SUPREME COURT OF KOSOVO

GJYKATA SUPREME E KOSOVËS

VRHOVNI SUD KOSOVA

KOSOVO PROPERTY AGENCY (KPA) APPEALS PANEL

KOLEGJI I APELIT TË AKP-së

ŽALBENO VEĆE KAI

GSK-KPA-A-011/14 **Prishtinë/Priština**

8 July 2015

In the proceedings of:

A.Sh.

Lekë Dukagjini no. 33
Dardania
Gjakovë/Đakovica

Appellant (Respondent in first instance)
Representative: Avdi Rizvanolli, laywer at Gjakovë/Đakovica

vs.

M.S.
Ratina 387
Kraljevo
Serbia

Appellee (Claimant in first instance)

The KPA Appeals Panel of the Supreme Court of Kosovo composed of Sylejman Nuredini, Presiding Judge, Rolandus Bruin and Willem Brouwer, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/203/2013 (case file registered at the KPA under No. KPA14815) (henceforth also: the KPCC Decision), dated 11 June 2013, after deliberation held on 8 July 2015, issues the following

JUDGMENT

1. **The appeal of A.Sh. against the decision of the Kosovo Property Claims Commission KPCC/D/A/203/2013, dated 11 June 2013, is accepted as grounded.**
2. **The KPCC Decision no. KPCC/D/A/203/2013, dated 11 June 2013, as far as it concerns claim no. KPA14815 is annulled.**
3. **The claim no. KPA14815 of M.S. is rejected as ungrounded.**

Procedural and factual background:

1. On 4 December 2006, M.S. as Claimant (henceforth: the Appellee) filed a claim with the Kosovo Property Agency (KPA), seeking confirmation of his use right and repossession of the property, located in Gjakova/Đakovica, parcel no. 4387/27, construction land (Commercial without buildings; class 3 field), with a surface of 00.04.17 ha (henceforth: the claimed parcel). He explained that the parcel was lost as a result of the circumstances of 1998/1999 in Kosovo on 13 June 1999.
2. To support his claim, the Claimant provided the KPA with the following documents:

- Decision No.19.464-550 issued by Municipality of Gjakova/Đakovica (Division of General Administration, Property, Legal and Joint Affairs) on 3 December 1997 (henceforth: the Allocation decision); according to this decision Appellee is given, following a direct agreement, the right to urban development land owned by the state and registered as Cadastral land plot no. 4378/27 with the area of 0.04.17 ha in Gjakova/Đakovica-Van Varos Cadastral District in line with the detailed urban design of the urban complex of Carec Potok.
- Payment receipt no. 48800 dated on 11 December 1997 in the name of the Appellee showing that he paid to the Municipality of Gjakova/Đakovica the amount of 625.50 Din as the tax for transferring the ownership.
- Decision No.952-O1-415/97 C issued by the Republic Geodesic Authority, Cadaster for Immovable Property of Gjakova/Đakovica on 6 January 1998 (henceforth: the Cadastral decision); according to this decision a registration of the use right is granted on the basis of the Allocation decision and so

the property is registered as cadastral land plot 4387/27classified as arable land 3rd class with the area of 0.04.17 ha from the possession list no. 856 in Gjakova/Đakovica Van Varos Cadastral District listed as Republic of Serbia State Property on behalf of Gjakova/Đakovica Municipal Assembly

