

DHOMA E POSAÇME E
GJYKATËS SUPREME TË
KOSOVËS PËR ÇËSHTJE QË
LIDHEN ME AGJENCINË
KOSOVARE TË
PRIVATIZIMIT

SPECIAL CHAMBER OF THE
SUPREME COURT OF KOSOVO
ON PRIVATIZATION AGENCY
OF KOSOVO RELATED
MATTERS

POSEBNA KOMORA
VRHOVNOG SUDA
KOSOVA ZA PITANJA
KOJA SE ODNOSI NA
KOSOVSKU AGENCIJU ZA
PRIVATIZACIJU

ASC- 10-0016

In the lawsuit of

Claimants/Appellants

**F.L, R.P, Xh.L, B.GJ, Xh.L,
M.G, N.L, Z.B, N.L, A.L, A.V, A.L, B.L, L.L, L.
B, R.L, M.K, B.K, M.L, B.E, N.J, Xh. L, N. H dhe N.K,
Represented by A.V, lawyer from Mitrovicë/a and H.H, lawyer from Prishtinë/Priština**

vs.

Respondent

- 1. Kosovo Trust Agency (KTA)**
- 2. Hotel -“M”, Socially Owned Enterprise, Pejë/Peć,
represented by the Privatisation Agency of Kosovo**

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo Related Matters (SCSC), composed of Mr.sc. Sahit Sylejmani, Presiding Judge, Sabri Halili, Gertraud Marx-Leitenberger, Vladimir Kanev and Ilmi Bajrami, Judges, on the Appeal filed against the Judgment of the SCSC, SCC-05-0453 of 10 December 2009, after deliberations held on2016, issues the following:

JUDGMENT

- 1. The appeal filed by the Claimants is rejected as unfounded.**
- 2. The Judgment of Trial Panel of the SCSC, SCC-05-0453 of 10 December 2009 is upheld.**
- 3. No court fees are imposed for the proceedings.**

Procedural background

On 11 October 2005 the claimants filed a claim and a request for a preliminary injunction with the Special Chamber for verification of the ownership over “H.K” in Pejë/Peć, which is a four story building originally constructed in 1929.

It is uncontested that the claimant`s predecessors Y and S.L bought “H.K” from Alexander Mirkovic in 1941. The transaction was properly registered at the time.

By decision K.K. Br. 18/45 dated 29 December 1945 the District Court of Pejë/Peć decided to “confiscate the immovable property of public enemies and fugitives from the people`s authorities in Albania Y and S.L” based on the Law on Confiscation of Property and Execution of Confiscation (Official Gazette of the Democratic Federation of Yugoslavia, NO. 40/45 of 9 June 1945). This decision included the “H.K”.

On 28 April 1960 the Municipal Assembly of Pejë/Peć allocated the contested Hotel to the Hotelier Company “M”.

On 3 August 1999 the Claimants requested the possession of the contested property from the Pejë/Peć Municipality declaring themselves as the owners. Later, allegedly by decision of the Municipal Assembly the Claimants gained the requested possession.

In July 2000 the Claimants initiated proceedings in front of the Municipal Court of Pejë/Peć in order to review the decision No. K.K. Br. 18/45. The Municipal Court of Pejë/Peć dismissed the application with decision No. 29/00 dated 17 February 2004. The dismissal was based on the grounds of lack of jurisdiction. The Claimants filed an appeal with the District Court of Pejë/Peć on 15 March 2004. The District Court of Pejë/Peć approved the appeal and instructed the Municipal Court to decide on the merits of the application (PN 329/04, dated 24 December 2004). After retrial the Municipal Court rejected the claimant`s application again by decision of 23 May 2006. The claimant`s appeal against this decision remained without success. By decision Pn.Nr. 74/06 of 10 January 2007 the District Court of Pejë/Peć rejected the appeal and confirmed the decision of the Municipal Court of 23 May 2006. On 9 March 2007 the legal representative of the claimants filed a request for protection of legality with the Supreme Court in Pristina, challenging decision KP Nr. 5/05 of the Municipal Court and decision Pn.Nr. 74/06 of the District Court in Pejë/Peć.

Meanwhile, the Claimants declared themselves as owners of the contested property in front of the KTA, the KTA granted temporary possession to the Claimants. The Claimants carried out some renovations and partially reopened the Hotel. Later, on 14 July 2003 the KTA Pejë/Peć Regional Office confirmed that the keys of the contested property were handed over to KTA by the Claimants. The Board of KTA on 19 September 2003 decided that the contested property is socially owned. Further, the KTA included the contested property in the 8th wave of privatization in 2005 and instructed the Claimants to file their claim with the Special Chamber.

