

Problematics of the Albanian legal framework in the division of property

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Abstract

By means of this paper, will be highlighted the importance of the special judgment for the division of property, firstly analysing the ownership and co-ownership according to the Civil Code and the Family Code, the procedural side of this judgment according to the Code of Civil Procedure as well as the contradictions encountered in practice, regarding the special judgment. The basic characteristic of the 'de quo' trial, consists in the fact that it takes place in two stages, where each stage carries its own characteristics and importance. The focal point here will be on the jurisprudence of the Supreme Court, in relation to the importance that this court gives to the first and second stage. The purpose of this paper is to highlight the problems encountered in the judicial practice, in the judgment for the division of property, through the analysis of the alternatives that the expert makes available to the court and the evaluation of the court on the property subject to division. Also, part of the analysis will be the way in which are treated in the judgment for the division of the property, the immovable properties which are not registered in the public registers but are in the process of legalization as well as those that are not in the process of legalization.

Key words: *Co-ownership, Property Division Judgment, Division of Assets in the Process of Legalization, First and Second Stage of the Trial, Methodology of Object Evaluation.*

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Introduction

The right to property as a fundamental human right is protected not only by the national legal order but also by international legislation. Although the right to property is protected at the top of the hierarchy of the legal order, there are not a few cases where it is violated to such an extent that it becomes impossible to enjoy it. For the property to enjoy full legal protection, it must be acquired according to the methods determined by law. In order for legal interests to arise from the property, the legislator has provided that the process of dividing the property is done by the will of the parties and if an agreement is not reached between them, the court is set in motion to decide on the ownership rights of the litigants.

As a special trial, the trial of judicial division refers to special rules that avoid some general procedural principles, the uniqueness of which lies in the fact that it takes place in two stages.

Up to this procedural moment, the legislature has clearly defined the procedure for the division of property, but the situation regarding the assessment of property is problematic, both in cases where the item cannot be divided in kind, as well as in cases where the division is possible but cannot be done in equal parts.

In addition to the discretion that the court has to choose one valuation method from another, the lack of a direct valuation method creates the possibility for litigants to present abusive requests, from which the party that requests the item to be left in kind, uses all legal spaces in a way that the value of the compensation owed to the other party is as reduced as possible.

Also, another problematic consists in the process of dividing constructions or additions that are not registered in the public register but which are in the process of legalization.

Co-ownership according to substantive law

The right to property is one of the basic human rights and one of the most important components of the legal order, on which the economic and social development of society is based (Giddens, 1997).

The right to possess, enjoy and dispose of wealth is historically among the oldest, since ownership was recognized by ancient Roman law as the entirety of *ius possidendi* (the right of possession), *ius utendi fruendi* (the right to receive fruits), *ius disponendi* (right of disposal), therefore ownership means full power over the the property (Mandro, 1998). The same meaning is given by the Civil Code in Article 149, where it is defined that: “Ownership is the right to freely enjoy and dispose of things, within the limits provided by law”. The object of the right to



property is very broad, but in this paper, we will focus mainly on things, objects of the material world that can be put under the rule of man.

In this context, the Civil Code in article 142 presents an exhaustive list of immovable objects, which can constitute an object of ownership only if, as an object of the material world, the object can be placed under the rule of one or several persons to the exclusion of others (Nuni & Hasneziri, 2010). Due to the high interest that individuals have towards the right to property, the latter is protected not only by the national legal order but also by international law, which seeks to coordinate national legal frameworks and tend to maximize the *'de quo'* (Maho, 2013; Shehu, 2000) protection of the right. For this reason, the legislator has provided the protection of this right at a Constitutional level, according to Article 11 of the Constitution, which cannot be violated without a proper legal process and without a fair reward. In addition, Article 17 of the Constitution foresees the limitations of fundamental rights and freedoms, which must be proportionate to the situation that dictated them, without affecting the essence of the freedoms and rights and without exceeding the limitations provided for in the European Convention on Human Rights. Thus, the Constitution gives to the right to property, as well as to the rights provided in the ECHR, the status of the minimum standard or the lowest common denominator, as far as the limitations of the rights and freedoms expressed in it are concerned (See Constitutional Court decision No. 30/2010).

