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-143/11 **Prishtinë/Priština**

15 March 2012

In the proceedings of:

A.F.

Respondent/Appellant

vs.

R.G.

Claimant/Appellee

The KPA Appeals Panel of the Supreme Court of Kosovo, composed of Anne Kerber, Presiding Judge, Elka Filcheva-Ermenkova and Sylejman Nuredini, Judges, on the appeal against the decision of the Kosovo Property Claims Commission KPCC/D/A/69/2010 (case file registered at the KPA under the number KPA31731), dated 21 April 2010, after deliberation held on 15 March 2012, issues the following

JUDGMENT

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

2- **The decision of the Kosovo Property Claims Commission KPCC/D/A/69/2010, dated 21 April 2010, as far as it relates to the case registered under the number KPA31731 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 8 March 2007, R.G. filed a claim with the Kosovo Property Agency (KPA), seeking to be recognized as the owner of a parcel of land acquired by inheritance and claiming repossession as well as compensation for usage. He asserted that his late father had been the owner of parcel No. 234/1, located at a place called "Poilla", cadastral zone of Shtupel/Štupelj, in the municipality of Klinë/Klina, a 5th class field with a surface of 80 ar and 47 m², and that he had inherited the parcel which was lost on 19 June 1999 as a result of the circumstances in 98/99.

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

- Possession List No. 23 of the Municipality of Klinë/Klina, cadastral zone of Shtupel/Štupelj, issued by the Republic of Serbia on 7 December 2006, showing that the claimed parcel as well as other parcels was registered under the name of R.G.;
- Death Certificate issued by the Municipality of Smed. Palanka on 6 February 2007, showing that R.G., born in 1909 in Shtupel/Stupelj, had died on 25 March 1974 at Mala Plana, Smed. Palanka;
- Birth Certificate, issued by the Municipality of Klinë/Klina on 20 May 1970, showing that the claimant's father was R.G., born on 2 October 1920 in Shtupel/Stupelj;

Later on in the proceedings, he also provided the KPA with an inheritance decision, issued by the Municipal Court of Smederevska Palanka on 6 November 2007 – O.bp.895/07 – according to which R.G., the claimant, is the heir of R.G..

On 6 September 2007 and on 8 February 2010, 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. Both times the KPA noted that the parcel (pasture) was not occupied. The photos taken of the parcel do not show any buildings. On 5 March 2010, the notification done in February 2010 was checked based on the cadastral map, orthophoto and GPS coordinates and was found to have been accurate.

On 8 February 2010, the day of the notification, A.F. responded to the claim. On 21 April 2010 he gave his statement to the KPA. He stated that his family had bought the parcel amongst others in 1970 from the owner, S.G.-P., for the amount of 2.5 million dinar. He explained that the change of ownership could not be documented in a legally valid way because no member of the family of R.G. had lived in Kosovo since 1970. He could only provide the KPA with a certificate for immovable property rights – UL-71006059-00023 –, issued on 10 December 2009 by the Kosovo Cadastral Agency, Municipal Cadastral Office of Klinë/Klina, cadastral Zone Shtupel/Stupelj, showing that R.G. was the owner of the litigious parcel.

The respondent explained furthermore that his family had built two houses on the parcels. He stated that in 1986 his family had bought other properties nearby for which the change of ownership had been documented in Possession List No. 24. To sustain his statement he provided the KPA with the Possession List No. 24, issued on 21 October 2005 by the Municipality of Klinë/Klina, cadastral zone Shtupel/Stupelj. The respondent named several witnesses and submitted written statements. The witness R.S.G., born on 9 June 1965, states that his father had bought a property comprising approximately 2 ha on 23 July 1969 from the owner, R.G., and that his father sold the parcel on 12 June 1970 to N.H.F..

Already on 24 March 2010, the KPA's Executive Secretariat had submitted the claim to the Kosovo Property Claims Commission (KPCC). In its report the Executive Secretariat mentioned that no responding party had approached the Executive Secretariat to contest the claim prior to the expiry of the statutory 30 days deadline.

On 21 April 2010, the day the interview with the respondent was held by the KPA, the KPCC in its decision KPCC/D/A/69/2010 considered the claim as uncontested and decided that the claimant had established his ownership of the claimed property. The KPCC dismissed the claim for compensation of loss of use for lack of jurisdiction.

The decision was served on the claimant on 14 April 2011. On 13 July 2011, the decision was served on the respondent.

On 12 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.

He upheld his statement of 21 April 2010, explained more details and named some more witnesses. In addition, he declared that the case fell not within the jurisdiction of the KPA as the property already had been sold long before the armed conflict of 1998/99.

Therefore, the appellant requested the Supreme Court to reject the claim.

A translated version of the appeal was served on the claimant (henceforth: the appellee). On 23 September 2011 he replied the following:
He declared that the appeal of A.F. was not correct. The appellee declared, that in the 1970s a person called A. was using the parcel and had promised the father of the appellee to buy the land. Yet "A." never paid the money. As the appellee's father died in 1974, the appellee himself tried to discuss this issue with "A." at the end of the year 1974. Yet "A." chased him and B.L., who had accompanied him, from his house. The appellee states that it was not possible for the appellant to buy the house without the necessary documents.

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 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 […]*". From the case file it has to be concluded that the respondent reacted to the claim already on the day of the notification, 8 February 2010, and came to the KPA to give his statement in detail on 21 April 2010. The Court deduces this from the fact that the printed form of the response at the bottom of the pages of the form reads as follows: *Printing date 21/4/2010; date of response 8/2/2010; date of interview 21/04/2010*. Respectively, the respondent submitted his response within the deadline given by the abovementioned regulation.

But even if the respondent had reacted only on 21 April 2010, the KPCC would have been compelled to take his response into consideration. Only on this day the KPCC came to its decision and would – so the Court assumes in favour of the appellant - have had the possibility to regard the response.

That the Commission, however, did not take into consideration the statement of the appellant – probably through an oversight – concludes from the report of 24 March 2010, 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 first have to consider whether this case falls within the jurisdiction of the KPCC and in this respect will have to regard the statements of the appellee. In case the KPCC considers the case to be in its jurisdiction it will have to examine the statements of both parties.

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 of the Law on Contested Procedure).

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 Filcheva-Ermenkova, EULEX Judge

Sylejman Nuredini, Judge

Urs Nufer, EULEX Registrar