Upon the claim and request of the claimants of 11 October 2005 the Special Chamber by decision of 12 October 2005 granted a preliminary injunction and banned the KTA for 3 months from continuing with the privatization process on the condition that the Claimants deposit an amount of € 20,000 security with the Court.

On 7 November 2005 and on 25 November 2005 the Claimants amended their claim and provided the Court with additional documents (cadastral records and cost of renovation). Primarily they requested now ownership and possession over the contested property and alternatively to declare the Decision of the KTA Board by which the contested property was announced as SOE property as illegal, to ban the KTA from privatizing the property and to order the KTA to the possession to the Claimants.

On 29 November 2005 the KTA filed its defense and a counterclaim. The KTA requested the dismissal of the claim on the grounds that it is untimely and also on the merits on the grounds that there is no Court decision indicating that the confiscation was illegal. Referring to the additional claim of the Claimants regarding the renovations, the KTA stated that it never gave its consent to any works carried out by the Claimants. With the counterclaim the KTA requested: € 915,000 as compensation for the financial loss occurred because of the lawsuit, € 54,888 for the repair works financed by the KTA, all property taxes for the contested property paid by the SOE and the cost of litigation.

On 20 December 2005 the Claimants filed their reply requesting the SOE “M” to be included into the suit. As to the counterclaim the Claimants repeated the above arguments regarding the ownership and suggested the Special Chamber to dismiss it as ungrounded.

On 9 January 2006 the Claimants applied for an extension of the preliminary injunction.

The Special Chamber held public hearings on 5 September 2006, 18 January 2007 and 6 February 2007. The parties announced that both the Municipal and the District Court of Pejë/Peć rejected the application of the Claimants to review the confiscation decision. The Claimants informed that they applied for the protection of legality before the Supreme Court of Kosovo.

Meanwhile, on 5 February 2007 the Claimants amended, extended and summarized their claim. Apart from the ownership claim, they requested alternatively 12,000 DM as compensation for the investments and € 250,000 for the lost profit both on the grounds of unlawful enrichment.

On 31 July 2008, the Special Chamber halted the proceedings until the decision on the request for protection of legality.

On 17 December 2008 the Supreme Court of Kosovo rejected the application of the Claimants as inadmissible. The Supreme Court stated that the Claimants were not entitled to initiate the proceedings for the protection of legality.

On 11 March 2009 the Special Chamber lifted the suspension and notified the Privatization Agency of Kosovo (PAK) about the pending law suit. The PAK and UNMIK on behalf of the KTA acknowledged the Decision of the Supreme Court and proposed the immediate dismissal of the claim.

By submission filed on 1 June 2009 the Claimants requested the suspension of the proceedings in front of the Special Chamber until the Constitution Court renders its Decision. They also summarized their final claim requesting the following:

- to confirm them as the owners of the contested property,
- to oblige the Respondent to hand over the possession,
- to compensate for the costs of the proceedings.

Alternatively:

- to invalidate the KTA's decision regarding the socially owned status of the property,
- to invalidate the privatization of the property and
- to prohibit the KTA to privatize the property.

Further the Claimants asked:

- to invalidate the privatization of the property.
- to declare that the exclusion of the Claimants from the property is illegal,
- to oblige the Respondent to hand over the possession and
- to prohibit the KTA to privatize the property.

The Claimants failed to make a statement on the preliminary injunction.

The final hearing was held on 29 September 2009. On 10 December 2009 the Trial Panel of the SCSC issued the judgment deciding as follows:

1. The second Respondent in the present case is designated as: Hotel M, Socially Owned Enterprise, represented by the Privatisation Agency of Kosovo.
2. The request for an extension of the preliminary injunction is rejected.
3. The sum of 20 000 (twenty thousands) Euros previously deposited with the Special Chamber of the Supreme Court of Kosovo as deposit to indemnify the Agency for any damages shall be reimbursed to the Claimants .
4. The request of the Kosovo Trust Agency for a suspension of the present proceedings until the end of the pending proceedings before the Constitutional Court is rejected.
5. The ownership claim of the Claimants is hereby rejected as ungrounded.
6. The Socially Owned Enterprise "M", represented by the Privatization Agency of Kosovo shall reimburse the amount of 5 738, 74 (five thousands seven hundred thirty eight 74/100) Euros to the Claimants within one month from the final judgment.
7. The counterclaims of the Kosovo Trust Agency and of the Privatization Agency of Kosovo are hereby rejected.
8. Each party shall bear the costs of the proceeding on its own.
9. Pursuant to section 9.5 of UNMIK Regulation 2008/4 an appeal against this decision can be submitted in writing to the appellate panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.

