

THE DISTRICT COURT OF PRISHTINË/PRIŠTINA in a panel composed of the EULEX Civil Judge ROSITZA BUZOVA, as Presiding Judge, Kosovo Judge MEDIHA JUSUFI and Kosovo Judge NEHAT IDRIZI, as panel members,

In the civil case of the claimant SLAVICA DUKIĆ from PRISHTINË/PRIŠTINA, replaced after her death in the course of the proceedings by MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ as her legal heirs, all represented by BOJANA ĐUROVIĆ from BELGRADE, the Republic of Serbia, and by Lawyer DOBRICA LAZIĆ from BRESJE/BRESJE, the Municipality of FUSHË KOSOVË/KOSOVO POLJE against the respondent BASHKIM SOPJANI from village LUMADH/ VELIKA REKA, the Municipality of VUSHTRRI/VUCITRN, represented by Lawyer HASAN REXHA from PRISHTINË/PRIŠTINA, for annulment of a contract on sale of apartment with legal basis Article 124 of the Law on Contracts and Tort (Official Gazette of the SFRY Nos. 29/78, 39/85, 45/89, 57/89 and Official Gazette of the FRY No.31/93) ("LCT") and delivery the possession of this apartment, with legal basis Article 93 of the Law No.03/L-154 on Property and Other Real Rights (Official Gazette of the Republic of Kosovo No. 57/2008) ("LPORR"),

Having received the appeal of BASHKIM SOPJANI against judgment C.nr.1451/04 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2010 by which the statement of the claim above was approved,

After deliberation and voting in a panel session under Article 190, paragraph 1, first hypothesis of the Law No. 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No. 38/2008) ("LCP") held on 23rd February 2012,

Hereby pursuant Article 195, paragraph 1, item c) and Article 198, paragraph 2 LCP renders the following

RULING

The appeal of BASHKIM SOPJANI from village LUMADH/ VELIKA REKA, the Municipality of VUSHTRRI/VUCITRN, is **APPROVED** and judgment C.nr.1451/04 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2010 is **ANNULLED** with remittal of the case to the first instance court for re-adjudication.

REASONING

I. Procedural background

1. By the challenged judgment C.nr.1451/2004 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2010, it was approved as grounded the statement of the claim of MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ as legal heirs of the deceased SLAVICA DUKIĆ - the contract on sale

of apartment Vr.nr.4725/02, dated 23rd August 2002, concluded between SLAVICA DUKIĆ as a seller, on one side, and BASHKIM SOPJANI as a buyer, on the other side, was annulled; this respondent was obliged to vacate the apartment and hand over its possession to the claimants within 15-days time period from the entry into force of the judgment under the threat of compulsory execution; the respondent was obliged to reimburse to the claimants their procedural expenses in the amount of 1 216.80 Euros.

2. Pursuant to Article 110, paragraph 1, first sentence and Article 155, paragraph 2 LCP this judgment was notified to the parties through service of its copies to their authorized representatives – for the claimants to Lawyer DOBRICA LAZIĆ on 24th September 2010, and to BOJANA ĐUROVIĆ on 21st October 2010, whereas for the respondents - to Lawyer HASAN REXHA on 9th November 2010.

3. On 11th November 2011, Lawyer HASAN REXHA on behalf of BASHKIM SOPJANI filed an appeal against judgment C.nr.1451/04 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2010 challenging it on the grounds of *substantial violations of the provisions of contested procedure* as per Article 182 LCP, *incomplete and erroneous determination of the factual situation* as per Article 183 LCP, as well as *erroneous application of the substantive law* as per Article 184 LCP. It was alternatively requested the judgment: 1) to be modified with full rejection of the claim as impermissible or ungrounded; or 2) to be annulled with remittal of the case to the court of first instance for retrial and decision on the merits.

4. As required by Article 187, paragraph 1 LCP, the appeal was served for reply in 7 days to the appellates through their representatives - on 2nd February 2011 to Lawyer DOBRICA LAZIĆ and on 8th September 2011 to BOJANA ĐUROVIĆ. No reply was submitted within the legal deadline. Upon its expiry, the appeal with the case file were sent by the Municipal Court of PRISHTINË/PRIŠTINA to the District Court of PRISHTINË/PRIŠTINA pursuant to Article 188, paragraph 1 LCP.

II. Competence of the panel of the District Court of PRISHTINË/PRIŠTINA

5. AC.nr.822/11 of the District Court of PRISHTINË/PRIŠTINA was selected based on Article 5, paragraph 1, item c) of the Law No.03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (“the Law No.03/L-053 on Jurisdiction”) (Official Gazette of the Republic of Kosovo No.27/08) through a ruling issued on 15th December 2011 by EULEX Judge acting as Delegate of the President of the Assembly of the EULEX Judges as per Decision ref.nr.JC/EJU/OPEJ/2696/ff/11, dated 25th November 2011. After the conduct of the taking over procedure foreseen by Article 5, paragraph 7, first sentence of the Law No. 03/L-053 on Jurisdiction and Article 3, paragraph 6, first sentence of the Guidelines for Case Selection and Case Allocation for EULEX Judges in Civil Cases, adopted by the 17th Assembly of the EULEX Judges on 16th November 2011 (“the Guidelines”), by ruling of the Delegate of the President of the Assembly of the EULEX Judges, dated 19th January 2012 according to Article 5, paragraph 7, second

sentence of the Law No. 03/L-053 on Jurisdiction and Article 3, paragraph 8 of the Guidelines, AC.nr.822/11 was assigned to a mixed three-judge panel of the District Court of PRISHTINË/PRIŠTINA under Article 5, paragraphs 2 of the Law No.03/L-053 on Jurisdiction with EULEX Civil Judge as Presiding. After majority derogation granted by Decision ref.nr.JC/EJU/OPEJ/2466/ff/11 of the President of the Assembly of EULEX Judges, dated 25th November 2011 in accordance with Article 5, paragraph 5 of the Law No. 03/L-053 on Jurisdiction, the Kosovo Judges - panel members were designated based on Article 4, paragraph 3 of the Guidelines by Decision Agj.nr.16/12 of the President of the District Court of PRISHTINË/PRIŠTINA, dated 20th January 2012.

6. Legally composed in conformity with the specific requirements of Article 5, paragraphs 1, 2, 4, 5 and 7 of the Law No.03/L-053 on Jurisdiction, this panel of the District Court of PRISHTINË/PRIŠTINA is empowered to adjudicate AC.nr.822/11 based on the functional competence of a second instance court foreseen by the general provisions of Article 15, paragraph 2 and Article 176, paragraph 3 LCP.

III. Admissibility of the appeal and the second instance procedure

7. No procedural impediments exist for adjudication of the appeal. *At first place*, its submission is not prohibited but explicitly foreseen by Article 176, paragraph 1, first sentence LCP as the challenged court decision is a first instance judgment on the merits of the dispute. *At second place*, the appeal is not belated under the terms of Article 186, paragraph 2 LCP. Judgment C.nr.1451/2004 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2009 was served to Lawyer HASAN REXHA, authorized representative of the respondents in the first instance case, on 9th November 2010. The appeal was sent by post on 11th November 2010, considered the date of its submission to the court - Article 127, paragraph 1, first sentence LCP, before the 15-days time period, prescribed by Article 176, paragraph 1, first sentence LCP, expired on 16th November 2010. *At third place*, the appeal is not impermissible under Article 186, paragraph 3 LCP – it is filed by Lawyer HASAN REXHA, duly authorized by BASHKIM SOPJANI who being respondent in the first instance has the procedural right and legal interest to submit it. No renouncement or withdrawal has been declared by him. *At fourth place*, the appeal has the requisite content under Article 178, items a) – d) LCP and is not incomplete as per Article 179, paragraph 1 LCP. Therefore there are no legal grounds excluding the admissibility of the appeal and/or the second instance procedure under Article 176 – 205 LCP initiated by it.