- Payment receipt of the date 5 February 1998 in the name of Claimant showing that he paid the amount of 55.000 DIN to the Department for Cadaster of Gjakova/Đakovica Municipality
- Invoice No.509 issued from "ElektroKosmet" on 13 March 1998 and payment receipt dated on 16 March 1998 in the name of Claimant setting the amount 22.50 DIN for using the services of "ElektroKosmet"
- Urban Planning Permit 05 No. 351-68 issued by the Department for Urbanism, Municipal and Housing Services, Construction and Preserving of the Environment of Gjakova/Đakovica Municipality to Appellee on 19 March 1998 for construction of a separate residential building
- Urban Planning Consent No. 05-351-105 issued by Department for Urbanism, Municipal and Housing Services of Gjakova/Đakovica Municipality on 13 April 1998 confirming that the technical documents have been drafted in accordance with the urban planning permission
- Decision on the Construction Permit 05 No. 351-108 issued by Municipal Assembly of Gjakova/Đakovica, Department for Urbanism, Housing and Municipal Services Construction and preserving of the Environment, dated on 13 April 1998 permitting Appellee to construct a building on the claimed parcel.
- Payment receipt dated on 15 April 1998 in the name of the Appellee showing that he paid 1.650.000 DIN to the Company for Construction Projects "Arkos".

3. KPA did not verify these submitted documents because it deemed not necessary, and added ex officio to the case file on 5 March 2007 Possession List no. 2281, dated 2 March 2007; according to this Possession List Appellee is private property holder of parcel 4387/27 in Cadastral Zone Gjakova/Đakovica –J.Qytet/I.Grada with surface of 4.17 are in the Place Carev potok (Class 3) and that this possession list was updated 2/1998 (p. 098 of the KPA file).
4. KPA informed potential interested parties about the existence of the claim in May 2011. On the claimed parcel was found a commercial building occupied by A.Sh.
5. A.Sh.as Respondent (from here on: the Appellant) sent to the KPA a notice of participation and stated that he claimed a legal right to the claimed parcel. Later on in the proceedings, especially with his responses of 25 August 2008 and 19 and 20 July 2011, he stated that a parcel no. 4387/2 with surface 00.07.78 ha was allocated to him in 1989 by the Socially Owned Enterprise-KBI "Ereniku" (henceforth: SOE-KBI "Ereniku") and that he took possession of it in 1990. The Appellant states that the parcel no. 4387/27, which is claimed by the Appellee, derives from the base parcel no. 4387/2 and he does not have knowledge on how the parcel no. 4387/2 was subdivided and how

the parcel no. 4387/27 was created. According to the Appellant, the Appellee cannot acquire the parcel no. 4847/27 since he was never the employee of the SOE-KBI "Ereniku" and Appellant cannot understand how the parcel can be registered in the name of the Appellee in the Cadaster.

6. In support of his responses the Appellant submitted to KPA:
   - Decision no. 271/91 issued by KBI-"Ereniku" dated 28 November 1989; according to this decision SOE-KBI "Ereniku" allocated parcel no. 4387/2 with the total surface 00.07.78 ha to the Appellant (p. 044 of the KPA file).
   - Minutes on entering into possession of immovable land, dated 14 February 1990; according to this minutes to the Appellant was handed over the parcel no 4387/2 on 14 February 1990 (p. 045 of the KPA file).
   - Invitation from the Municipality of Gjakova/Đakovica dated 12 December 2001, for the Municipal Assembly Session on 19 December 2001 (p. 094 of the KPA file).
   - Decision 01 No. 45-2001 issued by the Municipality of Gjakova/Đakovica on 19 December 2001; according to this decision a previous Decision No. 19.Nr.465-28, dated 28 October 1993 and administered by 'the Serbian occupying government', on transfer of land of the SOE –KBI-"Ereniku" was declared unlawful and inexistent (p. 095 of the KPA file).

   KPA deemed verification of these documents not necessary.
7. Appellee replied to the response of Appellant on 29 July 2011. In this reply he states that he acquired the use rights over the claimed parcel. He states that he is the sole owner based on the agreement with the municipality of Gjakova/Đakovica, as laid down in the Allocation decision. Further he states that he has paid the fee of 20.850 Dinars. The Claimant states also that he did not manage to construct a house on the claimed property since shortly after he obtained the construction permit he had to leave Kosovo due to the circumstances of the armed conflict.
8. On 21 February 2013 KPA added to the case file *ex officio* a Certificate for the Immovable Property Rights No.UL-70705028-02281 issued on 21 February 2013 by Kosovo Cadastral Agency, Municipal Cadastral Office of Gjakova/Đakovica; it reads that Appellee is the owner/possessor of the immovable property no. P-70705028-04387-27 with total surface of 0417 m² in Cadastral Zone Gjakova/Đakovica –J.Qytet/I.Grada.
9. KPA added also to the file a Certificate of that same Cadastral office, dated 11 December 2012, in which is stated that the owner/possessor of the immovable property P-70705028-4387-2 with surface of 2433 m² in Gjakova/Đakovica –J.Qytet/I.Grada is P.SH.Kuvendi Komunes Gjakova/Đakovica.

