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-144/11 **Prishtinë/Priština, 18 April 2012**

In the proceedings of:

A.A.

Respondent/Appellant

vs.

M.S.K.

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/62/2010 (case file registered at the KPA under the number KPA38964), dated 25 February 2010, after deliberation held on 18 April 2012, issues the following

JUDGMENT

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

2. **The decision of the Kosovo Property Claims Commission KPCC/D/A/62/2010, dated 25 February 2010, as far as it relates to the case registered under the number KPA38964, is annulled and case returned for reconsideration.**

3. **The costs of the proceedings shall be decided by KPCC.**

Procedural and factual background:

On 03 October 2007, M.S.K. (from now on "the claimant") filed a claim with the Kosovo Property Agency (KPA) for confirmation of his property right over parcel No. 1072 of 32 acres and 53 square meters, described as 4th class field in Rosul/Rosulja, Novo Selo, Vučitrn/ Novoselë, Vushtrri. The claimant has "established" that his property right is related to immovable private property that was lost as a result of the circumstances in 98/99 in Kosovo and the date of loss was 16 June 1999.

M.K. filed the claim as a member of the family household of Ž.K..

To support his claim the claimant provided the KPA with the following documents:

- possession List No. 228, issued on 23 December 1992 by the Communal geodesic administration in Vučitrn/Vushtrri, showing that parcel 1072 was registered under the name of Ž.M.K. (pages 10 and 11 of the KPA file);
- death certificate of S.K., born on 01 June 1921, died on 18 December 1995 issued by the municipality of Vrnjačka Banja (page 9 of the KPA file). The certificate is dated 22 December 1995. It also includes data regarding the parents of S.K., these were Ž.K. and N.K.. The certificate also states that the wife of S. was V.K., maiden name J.;
- death certificate of Ž.K., born 1883, died on 02 May 1970, issued by the same municipality (page 15 of the KPA file). The certificate is dated 04 February 2008. It establishes that the father of Ž. was M.K.;

- the file does not contain any written document proving that S.K. was the father of the claimant M.K.. According to a comment written by a KPA officer (page 62 ibid) claimant's brother P.K. and his mother V.K. have "confirmed" that M.K. is a son of S.K.. There is no data regarding how it was established that these two were the brother and the mother of the claimant;

Facts regarding the procedure in front of the KPA:

On 22 July 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 file their response within a month (page 38 of the KPA file). In its notification report (page 32 ibid), the KPA noted that the litigious parcel was uncultivated land. The report states that the property was found with the help of local people.

Later in 2009, on 02 November 2009 the KPA performed a second notification of the parcel (page 27 ibid) by putting a sign that the property is subject to a claim. The notification report dated 02 November 2009 (p.19 ibid) states that that the property is cultivated land, that it is occupied and that the responding party was not at the place. On 04 November 2009 the KPA issued a new notification report (page 17 ibid) to confirm that the notification of the claimed property was accurately based on cadastral data such as orthophoto and gps coordinates.

The ortophoto (page 18 ibid) displays the parcel and its neighbourhood, an added arrow shows the point within the parcel where the sign of the KPA was situated.

On 09 December 2009 A.A. (from now on "the respondent to the claim"), filed response claiming that his father F.A. is the rightful owner of the contested parcel. A.A. filed the response because F.A. was not in Kosovo (page 45 ibid). There is no written document proving that A.A. has the power of attorney to represent F.A..

To support his response he has presented:

- possession list, issued by the municipality of Vushtrri/Vučitrn, on 19 March 2007, under the name of M.K. about parcel No 2138/2 with the surface of 41 acres 28 square meters in Rosul/Rosulja (pages 55-56 of the KPA file);
- sale contract, concluded on 04 April 2007 between M.K. as a seller and F.A. as buyer , regarding the transfer of property over parcel 2138/2 at Rosul/Rosulja (page 68 ibid):
- certificate No. 7906-1/07, issued by the Cadastral office in Vushtrri/Vučitrn, on 04 April 2007, stating that parcel No 2138/2, which on the possession list is No 72, is under the name of M.K. (page 65 ibid).