IV. Summary of the first instance proceedings

8. On 10th June 2004, SLAVICA DUKIĆ from PRISHTINË/PRIŠTINA filed a claim against BEKIM SOPJANI and BASHKIM SOPJANI, both of them from village LUMADH/ VELIKA REKA, the Municipality of VUSHTRRI/VUCITRN. The claimant alleged that the first respondent misled her presenting himself as a person able to vacate her apartment, located in PRISHTINË/PRIŠTINA, “ULPIANA“ C-7,

entrance 10, nr.3, with a surface of 49.89 m², from its usurper. To this end, BEKIM SOPJANI required authorization, given by SLAVICA DUKIĆ by a power of attorney Vr.nr.4518/2002, attested by the Municipal Court of PRISHTINË/PRIŠTINA on 14th August 2002. Allegedly, it was prepared by BEKIM SOPJANI and was signed by SLAVICA DUKIĆ without reading its content. In a conversation few days later, they agreed the authorization to remain effective so that BEKIM SOPJANI could find a buyer, sell the property, give over to SLAVICA DUKIĆ the price and be rewarded for his service with appropriate commission. BEKIM SOPJANI used the same power of attorney to conclude on behalf of SLAVICA DUKIĆ as a seller contract on sale of the apartment with his brother BASHKIM SOPJANI as a buyer, attested by the Municipal Court of PRISHTINË/PRIŠTINA as Vr.nr.4725/02 on 23rd August 2002. He kept the money from the sale, not informing SLAVICA DUKIĆ. The statement of the claim was the aforementioned contract to be annulled, so it could not produce legal effect.

9. The claim was filed to the Municipal Court of PRISHTINË/PRIŠTINA as signed by SLAVICA DUKIĆ. By power of attorney, dated 3rd January 2006, enclosed in the case, she authorized DOBRICA LAZIĆ, Lawyer from BRESJE/BRESJE, to represent her in the dispute.

10. By power of attorney, dated 10th May 2006, presented to the case, BEKIM SOPJANI and BASHKIM SOPJANI authorized Lawyer HASAN REXHA from PRISHTINË/PRIŠTINA to represent them in C.nr.1451/2004 of the Municipal Court of PRISHTINË/PRIŠTINA.

11. The claimant SLAVICA DUKIĆ died on 18th April 2006. However, the court was not informed until 22nd June 2007, the proceedings continued without suspension and taking over by her legal successors. At the main hearing sessions on 30th May and 7th September 2006 present were Lawyer DOBRICA LAZIĆ on behalf of the already deceased SLAVICA DUKIĆ, and Lawyer HASAN REXHA for the two respondents BEKIM SOPJANI and BASHKIM SOPJANI.

12. On 22nd June 2007, Lawyer DOBRICA LAZIĆ filed a submission to the case that SLAVICA DUKIĆ died on 18th April 2006 and as her inheritors for the disputed apartment had been announced MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ, sons and daughter, who would take over the proceedings. Attached to this submission was a death certificate issued by the Municipality of OBRENOVAČ – SCG nr.17 on 20th April 2006 that SLAVICA DUKIĆ, born on 22nd March 1948 in PRISHTINË/PRIŠTINA died on 18th April 2006 in BORIC, OBRENOVAČ, the Republic of Serbia. Also presented with the submission was decision T.nr.120/2007 of the Municipal Court of OBRENOVAČ, dated 13th March 2007, according to which the inheritance of the late SLAVICA DUKIĆ consisted of the contested apartment and up to its value as her legal heirs of first rank were declared MILE DUKIĆ (son), MILAN DUKIĆ (son) and MIRJANA RADAKOVIĆ (daughter) with 1/3 hereditary share for each one of them.

13. At the main hearing on 26th September 2007, MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADA KOVIĆ, non-summoned, were absent. Without authorization in writing presented to the case, Lawyer DOBRICA LAZIĆ participated in the session on their behalf, *inter alia*, requesting amendment of the subjective scope of the claim consequent to the death of the initial claimant SLAVICA DUKIĆ.

14. Lawyer DOBRICA LAZIĆ continued his participation in the subsequent main hearing sessions on 1st November 2007, 15th April 2008, 17th June 2008, 4th August 2008, and 17th December 2008, for MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADA KOVIĆ without written authorizations for their representation in the case. This was determined by the court at the main hearing on 19th May 2010 when Lawyer DOBRICA LAZIĆ presented powers of attorney in his name given by MIRJANA RADA KOVIĆ on 4th March 2010, by MILE DUKIĆ on 11th March 2010 and by MILAN DUKIĆ on 17th March 2010, all in copies. The first and second powers of attorney were presented in original on 30th June 2010, whereas the third one on 8th September 2010.

15. On 1st June 2009, MILE DUKIĆ filed a request for disqualification of Judge OLGA JANIĆIJEVIĆ, initially assigned to the case, reasoned with non-scheduling of any hearing in its trial since 2008 and partiality in solving the dispute. On 8th July 2008, Judge OLGA JANIĆIJEVIĆ informed the President of the Municipal Court of PRISHTINĚ/PRIŠTINA, justified the stay in the trial after 18th December 2008 and also requested her exclusion from case. No ruling under Article 70, paragraph 1 LCP of the President of the Municipal Court of PRISHTINĚ/PRIŠTINA was ever rendered on the petition for her disqualification. However, the case was *de facto* continued by Judge TIHOMIR MIKARIĆ in the hearings on 19th May 2010, 30th June 2010 and 8th September 2010. At the last session Lawyer DOBRICA LAZIĆ withdrew the claim with regard to BEKIM SOPJANI, as well as specified it with regard to BASHKIM SOPJANI requesting the challenged contract to be annulled, and this respondent to be obliged to vacate the apartment and hand over its possession to the claimants.

16. By judgment C.nr.1451/04 of the MC of PRISHTINĚ/PRIŠTINA, dated 16th September 2010 the statement of the claim was fully approved as formulated in the last session immediately before the completion of the first instance trial.

V. Appellate review of the court of second instance under Article 194 LCP

Substantial violations of the provisions of the contested procedure - Article 182 LCP

17. The *first* procedural ground under Article 181, paragraph 1, item a) LCP in the appeal is for issuance of the challenged judgment by a court, not properly constituted – *a substantial violation of the provisions of contested procedure as per Article 182, paragraph 2, items a) and c) LCP*. C.nr.1451/04 of PRISHTINĚ/PRIŠTINA was registered on 10th June 2004. It was initially assigned to a *trial panel with Judge OLGA JANIĆIJEVIĆ as Presiding and two Lay Judges* according to Article 42, 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), Article 8 and Article 9, paragraph 1 of the Law on Regular Courts (“Official Gazette of the SPAK” No. 21/78, 49/79, 44/82, 44/84, 18/87, 14/88). After the entry into force of LCP on 30th October 2008, evidenced by the minutes of the main hearing sessions on 17th and 18th December 2008, Judge OLGA JANIĆIJEVIĆ continued to adjudicate this civil case as a single judge pursuant to Article 15, paragraph 1 in conjunction with Article 532, paragraph 1 LCP. On 1st June 2009, MILE DUKIĆ filed a petition to the President of the Municipal Court of PRISHTINË/PRIŠTINA for her disqualification because of continuous non-scheduling of any hearings since 2008 and overall bias in solving the dispute. The petition was filed on 1st June 2009 before the conclusion of the main hearing on 8th September 2010, within the legal deadline prescribed by Article 68, paragraph 1 LCP. It had the requisites under Article 68, paragraph 3 and 4 LCP – name of the Judge and the grounds under Article 67, item g) LCP for disqualification. Non-impermissible under Article 69, paragraph 1, items a) – c) LCP, it could not be rejected by Judge OLGA JANIĆIJEVIĆ as acting in the case based on Article 69, paragraph 2 LCP. Consequently, in conformity with Article 71, paragraph 1 LCP she ceased her work in the lawsuit and on 8th July 2009 informed the President of the Municipal Court of PRISHTINË/PRIŠTINA. The latter did not render in any moment a ruling on this petition for disqualification pursuant to Article 70, paragraph 1 LCP in the written form prescribed by Article 160, paragraph 1 in conjunction with Article 175 LCP after the preliminary inquiries foreseen under Article 70, paragraph 4 LCP. Thus the disqualification procedure had been only initiated, but not conducted and/or finalized as legally required with a ruling of the President of the Municipal Court of PRISHTINË/PRIŠTINA rendered on the basis of Article 70, paragraph 1 LCP. In its absence Judge OLGA JANIĆIJEVIĆ could not be excluded from the case, and Judge TIHOMIR MIKARIĆ could not be appointed as substitute in its future proceedings. This “transfer” of the case between them was not decided through disqualification by a ruling of the President of the Municipal Court of PRISHTINË/PRIŠTINA under Article 70, paragraph 1 LCP as *the only permissible judicial act* for its re-assignment. It lacks *also normative legal basis* – the hearings on 19th May, 30th June and 8th September 2010 by Judge TIHOMIR MIKARIĆ could not be justified with Article 71, paragraph 2 LCP as they were not held for *urgent procedural actions by the Judge with disqualification sought pursuant to Article 67, item g) LCP*. Summarizing, Judge OLGA JANIĆIJEVIĆ, initially assigned to C.nr.1451/04, after 1st June 2009 without being disqualified ceased the adjudication of the case and was *de facto* replaced in its subsequent proceedings without legal basis by Judge TIHOMIR MIKARIĆ. The latter decided the case even though it was still allocated to Judge OLGA JANIĆIJEVIĆ, she had not been excluded by disqualification according to Article 67, item g) LCP and there was no substitute appointed to finalize the proceedings. Consequent to this *de facto* handing over of the case, without formal *legal re-allocation*, the judgment was rendered by a court, improperly constituted because of unauthorized changes in its