10. On 4 March 2013 Appellant confirmed that he constructed his object on the claimed parcel in 2002 (p. 226 of the KPA file).
11. On 4 February 2013 KPA confronted Kosovo Cadastral Agency, referring to the claimed parcel and the Allocation decision, with the fact that the claimed parcel is located within the border of construction land, but that the claimed parcel is not indicated in the Immovable Property Rights Register and the Possession List as belonging to a Social Property User (p. 228 of the KPA file). Kosovo Cadastral Agency answered on 24 March 2013 regarding cadastral parcel 4387/27 CZ Gjakova/Đakovica that the Municipality of Gjakova/Đakovica through its Decision 464-550 dated 3 December 1997 allocated for permanent use the parcel 4387/27 with a surface of 0.04.17 ha to Appellee. The Cadastral Agency adds that the property is "Construction Land". This element and the element that the Municipal Assembly allocated the land for use to a natural person, although this is a socially-owned property, is not reflected on the Possession List and on the Certificate, so states the Cadastral Agency.
12. With the KPCC Decision (KPCC/D/A/203/2013 dated 11 June 2013), the KPCC decided that Appellee has established that he has a user right to 1/1 of the claimed parcel and decided that Appellee is entitled to possession of the claimed parcel. The KPCC reasons (in paragraphs 18, 28-31 of the Cover Decision) that Appellant submitted the Allocation decision, that this was verified as genuine and that the KPA ex officio obtained the certificate for immovable property rights, which also identifies Appellee as the property rights holder. According to KPCC Appellant failed to provide evidence for his allegations that the claimed parcel was allocated to him by SOE-KBI Ereniku; the submitted evidence from Appellant relates not to the claimed parcel but to another parcel with the other number 4387/2. KPCC also reasons that Appellant did not provide evidence for his allegation that parcels 4387/2 was created from the claimed parcel.
13. On 11 September 2013 Appellant received the KPCC decision. The decision was served to the Appellee on 23 September 2013.
14. On 30 September 2013 Appellant filed the appeal.
15. The appeal was served on the Appellee on 27 January 2014. He responded to the appeal on 18 February 2014.
16. The Appellant alleged in his letter of appeal that he was prevented to review the case file and to see the evidences which were presented by the Appellee. Therefore he requested to enable his Representative observation of the case file and evidences presented by Appellee.
17. The Supreme Court informed him on 18 December 2014 that KPA always sends copies of all presented documents to the other party and that he could request the Registrar to see the file.

The allegations of the parties:

Appellant

18. The Appellant states that the decision made by KPCC is based on violation of the substantive and procedural law, and also on an erroneous and incomplete determination of the factual situation. He firstly asks review of the decision by KPA/KPCC.
19. According to the Appellant, the Executive Secretariat of the KPA has confirmed as positive the evidences submitted by Appellee despite the fact that the same evidences are ungrounded. The Possession List of the year 1994 submitted by Appellee in other claims is too symptomatic whereby the Appellee is registered as owner of the claimed parcel and the same Possession List surprisingly was verified as positive by the Executive Secretariat of the KPA. According to the KPCC Decision through an alleged direct agreement the property was given in use to Appellee, but KPCC does not determine the basis and the terms of such agreement. The Appellant mentions various evidences which were submitted by the Appellee, by stating that to him it is unclear on which evidence the KPA based its decision. Appellant denies that the claimed parcel ever has been owned by the state. Appellant further states that Appellee is not the owner of the claimed parcel. The claimed parcel, as well as other parcels around, was destined for employees of SOE-KBI "Ereniku" Gjakovë/Đakovica. The Appellant alleges that he has the ownership right over the claimed parcel based on the work relations with the SOE-KBI "Ereniku" in Gjakovë/Đakovica and that he peacefully and freely possessed it for many years.

