

Human Rights and Communities Department

Legal System Monitoring Section

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Improper handling of fraudulent property transaction cases may breach public authorities' official duties and individuals' property rights.

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is aware of a considerable number of court cases involving fraudulent property transactions.¹ Such cases have been registered throughout Kosovo, but they appear particularly widespread in the Pejë/Peć region. This report analyses the handling of those fraudulent property transactions cases by the courts and prosecution offices from the perspective of their legal duties and also from the perspective of an individual's fair trial and property rights under domestic and international law.

The OSCE knows of approximately 40 civil cases in the Pejë/Peć region in which plaintiffs allege that their immovable property was sold through the use of falsified documents. Those proceedings generally involve the plaintiff asking the court to void the sale and order the cadastre to correct its records. The victims of such illegal transactions are usually displaced persons, mostly Kosovo Serbs, whose absence from Kosovo makes them and their property particularly susceptible to such crimes. Victims also include buyers of these properties, who may not have known they had purchased the property from someone other than its rightful owner.

Besides the serious breaches of the domestic civil and criminal law, such cases also violate international human rights law in so far as they affect a person's right to protection of property,² to a determination of civil rights within a reasonable time,³ and to an effective remedy.⁴

Civil law aspects of fraudulent property transactions

In cases monitored by the OSCE, properties appear to have been sold fraudulently through various methods: a) with authorizations verified with a false court stamp, b) with authorizations verified in courts outside Kosovo with a regular court stamp but by using falsified identification documents, c) by verifying contracts before Kosovo courts using falsified identification with the name and surname of a real owner, and d) by using falsified court judgments to register property in cadastral books. As such, the transactions usually involve the following three parties: an alleged real owner of the property, most often a displaced person not in contact with or with no factual possession of the property; an alleged falsifier of the authorization, very often one of the parties to the sales contract; and a purchaser of the land, whether *bona fide* or not.

¹ The OSCE Legal System Monitoring Section previously reported on this issue: "Civil courts admit into evidence and include as basis for their judgments invalid property documents and counsels fail to challenge such practice", July 2005 Monthly Report; "Civil courts' failure to report alleged criminal offences to the responsible authorities breaches the applicable law", November 2005 Monthly Report; "Civil courts accept and try property cases that fall outside their jurisdiction", April 2006 Monthly Report; Legal Representation in Civil Cases, June 2007; Review of the Civil Justice System, June 2006.

² Article 1, Protocol 1, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

³ Article 6(1), European Convention.

⁴ Article 13, European Convention.

Before civil courts, plaintiffs normally allege that the respondent purchased the property from a seller whose authority to sell was based on a falsified authorization. In eight cases verified by the OSCE, the authorization was purportedly stamped in a court in Bar. Plaintiffs also produced as evidence authorizations bearing the stamp of courts in Mitrovicë/Mitrovica, Belgrade, Kragujevac, Smederevo, Bremen, Podgorica, Rožaje, and Ulcinj.

The authorizations generally purport to give the named person (the seller) authority to sell the plaintiff's property on behalf of the plaintiff. They bear the apparent signature of the plaintiff and often an indication of what type of identification was used to verify the plaintiff's identity.

The authorizations themselves frequently contain contradictions or discrepancies. In some cases, the individual granting the authorization is deceased or the birth date listed in the authorization is decades different than the granter's actual birth date and visible age. Also, in three monitored cases, the authorization stamped outside of Kosovo contains the same date as the verified sale contract stamped inside Kosovo, giving rise to questions as to the feasibility of effecting an authorization and a sale on the same day. Both documents are signed by the same person - the allegedly authorized seller. Courts often fail to give sufficient weight in favour of the plaintiff to these facts.

In many civil cases, the plaintiff is suing only the buyer of the property, who may have unknowingly purchased the property from an individual not authorized to sell the land. The seller, who is the individual most likely responsible for the transaction allegedly depriving the plaintiff of his or her property, is not always summoned to court as a party or a witness.

In at least ten civil cases monitored by the OSCE, Kosovo courts did not take into account a final and legally enforceable decision of the Housing and Property Claims Commission.⁵ Further, in the early stages of at least 17 civil cases, the plaintiff asked the court to issue a temporary injunction preventing the municipal cadastral office from allowing any change in the property ownership records until the court issues a judgment. In only three of those cases did the court issue a ruling on the plaintiff's request.

