THE ISSUE OF PROCEDURAL PASSIVE QUALITY IN THE PROCESSES WHICH CONCERN USUCAPTION

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Abstract

In the Romanian legal system, usucaption is an original way of acquiring property rights. In court actions for the establishment of the existence of the right of ownership by virtue of usucaption, the question of the passive procedural quality has frequently been raised. The general rule is that the defendant is represented by the titleholder of the property to be usucaptioned. However, in practice there are different situations which need to be adapted to each individual situation. This paper aims to present the most common situations regarding the passive legal standing in actions for the establishment of ownership by virtue of usucaption.

Keywords: *usucaption, procedural passive quality, property rights, possession, court practice.*

1. Introduction

Usucaption is an original way of acquiring property rights which is characterised by the acquisition of ownership of real estate through long-term possession. Thus, the active subject is the person who has continuously and usefully possessed the immovable property and the passive subject is the legal owner of the property.

On the one hand, usucaption is a benefit for the person who has exercised uninterrupted possession of the property and, on the other hand, it is a penalty for the person who is the rightful owner of the property but has not taken an interest in it, thus remaining passive and allowing another person to acquire ownership of the property in question.

Depending on when the person subject to the proceedings began to exercise possession, several situations can be distinguished as regards the person who has passive procedural capacity.

Usucaption is regulated in the Civil Code in the matter of the effects of possession, applying accordingly the provisions concerning extinctive prescription.[1]

2. Passive procedural status depending on when possession was commenced

When the plaintiff seeks a declaration that he has acquired ownership on the basis of usucaption commenced before the Civil Code came into force, several situations will be distinguished.

The general rule is that the case will be brought against the person who has the last title to the property, who should bear the consequences of remaining in passive possession. As we have already stated, the institution of usucaption is not only a benefit of the law for the person who acquires the property in this way, but also a sanction against the non-diligent owner who leaves the property in the possession of another person for a long time.[2]

A first hypothesis, the one in which the fewest problems arise, is the situation in which the true owner is known. If the true owner is alive, the action will be brought against him and if he is deceased, the action will be brought against his heirs. If the action is brought against other persons or against the State or the territorial administrative unit within whose area the property is situated, the action shall be dismissed as being brought against a person who does not have the passive procedural position.

There are situations where the plaintiff has acquired the property on the basis of a non-transferable document of title, for example a hand receipt from a possessor who has also acquired the property on the basis

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[1] G. Boroi, C.A. Anghelescu, *Fișe de drept civil*, Hamangiu Publishing House, Bucharest, 2021, p. 655.

[2] HCCJ, dec. no. 356/2006, A. Pena, *Accesiunea imobiliară și uzucapiunea. Culegere de practică judiciară*, C.H. Beck Publishing House, Bucharest, 2009, p. 90, apud B. Zdrenghea, *Problema calității procesuale pasive în procesele care au ca obiect uzucapiunea*, in Analele Universității de Vest din Timișoara no. 2/2009, Seria Drept, p. 9.

of a hand receipt. In this case, the claimant must identify the true owner, the person who has title to the property, and litigate against him or his heirs. If the action is brought against the person from whom the property was purchased, *i.e.*, the person who sold the property with the handbill as the title deed, the action will be dismissed as being brought against a person who does not have the capacity to sue and be sued because he is not the true owner of the property.

„The person who must prove that the defendant is the owner, is the plaintiff, since it is he who brings the action and seeks a benefit. This solution is justified by the fact that in such an action, the plaintiff can be sued only in opposition to the true owner, whom he must indicate".[3]

The second hypothesis is the situation where the person who was the owner of the property is not known. Frequently, in this case, the claimant brings the action against the State or the territorial administrative unit in whose area the property is located.

In recent judicial practice there have been two approaches. The first is to dismiss the action as being brought against a person without standing. The second approach has been mainly concerned with a person's right of access to justice. Starting from the premise that the plaintiff had made every effort to identify the true owner, but for objective reasons this could not be done, the national courts have recently taken a different approach, based also on the ECtHR rulings, in particular those in the Case *Holy Monasteries v. Greece*.