Appellee

20. The Appellee states that the appeal is unfounded. The Appellee states that the Appellant has unsuccessfully tried to challenge his claim during the procedure before the KPA. Appeal does not have a single valid argument that would call into question the KPCC Decision. The Appellee gives a detailed presentation of the documents that he has submitted before KPA in order to confirm his use right.

Legal reasoning:

Admissibility of the appeal

21. The appeal has been filed within the time limit of 30 days as set in Section 12.1 of UNMIK Regulation 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 (henceforth: Law UNMIK 2006/50), and is admissible.
22. The Supreme Court leaves aside Appellant's request for review of the decision by KPA/KPCC, because that request is not addressed to the Supreme Court and does not contain a complaint against the appealed KPCC Decision.

Jurisdiction

23. The Appellant founded his claim on a permanent use right pertaining to urban construction land.
24. From the Law on Land for Construction (Official Gazette SAPK no. 14/80 and 42/86, henceforth: LLC), especially Articles 2, 3, 5, 8 and 24, the Supreme Court derives the following description of the essence of land for construction: Land for construction, as the good of the common interest, serves the needs of the social community and is used according to its destination. The municipality provides rational use of socially-owned land for construction. From the day of the decision by the municipality for determination of the borders of urban land for construction this land will be pronounced as socially owned land. The owner of a building on urban land for construction has the right to use the land under the building within the borders of the construction parcel. The urban land for construction may be determined by the municipality. The municipality allocates the parcels for construction.
25. From this description of (urban) land for construction in the LLC follows that according to this law, that dates back to Yugoslavian times but is still valid, land for construction is classified as socially owned land.
26. According to Section 3.1 of Law UNMIK 2006/50, as far as relevant here, KPCC has the competence to resolve conflict-related ownership claims with respect to and claims involving property use rights in respect of private immovable property.
27. These provisions in LLC and in Law UNMIK 2006/50 raise the question whether KPCC is competent to decide on claims that are based on property rights on constructed buildings on and use rights on land for construction: if the status of socially owned land for land for construction means the rights on use of the land for construction and property rights on the constructed buildings on this type of land is not related to private immovable property, KPCC would not have jurisdiction to decide on claims related to land for construction.
28. The KPA recommended KPCC in a legal memorandum of December 2012 to grant permanent use rights to urban construction land on (successful) claims of this type regardless of how the right has been registered in the cadastre records or by the courts. KPCC followed this recommendation, also

in this case. The recommendation is based on this: According to article 8 LLC all land deemed to be construction land by the municipalities would also be classified as socially owned land. As a consequence, any construction land – regardless it was previously owned by private persons and companies as well as municipal and public land – was registered with the abbreviation P.SH.SH (Social Property User) to show its classification as socially owned land.

According to articles 4, 11 and 24 LLC rights to construction land are not different from rights to other real property in terms of property transfer. The property right holder can transfer his property rights on the building as long as the transfer does not entail a change in the conditions of the use of the land. And the right to the building automatically includes the right to the use of the underlying land.

As negative rights KPA notes that according to article 20 of the Law on Transfer of Real Property (SAPK 45/81 and 29/86) the property right holder in the event of selling the structure has to give priority to the municipality before accepting an offer of a private party. The property right holder to a building on construction land has the right to use the land, but the right to the land cannot be transferred. The limitations to transfer the property go further than is common when exercising private ownership rights, but practice shows that these limitations are not strictly enforced.