Of the cases monitored by the OSCE, courts have rendered five judgments in favour of the plaintiff and dismissed or rejected three claims. Most cases are pending. The plaintiff's attorney in four cases has requested a judge from the European Union Rule of Law Mission in Kosovo (EULEX) to take over the case. In at least one case, the parties report that an EULEX judge has been appointed.

As with many other civil disputes, proceedings on fraudulent property transaction cases frequently suffer recurring delays. Repeated postponements, continual summoning problems, and change in the legislation mean many of these cases have dragged on for five or more years; some have yet to make it out of the preparatory stage. The issue of unreasonably long proceedings, besides being a concern in itself, also bears a direct impact on a plaintiffs' right to the peaceful enjoyment of their

⁵ See Article 2.7, UNMIK Regulation 1999/23, on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1999).

properties in so far as it delays annulment procedures and precludes the full exercise of displaced persons' ownership rights.

Criminal law aspects of fraudulent property transactions

Despite the criminal acts that may have been committed in relation to these civil cases, plaintiffs often do not file a criminal report but bring their first legal action in the civil justice system.

Civil courts often neglect to correct this error by failing to recognize the priority of criminal law in these issues. In cases where a plaintiff's first attempt to address the alleged illegal sale of his or her property involved the criminal justice system, Kosovo's civil courts often do not take into account the binding judgment of a criminal court.⁶ In some cases, the initial criminal proceedings occurred in courts outside of Kosovo. Specifically, in monitored cases, plaintiffs have presented evidence of criminal proceedings or judicial determinations of fact from courts in Bar and Rožaje.

Given that such immovable property transactions are typically made using falsified authorizations, there is a strong *prima facie* case that such transactions were preceded or accompanied by criminal acts, such as falsifying documents⁷ or legalisation of false content.⁸ Under these circumstances, civil courts which receive claims or complaints related to fraudulent transactions should refer the information on the potential criminal element to the police or prosecutor's office for further investigation into the apparent criminal misconduct.⁹ Prosecutors must initiate criminal investigations against specified persons if there is a reasonable suspicion that they committed a criminal offence.¹⁰ When criminal cases are referred for prosecution, civil courts often do not stay the civil proceedings pending the outcome of the criminal case as permitted by law.¹¹

Public prosecutors have initiated and conducted criminal investigations in relation to fraudulent transactions of immovable property in at least nine cases in Klinë/Klina municipality and in forty cases in Pejë/Peć municipality. These criminal cases do not

⁶ See article 12, Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982, 12 February 1982 (1982 Law on Contested Procedure); see article 14, Law on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (2008 Law on Contested Procedure).

⁷ Articles 332 and 333, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Criminal Code of Kosovo). On 22 December 2008, Kosovo promulgated Law No. 03/L-002 on Supplementation and Amendment of the Provisional Criminal Code of Kosovo, which left the code substantially the same as the 2003 law, though a paragraph addressing guilty pleas was added and the name of the code was changed.

⁸ Article 334, Criminal Code of Kosovo.

⁹ Article 197, Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (Kosovo Code of Criminal Procedure). On 22 December 2008, Kosovo promulgated the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed.

¹⁰ Article 220(1), Kosovo Code of Criminal Procedure.

¹¹ Article 213, 1982 Law on Contested Procedure; Article 278.2, 2008 Law on Contested Procedure.

entirely overlap with the previously-mentioned number of approximately 40 civil cases from the entire Pejë/Peć region involving fraudulent property transactions of which the OSCE is aware.

It appears that not all cases of fraudulent property transactions have been referred to the prosecution for investigations into apparent criminal activity. Also, in the cases which did result in formal criminal charges, prosecutors sometimes appear to have undercharged the suspects. For instance, some defendants are charged only with the crime of legalisation of false content,¹² despite the fact that from their testimonies and other evidence adduced, it appears that they may also have committed the crime of unlawful occupation of real property¹³ or falsifying documents¹⁴. In some cases prosecution was barred by the statute of limitations.¹⁵

Kosovo public prosecutors should be commended for investigating and prosecuting criminal offences related to fraudulent property transactions. Nevertheless, the scale and systematic re-occurrence of these transactions coupled with the fact that they often involve the same alleged perpetrators suggests the criminal justice response has yet to achieve a deterrent effect.

