

THE WAYS OF JURIDICAL PROTECTION OF THE RIGHT TO COMMON PROPERTY

Paper is devoted to actual issues of the development of national legislation and the mechanism of law practice in the field of the protection joint ownership in court. On the basis of an analysis of the scientific literature, legislation and judicial practice are formulated several comments on major issues and errors that arise in the practice of the application of legal measures to protect the right of joint ownership, and several recommendations are suggested.

Keywords: *property rights, joint ownership, judicial protection of joint ownership, remedies of judicial protection of joint ownership.*

Covering the issue of protection of the rights of common property both in the courts and through the application of various in-court ways to protect devoted quite a few scientific papers. Among them can be called scientific works of scientists such as T. Arivaniuk, I. Bolokan, A. Griniak, I. Dzera, O. Dzera, I. Ivashova, V. Krat, K. Kucheruk, Z. Romovska, A. Safonchik, F. Sevriukova, A. Sychevska, R. Stefanchuk, N. Hristenko, M. Cherevatenko, A. Yarema and others. Although studies on this issue, the constant development of social relations and the presence of a large number of litigations regarding the protection of the rights of the common property may result in the need to continue searching for ways to protect violated rights and interests, as well as the development of sustainable mechanisms of their functioning.

Given the above mentioned, the purpose of our scientific articles is the study and analysis of various scientific sources, regulations, norms which regulate the Institute of protection of the rights of common property in the courts, and

development on the basis of the analysis of the proposals and recommendations for improving the mechanism for the practical implementation of the right to the protection of the rights of common property in court. Ways to protect the rights of common property that are applied in the judicial procedure can be divided into general and special. Among the common norm ch. 2 art. 16 CC Ukraine calls recognition of rights; acknowledgement transaction invalid; termination, which violates the law; restoring the situation that existed before the violation; enforce the obligation in kind; change legal relations;; damages and other ways of compensation for property damage; reimbursement of moral (non-proprietary) damages; recognition of unlawful decisions, actions or inaction of State authorities, authorities of the Autonomous Republic of Crimea or a body of local self-government, their officials and officers. Among the special ways of judicial protection division of joint property relations of the property are allocated to the share, select share, establish procedures for the use of common property and transfer of rights and obligations of the buyer, etc. It should be emphasized that sharing ways to protect the General and special needs to come from the fact that lists common ways are not exhaustive and that the special ways to make the specifics and individuality of every specific relations. In addition, during practical application of rarely used only one of the known methods of judicial protection, usually with the aim of full and comprehensive protection of civil rights and interests, ways of protection of the rights of common property "work" in its totality.

In this paper we propose to consider the ways of judicial protection of rights of common property, which often occur in practice, as evidenced by materials of court practice, analysed below. So, the first method, which we'll highlight, recognition of property rights to share in the property, which is a common property, including prescription. Recognition of property rights, as O. Liushnia, this Court confirm the presence or absence of disputed ownership on the side of the owner (plaintiff) or the offender (defendant). Recognition can be of two kinds: positive, when the Court notes that the presence at the side of the holder of the

disputed law, and negative – lack of offender rights, which for certain reasons he is [1, p. 9–10]. According to the disposition 398 CC, recognition of property rights, as a way to protect the rights of common property in the courts, is applied in cases where the law is disputed or not recognized by any other person, as well as in case of loss of the document evidencing its ownership. That is, this method of protection can be applied only to legitimate owners that follows from the provisions of art. 398 CC, when their status the owner questioned a third person, including a co-owner, or when he loses a document confirming his ownership share in the joint property.

Example 1: A appealed to the Court with the claim to B., V., G., D., represented by G. involving third parties – registration service of the Chief Justice in Kiev, service for children, Podolsk district in Kyiv to the State Administration about the recognition of the ownership of the apartment. Claim is grounded in the fact that A. was in registered marriage with E. from the marriage, the couple had two children: a son, and a daughter – while staying married a. and E. for shared family funds purchased an apartment at a joint ownership of the apartment by mutual consent of the spouses has been decorated for her husband E. in 1998 marriage between A. and E. was terminated. After the dissolution of marriage e. bound marriage, from which was born the child etc. in 2008 E. died. After the death of E. his children and the latter's wife appealed to the notary public statements about inheritance. To the ancestral estate of the deceased has been incorporated including an apartment at a claims court satisfied fully, and acknowledged the right of ownership on $\frac{1}{2}$ of the apartments [2], based on the fact that she was the legal owner, but had no legal evidential document. Claims, the subject-matter and cause of action were formulated true evidence were reliable, the legality requirements was confirmed. When applying this method of protection is, in practice, there are problems related to the lack of necessary proofs (example 2) and wrong interpretation of the provisions of the legislation of Ukraine (example 3).