“Even though the Constitution was drafted chronologically after the ratification of the Convention, it not only took into account this important international document, but established it as a benchmark for the level of protection of human rights in the Albanian constitutional order” (Sulko, 2016: 29-30).

As a result, the Constitutional Court in its decisions refers to the jurisprudence of the ECHR, accepting the direct connection and the binding force of these decisions in the interpretation of constitutional standards. Among others the ECHR, in Article 1 of Protocol 1, foresees the obligation of the state not only must not violate the right to property, but it must also take effective measures to guarantee the exercise of the right to property.

“The concept of protection offered by the Convention as a synthesis of the national legislations of the Member States, although it is based on the general principles of the common law of the contracting States, has the advantage of allowing an evolutionary interpretation of the Convention formulations taking into account the changes that national legislations undergo... this elastic nature has allowed the ECHR to design a different protection model than what was crystallized in Article 1 of Protocol 1” (Marku, 2016: 179).

According to Article 163 of the Civil Code, which stipulates that: *“Property can be acquired through certain methods determined in the Civil Code and other methods*

determined by special law". From the literal interpretation of this provision, it should be understood that only legally acquired property enjoys constitutional and legal protection (See United Colleges of the Supreme Court decision No. 22/2002), or in other words, illegally acquired property cannot derive legal interests, much less enjoy legal protection.

The interpretation given by the Supreme Court to the above-mentioned article should be analyzed in harmony with the consequent jurisprudence of the European Court of Human Rights, which in the case of *Öneryildiz v. Turkey* has expanded the legal notion of Article 1 of Protocol 1, according to which: "*Property even when benefited in violation of legal norms, if allowed by the competent state authorities, takes the character of an asset that enjoys protection from Article 1 of Protocol 1.*"²

In the same line, the ECHR in the decision "*Broniowski v. Poland*", it is stated that: "*...the violation originates in a systemic problem, which is related to the malfunctioning of the internal legislation... and that the state must take measures to appropriate legal and administrative practices to ensure the implementation of the right to property... in accordance with the principles of protection of the right to property, according to Article 1 of Protocol 1*" (See ECHR decision 22/2004 complaint no. 31443/96).

Due to the special circumstances and transitional periods in which our country has passed, the issue of property in Albania has been and remains quite complex, since the right of ownership in general and that on immovable property in particular is dealt with by special laws that have undergone successive changes, up to the limits of the violation of the principle of legal certainty. Considering the current situation in which there are still two or more owners for the same immovable property, we come to the conclusion that "*legal oversaturation*" often creates confusion. The prominent Roman jurist, Publius Cornelius Tacitus, emphasized this in the first century AD in his main work "*Annals*" where he wrote: "*The more corrupt the Republic, the more numerous are the laws*" (Zaganjori, 2021: 160). The right to property, as a subjective right, may belong to several persons, who are all co-owners of this right, according to Article 199 of the Civil Code. This phenomenon, where none of the co-owners has exclusive ownership of the item, is called co-ownership (Torrente & Schlesinger: 2004).

Co-ownership is governed by two legal presumptions: the relative one according to Article 199/2 of the Civil Code "*where the shares of the co-owners in the common thing are presumed to be equal, until the contrary is proven*" and the absolute one according to Article 199/3 of the Civil Code "*where the rights and obligations of the co-owners are proportional to the respective parts*". Depending

² ECHR, request no. 48939/99, *ÖNERYILDIZ v. TURKEY*. In the case in question, the Turkish citizen, even though had built without a plan, in an waste collection area, the obligation to repair the consequences in human life and property damage, falls to the state authorities who had not taken any preventive measures.



on the cause of co-ownership, the law recognizes co-ownership in part and in whole. “*The fundamental difference between the two types of co-ownership is that in co-ownership in parts, the share of each co-owner is determined from the beginning of the existence of the co-ownership. On the contrary, in the co-ownership as a whole, the share of each co-owner is undetermined, during the existence of the co-ownership and the parts shall be determined only when this co-ownership ends in the cases defined by law*” (Nuni & Hasneziri, 2010). In co-ownership in parts, the ‘part’ represents the extent of the right of each co-owner over the item, a right which may arise from: the purchase of a joint item; exercising a common activity; marriage or from the death of a person (legal action *mortis causa*). While co-ownership as a whole, since the share of each co-owner is undefined, it can appear in three forms, such as: compulsory co-ownership, between spouses and between members of the agricultural family. From the content of Article 209 of the Civil Code, it results that *mandatory co-ownership* arises due to ownership relationships that are created between separate owners of floors or units in buildings divided into floors, which due to their character and function, are intended for the common use and enjoyment of all co-owners (Bengu, 2011: 109). Regarding the co-ownership of members of the agricultural family, there is a discrepancy between the provisions of the Law No. 7501/1991 “*On Land*” and the Civil Code, because the code expands the circle of members of the agricultural family.