personal composition – a substantial violation within Article 182, paragraph 2, item a) LCP.

18. The *second* procedural ground under Article 181, paragraph 1, item a) LCP in the appeal is for undue representation of SLAVICA DUKIĆ by Lawyer DOBRICA LAZIĆ as a substantial violation within Article 182, paragraph 2, item k) LCP. It is not founded. The claim was filed on 10th June 2004, signed by SLAVICA DUKIĆ – as this procedural action was undertaken personally by the party according to Article 89, paragraph 1 LCP 1977, no authorization for its conduct was to be issued according to Article 94 LCP 1977 and presented in the case according to Article 97, paragraph 1 LCP 1977. On 3rd January 2006, SLAVICA DUKIĆ signed a power of attorney authorizing Lawyer DOBRICA LAZIĆ to represent her in the dispute already pending at the Municipal Court of PRISHTINĚ/PRIŠTINA. Since this authorization was given generally, its scope included all actions in the proceedings as foreseen by Article 95, paragraph 1 LCP 1977. Non-based are hence the appellant's allegations that Lawyer DOBRICA LAZIĆ acted in the case without being authorized by the initial claimant - the claim was submitted personally by SLAVICA DUKIĆ, while for all procedural actions undertaken till 18th April 2006, Lawyer DOBRICA LAZIĆ represented her based on the power of attorney, dated 3rd January 2006, within its scope under Article 94, paragraph 1 LCP 1977. There are also no infringements related to the participation of SLAVICA DUKIĆ in the trial – she attended the first hearing on 3rd January 2006, whereas her presence in the next one on 14th March 2006 was not mandatory - Article 295 LCP 1977. Contrary to the appellant's allegations, in the first instance it was not decided SLAVICA DUKIĆ to be heard as a party pursuant to Article 264, paragraph 1 LCP 1977 and she was never invited to such hearing pursuant to Article 268 LCP 1977. This, however, could not be qualified as a procedural omission – *firstly*, none of the litigants made such evidentiary proposal under Article 219 LCP 1977; *secondly*, this hearing was facultative according to Article 264 LCP 1977; *thirdly*, according to Article 269, paragraph 1 LCP 1977 no party could be forced to testify or sanctioned for failure to respond to court's invitation. In sum, the absence of SLAVICA DUKIĆ at the sessions in the interval 10th April 2004 – 18th April 2004 and her non-hearing as a party did not violate a procedural rule as per Article 182, paragraph 2, item k) LCP.

19. The *third* ground under Article 181, paragraph 1, item a) LCP is related to the death of the claimant in the course of the proceedings and it is founded. *At first place*, C.nr.1451/04 of the Municipal Court of PRISHTINĚ/PRIŠTINA was initiated on 10th June 2004, SLAVICA DUKIĆ died on 18th April 2006, evidenced by death certificate of the Municipality of OBRENOVAĆ nr.17, dated 20th April 2006, while the court was informed for her death by the submission of Lawyer DOBRICA LAZIĆ filed on 22nd June 2007. Thus for more than a year (from 18th April 2006 to 22nd June 2007) C.nr.1451/04 of the Municipal Court of PRISHTINĚ/PRIŠTINA was adjudicated with respect to SLAVICA DUKIĆ as a litigant though with her death she had lost *ex leges* her procedural capacity under Article 79, paragraph 1 LCP 1977 to be a party in the

case. This is an absolute violation within Article 182, paragraph 2, item (k) LCP – in the first instance for a continuous period of time procedural actions were conducted in relation to SLAVICA DUKIĆ and on her behalf though following her death on 18th April 2006 she had automatically lost the status of a claimant. *At second place*, C.nr.1451/04 of the Municipal Court of PRISHTINË/PRIŠTINA was not suspended pursuant to Article 212, point 1 LCP 1977, or Article 277, item a) LCP (after its entry into force 30th October 2008) though this suspension was mandatory since a party had died and its procedural succession in the case had to be regulated. *At third place*, the heirs of SLAVICA DUKIĆ have never requested to take over the proceedings after her death, though imperatively demanded by Article 215, paragraph 1 LCP 1977, and Article 280, paragraph 1 LCP. This could not be attributed to the submission of Lawyer DOBRICA LAZIĆ of 22nd June 2007 - it was filed before his authorizations for representation in the case by MIRJANA RADAKOVIĆ, by MILE DUKIĆ and by MILAN DUKIĆ, dated 4th, 11th and 17th March 2010, respectively. No motion of this kind has been made personally by them in writing or orally in any hearing after 18th April 2006. In its absence *per argumentum ad contrario* of Article 215, paragraph 1 LCP 1977, and Article 280, paragraph 1 LCP, the case could not be adjudicated with the participation of MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ – they have not explicitly requested from the court to continue the proceedings initiated by SLAVICA DUKIĆ after her death and consequently have not acquired the status of her *procedural successors*. They acted in C.nr.1451/04 without being *constituted as claimants, replacing the deceased initial one* contrary to Article 215, paragraph 1 LCP 1977, and Article 280, paragraph 1 LCP – a procedural violation to be qualified under Article 182, paragraph 2, item (k) LCP.

20. The *fourth* ground under Article 181, paragraph 1, item a) LCP related to the representation of MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ by Lawyer DOBRICA LAZIĆ is also based. *At first place*, the power of attorney issued by SLAVICA DUKIĆ on 3rd January 2006 in the name of Lawyer DOBRICA LAZIĆ to represent her in the case with her death on 18th April 2006 has become ineffective *ex leges* pursuant to Article 95 in conjunction with Article 532, paragraph 1 LCP. This termination of the authorization consequent to the death of the natural person granting it is similarly previewed by Article 94, paragraph 3 LCT. Its legal effect could not be considered reserved with respect to the heirs of SLAVICA DUKIĆ – LCP does not foresee such extension of the validity of the authorization after the death of the party – natural person that has issued it, while the possibility under Article 94, paragraph 3 *in fine* LCT is non-applicable for the procedural representation. *At second place*, Lawyer DOBRICA LAZIĆ acted in the proceedings *on behalf of the heirs SLAVICA DUKIĆ without authorizations* for almost 3 years - from 22nd June 2007 when he informed the court for their names till powers of attorneys were issued in his name by MIRJANA RADAKOVIĆ on 4th March 2010, by MILE DUKIĆ on 11th March 2010, by MILAN DUKIĆ on 17th March 2010, and their originals were presented to the case on 30th June 2010, 30th June 2010 and 8th September 2010, respectively. Within this interval