Example 2. A. appealed to the Court with the claim to be about establishing the fact of residence one family man and woman without marriage registration, recognition of the ownership of property acquired during cohabitation. However, convincing evidence that would confirm the fact of presence of long-lasting relations inherent to spouses, maintenance of common life, the emergence of mutual rights and obligations are not provided. In this connection, the Court rejected as. deny the claim [3].

Example 3: A. appealed to the Court for recognition of the property rights on $\frac{1}{2}$ of the apartments for acquired prescription, substantiating their requirements as follows: he is the owner of the other $\frac{1}{2}$ of the apartment, which is inherited by will after the death of b. Almost 9 years continuously together with his family enjoys the whole apartment, paying for housing and communal services, carries out repairs to maintain the apartment in good condition. The apartment is one-roomed, never was used as a communal, has a small area-31.4 sq m, and therefore cannot be used by several families simultaneously. Has repeatedly appealed to the Podolsk district in Kyiv State administration, Kyiv City Council statements about transfer him $\frac{1}{2}$ parts of the apartment, however, question this time is not resolved. The representative of the respondent in pointing out that the Kyiv municipal Council currently can not solve the issue of the transfer of the property and $\frac{1}{2}$ part of the apartment, because after the liquidation of the Kyiv District Councils and the controversial part of the flats as property of the Podolsk District Council was transferred to Kiev. The Court rejected as: deny the claim, citing the fact that the claim is premature, i.e. not yet has 10 years of using (one of the necessary conditions for the application of limitations), and the term of the previous owner of the disputed pieces can be combined with a period of possession, because he is not his heir [4].

Example 2 and 3 is the problem of common understanding of limitations and the obvious gaps, admitted the legislator, namely the understanding of the article ownership as a necessary condition of acquisition of the property in the property for nabuval'noû prescription (abz. 1 part 1 article 326 CC). As it is seen from the

examples, the plaintiffs were assured that conscientiously use the controversial part of the property, which is in common ownership, and are legally entitled to it. At the same time, in this case you should go with the analogy. So, with the analysis of part 1. 388, part 1 article. 390 CC Ukraine follows that a necessary sign of good faith possession is that the person did not know and could not know that owning a property illegally, i.e. that it is by law belongs to another person. I.e. in examples 2 and 3 are clearly traceable negligent ownership, since the plaintiffs knew that the property belongs to another legal ownership. But according to art. 361 central Ukraine, co-owner of at their discretion to dispose of a share. From this it follows that even if the owner is clearly not expresses interest in its share is his strong-willed choices, which is confirmed by the absence of abandonment of property (article 347 of the CC). In addition, a link to something that not all the owners keep the joint property may not deprive the right of ownership on it, it only indicates that the owner does not reside with them (art. 64 of the Housing Code of the Ukrainian SSR [9], and according to his desire, he can provide in free use of his part of the property the other co-owners, thus it will not be a waiver of the right to property. If the same person has had its share of only using the other co-owners, since it is where to reside, for example, on the condition that they themselves bear the burden of keeping, then the requirements of art. 360 CC do not institute legal proceedings will meet the demand of the century. 64 LCD of specified does not indicate about the renunciation of the ownership share in the property, but only to transfer it into the temporary use. In a pinch, you can request from the owner of the disputed shares participate in keeping the joint property.

To prevent errors in practice, at the legislative level to consolidate the concept of good faith of, in particular, by putting in a art. 344 CC of this notion. The next way to protect the rights of common property in the courts is to determine the order of use of common property. This method is derived from the rights owners enshrined in art. 358 and art. 369 CC. This method is used when there is an agreement between the co-owners concerning the use of the common property, without judicial intervention, sharing is a impossible as co-owners of impeding the

realization of the rights and interests of other stakeholders through lack of understanding between them. The way to protect often associated with others – the removal of obstacles to use (article 391 of the Code) that applies regardless of the presence of the order in the use of common property. Committing obstruction of use means creating the conditions under which the use of joint property for the other co-owners is impossible or difficult.

Example 4: A. appealed to the Court with the claim to be about the establishment of the procedure of habitable premises. In the future, the plaintiff repeatedly have specified claims, asked to oblige B. don't put obstacles in use and determine the procedure for the use of a shared apartment, namely: select the use plaintiff room conductor area of 14.9 , and defendant-room conductor area of 14.8 sq m., utility rooms: kitchen 7.7 sq m., corridor area 4.8 sq.m., bathroom covering 1.9 sq m., dressing room/tapestry/area of 0.9 sq m. leave in general use. Their claims and substantiated so that the apartment belongs to the plaintiff and the defendant on the right of private property into equal parts, however, because the parties were hateful relationship, the defendant puts obstacles in using the disputed apartment, violates protected by law the rights of the plaintiff. The Court satisfied the claim and ordered would not put obstacles in using the shared apartment [5].