The Trial Panel held that its judgment did not depend on the result of the pending proceedings before the Constitutional Court. It reasoned that the contested property was confiscated from Y and S.L although the conditions which would allow confiscation and transfer of the property where not established. As on 18 April 1960 the contested property was transferred by the

Municipality National Board of Peja/Peć to “the hotel management enterprise M for its use and management” and was at least since 1960 for 20 years without any interruption (since the first contestation of the situation happened on 2 August 1999) possessed by the State through its representative and its manager the Trial Panel concluded that the property right on the contested real estate was transferred to the State by adverse possession. Consequently, the alternative claims of the Claimants challenging the KTA announcement regarding the socially owned status of the property and the privatization proceedings are unfounded. Given that the Trial Panel rejected the claim of the Claimants it also rejected the counter claims filed by both KTA and PAK as ungrounded. The Claimants repeated requests for extension of the preliminary injunction (issued on 12 October 2005 banning the KTA for continuing with the privatization process which expired after 3 months) were rejected as ungrounded. In addition, since the injunction of 12 October 2005 was not valid any longer, the Trial Panel ordered the sum of € 20,000 previously deposited with the SCSC to indemnify the Agency for any damages to be reimbursed to the Claimants. The Trial Panel established that the invoices provided by the Claimants prove their expenses to repair the hotel from 2001 – 2003 during the period they run the hotel based on the permission of the UNMIK Department for Trade and Industry (DTI). The Trial Panel reasoned that since the Claimants have no title to the “H.K” the amount they paid for renovation of the immovable property of the Respondent is to be compensated; thus their claim for reimbursement in the amount of 5 738.74 EUR, is grounded.

This judgment was served to the representative of the Claimants lawyer A.V and PAK on 12 January 2010; and on 14 January 2010 to UNMIK Office of Legal Affairs. It was appealed by the Claimants on 10 February 2010.

The Claimants (now: the Appellants) allege violation of the provisions of contested procedure and erroneous application of substantive law. The Appellants request from the Appellate Panel to amend the appealed judgment by approving their claim as grounded and oblige the Respondents to pay to them the expenses of court proceedings including expenses for their authorized representatives calculated in accordance with the tariff of Bar Association of Kosovo. The Appellants strongly oppose the conclusion of the Trial Panel that the respondent gained ownership of the contested real estate by adverse possession. They state that the legal predecessor of the Respondent did not act in good faith when it confiscated the property of the Appellants predecessors. At that time of the Decision on Confiscation KK.nr.18/45 of 29 December 1945 the State violently became “*an owner*” of the immovable property. On the other hand they agree with the opinion of the Trial panel “*..the conditions required for establishment of the valid title which allows confiscation and transfer of the property where not fulfilled.*” They insist that the valid title for transfer of the property is missing and therefore the legal base for acquisition of the ownership by adverse possession is missing as well.

On 2 April 2010 the Appellate Panel was informed that the Claimant N.H died on 13 January 2007 and her children/heirs Dh.H and Gj.C took over the procedure. They provided the statements accepting all actions undertaken by the lawyer A.V and also authorized him to represent them before the Special Chamber. Also, the heirs S.D and Sh.J of now late N. J submitted statements that they agree with all actions undertaken until now by lawyer A.V as of the authorization dated 14 October 2003 and that they authorized him to represent them before the Special Chamber.

On 15 October 2010 the Constitutional Court of Republic of Kosovo (CC) rejected the Referral of the Appellants by which they challenged the Decision Nr.PKL.Nr. 21/07 of the Supreme Court of 17 December 2008 on their request for protection of legality as inadmissible.

On 14 October 2011 the PAK submitted its response to the appeal of the Appellants. In the response the PAK requested from the SCSC to check if the appeal is timely filed because the Appellants did not indicated in their appeal the date the appealed judgment was served on the authorized representative. Further it stated that the appeal should be rejected as ungrounded. PAK maintained that the Appellants also in the appeal procedure failed to make their claim credible.