Regarding co-ownership between spouses, the Civil Code refers to the Family Code, according to Article 231 of the Civil Code. The exact moment of marriage has an impact on the categorization of wealth, but not everything acquired before marriage is personal and everything acquired after marriage is shared (Mandro, 2009). Article 66 of the Family Code gives priority to the will of the parties, defining the marriage contract as the most suitable instrument for regulating the economic aspect of family relations and establishing the subsidiary legal regime in relation to the contractual regime, in the sense that it becomes enforceable in the absence of contractual property regime (Ragazzini, 1987: 7). The legislator has defined three types of voluntary property regimes apart from the legal one and the future spouses can determine, through a prenuptial agreement, which regime they will decide to ‘govern’ their assets during the marriage (Mandro, 2009: 218). In addition, during the division process, article 76 of the Family Code should be taken into account, which stipulates that: “*The property of the spouses is presumed to be jointly owned, except in the case when the spouse proves its individual character*”.

Features regarding judgment for the division of property

In order to avoid procedures, procedural deadlines as well as court costs, individuals must try to resolve conflicts by agreement, since the initiation of a court process would cost a lot to each of the parties, both in terms of time, intellectual capacities or on the material side. This is the reason why the trial for the division of the property is initiated only after attempts between the parties to voluntarily divide the item and in case that the opposing wills do not match, the interested party addresses the matter to the court.

Like any other trial, the trial for the division of property is subject to the Latin principle “*nemo iudex sine actore*” (literally, no judgment without a plaintiff), which means that the civil process can only be initiated at the request of one party, which assumes the position of the plaintiff who exercises the right to sue, against the other party who assumes the position of the defendant.

The Supreme Court in decision No. 29, dated 01.10.2009, argues that: “*For the lawsuit to be valid, it must meet two basic conditions:*

- a. *A legitimate interest to file a lawsuit*
- b. *Legitimacy to act.*

If these two conditions exist, we can say that the lawsuit exists and the court will make a decision on its merits to reject or accept it”.

This decision deals with the term “*valid lawsuit*” while our procedural law does not recognize valid or invalid lawsuits, but if the elements of the lawsuit provided for in articles 154-156 are missing, the lawsuit is considered flawed and the plaintiff is given time to fix this flaws and in the event that the latter does not act and the deadline set by the court for correcting the defects passes, the lawsuit is considered not to have been filed (Qeleshi, 2011).

“Procedural prerequisites are those elements that must exist before the act will be carried out, from which the process arises, or before the submission of the request” (Simone, 2016; Vani Trans.).

Regarding the prerequisites of the lawsuit the Supreme Court in Unifying Decision No. 3, dated 29.03.2012, assesses that: “*... in accordance with Article 154/a of the Civil Procedure Code, the court has the right to evaluate the lawsuit ‘prima facie’, evaluating if the prerequisites for the existence of the lawsuit appear to exist (Interest, hypothetical admissibility and legal possibility, as well as apparent legitimacy of the parties)*”. So the preliminary conditions for the existence of the lawsuit are those conditions that are evaluated by the judge alone at the time of filing the lawsuit, the absence of which makes the judge to express himself about the process and not about the merits of the lawsuit.