of time Lawyer DOBRICA LAZIĆ appeared in the case as proxy of MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ without being really authorized to represent these parties, contrary to the mandatory requirements of Chapter VI LCP 1977, applicable till 30th October 2008 and Chapter V LCP, applicable after that date. According to Article 94, paragraph 1 LCP 1977, as well as Article 89 and Article 90, paragraph 1 LCP *only the party is entitled to authorize its representative and the scope of authorization for all or certain actions in the proceedings by a written power of attorney or orally in the records* as prescribed by Article 97, paragraph 1 LCP 1977 and Article 92, paragraph 1 LCP. According to Article 98, paragraph 1 LCP 1977 and Article 93, paragraph 1 LCP *the authorization should be formalized and presented in the case at the very first action undertaken by the representative*. In violation of these rules in C.nr.1451/04 Lawyer DOBRICA LAZIĆ acted for more than 3 years for the successors of SLAVICA DUKIĆ without being determined as their representative pursuant to Article 94, paragraph 1 LCP 1977 or Article 90, paragraph 1 LCP by duly issued powers of attorney in the written form under Article 97, paragraph 1 LCP 1977 or Article 92, paragraph 1 LCP, prescribed for their validity, presented in the case according to Article 98, paragraph 1 LCP 1977 and Article 93, paragraph 1 LCP. The representation of Lawyer DOBRICA LAZIĆ for the heirs of SLAVICA DUKIĆ was established when their original powers of attorney were submitted to the case on 30th June 2010 for MILE DUKIĆ and MIRJANA RADAKOVIĆ and 8th September 2010 for MILAN DUKIĆ. Till then, without authorizations, evidenced in the proceedings, Lawyer DOBRICA LAZIĆ participated *de facto* in the case not being *de jure* entitled to act for these litigants. As the duly acquired capacity of an authorized representative is a prerequisite for validity of all procedural actions taken on behalf of the parties (Article 92 LCP 1977; Article 86, paragraph 2 LCP), the ones of Lawyer DOBRICA LAZIĆ for MILE DUKIĆ and MIRJANA RADAKOVIĆ till 30th June 2010 and for MILAN DUKIĆ and 8th September 2010 were invalid, without legal effect (Article 90 LCP 1977; Article 86, paragraph 1 LCP). *At third place*, the first instance allowed the participation of Lawyer DOBRICA LAZIĆ in the case for almost 3 years without ordering him to present the missing authorizations by the claimants or their consent for the procedural actions taken, within a prescribed period of time as demanded by Article 98, paragraph 2 LCP 1977 and Article 93, paragraph 2 LCP. For a substantial part of proceedings, the first instance did not fulfill also its duty under Article 98, paragraph 4 LCP 1977 and Article 93, paragraph 4 LCP to check *ex officio* whether Lawyer DOBRICA LAZIĆ appearing for the claimants was really authorized by any of them. There procedural errors remained non-corrected - MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ have not given their consent with the actions of Lawyer DOBRICA LAZIĆ in the case before the issuance of powers of attorney in his name on 4th, 11th and 17th March 2011 and the submission of their originals to the case on 30th June 2010 and 8th September 2010. Signed with the minimum content under Article 89 LCP, these were general authorizations to undertake *future* actions in the proceedings with *ex nunc* legal effect only. No *ex tunc* consent of the claimants

with the *past* procedural actions of Lawyer DOBRICA LAZIĆ was included in the powers of attorney of 4th, 11th and 17th March 2011. Such confirmation had not been expressed in writing in any of the documents submitted by the claimants to the case or orally in any hearing. No ratification was stated by BOJANA ĐUROVIĆ, based the power of attorney signed by MILE DUKIĆ, MILAN DUKIĆ and MIRJANA on 25th December 2006, during her first appearance in the trial on 19th May 2010 or afterwards. The non-authorized actions of Lawyer DOBRICA LAZIĆ in the case have never been approved by the parties according to Article 98, paragraph 4, second sentence *in fine* LCP 1977 or Article 93, paragraph 4, second sentence *in fine* LCP as the only legal instrument for their retroactive validization. They were not stabilized by the ruling rendered by the Municipal Court of PRISHTINË/PRIŠTINA on 30th June 2010 to reject their cancellation as unlawful as per Article 93, paragraph 4, second sentence *in fine* LCP requiring these procedural actions of non-authorized person, not consented to by the parties, to be annulled. The same one taken *without proper written authorizations* under Article 97, paragraph 1 LCP 1977 or Article 92, paragraph 1 LCP in the name of Lawyer DOBRICA LAZIĆ for MILE DUKIĆ and MIRJANA RADAKOVIĆ till 30th June 2010 and for MILAN DUKIĆ and 8th September 2010 as *non-confirmed by the parties* or *cancelled by the first instance* later in the proceedings as previewed by Article 98, paragraph 4, second sentence *in fine* LCP 1977 or Article 93, paragraph 4, second sentence *in fine* LCP, constitute a procedural violation under Article 182, paragraph 2, item k) LCP, which suffices the approval of the appeal.

21. The *fifth* ground under Article 181, paragraph 1, item a) in conjunction with Article 182, paragraph 2, item n) LCP is related to errors of the judgment that could not be examined. It is also substantiated. C.nr.1451/2004 of the Municipal Court of PRISHTINË/PRIŠTINA was initiated by a claim of SLAVICA DUKIĆ as a claimant against BEKIM SOPJANI and BASHKIM SOPJANI as respondents for annulment of contract on sale of apartment Vr.nr.4725/2002, attested by the Municipal Court of PRISHTINË/PRIŠTINA on 23rd August 2002. In the last session on 8th September 2010, Lawyer DOBRICA LAZIĆ *withdrew* the claim in relation to BEKIM SOPJANI and *specified* its statement in relation to BASHKIM SOPJANI requesting apart from annulment of the contract, this respondent to be obliged to vacate the apartment and to hand over its possession to the claimants. This motion was impermissible. *At first place*, the *claim for delivery of real estate* under Article 113 LPORR, emanating from factual and legal basis, different from the one of the initial first claim for annulment of contract, *was not joined to it in one suit* as previewed by Article 255, paragraph 2 LCP, but filed after the case commenced on 10th June 2004, in the last main hearing on 8th September 2010. The respondents were not given the right to reply to this new claim according to Article 395 LCP, to present facts for its denial and/or to propose evidence that prove their objections on this dispute as previewed by Article 396 LCP. For all these reasons, the eviction could not be solved by the first instance since its introduction in the end of the trial was procedurally irregular and detrimental to the rights of the respondents. *At second place*, it could not be considered filed according

to Article 2, paragraph 1 LCP through *amendment of the claim* under Article 257, paragraph 1 LCP. As of 8th September 2010 the preliminary hearing has already been concluded, while the main hearing has been initiated. At that procedural stage the claim could not be freely amended in none of the alternatives under Article 258, paragraph 1 LCP, given *the lack of consent of the respondents*, mandatorily required by Article 258, paragraph 2 *in fine* LCP. *At third place*, as the initial claim had all the requisites under Article 253, paragraph 1 in conjunction with Article 99, paragraph 1 LCP, it could not be corrected or completed as per Article 102, paragraph 2 LCP. Moreover, this procedure could not be used for submission of *a new separate eviction claim* since it does not represent correction or completion of the *already filed initial claim for annulment of contract*. Therefore the request of Lawyer DOBRICA LAZIĆ “*to precise the claim*” could not be legally justified with Article 253, paragraph 1, Article 102, paragraph 2 or Article 257, paragraph 1 in conjunction with Article 258, paragraph 2 LCP as the initial claim remained *non-changed*, while *the subject-matter of the case was unlawfully expanded in the end of the trial* without the consent of the respondents and with no adjudication on the eviction. *At fifth place*, in the summary part, enacting clause and statement on the grounds of the judgment, MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ are determined as claimants, though the conditions under Article 280, paragraph 1 LCP for acquiring this procedural status based on their legal succession with SLAVICA DUKIĆ after her death on 18th April 2006 have not been fulfilled (see Section 19 above). Further, BASHKIM SOPJANI is indicated as the only respondent, though the proceedings with respect to BEKIM SOPJANI could not be considered terminated. In the main hearing on 8th September 2010, Lawyer DOBRICA LAZIĆ withdrew the claim against BEKIM SOPJANI. The latter neither in person, nor through Lawyer HASAN REXHA gave his *consent* with this withdrawal *explicitly* pursuant to Article 261, paragraph 2, first sentence LCP, or *tacitly* pursuant to Article 261, paragraph 2, second sentence LCP. No ruling was issued by the Municipal Court of PRISHTINË/PRIŠTINA for the withdrawal of the claim according to Article 261, paragraph 3 LCP and thus the proceedings in the respective part have remained pending. Summarizing, the judgment was rendered based on the statement of Lawyer DOBRICA LAZIĆ in the hearing of 8th September 2010 which being impermissible did not validly change the subject-matter of the case and the litigants in the proceedings. Consequently, the judgment mistakenly defines the *dispute under adjudication*, the *procedural status of the heirs of the SLAVICA DUKIĆ as new claimants* not acquired as demanded by Article 280, paragraph 1 LCP and the *passive legitimacy* of BASHKIM SOPJANI as the only respondent, though the proceedings for BEKIM SOPJANI has not been terminated pursuant to Article 261, paragraph 3 LCP. All these enumerated procedural errors of the judgment fall within the scope of Article 182, paragraph 2, item n) LCP.