The next way to protect the rights of common property in a judicial procedure is restoring the original state of the property, which is in common ownership. The essence of the method consists in the fact that the court obliges owners to restore the original state of the joint property, which was changed by the absence of the consent of the other co-owners of the infringing his rights and interests, and its application based on ch. 3-5 St. 357, p.1. 358, art. 361, part 2 of article. 369 CC. Example 5: a. sued to b. v., the third person-registrations department of Podolsk MIA of Ukraine in Kiev about the obligation to bring home ownership to its original state, the separation of the House in kind, defining use of land, evictions. Their claims and justifies the fact that his right of ownership on the basis of a contract of donation from 06.10.1995, owned by 3/4 of the House. Defendant B. belongs to 1/4 part of this House on the basis of a certificate of

inheritance from 17.12.2004 year. The plaintiff notes that defendants without sufficient grounds to enjoy all House and adjoining to it of land and putting him obstacles to use his part of the House and land.

In addition, in the course of consideration of the case of the defendants provided technical passport he became aware that after the primary and additional forensic building-technical expertise in the House during the trial housing room was converted into the kitchen, installed additional partitions, resulting in decreased residential and the total area of the disputed House, and in particular, part of the House, which the plaintiff seeks to highlight in the property. Since the unauthorised alterations and refurbishments of the disputed House was conducted without his consent, without proper authorization, duly approved project violates his rights as a co-owner of the disputed House, prevents the realization of its rights to the separation of home ownership, the plaintiff asked defendants to oblige to bring home ownership at the original state in accordance with the technical passport for 2004. Requested also divide this home ownership on option 2 forensic building-technical expertise № 943/944 from 10.03.2009. Determine the order of use of land, according to option 2 conclusion of additional forensic building-technical expertise No 9089/10-15 from 30.05.2011 year. Evict defendants and in all dependent on these entities with space allocated to him in the property, recover from the defendants the benefit incurred legal costs by paying legal fees and payment of judicial expertise. The Court satisfied the claim in full [6].

Recognition of contract of alienation share in joint property invalid. When choosing this method of protection rights of common property should be coordinated, first of all, the disposition of the art. 215-235 of the CC of the invalidity of transactions, which is understood as underexposed law at the moment of committing the transaction. Application of this method of protection is possible only in the presence of the grounds defined in the current legislation. I want to add that in some of the cases, the offender commits a crime and, therefore, should bear criminal responsibility (for example, forced to perform non-civil-legal obligations – Article 355 of the Criminal Code of Ukraine [7] (hereinafter referred to as the

CC of Ukraine); forging documents and using a counterfeit document, knowingly-
ch. 1, part 4, article 358 of the Criminal Code).

Example 6: b. and filed a counterclaim to the third person-private notary G. of recognition bestowal contract invalid, motivating, 06 October 1995 was concluded a contract of donation, according to which d. presented and adopted in Dar 3/4 parts of a residential building. Notes that Dr. this agreement is not ukladala, this Treaty is a fake. Signature of the contract on behalf of D. affixed twice, sloppy. In addition, note that the Treaty was according the private notary of Kyiv city notarial district, however, as they are known, in the time period from 1994 to 2004 g. worked the State notary of the State notary of Kyiv 15 and could not make private notarial activity. In addition, the contract of donation was not registered in the Executive Committee of the local Council of people's deputies. During the conclusion of the contract of donation in October 1995, no one asked in v. and g. consent to alienation of the House. Asked to acknowledge a void contract donation 3/4 parts of a residential building on 06.10.1995 year, concluded between D. and A. Court refused to deny the oncoming lawsuit for lack of evidence [6].

Example 6 traced one of the typical problems of realization of the right to defense is lack of evidence necessary to prove the facts. In particular, for proof that the document has been tampered with is to carry out an examination, except if there is confidence that done the crime – you must contact law enforcement. The absence of these actions, says only about attempting to illegally acquire property or a lack of thought about actions aimed at the protection of rights and interests. If the same was done simulated laps, you should gather evidence concerning the sudden enrichment of individuals, which alienated a part of the property under the contract of donation, or other circumstances that point to the fact of committing false transaction. Example 6 also points out another mistake, which has already been mentioned above in the article-misunderstanding of legal norms. So, consent to the disposition of common property is required only if there is a common joint property (part 2 of article 369 of the CC). If this is a common partial property rights – consent to dispose of common property is not required (article 362 CC).