Pursuant to the civil procedural provisions, in the light of the changes applied by law No. 38/2017, the sole judge studies in advance in the consultation room the complete court file and evaluates whether the legal conditions for appointing a preparatory session are met. Initially, the sole judge examines the jurisdiction and competence as procedural prerequisites of the process, if he finds the lack of jurisdiction, he decides that the case is out of his jurisdiction and decides to suspend the trial, according to Article 299/c of the Civil Procedure Code of the Republic of Albania. If the case is about the division of immovable property and there is lack of exclusive territorial competence or the lack of subject matter competence is found, the sole judge decides to send the case for trial to the competent court. Next, the judge checks the procedural legitimacy of the parties and their real legitimacy. Procedural legitimacy and the way of representation must meet all legal criteria, while the real legitimacy at this stage is subject to a *'prima facie'* control, since the very essence of the trial determines that each party has a subjective right (Tafaj & Vokshi, 2018). The lack of procedural legitimacy leads to the suspension of the trial of the lawsuit, while the lack of real legitimacy leads to its dismissal (See Supreme Court decision No. 165/2016).

In the event that the evaluation of the above-mentioned criteria gives a positive result, the sole judge (in the consultation room) depending on the requests of the parties or procedural needs, may perform the actions provided for in point 2 of article 158/a of the C.P.C

According to Article 158/b of the C.P.C, the preparatory session is no longer necessary for any type of issue. The legislator has left the conduct of the preparatory session to the discretion of the court, as it is carried out in any case when it is deemed necessary to call and hear the parties, as well as in other cases provided for in the law, for example the articles 134-136 of the Family Code. The main purpose of the preparatory session consists in the opportunity for the judge to clearly understand the nature and essence of the dispute through the declarations of the parties (See Supreme Court decision, No. 33/2001). The trial for the division of the property turns out to be a type of trial in which the holding of the preparatory session is mandatory for several reasons: *firstly*, we are dealing with a judgment for the correct resolution of which special technical knowledge is required, so starting from the preliminary actions, the sole judge must appoint an expert; *secondly*, the court must make an effort to resolve the case by agreement, according to Article 158/ç of C.P.C; *recently*, in the preparatory session the court verifies the mandatory co-litigation in accordance with Article 162 of the C.P.C “*Unlike optional co-litigation, mandatory co-litigation is determined by the law or by the nature of the legal relationship subject to judicial conflict*” (See Supreme Court decision No. 76/2018).

In order to avoid the violation of the decision due to the non-regular formation of co-litigation according to Article 467 of C.P.C and unreasonable delays in

the process, the court must show special care in the formation of co-litigation in the case of lawsuits for the division of property since the latter have as a characteristic the mandatory co-litigation according to the article 162 of C.P.C. The Constitutional Court in decision no. 43, dated 19.12.2007 analyzes that: “A delay in the execution of a decision can be justified in special circumstances, but the delay cannot be to such a degree as to damage the essence of the right”. The result of the application of the principle of availability in the civil process is the fact that the creation of co-litigation is within the full competence of the parties and “the court, as a rule, cannot create different litigants from what the parties create” (See Supreme Court decision No. 76/2000). Exceptionally, in application of Article 161 C.P.C, the court, when it finds that the mandatory co-litigation on the part of the defendants is incomplete, gives the plaintiff a term of 20 days to fix it, according to letter “c” of this article and Article 154/a of this Code. After the judge performs the necessary preliminary and/or preparatory actions, it is assumed that the case has been procedurally prepared to begin the judicial investigation stage, and therefore the judge alone issues the order for scheduling the court session.

For a more efficient application of the principle of trial within a reasonable time, law 38/2017 has amended the Civil Procedure Code, treating the order for scheduling the court session in such a way that it is considered as a ‘obstruction’ for some procedural requests, as long as the issuance of the execution order in principle leads to the loss of the right to submit a series of procedural requests³, during the judicial investigation stage. “The court session is one of the most important stages for the resolution of the dispute and the discovery of the objective truth, based on the material law, the procedural law, the evidence administered in the judicial process and the conviction of the judge established on the totality of the facts and evidence” (Tafaj & Vokshi, 2018: 36). The procedure for the division of the property has a double object, since, on the one hand, at the end of this trial, the right that each participant has in co-ownership is clarified and, on the other hand, this right is practically implemented (Simone, 2016; Vani Trans.). A division trial is a process that aims to change the right from a corresponding part of a share of each co-owner to an exclusive right of ownership over the specified items. As a special trial, the judicial division trial refers to special rules which override some general procedural principles. So the uniqueness of this trial lies in the fact that it takes place in two stages, each of which carries its own characteristics and importance.