The Respondent claimed that his father has bought parcel 2138/2 and that the notification sign for the parcel in dispute, which is 1072, was placed in his property, i.e. 2138/2

Based on the present documents, the database available and the procedural measures taken pursuant to section 11.3 (c) and (d) UNMIK/REG/2006/50, the KPA established that the claimant has proven the property right holder's ownership over the claimed property and that the respondent's evidence does not relate to it. In this regard a decision in favour of the claimant was granted *(page 105/106 ibid, para 30 of the cover decision dated 25 February 2010)*. The KPA stated that when the Executive secretariat has contacted the respondent, he has confirmed that his purchase contract relates to a different parcel of land, but he claimed that the notification sign was placed in his property. The KPA further stated that the notification report prepared by the Executive secretariat indicated that the notification sign had been placed on the correct property. The Cover decision, dated 25 February 2010 has been followed by an individual decision, dated 29 June 2010 *(page 95 ibid)*. The decision proclaims the rights of the property right holder *(i.e. Ž.K.)* over the disputed property and **disposes that any person that might occupy it should vacate it within 30 days.**

The decision was served to the claimant on 05 October 2010 (p. 132 ibid). On 02 November 2010 he filed a request with the KPA to take the disputed property under its administration pursuant to section 23.1 UNMIK/DIR/2007/5, as amended by Law 03/L-079.

The decision was served to the Respondent on 05 August 2011 (p.135 ibid). The same day he filed an appeal (p. 151). He claims that the Decision is wrong, because there is an incorrect notification of property given that Maxhunaj/ Vushtrri /Vučitrn[i] village is included in the land consolidation which has resulted in new numbers of parcels being created.

On 20 November 2011 the claimant, now appellee has stated that the presented sale contract regarding parcel, subject of KPA file 38964, was not valid *(p. 160 ibid)*. He has not given any explanation regarding the statement of the appellant that there are new numbers of the parcels.

On 21 December 2011 the Appeals Panel of the SC has requested from the KPA to explain how the notification team used the Kosovo Cadastral Agency (KCA) data and how it concluded that the parcel on which the notification was done *(p.18 ibid)* was parcel 1072. The KPA also had to provide (if possible) an evaluation of the KCA data concerning the number of this parcel.

On 02 February 2012 the Appeals panel of the SC received from the KPA an answer named "legal memorandum", regarding the questions as listed above. The KPA explains that according to the cadastral map *(p.49 of the court's file)* parcels 1071 and 1072 were adjacent to each other. In 1989, as a result of a land consolidation *(decision from 01 February 1989, p. 51 ibid)* parcel 1071 was transferred to parcel N 2138/2. Parcel 2138/2 has a surface of 41.28 acres and parcel 1071 has a surface of 31.03 acres **and it is very likely that part of parcel 1072 has been transferred to parcel 2138/2**. This has not been confirmed by the Cadastral Directorate[ii] as there was no decision following the land consolidation. These facts were unknown to the KPA. As a result of that the KPA affirms that the notification of parcel 1072 was based on the old data presented by the Kosovo cadastral Agency. The KPA does not have updated data on the

current status and location of the claimed property**. The KPA concludes that the notification done on 02 November 2009 *(para 6 of memorandum)* did not match with the current status and location of the claimed property.**

In addition to that, a report dated 01 February 2010 *(page 84-86 of the KPA file)* contains data that parcel 2138/2 is a subject of a different claim, filed by M.K. and this claim has not yet been processed by the KPA.

Legal reasoning:

The Appeal was filed within the time limits, as determined by section 12.1 of UNMIK/REG/50 as amended by Law No. 03/L-079 and therefore it is admissible. The appellant claims that the contested property is included in the land consolidation which resulted in new numbers of parcels and as a result of that the notification was wrong. These statements relate to a decision taken on the basis of erroneous and incomplete determination of facts (section 12.3 (b) ibid) and misapplication of the procedural law (section 12.3 (a) ibid).