22. The procedural violations under Article 182, paragraph 2, items a), k), and n) LCP indicated in the appeal exist. No such violations under Article 182, paragraph 2, items b), g), j), and m) LCP which the court of second instance is obliged to examine

ex officio have been determined. The judgment was rendered on a claim falling in the territorial jurisdiction of the Municipal Court of PRISHTINË/PRIŠTINA defined by Article 53 LCP (*Article 182, paragraph 2, item b) LCP*). It was not based on unlawful disposition of the parties under Article 3, paragraph 3 LCP (*Article 182, paragraph 2, item g) LCP*). The litigants were not denied the right of interpretation in his/her own language (*Article 182, paragraph 2, item j) LCP*). The publicity guaranteed by Article 444, paragraph 1 LCP was not excluded in the trial sessions (*Article 182, paragraph 2, item m) LCP*).

Erroneous and incomplete determination of the factual situation - Article 183 LCP

23. The *second* ground in the appeal is under Article 181, paragraph 1, item b) LCP for *erroneous and incomplete determination of the factual situation*. It is based as per the criteria of Article 183, paragraph 1 LCP.

24. It is not determined in the appealed judgment that by *written authorization*, attested by the Municipal Court of PRISHTINË/PRIŠTINA Vr.nr.4518/2002 on 14th August 2002, SLAVICA DUKIĆ authorized BEKIM SOPJANI on her behalf to conclude a contract on sale for the apartment, located in PRISHTINË/PRIŠTINA, “ULPIANA” C-7, entrance 10, nr.3, with a total surface of 49.89 m². The authorized person was entitled to transfer the property to a third person, to sign the contract on its sale at the competent court, as well as to conduct other necessary actions regarding the apartment. The existence of such authorization was explicitly admitted by SLAVICA DUKIĆ in the claim according to Article 221, paragraph 1 LCP 1977. It was proposed as evidence in the preliminary hearing on 30th May 2006 and was processed as such in the main hearing on 19th May 2010. The *signature* of SLAVICA DUKIĆ, attested by the Municipal Court of PRISHTINË/PRIŠTINA as Vr.nr.4518 on 14th August 2002 with binding evidentiary effect under Article 230, paragraph 1 LCP 1977 (*Article 329, paragraph 1 LCP*), was never determined as non-authentic pursuant to Article 230, paragraph 3 LCP 1977 (*Article 329, paragraph 3 LCP*). Its issuance in the *written form, attested by the court*, was not contested and the original was never requested pursuant to Article 108, paragraph 3 LCP 1977 (*Article 101, paragraph 3 LCP*). The *content* of the authorization does not contain crossings, deletions, insertions between the lines, corrections and other external deficiencies excluding its probative value. Its *scope* is determined by SLAVICA DUKIĆ as per the type of legal transaction to be concluded on its basis (sale) and the property to be sold. No factual findings as per this authorization, though alleged in the claim, are included in the judgment, which is incompleteness of its factual state under Article 183, paragraph 1 LCP.

25. It is not determined by the first instance court that on 23rd August 2002 the Municipal Court of PRISHTINË/PRIŠTINA attested under Vr.nr.4725/02 contract on sale of apartment concluded by SLAVICA DUKIĆ as a seller through her authorized representative BEKIM SOPJANI, on one side, and BAHSKIM SOPJANI as a buyer, on the other side. According to its points I and II, SLAVICA DUKIĆ as the owner of

apartment in PRISHTINË/PRIŠTINA, “ULPIANA” C-7, entrance 10, nr.3, with a surface of 49.89 m², on the basis of purchase contract, attested by the Municipal Court of PRISHTINË/PRIŠTINA under Vr.nr.8185/93 on 14th September 1993, sold it to BAHSKIM SOPJANI, while he bought it for the price of 31 000 €. In point III, it was agreed on the date of conclusion of the contract the possession of the apartment to be delivered by the seller, and its price to be paid by the buyer.

26. Another factual incompleteness under Article 183, paragraph 1 LCP is related to the *payment receipt, dated 3rd September 2002*. By its issuance SLAVICA DUKIĆ *admitted* that as a seller of the apartment in PRISHTINË/PRIŠTINA, “ULPIANA” C-7, entrance 10, nr.3, with a surface of 49.89 m², received on 3rd September 2002 from the buyer BASHKIM SOPJANI the full price of 31 000 €. At the bottom the names of these parties are typed and respective signatures are handwritten. The receipt was proposed by Lawyer HASAN REXHA as evidence in the preliminary hearing on 30th May 2006 and collected in the main hearing on 19th May 2010. Its original was not requested pursuant to Article 108, paragraph 3 LCP 1977 or Article 101, paragraph 3 LCP to verify its copy in the case, which is without external deficiencies. The parties, the description of the apartment and the sale price as explicitly mentioned in the receipt *coincide with the ones of the challenged contract*. So, it is not doubtful that the receipt is issued for its fulfillment. It cumulatively represents: a) a *document*-Article 232, paragraph 1 LCP 1977 (Article 331, paragraph 1 LCP); and b) *admission* of a party - Article 221, paragraph 1 LCP 1977 (Article 321, paragraph 2 LCP). This *admissible and relevant evidence, with special probative value* under Article 321, paragraph 1 LCT for fulfillment of obligations, has not been considered by the first instance court at all. It has not been checked by forensic expertise pursuant to Article 319, paragraph 3 LCP though in the hearing on 4th August 2008 MILE DUKIĆ contested as non-authentic the signature of SLAVICA DUKIĆ on the receipt. As a result of all these omissions contrary to Article 322, paragraph 1 LCP the first instance applied *the burden of proof rule* under Article 322, paragraph 2 LCP, though the payment of the price could be established by *this specifically foreseen evidence*, collected in the case.

27. The factual analysis of the statements of the respondent BASHKIM SOPJANI is also imprecise. *At first place*, they were given in the hearing on 17th June 2008 for which the claimants MILE DUKIĆ, MILAN DUKIĆ and MIRJANA RADAKOVIĆ were not summoned, were not present and were not duly represented as pointed out in Section 20 above. The session therefore should have been postponed - Article 294 LCP 1977. Its conduct with such irregularities invalidates all the procedural actions taken in its course. *At second place*, apart from this general irregularity, the statements of Lawyer HASAN REXHA in the hearing on 17th June 2008 should not have been taken into account in the examination under Article 8 LCP at all, since *they are not evidence*. Being an *authorized representative* of the respondents, this lawyer could not be considered heard as *a party* pursuant to Article 264, paragraph 1 LCP 1977. For the