The Supreme Court in decision No. 45, dated 01.02.2011 attaches special importance to the first stage of the judicial division of property, since in this part

³ With the issuance of the execution order, the following cannot be submitted: the request for joining the case; the request for the lack of territorial competence; counter lawsuit; request to change the cause or object of the lawsuit; request for primary and secondary intervention; the summoning of the third person by the party or by the court.



of the process problems arise both of a legal and practical nature, given that they must be evidenced beyond any reasonable doubt: the right of co-ownership of the litigants, their corresponding parts and the things that shall undergo division, according to Article 370 of C.P.C. Since the circle of litigation is derived from the legal relationship itself, the circle of co-owners is determined taking into account the cause of the birth of the co-ownership and the forms of its manifestation. In this context, the litigants have the obligation to prove before the court their right of ownership over the thing that will be divided. After the right of ownership of the items to be divided has been determined, the division of the ideal parts proceeds, where the court must focus on the principle, according to which “*parts between co-owners are presumed to be equal until proven otherwise*”.

During the judicial review, the court investigates whether the item can be the subject of division, given that in practice there are not few cases where the division of property on a single property acquired illegally or the division of property which is legally considered personal property is claimed. Referring to immovables that are not registered in the public register, the jurisprudence of the Supreme Court prohibits their division, as it is considered that legal interests cannot arise from illegal assets (See Supreme Court decision No. 22/2002). “*In the case of judicial division of immovable property, the registration of the latter in the real estate registers is necessary, since the effects resulting from the division of the common property are in a certain way equated with the alienation of immovable property*” (See Supreme Court decision No. 45/2011). At the end of the first stage, the court with an intermediate decision determines: the circle of co-owners who will participate in the division, the circle of co-owned items that will be subject to division and the ideal shares of each co-owner in the common item.

“*The precise and clear non-determination of these three elements makes the first stage of the trial for the division of the property in co-ownership vulnerable and not in accordance with the law*” (See Supreme Court decision No. 45/2011). Against the intermediate decision of the first stage according to Article 370/2 of C.P.C a separate appeal is allowed, the submission of which suspends the continuation of the trial. “*With the suspension of the trial, the process remains frozen and enters a state of calmness, which excludes any kind of procedural activity from its subjects*” (Brati, 2008).

The first stage ends with an intermediate decision “*sui generis*” which must take definitive form or must be expressly accepted by the parties, according to Article 371 of C.P.C, in order to proceed with the second stage of the special judgment for the division of the property. The decisions of the first stage of division, as intermediate decisions of a special ‘*sui generis*’ type of decision, are not decisions of a purely procedural character, i.e. are not given only to ensure the normality of the development of the trial within the requirements of the procedural norms. Based

on the special nature of the judgment of cases with the object of property division, the legislator has deemed it necessary to solve some problems definitively with an intermediate decision at the end of the first stage. Once the interim decision becomes final, during the second stage trial, neither the circle of co-owners, nor the items to be divided, nor the corresponding parts of each co-owner can be further discussed.

It is a practice consolidated by the jurisprudence of the Supreme Court, the fact that: *“In no case and for any reason, the court that examines the validity of the decision of the second stage of the division of the property does not have the right to examine problems related to the judgment of first stage”* (See Supreme Court decision No. 628/2000). At this stage, the division of the common property in nature will be finally decided, a decision which will be decided taking into consideration, the demands of the litigants and the opinion of the expert, since the solution of the case requires special technical and scientific knowledge, which the court does not possess *“Experts determine the market value of the property that is required to be divided, the value of each co-owner’s share, the determination of the possibility of division in kind of the thing and the variants that may exist, the determination of the values that the parties must compensate each other in case of inequality in parts as a result of the division of things in kind”* (Tafaj & Vokshi, 2018).

As a rule, if the division of the thing in nature is possible from a physical and legal point of view, the thing is divided into equal parts between the co-owners. The division of things by lottery is a feature of this judgment which will be applied in all those cases where it is determined that the parts to be divided are equal or almost equal. When the division in kind is possible both physically and judicially, but this division cannot be carried out exactly in equal parts, *“the inequality of the parts, resulting from the division in kind of the thing, is compensated by a monetary reward”*, according to Article 207 of the Civil Code.

