SUPREME COURT OF KOSOVO
GJYKATA SUPREME E KOSOVËS
VRHOVNI SUD KOSOVA

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

GSK-KPA-A-111/11 **Prishtinë/Priština, 8 March 2012**

In the proceedings of:

A.S.

Respondent/Appellant

vs.

G.M.

Claimant/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Anne Kerber, Presiding Judge, Elka Ermenkova and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/60/2010 (case file registered at the KPA under the number KPA35695), dated 25 February 2010, after deliberation held on 8 March 2012, issues the following

JUDGMENT

1- **The appeal of A.S. is accepted as grounded.**

2- **The decision of the Kosovo Property Claims Commission KPCC/D/A/60/2010, dated 25 February 2010, as far as it relates to the case registered under the number KPA35695 and concerns the ownership of the appellee, is quashed and the case returned to the KPCC for reconsideration.**

3- **The costs of the proceedings will be decided upon by the KPCC.**

Procedural and factual background:

On 12 April 2007, G.M. on behalf of his grandmother filed a claim with the Kosovo Property Agency (KPA), seeking for his grandmother to be recognized as the owner of a parcel of land and claiming repossession as well as compensation for usage. He asserted that his grandmother was the owner of parcel No. 996, located at a place called "Livoc", cadastral zone of Livoç i Ultë/Donji Livoc, in the municipality of Gjilan/Gnjilane, a 1st class field with a surface of 70 ar and 74 m^2, and that the parcel was lost on 16 June 1999 as a result of the circumstances in 98/99 in Kosovo.

To support his claim, he provided the KPA with the following documents:

- Possession List No. 354 of the Municipality of Gjilan/Gnjilane, cadastral zone of Livoç i Ultë/Donji Livoc, dated 19 April 1984, showing that the claimed parcel as well as other parcels was registered under the name of (I.)S.M.;
- Death Certificate issued by the Municipality of Kragujevac on 6 October 2006, showing that in the register of the deceased for the municipality of Grosnica under number 20 of the year 2006 was registered that M.M., whose mother was S.M., had died on 30 September 2006 in Grošnica, Kragujevac;
- Birth Certificate, issued by the Municipality of Gjilan/Gnjilane (Federal Republic of Serbia) on 29 October 2002, showing that the claimant's father was M.M.;

- Decision No. O-268/07 of the Municipal Court of Kragujevac, issued on 24 May 2007, according to which G.M. was the heir of the late M.M..

On 5 June 2008, KPA officers went to the place where the parcel was allegedly situated and put up a sign indicating that the property was subject to a claim and that interested parties should have filed their response within 30 days. The parcel was found cultivated, but as the local people were not willing to cooperate with the team, the occupant could not be found.

The notification was repeated on 13 January 2010. Again the property was found occupied, the person who was using the property, however, could not be found. The next day, the notification was checked based on orthophoto and GPS coordinates and was found to have been accurate.

In the meanwhile, the KPA had been able to verify the Possession List. A Certificate for Immovable Property Rights was issued by the Municipal Cadastral Office of Gjilan/Gnjilane on 25 June 2008 (UL-70403020-00354), showing that the litigious parcel was in the possession of S.(I.)M.. The KPA also was informed by the mother of the claimant that S.M. was the grandmother of the claimant.

On 12 February 2010, A.S. visited the KPA office. He responded to the claim, stating that he had a legal right over the property. In his written statement he explained that in 1996 he had bought the property for 21.000 DM. The seller had been the son of the owner, T.M., with whom he had concluded a verbal contract. He stated that he had used the parcel since 1996 without any disturbance.

In its processing report of 22 December 2009, the KPA had processed the claim – at that time correctly – as uncontested.

On 25 February 2010, the KPCC in its decision KPCC/D/A/60/2010 also considered the claim as uncontested (paragraph 9 of the decision) and decided that the claimant had established his ownership of the deceased property right holder. The KPCC dismissed the claim for compensation of loss of use for lack of jurisdiction.

The decision was served on the claimant on 2 March 2011. On 8 July 2011, the decision was served on the respondent, A.S..