same reason, his statements do not represent admission of a party under Article 221, paragraph 1 LCP 1977. In the session on 17th June 2008 Lawyer HASAN REXHA *did not participate as a witness* – he was not summoned for examination according to Article 235 and Article 242 LCP 1977; he was not informed for his duties to tell the truth and/or warned for the consequences of giving false testimony as demanded by Article 243, paragraph 1 LCP 1977; he was not informed for his rights to refuse to testify on facts that have come to his knowledge as a lawyer according to Article 237, paragraph 2 LCP 1977. Without compliance with all these requirements, Lawyer HASAN REXHA *has not acquired the procedural status of a witness*. Hence, his answers to the questions of the court in the hearing on 17th June 2008 *do not constitute witness testimonies*. As they could not be legally qualified as evidence, based on them the first instance could not distrust the statements of BASHKIM SOPJANI, heard in this session. *At fourth place*, during the preliminary hearing on 30th May 2006 Lawyer HASAN REXHA on behalf of the respondents replied to the claim, *inter alia*, that as the payment receipt was signed by SLAVICA DUKIĆ in his office, he could confirm the truthfulness of its content, but he was not aware what had happened between the parties afterwards. This was a *procedural statement* under Article 287, paragraph 1 LCP 1977 of the authorized representative of the respondents for denial of the claim, *without probative value as evidence* under Article 220, paragraph 1 LCP 1977. It could not be used for factual findings in the dispute, directly or indirectly. For all these reasons, the first instance impermissibly took into account the statements of Lawyer HASAN REXHA in the hearings on 30th May 2006 and 17th June 2008 as “*evidence*”, though lacking such probative value. *At fifth place*, apart from that, they were generalized *as fully controversial*, though they coincide on the fact that the payment receipt was signed personally by SLAVICA DUKIĆ in the office of Lawyer HASAN REXHA after the price had been paid to her. On 17th June 2008 BASHKIM SOPJANI stated that he paid the money to SLAVICA DUKIĆ a week or two after the contract in the office of Lawyer HASAN REXHA, present there, who drafted a written receipt in Serbian language, signed by the parties with the ID of SLAVICA DUKIĆ copied on the backside. As to Lawyer HASAN REXHA, on 17th June 2008, out of any procedure for collection of evidence, answered to the court that he drafted the receipt, stamped it with his facsimile, after the parties, both present in his office, confirmed the payment of the price and signed the receipt personally in writing. It is irrelevant whether being busy with other work that day, Lawyer HASAN REXHA has witnessed himself the payment of the price. Relevant is only that SLAVICA DUKIĆ confirmed that on 3rd September 2002 she received from BASHKIM SOPJANI the full price for the apartment in the amount of 31 000 € by signing with him in person the receipt, prepared by Lawyer HASAN REXHA. In the motives of the first instance court, the *moment of payment of the price* is erroneously mixed with *the moment of signing the receipt*, though factually they are not identical and *their coincidence is not mandatory by law*. According to Article 321, paragraph 1 LCT the fulfillment of the obligation by the debtor is to be verified by a receipt issued by the creditor. Without

explicit requirement by this or other provision, its issuance could be *simultaneous* with the fulfillment of the obligation or *subsequent* to it, with no preclusive deadline.

28. Based on these considerations, the factual situation in the appealed judgment should be qualified as *incomplete* and *erroneous* per Article 183, paragraph 1 LCP. The first instance court *failed to establish all facts*, alleged in the claim contrary to Article 319, paragraph 2 LCP, by non-assessing evidence, decisive for the lawsuit. The first instance court also *incorrectly established other facts*, alleged by the reply to the claim, disqualifying the hearing of the respondent under Article 264, paragraph 1 LCP 1977 by statements of his authorized representative *without evidentiary value* and *mixing its findings for the issuance of the receipt with the ones for the payment of the price, verified by it*. The ground under Article 181, paragraph 1, item a) LCP invoked in the appeal is justified and substantiates its approval.

Erroneous application of the substantive law - Article 184 LCP

29. Pursuant to Article 194 LCP the panel shall examine the challenged judgment within the appeal, as well as *ex officio* for *erroneous application of the substantive law* under Article 184 LCP.

30. The first instance court has not applied any of the substantive law provisions applicable to the authorization, signed by SLAVICA DUKIĆ to BEKIM SOPJANI on 14th August 2002. *At first place*, its issuance for conclusion of the challenged contract through a representative is explicitly recognized by Article 84, paragraph 1 LCT as permissible. Though *not based on law or an act of a competent body*, according to Article 84, paragraph 2 LCT, the representation has been duly established by the said authorization, expressing the will of SLAVICA DUKIĆ as the person granting this authority to BEKIM SOPJANI to exercise it as an authorized person (proxy) – Article 89, paragraph 1 LCT. The existence and the scope of this authorization according to Article 89, paragraph 2 LCT *is independent* of any possible legal transaction serving as a ground for its issuance. Therefore it has produced its legal effect under Article 84, paragraph 2 LCT, regardless of the conclusion of a *contract of order* under Article 749, paragraph 1 LCT, a *contract of commission* under Article 771, paragraph 1 LCT or *any other contract* obliging BEKIM SOPJANI to sell the apartment of SLAVICA DUKIĆ, with or without remuneration. *At second place*, the written form attested by the court, prescribed by Article 4, paragraph 2 of the Law on Trade of Immovable Property (Official Gazette of the SRS No. 43/81, 24/85, 28/87, 6/89 and 40/89) (“LTIP”) as mandatory for all contracts on transfer of rights on immovable properties, applicable also for the authorization for their conclusion pursuant to Article 90 LCT has been observed. The authorization for the challenged sale of apartment has been signed by SLAVICA DUKIĆ in writing with attestation by the Municipal Court of PRISHTINË/PRIŠTINA as Vr.nr.4518/02 on 14th August 2002. Issued in the form prescribed by Article 90 LCT in conjunction with Article 4, paragraph 2 LTIP, it is with legal effect, and the sanction in Article 70, paragraph 1 LCT for the lack of this

necessary form is non-applicable. *At third place*, the allegations in the claim for *simultaneous verbal amendments* of the authorization have not been proven by the claimants according to Article 319, paragraph 1 LCP. Hence, its scope could not be considered restricted to the eviction of the apartment based on Article 71, paragraph 2 LCT and the *authorization is valid only with the content, incorporated in its formal document*, presumed as complete by Article 71, paragraph 1 LCT. As no *subsequent verbal amendments*, have been also evidenced in the case, none of its terms could be deemed changed pursuant to Article 67, paragraph 3 LCT. Thus BEKIM SOPJANI has been entitled to undertake the legal actions *within the scope of the authorization* pursuant to Article 91, paragraph 1 LCT, as defined in its formal document - Article 71, paragraph 1 LCT. It specifies the legal action to be taken-conclusion of a contract, its type – sale, and the apartment to be sold in PRISHTINË/PRIŠTINA, “ULPIANA” C-7, entrance 10, nr.3, with a surface of 49.89 m². Therefore BEKIM SOPJANI was *particularly* authorized as demanded by Article 91, paragraph 3 LCT to conclude on behalf of SLAVICA DUKIĆ sale of this immovable property without limitations as per its buyer, price or other terms. *At fourth place*, none of the deficiencies of will of SLAVICA DUKIĆ in granting the authorization, alleged in the claim, though without clear distinction, were proven by the claimants as required by Article 319, paragraph 1 LCP. No evidence has been collected for her *substantial mistake* under Article 61, paragraph 1 LCT as per the status of the apartment, the person - her proxy for its sale and/or other circumstances decisive for the authorization. No *mistake in the motives* of SLAVICA DUKIĆ under Article 62 LCT has been established in the case, namely related to the abilities of BEKIM SOPJANI to vacate the apartment from its usurper. The authorization has been issued without *misunderstanding* under Article 63 LCT as per the type of contract to be concluded on her behalf and its subject. Non-proven in the case is also the allegation that BEKIM SOPJANI has misled SLAVICA DUKIĆ by *fraud* under Article 65, paragraph 1 LCT. Without these will deficiencies, the authorization could not be nullified - Article 61, paragraph 2 LCT, deemed not issued - Article 63 LCT or rescinded - Article 63, paragraph 3 LCT. *At fifth place*, without a time limit under Article 77 LCT or a rescinding condition under Article 74, paragraph 3 LCT, it was revoked by the submission filed by SLAVICA DUKIĆ to the Municipal Court of PRISHTINË/PRIŠTINA on 8th June 2004 pursuant to Article 92, paragraphs 1 and 2 LCT. Thus it was terminated *ex nunc*, having no retroactive effect for the challenged contract concluded on 23rd August 2002, before this revocation on 8th June 2004, with BAHSKIM SOPJAINI as a third person according to Article 93, paragraph 1 LCT. Summarizing, the authorization was issued by a natural person without will deficiencies, in the prescribed form, with the particularity necessary for the transfer of immovability. It produced its legal effect with its issuance on 14th August 2002 - Article 89, paragraph 1 LCT till its revocation on 8th June 2004 - Article 92, paragraph 1 LCT, thus validly legitimating BEKIM SOPJANI as an authorized representative of SLAVICA DUKIĆ on the day of the contested sale - 23rd August 2002.