On the basis of this ECtHR judgment, domestic judicial practice has held that „in this situation, if the administrative territorial unit were not considered the owner of the property and therefore had passive legal standing in the action for usucaption, the claimant-possessor would inevitably be deprived of any real possibility of obtaining recognition of his right of ownership acquired by usucaption. If the plea of lack of the passive procedural position on the part of the administrative territorial unit were to be examined as a matter of priority and upheld, the substance of the applicant's right to effective access to the courts, an essential pillar of the right to a fair trial, would be affected".[4]

Thus, according to domestic court practice, if the claimant is objectively unable to obtain information about the owner of the property he wishes to obtain the ownership on, he would be entitled to bring an action against the State or territorial administrative unit. Otherwise, his right of access to justice would be affected.

HCCJ also ruled in this regard in dec. no. 24/03.04.2017 on the interpretation and application of the provisions of art. 1845 in conjunction with art. 1847 CC 1864 and art. 36 CPC, in which it held: „A review of the case law of the selected judgments of the courts of appeal shows that, to a considerable extent, the majority opinion of the courts is to the effect that as long as there are no other persons (natural or legal) who have title to the immovable property in relation to which it has been requested that the statute of limitations on acquisition has expired, the immovable property is deemed to belong to the public or private domain of the administrative-territorial unit, within the radius of the immovable property, which has passive legal standing."[5]

Another possible situation would be where the true owner of the property is known but the claimant is unable to indicate his heirs because there is not enough data on the person in the population register databases. In our opinion, the above-mentioned situation, in which the plaintiff sues the State or the territorial administrative unit, is also applicable in this case.

At the same time, there may be situations where the true title holder is more than one person. In this situation, legal action should be brought against them or against the heirs of each of the owners. The situation becomes even more difficult when the title deeds are old and information about the heirs of the owners is difficult to obtain. However, if the plaintiff is only able to obtain information about the heirs of one of the owners and proves that he has made every effort to identify the heirs of the other owners, but is unable to do so, it has been held in judicial practice that this situation can be described as one of mixed passive legal standing.

In this case, the territorial administrative unit invokes the plea of lack of passive legal standing on the ground that it does not have passive legal position because the true heirs must be sued. However, a court judgment held that ,, Therefore, as regards the heirs of C T B, they have been identified, the defendants being the natural persons in the present case. As regards the heirs of M T B, they could not be identified. Analysing first of all the plea of lack of passive legal standing of the defendant Municipality of Bucharest, the court notes

[3] CA Bucharest, dec. no. 1528/1996, available at *http://spete.avocatura.com/speta.php?pid=469*, apud B. Zdrenghea, *Problema calităţii procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universităţii de Vest din Timişoara no. 2/2009, Seria Drept, p. 3.

[4] District 3 Court, Bucharest, dec no. 8812/09.10.2023, pronounced in case no. 5808/301/2022.

[5] HCCJ, civ. s., dec. no. 24/03.04.2017, *www.scj.ro*.

that judicial practice has consistently held that, in a situation where the true owner of the possessed property has not been identified in the usucaption action, the ECtHR in the Case *The Holy Monasteries v. Greece* are applicable. In view of the all above reasons, the court considers that the case requires the existence of a mixed passive procedural capacity represented both by the heirs of C T B (the defendants natural persons in the present case) and by the Municipality of Bucharest through the Mayor who is suing in view of the impossibility of establishing the heirs of M T B. In the light of these considerations, the court will reject the plea of lack of *locus standi* of the defendant Municipality of Bucharest, raised in the statement of defence, as unfounded."[6]

Another approach taken by the courts in cases where the heirs could not be identified was to request that a certificate of inheritance vacancy be attached to the case file, on the grounds that this was the only way to justify the passive procedural status of the territorial administrative unit.

Thus, in doctrine, it has been held that „before establishing usucaption, however, it must be established that the succession is vacant".[7] „In the same sense, the provisions of art. 1 letter b) of GO no. 128/1998 specify that among the goods that become the private property of the State are also movable or immovable property resulting from inheritances without legal or testamentary heirs."[8]

A clarification is necessary to be made with regard to the application of the law over time in relation to the holder of the vacant inheritance. If the inheritance became vacant during the period of application of the old Civil Code, it is the State which becomes the holder of the inheritance. Thus the provisions of art. 477 CC 1864 state that „All vacant and unclaimed estates, as well as those of persons who die without heirs, or whose estates are bequeathed, belong to the public domain"[9]. Art. 680 CC 1864 also states that in the absence of legal or testamentary heirs, the property left by the deceased passes to the State.