When the division in kind can be carried out since the economic destination of the item is not damaged and the parts formed are equal or compensated in money, the court is obliged to draw up a project of division and deposit it in the secretary no later than ten days before the holding of the next judicial session. According to Article 373 of C.P.C, the parties had the right to present their remarks on the draft division filed by the court, but this right must be exercised within a decadent period of five days before the next court session. In relation to the preparation of the draft division, the Court has concluded that: *“The lack of a draft division or in case of its non-submission to the secretary by the court constitutes a serious procedural violation, which necessarily leads to the annulment of the decision by the higher courts and the return of the case for retrial in the first instance court “* (See Supreme Court decision No. 628/2000).



In the event that the item cannot be divided in kind as the physical and/or legal criteria are not met, the legislator has made several alternatives available to the litigants. When the item cannot be divided in kind and the co-owners request the division in kind, the court can order that the item be left in the ownership of the co-owners who submitted the request, forcing them to pay in favor of the other co-owners.

In the event that during the trial, none of the co-owners wants to acquire ownership of the item and compensate the other co-owners, the court proceeds with the sale of the item at auction. The auction procedure is developed in accordance with the provisions made in the C.P.C for the mandatory execution of court decisions and the body that organizes the auction is the enforcement office.

Another hypothesis provided for in the law is when the item subject to division is a residential house and cannot be divided in kind. In these circumstances when the item is claimed by several co-owners, the court is guided by the principle of '*positive discrimination*', leaving it to the co-owner who lives in or is more in need of that residential house, towards the obligation to compensate the other co-owners. "*It is the duty of the court to solve such problems as fairly as possible, taking into account all the factors and leaving the residential house to the person who, not only from the legal side, but also from the social and humanitarian side, needs this thing the most*" (Nuni & Hasneziri, 2010: 195). At the end of the second stage, the court ends the co-ownership relationship with a final decision, transforming the co-owners into owners with exclusive title to the property. Depending on the cause of the birth of co-ownership, the aspects of the special judgment on the division of property also change.

The court, during the division of the marital property (in the case of the legal communion regime), must take into account some special rules related to this form of co-ownership. The division of the property of the spouses is done taking into consideration, in addition to the Civil Code and the Civil Procedure Code, also the legal regulations of the Family Code. The division of property can be done by agreement only in cases where the spouses dissolve the marriage, meanwhile when the spouses on their own free will change the property regime, from the regime of the legal communion to the regime of separate assets according to Article 98 of the Family Code, the division of the marital property is done only by initiating a judicial process (Mandro, 2009). At the beginning of the communion property division procedure, the spouses or their heirs have the right to receive personal movable property that belonged to them before the communion or they acquired during the communion in the form of inheritance or donation. The property that is subject to division between the spouses is what remains, after deducting from the communion the obligations it has towards the spouses or third parties.

Regarding the items that are not subject to division in this type of trial, we consider the personal items listed in Article 77 of the Family Code, as well as the fact that: "*In*

the case of a gift between spouses of personal items or co-owned items, the donated item will pass to the personal property of the beneficiary spouse, and these items do not belong to the communion between the spouses” (See Supreme Court decision No. 3/2006). The peculiarity of this type of judgment, is the fact the court can decide to transfer a part of the common property that belongs to one spouse, in favour of the other spouse depending on the children’s necessities and the parent that will have custody of the child, according to Article 103 of The Family Code.

Another important institution in the procedure for the division of marital property is the compensatory contribution, which is made for the benefit of one spouse and consists in the fact that *“the court can oblige one of the ex-spouses to pay a contribution on behalf of the other, to compensate for the inequality that may be caused in the other’s life from the division of assets as a part of the dissolution of the marriage process, apart from the alimony obligation”*, according to Article 147 of The Family Code. Regarding the division of the assets of the agricultural family, apart from the general rules provided by article 207 of the Civil Code and 369-374 of the Civil Procedure Code, there are also implemented some specific rules related to this special form of co-ownership. With the intention of reserving the continuance of the agricultural family, when a particular member requests his share, it is not given in nature but it is evaluated and given back in cash (distinctive from the general principle). An exception to this principle is the cases when, the allotment is requested by several members of the agricultural family with the purpose to create another agricultural family. Under these conditions, the court can decide that the share can be given in nature, provided that the agricultural land that remains after the division, should not be less than *the minimal unit of cultivation*, according the definition given in the article 228/4 of the Civil Code.