31. The first instance court has not applied also the substantive law provisions on

the validity and/or legal effect of contract Vr.nr.4725, attested by the Municipal Court of PRISHTINË/PRIŠTINA on 23rd August 2002. *At first place*, having the transfer of ownership as its subject, its legal qualification is a *sale* under Article 454, paragraph 1 LCT. It is concluded *in writing with attestation by the court* which is the statutory form under Article 4, paragraph 2 LTIP in conjunction with Article 67, paragraph 1 *in fine* LCT for all contracts on transfer of immovable properties. Its *content* includes the *essential elements* of sale – 1) *object* under Article 458, paragraph 1 LCT – apartment, specified with its location address and surface, 2) *price* – *determined by the contract* in the amount of 31 000 € according to Article 462, paragraph 1, first hypothesis in conjunction with Article 394 LCT, *not subject to other determination* by prescribed price (Article 463 LCT), by current stipulated price (Article 464 LCT), by a third person (Article 464 LCT) or by a negotiating partner (Article 465 LCT). With these constitutive elements agreed, according to Article 26 LCT the challenged contract was *concluded* after its formal document was signed by the representative of the seller and the buyer in the court on 23rd August 2002 according to Article 72, paragraph 1 LCT. *At second place*, the contract is not null and void: 1) as its *subject* is not impossible, unlawful, unspecified or undetermined (Article 47 LCT); 2) *its ground* is not non-existing or non-permitted (Article 52 LCT); 3) the parties are natural persons with the *capacity* under Article 2 and Article 54, paragraph LCT; 4) none of the *deficiencies of will* under Article 60 - 66 LCT existed with respect to any of the parties; 5) as the *form* is the necessary one, non-applicable is the nullity for its lack under Article 70, paragraph 1 LCT; 6) the contract is not void as contrary to *compulsory regulations, public policy or fair usage* - Article 103, paragraph 1 LCT. In particular, it is not null for being concluded between a buyer in family relationship with the representative of the seller. This configuration does not violate any compulsory regulation and does not invalidate this legal transaction. *At fourth place*, concluded by BEKIM SOPJANI as an authorized representative of the seller SLAVICA DUKIĆ, within the limits of his authority, this contract was binding for her as principal and the other contracting party – the buyer BASHKIM SOPJANI pursuant to Article 85, paragraph 1 LCT. The latter was informed for the status of BEKIM SOPJANI as an authorized person since it had been explicitly indicated in the formal content of the contract, keeping it effective for both contracting parties pursuant to Article 85, paragraph 3 LCT. BEKIM SOPJANI exercised his authority as representative *in person* without transferring it to another - Article 86, paragraph 1 LCT. The sale of the contested apartment was concluded in the limits of this authority, *without transgression* under Article 87, paragraph 1 LCT. Hence, no subsequent approval of the principal under Article 87, paragraphs 2 and 3 LCT was necessary. It was not needed based on Article 88, paragraphs 2 and 3 LCT as well - the contract was not signed by BEKIM SOPJANI on behalf of SLAVICA DUKIĆ, without authorization issued by this principal. Therefore, its legally binding force could not be excluded because of transgressed limits of the authority of BEKIM SOPJANI as representative of SLAVICA DUKIĆ – Article 87 LCT or for conclusion by unauthorized person – Article 88 LCT. Signed based on valid authorization issued

by the seller, within its limits, the contract has entered into force with its attestation by the court as sale under Article 454, paragraph 1 LCT of ownership on an apartment, in its legal effect neither null, nor rescindable.

32. The first instance has literally quoted in the judgment Article 516, paragraph 1 LCT *stipulating the obligation of the buyer to pay the price at the time and the place specified in the contract*. However, it failed to apply this provision properly. *At first place*, it was just mechanically reproduced in the judgment without any legal analysis of the particularities of the concrete lawsuit contrary to Article 160, paragraph 5 LCP. *At second place*, the rule for simultaneous delivery the possession of the apartment with the payment of its full price on the day of conclusion of the contract formulated in its point III as previewed by Article 516, paragraph 1 LCT, following Article 516, paragraph 2 LCT, has not been implemented at all by the first instance court. As long as SLAVICA DUKIĆ did not fulfill her obligation under Article 454, paragraph 1, Article 467, paragraph 1 LCT to deliver as a seller the possession of the apartment to BASHKIM SOPJANI as a buyer, on 23rd August 2002, the day of conclusion of the contract, *the same one was not obliged to pay the price until being able to inspect the object pursuant to Article 475 in fine LCT*. Explicitly postponed *ex leges* until the delivery of the property, the obligation of BASHKIM SOPJANI for payment of the price under Article 516, paragraph 1 LCT has not become due before handing over the possession of the apartment, as its fulfillment could not be requested by the creditor before the expiry of this time limit – Article 315, paragraph 1 and Article 316 LCT. This consequently excludes the failure in its performance and the annulment of the contract under Article 124 LCT due to such non-performance. *At third place*, the non-delivery of the apartment by SLAVICA DUKIĆ to BASHKIM SOPJANI on the day of conclusion of the contract - 23rd August 2002, as foreseen by its point III and Article 467, paragraph 1 LCT, is her *creditor's delay* under Article 325, paragraph 2 LCT, which pursuant to Article 326, paragraph 1 LCT *exonerates* him from all legal consequences of his *debtor's delay* in the simultaneous payment of the price on the same date, including the annulment of the contract under Article 124 LCT. *At fourth place*, according Article 122, paragraph 1 LCT with bilateral contracts no party shall be bound to fulfill its obligation unless the other fulfils, or is ready simultaneously to fulfill its obligation. Following the rule, BASHKIM SOPJANI was not bound to pay the price according to Article 516, paragraph 1 LCT provided that SLAVICA DUKIĆ had not delivered to him the sold apartment on 23rd August 2002, nor had offered subsequent simultaneous delivery according to Article 122, paragraph 1 and Article 467, paragraph 1 LCT. Nothing else was agreed by the contract, determined by law or resulting from the nature of the transaction. Thus the *non-performance of the seller postpones the performance of the buyer*, legalizes *the delay in the agreed time limit* for payment of the price on 23rd August 2002, makes this obligation *undue*, *excludes the failure for its fulfillment*, and hence *the repudiation* of the contract under Article 124 LCT.