Conclusions and recommendations

To effectively prevent the re-occurrence of such crimes in the future, the problem of fraudulent property transactions needs to be addressed on two levels: first through criminal proceedings in order to establish the commission of a criminal offence and bring to justice suspected offenders, and second through civil proceedings in order to declare the said contracts null and void and restore the parties to their original conditions, to the extent possible.

The court's role in verifying property contracts implies the court may have some liability in these apparent fraudulent transactions. Legalization clerks should inquire further when presented with contracts for the sale of a displaced person's property, in particular when those contracts involve an authorized seller rather than the property owner himself or herself, and when the authorization bears a stamp from a court outside of Kosovo. Though the OSCE has seen no evidence of malfeasance on the part of legalization office staff, clerks should be aware of potentially problematic document verification requests. Temporary injunctions regarding cadastral records should be issued swiftly whenever required, while courts should summon and hear all persons and examine all documents necessary for a fair resolution of the dispute.

¹² Article 334, Criminal Code of Kosovo.

¹³ Article 259, Criminal Code of Kosovo.

¹⁴ Article 332, Criminal Code of Kosovo.

¹⁵ The law prescribes a statutory limitation of three years for the prosecution of the crime of falsifying documents, and of five years for the prosecution of the crime of legalisation of false content; see article 332 in conjunction with article 90(1)5, and article 334 in conjunction with article 90(1)4 of the Kosovo Code of Criminal Procedure, respectively. The statutory period is sometimes missed, because the victims of such fraudulent transactions are often displaced persons with no factual possession over their property and only become aware of such frauds and report them to the authorities after some time has passed.

Any apparent criminal aspect should be referred to the public prosecution office for investigation, and prosecutors should investigate and prosecute criminal offences related to fraudulent property transactions in a rigorous and expeditious manner. The European Court of Human Rights has held that when an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the authorities to ensure that in their domestic legal system “property rights are sufficiently protected by law, and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained”.¹⁶ Moreover, “where the interference is of a criminal nature, [the] obligation will in addition require that the authorities conduct an effective criminal investigation and, if appropriate, prosecution”.¹⁷

Criminal proceedings should be conducted efficiently and swiftly, since the outcome of civil proceedings in fraudulent transactions cases will often depend on them. In general, cases of fraudulent property transactions should be resolved with particular diligence and expedience, since often what is at stake in such cases is not just a person’s attempt to re-establish possession over his or her rightful property but ultimately a displaced person’s effort to re-gain a home and return to normal life.¹⁸

In the interests of promoting justice, the rule of law, and confidence in the court system, judges, prosecutors, parties, and lawyers should work to ensure these cases proceed in a fair and efficient manner.

In light of these observations, the OSCE recommends the following:

- Courts and other public entities should always report information on alleged fraudulent transactions to the police and/or the office of the public prosecutor.
- Police and public prosecutors should swiftly and rigorously investigate and prosecute criminal activities related to property transactions.
- Civil courts should use facts established in the course of criminal proceedings, or in civil proceedings involving fraudulent property transactions.
- Civil courts should suspend contested property transactions pending the outcome of criminal proceedings on the same issue.
- Courts should rule on requests for temporary injunctions within a reasonable time.
- Courts should identify where errors/delays in the implementation of criminal and property law have occurred and find possible solutions to protect the right to property and establish due process of law.

¹⁶ *Blumberga v. Latvia*, ECHR Judgment of 14 October 2008, paragraph 67.

¹⁷ *Ibidem*, paragraph 67, with reference, *mutatis mutandis*, to *M.C. v. Bulgaria*, ECHR Judgment of 4 December 2003, paragraphs 151-153.

¹⁸ “The right to return can be seen as a derivative, constructed right made principally of the right to freedom of movement (Article 2, Protocol 4, European Convention), the right to property (Article 1, Protocol 1, European Convention) and the right to respect for family and private life (Article 8, European Convention). [...] Displaced persons and refugees have the right to return to their homes and recover their possessions.” The United Nations developed a set of standards for the protection of housing, land, and property rights in post-conflict situations called the “Pinheiro Principles”. *You are displaced, your rights are not: Compendium on sustainable property restitution and solutions to displacement in Kosovo during transition*, Final Conference Document and Recommendations (26-27 November 2007).

- The Kosovo Judicial Institute should train civil judges on the importance of resolving preliminary issues in civil proceedings.
- The Kosovo Judicial Institute should train prosecutors on investigation and prosecution of criminal offences related to fraudulent property transactions.
- Legalization office staff should be trained to identify suspicious documents.