Problematics of the Albanian legal framework in the division of property

The Court of the Judicial District of Tirana in the decision No. 10754, dated 27.11.2014, decided: *“The division of the apartment with a surface area of 52 m², benefiting ½ part each”*. From the Expert Report was ascertained that the apartment (built about 40 years ago) had been reconstructed) and is located in a developed area and was evaluated in base of table No. 3 of the Instruction of the Council of Ministers, dated 22.08.2016. The Court of Appeal observes that:

“The apartment should be left in nature to the defendant because he lived there with his family. Regarding the value of the apartment, the court observed that the evaluation should have been calculated using the reference price, and that the expert had not used a concrete sales contract as reference, but instead referred to

the general value/m² of the potential sale of the apartment. Also, it should be taken in consideration the fact that in this case, in the lawsuit for the division of property, does not occur the process of transferring of the property to third parties, which also presupposes the opportunity to benefit from the highest possible value of the property.”

So, the court did not take in consideration the market value of the property, but the factual condition of the property and the table No. 3 of the Instruction of the Council of Ministers, with the reasoning that the apartment is not newly constructed and the evaluation is not in terms of being sold to third parties with the purpose of making profit, but as an object of a division of property court trial between two ex-spouses.

The Court of the Judicial District of Tirana with the decision No. 3815, dated 06.05.2016, has taken a different position in the case with object: the division of the apartment with a surface area of 80 m² and the vehicle. The parties in this case requested that the assets subject to division be left in nature, with the obligation to compensate the other party. From the expert report, it results that the apartment cannot be divided in nature and the value was suggested to be calculated according to the Instruction No. 2, dated 06.08.2014 of the Council of Ministers, while the vehicle was estimated according to the market value.

The court decided that: *“The apartment and the vehicle must be left to the defendant, since the apartment is indivisible in nature, and the defendant has lived there for many years, while the plaintiff lives in her parents apartment”*. Unlike the first practice, in this case, the court considered the defendant’s claims on the evaluation of the apartment based on the Instruction of the Council of Ministers, to be unfair, on the grounds that the evaluation according to the instruction is calculated according to the average cost of construction, while the evaluation of the apartments in the divisions of the property should be evaluated according to the market value of properties.

The peculiarity of this case consists in the fact that, during the trial none of the parties showed any interest in dividing the apartment in nature, while the only claim of the plaintiff was related to the evaluation of the object according to the The Council of Ministers decision No. 132, dated 07.03.2018, as amended. The court with the interim decision on the first stage of the division, decided: *“The division of the apartment between the co-owners with belonging parts, ¼ part each.”* In these conditions, the expert finds that apart the apartment, there was also an additional area of about 12 m² that was not reflected in the certificate of ownership and is not included in the registered surface area of 78.94 m², which was not taken into consideration. The expert has come to the conclusion that the object cannot be divided in nature and has evaluated the object based on the market value. The court considers the plaintiff’s claim for the valuation of the object unfounded, on the grounds that: *“The purpose of the Decision of the Council of Ministers No. 132,*

dated 07.03.2018 is to provide the methodology for determining the taxable base of the immovable property “building “ and not to determine the methodology for calculating the value of the object in partition lawsuits, which should be evaluated according to the market value, since it is the real value of the object”.

In another practice, the Court of the Judicial District of Tirana, with decision no. 147, dated 18.01.2021, considered the case with the object: the division of the residential apartment, between the plaintiff in the quality of the testamentary heir and the wife of the testator.

From the content of the will, the testator stated that: “... *the ownership of 1/2 undivided part of the apartment that I co-own with my wife, to be transferred to my daughter after my death*”. From the expert report resulted that the apartment could not be divided in nature, so the court decided that the object should be left in nature to the defendant, since she had lived there for 20 years. The same stance was held by The Court of the Judicial District of Tirana in decision No. 2554, dated 29.03.2017, which after analyzing the expert report, assesses that: “The property subject to division will be valued according to the free market value and can be divided in nature, into two parts: Part “A” with a floor apartment of 70 m² and a land area of 110 m² and Part “B” with construction area, a floor apartment of 60 m² and land area of 108 m². Despite the plaintiff’s claim that: “The compensation value should have been according to the legal reference price and not according to the market value, since there was no financial possibility to afford this compensation value”, the court decided that the compensation should be assessed based on the price of market, because it fulfils the mutual interests of the parties.