The fact of the conclusion of the contract of donation on clearly defined part of the property indicates that the specified event preceded the Division of the joint property of the particles, and so was the common partial property, therefore the consent of other owners did not need to. In court, for example 6 was not proven the circumstances that would have pointed to the opposite, i.e. that the property was located in the shared joint property.

- Division of property in common ownership as a way to protect the rights and interests of the co-owners in court differs from the previously described method so that in this case the joint property is divided in kind between all the co-owners (p.1 art. 367 of the CC). IE application of this method is determined by the following features: – the separation is carried out solely in kind (p.1 art. 367 of the CC), as opposed to separation, when possible compensation. This rule applies when the Division of joint ownership. In the case of Division of joint property is compatible with this requirement is not provided (p.1 art. 372 CC); – the separation is carried out with a selection of all the co-owners (p.1 art. 367 of the CC, part 1 of article 372 of the CC), not just one, as it is. This method applies when an agreement about Division is not reached out of Court (p.1 art. 367 of the CC, part 1 of article 372 CC) or when there is a dispute about the size of the particles in the compatible property (part 2 of article 362 CC).

Examining the materials of the case, the Court finds that the claim is satisfied – divided in kind home ownership: a dwelling house with farm buildings and structures, highlighting the kind of individual home ownership with public ownership. In connection with the Division in the kind of home ownership to terminate the right of joint ownership, B, V, G, D in home possession: residential building with farm buildings and structures [9]. Transfer of rights and obligations of the purchaser under an agreement of purchase and sale share in the joint property, as a way of protection, enshrined in part 4. 362 CC. This method is applied in case of violation of preemptive rights to purchase shares in a shared Maino (ABS 1 part 4 of article 362 CC) when co-owner was not informed properly of other stakeholders about his intention to sell its share in the joint property (p.1

art. 362 CC); cost of the alienated portion is different in the smaller side from the one which was proposed co-owners (ch. 1, abz. 1 part 2 of article 362 CC); concluded the agreement of purchase and sale with a third person (derived from the General content of the article 362 CC); absent waiver of owners from buying this stake (abz. 2 of part 2 of article 362 CC).

When applying this method of protection recognizing the sales contract void to be unnecessary one, since otherwise the relationship sale will be suspended, and, accordingly, the preferential right to purchase a share in a shared Maino disappear. We'll note that the right to the use of this method is also implemented in practice with errors. In particular, through a misunderstanding of the legal regime of the property and the interpretation of the provisions of the applicable law.

Obviously, properly formulated claims, subject matter and cause of action, providing the Court with the reliable evidence to prove the legality of claims, is the key to proper protection of the rights and interests of persons in the exercise of the right of common ownership.

LIST OF USED SOURCES

1. *Люшня А.В.* Признание права собственности как способ защиты гражданских прав : автореф. дисс. ... канд. юрид. наук : 12.00.03 / А.В. Люшня. – М., 2005. – 30 с.
2. Рішення Подільського районного суду м. Києва : від 3 липня 2013 р., справа № 2607/15239/12 [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/32247288>
3. Рішення Шевченківського районного суду м. Києва : від 26 квітня 2013 р., справа № 2-259/11, провадження № 2/761/251/2013 [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/31056617>
4. Рішення Подільського районного суду м. Києва : від 26 лютого 2013 р., справа № 758/1428/13-ц [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/29709986>

5. Рішення Шевченківського районного суду м. Києва : від 2 квітня 2013 р., справа № 2610/2173/2012, провадження № 2/761/1091/2013 [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/31693823>
6. Рішення Подільського районного суду м. Києва : від 11 лютого 2013 р., справа № 2-169/11 [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/31411066>
7. Кримінальний кодекс України : Закон № 2341-III від 5 квітня 2001 р. (станом на 4 липня 2013 р.) [Electronic resource]. – Access Mode : <http://zakon2.rada.gov.ua/laws/show/2341-14>
8. Рішення Колегії суддів Судової палати у цивільних справах Верховного Суду України : від 28 квітня 2010 р. [Electronic resource]. – Access Mode : http://www.yurincom.com/ua/legal_practice/?id=8826
9. Житловий кодекс Української РСР : Закон № 5464-X від 30 червня 1983 р. (станом на 12 червня 2013 р.) [Electronic resource]. – Access Mode : <http://zakon2.rada.gov.ua/laws/show/5464-10>
10. Заочне рішення Подільського районного суду м. Києва : від 8 липня 2013 р., справа № 758/3972/13-ц [Electronic resource]. – Access Mode : <http://www.reyestr.court.gov.ua/Review/32563407>

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