KPA also notes that socially owned property administered by socially owned enterprises is treated different from socially owned construction land. KPA also notes that article 8 LLC defines construction land as socially owned land, but does not specifically mention the status of buildings on that land. KPA further notes that the property right holder holds an ownership right to the building and only a user right to the land.

29. In this case KPA in its advice to KPCC also refers to article 11 LLC, in which is stated that permit holders of a right to use urban construction land, can sell, rent or otherwise dispose of the property and henceforth in a real estate transaction are regarded more or less as private owners. The article, third paragraph, reads: *The holders of the rights of use on constructed urban land may transfer this right within the borders of parcel only in conjunction with transfer of the right of use, as well as the property right on building that may be in a transfer, under unchanged condition of use of this land.* So KPA advices to KPCC that the claimed parcel has characteristics more closely linked to private immovable property than public; hence, the KPA advised an KPCC decided that the claim is within jurisdiction of the KPCC.
30. The Supreme Court comes to a different conclusion than the KPCC.
31. As far as a claimant seeks recognition and repossession of a use right on land for construction the claim is outside jurisdiction of KPCC because such a use right is related to socially owned immovable property and not private immovable property. This follows from the Law on Land for Construction, especially article 8.3. The arguments noted by KPA as mentioned in the memorandum, quoted

before in paragraph 28, cannot convince that the use right is related to private immovable property and not socially owned property. To this type of claim KPCC has no jurisdiction.

32. As far as a claimant seeks recognition and/or repossession of his ownership right to a building (or other construction) on land for construction he or she is not seeking for recognition or repossession of a right related to socially owned immovable property, but that claim is an ownership claim with respect to a private immovable property. This conclusion is based on the system of the Law on land for Construction and more specific Article 24 LLC. According to the law a person can construct a building on land for construction and this building will be his private property. He or she can sell this building to another private person. As KPA advises in the memorandum there is no restriction on this type of sale or transfer of that kind of property related to a building on land for construction. With regard to such a claim KPCC has jurisdiction.

On the merits

33. The appeal is grounded.
34. As far as Appellee seeks confirmation of his use right on the claimed parcel KPCC has no jurisdiction to decide on the claim as reasoned here for in paragraph 31.
35. As far as Appellee seeks repossession of a building on the claimed parcel his claim cannot be granted, because from the facts and his allegations follows that he did not realize a building on the claimed parcel. This means he did not gain a (private) property right on such a building. That he gained a permission for building and a parcel of land for construction was allocated to him, which facts should follow from the not verified documents meant in paragraph 2, is not enough to gain a (private) property right on a non-constructed and therefore not existing building. The (private) property right to a building on land for construction is certainly depending on the existence of the constructed building as follows from article 24.2 LLC.
36. The fact that according to the ex officio gathered Possession list, mentioned in paragraph 3, and the Certificate for Immovable Property Rights, mentioned in paragraph 9, in the cadaster is registered that Appellee is mentioned as 'private property holder' of the claimed parcel does not lead to another conclusion. Kosovo Cadastral Agency confirmed that this entry in the registration is based on the Allocation decision for the permanent use of this parcel of land for construction. So the Possession list and the Certificate only relate to use rights on socially owned property. They also only refer to the parcel of land and not to any building on it. So also these evidences do not prove Appellee gained a (private) property right on a building on the claimed parcel.

37. This conclusion leads to rejection of the claim. After that conclusion, the assertions of Appellant on his own rights to the claimed parcel cannot and do not have to be discussed, because Appellant did not file a claim on which the Supreme Court can decide.
38. Consequently according to Section 13.3 (c) of the Law UNMIK 2006/50 the appeal has to be accepted as grounded and the claim rejected as unfounded.

Legal Advice

39. Pursuant to Section 13.6 Law UNMIK 2006/50 this judgment is final and enforceable and cannot be challenged through ordinary or extraordinary remedies.

Sylejman Nuredini, Presiding Judge

Rolandus Brouin, EULEX Judge

Willem Brouwer, EULEX Judge

Urs Nufer, EULEX Registrar