*". If there was no authorization the proxy cannot undertake any actions.

37. A contract concluded without a POA would be binding for the principal (the one who was represented without POA) only if he/she would have subsequently approved such contract – art 88 of the Law on obligations[8].

38. However in the particular case such possibility never existed, because the alleged "principal represented", *i.e.* J. K. was dead even before the conclusion of the contract - 24 June 2005.

39. Finally, even if the authorization of 27 April 2005 was valid (which was not the case) it would not have changed anything because it would have been terminated with the death of J. K., regardless whether it happened on 27 April 2005 or any day after that before 11 May 2005, when the death certificate was issued.[9]

40. Thus the contract concluded on the above mentioned date had no legal effect whatsoever. In this regard the Court deems unnecessary to comment on the disposition of the appellants that the Commission had no right to "consider any transaction void". The validity of the contract in question was a legal fact that had to be evaluated by the Commission as a prerequisite material issue for the proper resolution of the property dispute subject of this case.

41. It is established that on the basis of the same transaction (from 24 June 2005) the appellants were registered as the owners of the properties in the Immovable Property Right Register. It is correct, as the appellants note, that the entries in this registry enjoy the presumption of "accuracy, truthfulness and legality", argument after art. 7. 2 the Law on the Establishment of the Immovable Property Rights Register of 2002, hereinafter the LEIPRR[10]. The presumption is however rebuttable. In the current file there is evidence that the entries in the Register are wrong, meaning that the presumption is rebutted. It was established that the transaction was made without authorization and that the property was never transferred (as explained in details above).

42. It is outside the subject of the current dispute who has to initiate proceedings, and in what manner, before the relevant authorities, so that the entries in the Registry are corrected in order to correspond to the existent or non-existent material rights of the dispute.

43. In conclusion the Court reiterates that there is neither erroneous establishment of facts nor misapplication of the procedural or material law which influenced the outcome of the

[8] Art. 88 (1) *ibid*: *"A contract concluded by a person, as agent, on behalf of another and without his authorization shall be binding for the principal represented without authority only after his subsequent approval of the contract".*

[9] Art. 94 (3) *ibid*: *"An authorization shall be terminated with the termination of a legal person, namely after death of a person granting it unless a transaction already commenced becomes impossible to interrupt without damage to legal successors, or should the authorization continue to be valid also in case of death of the person granting it, either according to his intention or due to the nature of the transaction".*

[10] Law No. 2002/5 on the Establishment of the Immovable Property Rights Register, entered into force on 20 December 2002 (UNMIK/REG/2002/22), amended with Law No. 2003/13 (UNMIK/REG/2003/27) and amended and supplemented by Law No.04/4L-009 of the Kosovo Parliament

KPCC's decision. Consequently the appeal according to Section 13.3 c) of UNMIK-Regulation 2006/50 as amended by Law No. 03/L-079 had to be rejected as unfounded and the decision of the KPCC confirmed.

Legal Advice:

Pursuant to Section 13.6 of UNMIK Regulation 2006/50 as amended by the Law 03/L-079, this judgment is final and enforceable and cannot be challenged through ordinary or extraordinary remedies.

Elka Filcheva-Ermenkova, EULEX Presiding Judge

Dag Brathole, EULEX Judge

Sylejman Nuredini, Judge

Holger Engelmann, EULEX Registrar