Section 10.1 of UNMIK Regulation 2006/50 as amended by Law No. 03/L-079 prescribes: "Upon receipt of a claim, the Executive Secretariat shall notify and send a copy of the claim to 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 and make reasonable efforts to notify any other person who may have a legal interest in the property".

Section 11.3 (c) and (d) ibid provide that the KPCC may take any other procedural measures it considers appropriate to expedite it decision making.

Section 11.1 ibid provides that the provisions of the Law on Administrative Procedures are applicable mutatis mutandis to the proceedings of the KPCC, except as otherwise provided in UNMIK Regulation 2006/50 as amended by Law No. 03/L-79 and in UNMIK/DIR/2007/5 implementing the Regulation.

Art. 39.2 of the Law on Administrative Procedure – Law No.02/L-28[iii] prescribes that notwithstanding the provisions of paragraph 1 of the present article, the public administration body shall, if applicable, correct the request of the interested parties, without prejudice to legal interest of the interested parties. This resolution is a manifestation of the principle of legality, as determined in art.3.1 ibid, according to which public administration bodies shall exercise their administrative activity in compliance with the applicable legislation in Kosovo, within the scope of competencies vested in them and for the purposes that such competencies were vested for. Another manifestation of the principle of legality which is relevant to the current case is the one formulated in art. 3.2 ibid which states that public administration bodies shall ensure the implementation of their administrative acts, mutatis mutandis decisions, as are the acts of the KPCC named.

Art. 55 ibid also provides that the competent body shall ask and shall be acquainted with all the facts necessary to reaching the final decision, employing all the means of verification provided for by the Law. This resolution systematically follows from the principle of objectivity of the administrative process pursuant to art. 7.1 ibid: "During an administrative activity, public administrative bodies shall consider and weigh all the factors related to a specific administrative act". Along the same line, art. 53.1 ibid which states that during an administrative proceedings, the official running the proceedings shall consider all relevant factors for the matter at hand, and shall duly evaluate every factor and the principle of objectivity as a basic principle.

In the current case the KPCC has taken its decision in violation of the principle of objectivity, without considering all the factors related to the issuance of its decision.

As stated in its "legal memorandum" dated 02 February 2012 the KPA explains that parcels NN 1071 and 1072 were adjacent to each other and that 1071 was included in the land consolidation and then transferred to parcel N 2138/2 and that it is very likely that part of parcel 1072 was transferred to parcel 2138/2. The only factual conclusions that can be made are that the numbering 1071 and 1072 does not reflect the current cadastral situation and that after the consolidation of 1989 new parcels were created (either through amalgamation or subdivision); i.e. what were in 1989 parcels 1071 and 1072 have been transformed in new cadastral units with new numbers. **Respectfully the right of property over parcel 1072 has been transformed into a right of property over either a new parcel in its entirety or in ideal parts of other parcels, contingent on the fact whether 1072 has been only given new name or whether it has been "absorbed" (which is what the "legal memorandum" implies) into two or more different cadastral units.**

In this regard the KPCC should have explored the current cadastral situation (pursuant to the principle of objectivity), which includes the cadastral history of the land which was once individualized as parcel 1072 and ex officio *(pursuant to the principle of legality – art. 3.1 in relation with article 39.2 ibid)* correct the claim so that it reflects the actual cadastral situation of the claimed property and the will of the claimant. By not doing this the KPCC has taken a decision which cannot be implemented, which is another violation of the principle of legality *(see art 3.2 ibid)*. I.e. in the part where the decision of the KPCC states that third parties should vacate the property the decision is not executable, there is no identification of boundaries, there is no actual cadastral number to determine which piece of land the relevant third parties are supposed to vacate. In order the decision to be implementable/executable it should refer to a piece of land which is distinguishable from neighbouring pieces of land – with a unique number *(actual number, reflecting the actual plan. In case of lack of clarity regarding the actual cadastre than boundaries and boundary points would be a necessity)*. In this regard the provisions of the cadastral legislation should be taken into account. E.g: according to section 2, para 2.9 of the Law No. 2003/25 on Cadastre (04 December 2003), as amended by Law No. 02/L-96 *(26 Jan 2007, superseded by Law No. 04/-L-013 (29 July 2011), i.e. in force and applicable at the time of the proceedings before the KPA)*, the land parcel is an undivided land property formed by boundaries