On 2 August 2011, the respondent (henceforth: the appellant) filed an appeal with the Supreme Court against the aforementioned decision which, according to him, involved a fundamental error and serious misapplication of the applicable procedural or material law and was based on insufficient facts and an erroneous assessment of evidence.

The appellant declared that the enacting clause was in contradiction to the reasoning and that in addition the reasoning was unclear. He also criticized that the factual situation had not correctly been established as he had bought the mentioned property in 1996 like he already had mentioned in his response to the claim.

Therefore, the appellant requested the Supreme Court to change the KPCC's decision, to approve his appeal and recognize him as the owner of parcel No. 996.

A translated version of the appeal was served on the claimant (henceforth: the appellee) on 27 October 2011, however, he did not respond.

Legal reasoning:

The appeal is admissible and grounded. Thus the KPCC's decision has to be quashed. As the appellant's reasoning has not been considered by the KPCC, the case had to be sent back to the KPCC for reconsideration.

The appeal is admissible. The appellant has filed his appeal within the deadline prescribed by Section 12.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079.

The decision of the KPCC has to be quashed and the case sent back for reconsideration as the Court has to note a serious misapplication of the applicable procedural law.

Section 11.2 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 prescribes: "*The Commission shall reach its decisions on the basis of the claim and the reply or replies*". In this case, however, the Commission has not considered the statement of the respondent although the Commission has been obliged to do so.

Section 10.2 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 prescribes: "*Any person other than the claimant who is currently exercising or purporting to have rights to the property which is the subject of the claim […] shall be a party to the claim and the related proceedings, provided that such person informs the Executive Secretariat of his or her intention to participate in the administrative proceedings within thirty (30) days of being notified of the claim […]*". According to the case file, the appellant reacted to the claim on 12 February 2010, within the deadline of thirty days after the notification of the claim on 13 January 2010.

That the Commission, however, did not take into consideration the statement of the appellant – probably through an oversight – concludes from the report of 22 December 2009, in which the case is treated as uncontested. Also in its decision the KPCC under No. 9 mentions that all of the claims are uncontested in the sense that no party has contested the validity of the claim within the 30-day period prescribed in section 10.2 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079.

A party, however, usually is entitled to be heard not only by one (in this case: the appellate) instance, but to be heard by at least two instances. If a party – as in this case – is deprived of this right by a fundamental mistake of the first instance, this has to be considered a substantial violation of the procedure. Also the Court finds a substantial violation of the provisions of contested procedure, (Article 182.1 of Law No. 03/L-006 on Contested Procedure in connection with Section 13.5 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079). That the Commission did not consider the response is an equally significant violation of the law as the substantial violations enumerated in Article 182.2 (h) and (i) – rendering a judgment based on the parties' failure to comply or absence contrary to the provisions of the law. Consequently, the case has to be sent back for reconsideration and decision (Art. 195.1 (c) of Law No. 03/L-006 on Contested Procedure), even though the Court is aware that the proceedings of the KPA and KPA Appeals Panel should be expeditious.

In the new proceedings, the KPCC will have to consider whether the claim meets the requirements of Section 5.2 of Administrative Direction No. 2007/05 as amended by Law No. 03/L-079 ("*In proceedings before the Commission, where a natural person is unable to make the claim, the claim may be made …* ") although according to No. 9 of the decision "no acceptable evidence has been submitted by the claimant that would establish death". Also the KPCC will have to consider the arguments of the appellant.

For reason of clarification the Court notes that the decision of the KPCC has not been challenged and is not quashed insofar as the Commission dismissed the claim of the appellee for compensation.

Costs of the proceedings:

As the decision of the KPCC is quashed and the case is returned for retrial, the costs of the proceedings will be decided upon by the KPCC as the first instance (Art. 465.3 LCP).

Legal Advice:

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

Anne Kerber, EULEX Presiding Judge

Elka Ermenkova, EULEX Judge

Sylejman Nuredini, Judge

Urs Nufer, EULEX Registrar