On 14 October 2011 (date of post office stamp; registered on 17 October 2011) the UNMIK Office of Legal Affairs (KTA) filed a response at the Special Chamber. The KTA requested from the Appellate Panel to reject the appeal as it lacks any legal bases and uphold the appealed judgment of the Trial Panel. The KTA submitted that the Appellants failed to distinguish between establishment of facts by the Trial Panel and evaluation of such facts for the purpose of the application of the material law. According to KTA the Appellants correctly asserted that the Trial Panel established that they were deprived of their property in an illegal way. However, the Trial Panel clearly explained that the Appellants could, or have a right to request the recovery of an allegedly illegally confiscated property; such right was curtailed in the present circumstances by the acquisition of the ownership rights in respect to the same property in this case by Respondent 2, through adverse possession. Therefore, the allegations of the Appellants that the Trial Panel failed to comply with Article 8.1 of the Law of Contested Procedure (LCP) lacks any legal basis. Further, in the present case both conditions provided by Article 28.4 of the LBPR were met and the Trial Panel correctly established the facts of the case pursuant to the evidences submitted by the KTA. The KTA also referred to previous judgments of the Special Chamber concerning the acquisition of ownership rights in respect to socially owned property in Kosovo, *Municipality Prizren Vs KTA, Municipality Peje/Pec Vs KTA and JSC "T" Peje/Pec vs KTA and Catering and Tourist Company "R" (The Municipality Land Grab Cases)*. As far as the "good faith" of the SOE M is concerned in respect of the possession of "H.K", KTA submits that it should be distinguished between the "State" and the SOE -M. SOE -M is not a state entity or subsidiary organ of the State, or of the municipality. It is instead an independent and self-managing enterprise. The KTA maintained that even if there would have been a clear indication of bad faith on part on state institutions with respect to confiscation of the property, establishment of such bad faith would be of no relevance and consequence with respect to the good faith possession of the property by the SOE.

On 13 August 2012 the Appellants submitted their response to the response of the KTA to the appeal of the Appellants. They claim that the second condition foreseen by Article 28.4 of the LBPR is not met as the property was not kept in "good faith". The Municipality of Peje/Pec did not expropriate the contested property but confiscated it and as such it was not *a good faith* possessor. The cases to which the KTA referred in its response deal with contests between two legal entities and not as it is the case at hand with a contest going on between private persons and a social owned entity. Since the Municipality did not possess it in a good faith then no one after

it could have it in a good faith. Moreover they claim that the Law based on which their property was confiscated ceased to be valid before the decision on confiscation was issued.

On 8 October 2012 the KTA file a counter response.

Legal reasoning

Admissibility of the appeal

The appealed judgment was issued on 10 December 2009. It was served on the representative of the Appellants and PAK on 12 January 2010. The appeal of the Claimants was filed on 10 February 2010.

The appeal is admissible as it is filed within timeframe and by an authorized person.

Merits of the appeal

Based on Article 64.1 of the Annex of the Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo in Privatization Agency of Kosovo Related Matters (hereinafter: the LSC), the Appellate Panel decided to dispense with the oral part of the proceedings.

In the case at hand it is decisive whether the confiscation decision K.K. Br. 18/45 of the District Court of Pejë/Peć dated 29 December 1945 resulted in the loss of ownership on the real property “H.K” in Peja by the predecessors of the claimants.

The Appellate Panel finds that this decision which has (according to the copy taken from the original document which was kept by the Administrative Officer for property right-relations of the District Court in Peja/Peć) been taken on 29 December 1945 and been declared final and binding on 16 November 1955 by the District Court in Peja/Peć has to be respected by everybody including all courts regardless whether the finding of facts or the legal assessment leading to the decision were deficient. The decision in question does not have defects of such severity that these deficiencies would render it invalid *prima facie*. Furthermore, it has been reviewed by regular courts in proceedings which were found fair in no way tainted by arbitrariness by the Constitutional Court (Resolution in the case no. KL 14/09 of 15 October 2010). As far as the question of restitution of property is concerned the Appellate Panel shares the opinion of the Constitutional Court which in its Resolution of 15 October 2010 pointed out that insofar the Assembly of Kosovo is in charge whose task it is to solve the concerned issues by a Law on Restitution.

Lacking any legal grounds to question the validity of the decision of the District Court of Pejë/Peć dated 29 December 1945 any longer there is no legal doubt that the predecessors of the claimants lost their ownership rights on the “H.K” and neither they nor the appellants gained these rights back. This situation given the ownership claim of the claimants has been rightly rejected by the Trial Panel.

Therefore, based on article 10 paragraph 10 Law on the Special Chamber of the Supreme Court (privatization matters) the appeal of the appellants has to be rejected as ungrounded and the appealed judgment has to be upheld.

In regard to Point 3 of the enacting clause of the appealed judgment the Appellate Panel confirms that the claimants have to be reimbursed with the amount of 20000 EUR immediately.

Court fees/costs:

No court fees are imposed for the proceeding because the approved schedule of court fees of the SCSC, which entered into force in 27 March 2014, cannot be applied, in a retrospective way, to pending cases.

Issued by the Appellate Panel of the SCSC, 2 September 2016

Mr.sc. Sahit Sylejmani, Presiding Judge signed