33. The first instance court has not applied the substantive law provisions on the *fulfillment* under Chapter VI, Section 2 LCT. In particular, non-implemented in its judgment is Article 321 LCT, though applicable in the lawsuit. Its paragraph 1 states that *whoever fulfils obligation entirely or partially shall be entitled that the creditor issues him a receipt at his own expenses*, its paragraph 2 derogates the rule only for payment of the debt through a bank or post office, its paragraph 3 presumes that the receipt issued for the paid off principal refers to the accessorial interest and expenses as well. The receipt is introduced as *special evidence for fulfillment of all obligations*, including the contractual monetary ones. Therefore its *probative value* prevails over that of any other evidence in the dispute for payment of the price under Article 516, paragraph 1 LCT. Contrary to these rules, the receipt, issued by SLAVICA DUKIĆ on 3rd September 2002, collected in the first instance case, has not been examined as per its authenticity by forensic expertise pursuant to Article 319, paragraph 3 LCP in order to corroborate the payment of the price as a fact, crucial in the dispute. Further, the receipt, though being admissible and relevant evidence, has not been considered at all by the first instance court as demanded by Article 8 LCP. In the statement of the grounds of the appealed judgment under Article 160, paragraph 4 LCP it has not been examined, assessed or used for establishment of any facts. If processed without these legal omissions, the receipt of 3rd September 2002 is sufficient to verify as previewed by Article 321, paragraph 1 LCT fulfillment of the obligation for payment of the price under Article 516, paragraph 1 LCT in compliance with the terms of the contract. *At first place*, according to the receipt the price has been paid by BASHKIM SOPJANI in person, which is fulfillment of the obligation *by the debtor* in conformity with Article 296, paragraph 1 LCT. There is no evidenced fulfillment by a *third person* under Article 296, paragraphs 2–4 LCT, with or without the subrogation regulated by Article 299 – 304 LCT. *At second place*, according to the receipt the price has been paid to SLAVICA DUKIĆ, which is fulfillment to the *creditor* in the first hypothesis of Article 305, paragraph 1 LCT. The price has not been received by BEKIM SOPJANI, as alleged in the claim, which excludes any possible invalidity of such payment because of non-designation by the creditor in the fourth hypothesis of Article 305, paragraph 1 LCT. *At third place*, according to the receipt, the *subject of the fulfillment* corresponds to the one of the obligation under Article 516, paragraph 1 LCT as assumed by the contract – it has been fulfilled as monetary through payment of the price in its agreed currency and amount of 31 000 € in compliance with Article 307, paragraph 1 LCT. No substitution of the fulfillment in the alternatives under Articles 308 and 309 LCT has been realized. *At fourth place*, according to the receipt the price under Article 462, paragraph 1 LCT as determined in the contract on sale has been *fully* paid off. This excludes invalidity of this payment as *partial fulfillment* pursuant to Article 310, paragraph 1 or paragraph 2 *in fine* LCT. The expenses on the ownership transfer and all the other fulfillment expenses according to point V of the contract and Article 298 LCT have to be covered by buyer only, which excludes them from the payment due by him to the seller. As between these parties existed only one

monetary obligation for the payment of the price under Article 516, paragraph 1 LCT, non-applicable were the rules for making allowances as per the fulfillment of several obligations of the same kind under Articles 312 – 313 LCT. *At fifth place*, as the time limit for payment of the price on 23rd August 2002, agreed by point III of the contract, due to non-delivered possession of the apartment on that date has been *ex leges* extended to the moment of fulfillment of this obligation of the seller according to Article 475 LCT, the payment on 3rd September 2002, though before the expiry of this new legal deadline, is validly effected based on Article 315, paragraph 1 LCT. *At sixth place*, as verified by the receipt the price was paid on 3rd September 2002 in PRISHTINË/PRIŠTINA, being at that time the domicile/residence of the creditor SLAVICA DUKIĆ. Therefore the place of fulfillment of this monetary obligation is the one previewed by Article 320, paragraph 1 LCT. *At seventh place*, the receipt could not be attested by the court, as mentioned by MILE DUKIĆ in the hearing on 4th August 2008 since no such statutory form and procedure are legally foreseen for this type of documents. According to Article 321, paragraph 1 LCT its issuance in written form is legally sufficient. Summarizing, if the payment receipt of 3rd September 2002 is confirmed as authentic, according to Article 321, paragraph 1 LCT it has the probative value to establish that BASHKIM SOPJANI has fulfilled his obligation to pay the full price of the apartment, assumed by the contested contract. The fulfillment so verified being valid, has terminated this obligation pursuant to Article 295, paragraph 1 LCT which excludes the *failure in its performance* as a mandatory prerequisite under Article 124 LCT for annulment of the contract due to non-performance.

34. The erroneous application of the substantive law under Article 184 LCP, invoked in the appeal and controlled *ex officio* by the second instance based on Article 194 LCP, exists. The first instance court has failed to apply properly the provisions regulating the conclusion of the challenged contract, its validity, legal effect and/or performance while rendering its decision on this lawsuit.

VI. Conclusion

35. Based on these considerations the court of second instance court shall approve the appeal of BASHKIM SOPIANI – judgment C.nr.1451/04 of the Municipal Court of PRISHTINË/PRIŠTINA, dated 16th September 2010 shall be annulled pursuant to Article 195, paragraph 1, item c) LCP as unlawfully rendered with the grounds under Article 181, paragraph 1, items a) – c) LCP, identified in the appellate review. The case shall be returned to the first instance for retrial pursuant to Article 198, paragraph 2 LCP in compliance with the instructions under Article 198, paragraph 3 LCP given below.

36. The procedural status of the heirs of SLAVICA DUKIĆ as claimants in the case should be regularized based on officially certified final inheritance decision and their explicit request to the court for taking over the proceedings as her procedural

successors pursuant to Article 280, paragraph 1 LCP. The withdrawal of the claim against the respondent BEKIM SOPJANI initiated in the hearing on 8th September 2010 should be completed – by receiving his consent under Article 261, paragraph 2 LCP and issuance of a ruling under Article 261, paragraph 3 LCP. The subject-matter of the dispute should be explicitly defined at the very beginning of the retrial, namely as claim or claims filed according to Article 2, paragraph 1 LCP, individualized with all the requisites under Article 253, paragraph 1 LCP and paid court fees according to Article 253, paragraph 4 LCP. All procedural actions for processing of evidence should be repeated with no irregularities in the representation of the parties. The authenticity of the payment receipt, dated 3rd September 2002 should be corroborated by forensic expertise according to Article 319, paragraph 3 LCP. The statements of Lawyer HASAN REXHA upon respective evidentiary proposal should be heard only after fulfilling the requirements under Articles 339 – 355 LCP for his examination as a witness. The evidence collected in the retrial should be assessed individually and as a whole according to their probative value as required by Article 8 LCP.

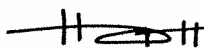
In view of the aforementioned reasoning it is decided as in the enacting clause.

LEGAL REMEDY: No appeal is allowed against this ruling.

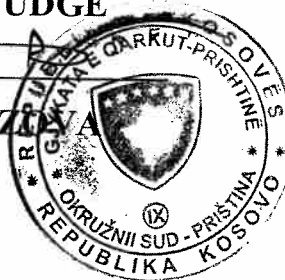
THE DISTRICT COURT OF PRISHTINË/PRIŠTINA

AC. nr.822/2011 on 23.02.2012

PRESIDING JUDGE



ROSITZA BUZOVA



NOTE OF DELIBERATION AND VOTING

THE DISTRICT COURT OF PRISHTINË/PRIŠTINA in a panel composed of EULEX Civil Judge ROSITZA BUZOVA as Presiding, Judge MEDIHA JUSUFI and Judge NEHAT IDRIZI as panel members, on 23rd February 2012 deliberated and voted unanimously as in the enacting clause.

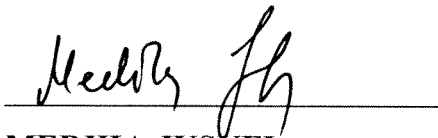
The present note is added to ruling AC.nr.822/2011 of the District Court of PRISHTINË/PRIŠTINA, dated 23rd February 2012 pursuant to Article 140, paragraph 1, second sentence LCP.

THE DISTRICT COURT OF PRISHTINË/PRIŠTINA

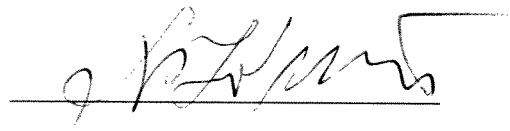
AC.nr.822/2011 on 23.02.2011



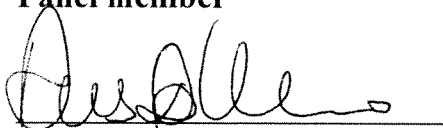
ROSITZA BUZOVA
Presiding Judge



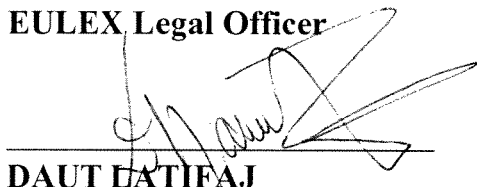
MEDIHA JUSUFI
Panel member



NEHAT IDRIZI
Panel member



ANDRES MORENO
EULEX Legal Officer



DAUT DATIFAJ
Interpreter/Translator (English/Albanian)



JELENA JANCIC
Interpreter/Translator (English/Serbian)

Prepared in English as an 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 and signed by the Kosovo Judges after translation by the above referred interpreters/translators.