On the other hand, if the inheritance becomes vacant after the entry into force of the new Civil Code, art. 1138 CC stipulates that „Vacant inheritances shall revert to the commune, town or, as the case may be, the municipality in whose territorial area the property was located at the date of the opening of the inheritance and shall enter their private domain".

In judicial practice, it has been decided that the court hearing an action for usucaption may find, as an incidental question, that the succession is vacant. In this respect, it has been pointed out that the absence of a notarial certificate of vacancy is not such as to justify the general lack of jurisdiction of the courts to find that the succession is vacant, especially as the court is seised of the application of a person who justifies an interest.[10]

In this situation it is important to note that the provisions on the jurisdiction of the courts are also relevant. Thus, if it is requested that an inheritance be found to be vacant, the provisions of art. 118 CPC become applicable, which states that in cases concerning inheritance, until the end of the indivision, the court of the last domicile of the deceased has jurisdiction. However, in the case of actions for a declaration of the existence of a right of ownership by virtue of usucaption, the court of the place where the property is situated has jurisdiction. The two courts could therefore be different. In this situation, the court hearing the case on usucaption would be able to suspend the case under art. 413 para. (2) CPC, until the case is resolved by finding that the inheritance is vacant, so that the administrative-territorial unit has standing legal position in the original case on usucaption.

As mentioned above, there have also been situations where courts have held that the territorial administrative unit or the State has standing when heirs cannot be identified, without also requesting the certificate of inheritance. Thus, in a ruling it was stated that „As regards the passive legal standing of the defendant Municipality of Bucharest, represented by the Mayor General, the court holds that the plaintiff has not indeed provided unquestionable proof of ownership belonging to the private domain of the State, in the sense of showing a title deed. On the other hand, in the present dispute, all possible and necessary steps were taken before the court in order to ascertain the heirs of the owners of the property. From all the evidence in the case file it appears that there is no evidence for the period prior to the plaintiff's occupation of the land and that for over 42 years the plaintiff has never been disturbed in the exercise of his possession. However, in these circumstances, dismissing the case on the basis that the Municipality of Bucharest is a person lacking passive

[6] District 3 Court, Bucharest, dec no .1275 from 23.02.2024, pronounced in case no. 4326/301/2021.

[7] B. Zdrenghea, *Problema calității procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universității de Vest din Timișoara no. 2/2009, Seria Drept, p. 5.

[8] GO nr. 128/1998 for the regulation of the manner and conditions for the exploitation of goods legally confiscated or entered, according to the law, in the private property of the state, published in the Official Gazette of Romania, Part I, no. 863/26.09.2005.

[9] Art. 477 CC 1864.

[10] B. Zdrenghea, *op. cit.*, p. 4.

legal standing, would mean depriving the plaintiff of any possibility of recovering their rights, which constitute an 'asset' within the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights."[11]

In our opinion, if there are no heirs or if the heirs of the owner of the property right cannot be identified, the correct solution is that the plaintiff obtains a certificate of inheritance before filing a lawsuit for a declaration of ownership by virtue of usucaption. In this way, there can be no doubt as to the passive procedural status of the territorial administrative unit. This cannot be regarded as a restrictive interpretation restricting the claimant's access to justice. In the cases mentioned above, the passive procedural status of the territorial administrative units or of the State can be established by means of the certificate of inheritance, following a fairly simple procedure, which does not prevent the claimant from having access to justice. This will simplify the process of seeking a declaration of ownership on the basis of usucaption, as the passive procedural status of the State or of the territorial administrative units will be clearly established.

3. Passive procedural position in the case of usucaption commenced during the period of application of the new civil code. Special procedure provided by the new code of civil procedure

If the plaintiff bases his action for a declaration of ownership on the basis of usucaption on the provisions of the new Civil Code and implicitly on the procedure provided for by the new Code of Civil Procedure, the passive procedural status changes quite a lot.