and boundary points, located within one cadastral zone and recorded in the Cadastre as a land parcel with a unique number.

In addition, the cadastral changes to which the "legal memorandum" refers create the impression that the dispute regarding the piece of land enclosed within parcel 1072 might have occurred long before the armed conflict of 1998/1999. What is known so far is that there was a land consolidation in 1989 and that it was followed by a cadastral change. It is unknown when within the time frame between 1989 and 1998 has the cadastral change taken place and whether the PRH lost possession as a result of the land consolidation and/or the cadastral change, or as a result of the conflict some years later. As defined in UNMIK/REG/2006/50 *(section 3.1)* one of the conditions for the admissibility of a claim under this specific procedural mechanism, is that the claim is related to circumstances resulting from the armed conflict and not because of the occurrence of facts, non-related or not resulting from the conflict.

Also, the KPA had data that another person M.K. has filed a claim regarding parcel 2038/2, for which the KPA had implications that might be overlapping with the 1072 and it **should have been considered** whether the two procedures should not be adjudicated together (argument after section 11.3 UNMIK/REG/2006/50 as amended by Law No.03/L-079 – common evidentiary issues).

The decision of the KPCC being not implementable in its nature resembles an invalid administrative act (art 91 in relation to art 92 (d) ibid), it is issued in contradiction to the procedure set out by the Law on administrative procedure, in contradiction with general principles of the administrative procedure. An invalid administrative act in the hypothesis of absolute invalidity does not generate any legal consequences and does not need to be revoked – argument after art. 93.1 Law on Administrative procedure. It suffices that such an act is declared invalid – argument after article 93.3 ibid. However, considering that the Appeals panel of the SC applies the procedural instruments provided in UNMIK/REG/2006/50 as amended by Law No. 03/L-079 and subsidiarity – i.e. mutatis mutandis the Law on contested procedure, the Panel annuls the decision and sends it back to the KPA for reconsideration.

During the new procedure the KPA *(see ii)* should:

- explore (as appropriate, as much as it is possible) whether the possession of the property was lost as a result of the armed conflict or prior to that as a result of other sets of facts and circumstances;
- correct the claim so that it reflects the actual cadastral situation of the disputed property and the will of the claimant;
- request a written document that certifies that S.K. is the father of M.K. in order to establish whether M.K. qualifies as "family member" of the property right holder;
- consider whether the current claim should not be adjudicated together with the claim of M.K., mentioned in the report (pages 84-86 of the file of the KPA – page 85, second para from the bottom up);

- request a prove that A.A. has the power of attorney to represent F.A. in order to establish whether there is a respondent party in the procedure;
- and finally analyse whether the property right holder has been the rightful owner (because confirmation of property right has been requested, according to the claim) of the disputed land and if yes whether the respondent party has acquired the same property in 2007, as claimed by the same party;

Regarding the cost of the proceedings in front of the SC, as the appealed decision is annulled and the case is returned for reconsideration, the costs of the proceedings will be decided upon by 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 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

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[i] In different documents of the file the village is named Novo Selo (the claim) or Maxhunaj (the sale contract, presented by the respondent to the claim). It is known to the Court that these references relate to the village of Novoselë Magjun/ Novo Selo Mađunsko.

[ii] The Directorate of geodesy, cadaster and property of the Municipality of Vushtrri/Vučitrn, decision dated01.02.1989, copy on p. 51 of the court's file)

[iii] Law No.02/L-28 as of 22 July 2005