In relation to the division of immovable property that are not registered in the public registers, the Court of the Judicial District of Tirana in decision No. 2744, dated 28.04.2021, did not consider the additional area of about 12 m², referring to the jurisprudence of the Supreme Court, according to which: “*Addition or construction, which has been carried out in violation of the norms in force and has not been registered in the immovable property register, cannot be the subject of judicial division. In this sense, it cannot be claimed that co-ownership rights arise from illegal construction because the right of ownership has not been acquired legally*” (See Supreme Court decision No. 22/2002) *The same position was held by The Court of the Judicial District of Tirana in decision No. 4581, dated 09.04.2014, in the court case with object: Division of the marital property, consisting of a residential apartment, registered in the name of the plaintiff and two apartments (ordered by the plaintiff with an undertaking contract), not registered in the Office of Registration of Immovable Property. At the end of the first stage of the division, the Court decided: “The division of the residential apartment, registered in the Office of Registration of Immovable Property, between the litigants with 1/2 part each “. Regarding the other two apartments, the court assesses that: “They cannot be divided between the*

two litigants, because they are owned by the construction company, which is not a part to the trial. Also, these objects are not registered in the Office of Registration of Immovable Property, this fact legally indicates not only the existence of an immovable object, but also its ownership.”

Against this decision an appeal was filed on the second part of the provision, for which the Court of Appeal argued that: “...The subsequent registration of these immovable properties would put the plaintiff in a disadvantageous position to then later request the division, as the court previously decided to dismiss this claim. For this reason, the College assesses that the trial should be suspended for this claim, as a lawsuit that could not be filed at this stage of the trial”. As per the above, the Court decided that: “The object of judgment must be left in ownership of the plaintiff, with the obligation to compensate in favor of the defendant, the belonging parts in monetary value, because this object has been in the possession of the plaintiff for a long time, who has made changes in the destination and has used it as a means to earn income”.

Another issue that has created a lot of controversy, is the way of evaluating immovable property that has not been registered in the public registers, but that are in the process of legalization. The Court of the Judicial District of Tirana with decision no. 7796, dated 06.10.2016, assesses that: “The object that was built by the defendants and the contractor, is in the process of legalization and as such, it cannot be treated by the court as an illegal construction, as long as the competent state entity has not reached in this conclusion”. In order to determine the current value of this property, the court chose the direct comparison method, with the reasoning that: “This method is used for the evaluation of all properties that have a sale market or a rental market”.

Conclusions

The judgment for the division of property between the co-owners, is a judgment that requires a considerable time to be finalized in a final decision. Under these conditions, it is imperative that the problems that arise during judicial practice be dealt with quickly and efficiently, so as not to cause artificial delays to a process which is destined to last in time. Among them, the process for the notification of the parties is often an obstacle in the judgment on the division of property, since a considerable number of citizens who have property in common ownership live outside the territory of the Republic of Albania. In order to avoid unnecessary delays, it is necessary to make an attempt to notify these citizens at their places of residence, before proceeding with the notification by announcement. In addition, in the conditions where the Decision of the Council of Ministers No. 132/2018 and

Instruction No. 2/2014 of the Council of Ministers do not aim to determine the methodology for calculating the value of the item in lawsuits division, allowing this evidence to be taken by the expert is not only totally useless for the purpose of the trial, because it causes delays and confusion.

In order to really determine the value of the immovable property and to guarantee the impartiality of the expert in the assessment of the property, it is recommended that the expert obtain information about the market value of the property in some of the real estate offices in the area where the subdivision object is located. On the other hand, in the judgment of the division of the immovable properties that are not registered in the public registers (which cannot be subject to judicial division) it is necessary to decide to dismiss the trial and not the dismissal of the lawsuit, since the subsequent registration of these assets will put the plaintiff in a disadvantageous position to request later their division (when the court has previously decided to dismiss the trial). However, should be highlighted that the constructions in the process of legalization cannot be treated by the court as illegal, as long as the competent state entity has not reached in this conclusion.

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