So far there has been ample discussion as to whether the plaintiff can avail himself of the provisions of the new Civil Code in relation to the time of the commencement of his possession. CCR dec. no. 225/02.04.2015 established that the new procedure can also be applied with regard to rights acquired by virtue of usucaption under possessions commenced prior to the entry into force of the new Civil Code. Subsequently, by dec. no. 19/05.10.2015, HCCJ handed down in an appeal in the interest of the law, established that the procedure provided for by the new Code applies only where possession began after the entry into force of the current Civil Code.

The question of the application of the law over time is not the subject of this paper, so the passive procedural quality in actions based on the establishment of the right of ownership by virtue of usucaption will be analysed on the premise that the new Civil Code and the new Code of Civil Procedure will apply.

Analysing the provisions of art. 1050-1052 CPC, it can be seen that the procedure to be followed is a non-contentious one. At the initial stage of the action, the court checks whether the plaintiff's action contains all the documents provided for in art. 1051 and the list of the two witnesses to be heard. Subsequently, the court orders the summons to be served on the holder of the right entered in the land register or on his heirs and also orders the issue of summonses to be posted at the court's premises, at the premises of the property to be usurped, at the land registry office and at the premises of the town hall in whose district the property is located. Also, the summons are published in two newspapers.

So we can see that at least in the initial phase, the procedure is not very long. Although the non-contentious procedure is defined as „a procedure involving the delivery of judgments in cases where the court is required to intercede, but in which the aim is not to establish an adverse claim against another person"[12], the legislator has chosen to greatly simplify the procedure whereby a person can obtain title to a piece of real estate, thus sanctioning the passivity of the true owner.

This „non-contentious" procedure can only be transformed into a contentious procedure if the interested parties lodge opposition. Thus, if opposition has been lodged, it is communicated to the plaintiff so that he can defend himself by means of a statement of defence. It can be seen that in this case, although it is the plaintiff who brings the action, he subsequently becomes the party who formulates defences. This procedure thus introduces a new feature in the way civil proceedings are conducted in this respect too. In practice, passive procedural quality is also transferred to the plaintiff, who must defend himself against the claims of a person who is interested in not acquiring ownership of the property.

However, if no person objects, the procedure remains uncontested until the court finally finds that the claimant has acquired ownership of the property by virtue of usucaption.

[11] District 3 Court, Bucharest, dec. no. 10565/10.11.2022, pronounced in Case no. 31453/4/2019.

[12] R.I. Vasiliu, *Procedura necontencioasă în Noul Cod de procedură civilă – Comentariu*, Revista de Drept Social no. 8/2012, p. 2.

4. Conclusions

In conclusion, the new procedure brings significant novelties in terms of passive legal standing in actions concerning usucaption. Although it starts from a non-litigious procedure, with no need to name a defendant, it can subsequently be transformed into a procedure involving two or more parties, depending on the number of persons lodging objections.

It is difficult to understand why the legislator chose to simplify so much a procedure whereby a person becomes the owner of a property right, as usucaption is an original way of acquiring property rights. In our opinion, the publicity of the procedure provided by the publication of notices is not sufficient.

Therefore, we can conclude that the issue of standing in actions based on obtaining a right of ownership by virtue of usucaption is topical, regardless of whether the plaintiff bases his action on the provisions of the old Civil Code or on the provisions of the new Civil Code.

References

- Boroi, G., Anghelescu, C.A., *Fișe de drept civil*, Hamangiu Publishing House, Bucharest, 2021;
- District 3 Court, Bucharest, dec no. 1275/23.02.2024, pronounced in Case no. 4326/301/2021;
- District 3 Court, Bucharest, dec no. 8812 from 09.10.2023, pronounced in Case no. 5808/301/2022;
- District 3 Court, Bucharest, dec. no 10565 from 10.11.2022, pronounced in Case no. 31453/4/2019;
- HCCJ, dec. no. 356/2006;
- Pena, A., Accesiunea imobiliară şi uzucapiunea. Culegere de practică judiciară, C.H. Beck Publishing House, Bucharest, 2009;
- Vasiliu, R.I., Procedura necontencioasă în Noul Cod de procedură civilă - Comentariu, Revista de Drept Social no. 8/2012;
- Zdrenghea, B., *Problema calităţii procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universității de Vest din Timișoara no. 2/2009, Seria Drept.