CO-POSSESSION OF COMMON PARTS OF THE BUILDING - THE ATTRIBUTE OF OWNERSHIP RIGHT OF APARTMENT OWNERS IN CONDOMINIUM

Svetlana DOGOTARU[1]
Alla CLIMOVA[2]
Mircea URSU[3]

Abstract:

The common property in multi-apartment buildings is still not yetregistered in the Real Estate Register for the benefit of apartment owners. This is probably explained by the fact that the Law on Privatization of Housing Fundstipulates the term of "co-possession" instead of "co-ownership" for the common parts of the building, that has led to multiple errors in other regulations on state registration of real estate, and to stagnation of process for the establishment of appropriate management of housingfund by the apartment owners.

Simultaneously, the Law on Condominium in Housing Fund provides for the owners' shared ownership right over the common property elements.

The present work proposes an analysis of situation, favoring the registration of housing buildings together with the ownership right on the share in the common property in the benefit of the apartment owners in that buildings.

In conclusion, the authors emphasize that the concept of 'co-possession' does not represent an impediment for the registration of ownership right, taking into account that the concept of 'co-possession' is an attribute of this ownership right and, in this sense, does not exclude the ownership right as a whole, - such position is strengthened by relevant provisions in the Law on Condominium in Housing Fund.

Also, we find that the local government bodies are unduly delaying the transmission of buildings to the owners and stagger the building management organization process required by law. This situation needs to be remedied urgently, as the buildings need to be maintained and repaired properly, to avoid degradation of constructions which already are under increased risk of destruction.

[1] Ph.D. in Law, university professor UTM (Technical University of Moldova), Republic of Moldavie.

[2] Ph.D. in Law, university professor UTM (Technical University of Moldova), Republic of Moldavie.

[3] Expert in Public Administration, Public Administration Academy of Moldova, Republic of Moldavie.

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The need to elucidate a few aspects regarding the owners' rights on assets in multi-apartment buildings is being urged by the current situation in the housing fund management where the apartment owners are artificially marginalized. We are witnessing a variety of attempts to develop the buildings by constructing annexes, attics, superstructures, etc., attracting undue enterprises that try to take advantage of the assets which doesn't belong to them. And this situation intensifies daily and people are passive in action… for various reasons - do not know their rights, do not have necessary resources to hire qualified lawyers, while public authorities are incapable to solve problems and are the first to admit infringements.

The privatization of housing in Moldova was the first essential step in the reorganization of this area by transition of state property to private ownership of apartments' tenants. Along with the privatization process the powers of public authorities have changed, with all housing-communal issues being shifted to local authorities. The transfer of ownership obviously generated a new method of management of residential buildings. But let's look at how these changes took place.

The Chapter III of the Law on Privatization of Housing Fund[4]has been dedicated to the maintenance and repair issues of privatized housing. Thus the legislature ensured that the transfer of state property to private individuals will not interrupt the maintenance of buildings with apartments under privatization. In this respect, the law foresees obligations for both, apartment owners and public authorities. Apartment owners were given the obligation to finance these works and local public authorities to ensure the organization and monitoring processes. (Art. 20 to 27, Law on Privatization of Housing Fund).

Now, let's clarify who owns the building (i.e., the "building" means a multistoried building with several apartments, including spaces with other destination than housing, with all networks and infrastructures

[4]*Law on Privatization of Housing Fund* nr.1324-XII from 10.03.1993. nr.5 from 13.01.2000.

as parts (elements) of this building, and without which, the building does not have functionality).

For a better understanding of the addressed problem, we must define the property rights in an apartment building with several owners - 1) exclusive ownership right over the apartment / room, space with other destination than housing, which are registered and determined by name in the Real Estate Register, belonging to natural or legal person[5] and 2) shared ownership right on the common parts of the building, attributed to all apartment owners in that building.

1) With regard to ownership right on the apartment / room, space of other destination, all procedures on ownership occurrence are completedunder the law, by its registration in the Real Estate Register.

2) Ownership right on shared common parts of the building (building structure, foundation, roof, stairwells, common areas, equipment, utility networks, - what we generally determine as apartment building or housing block) are not registered in favor of apartment owners in the Real Estate Registry. Apartment buildings arrestill registered as property of the Republic of Moldova or administrative-territorial units.With a few exceptions, eventhe new buildings constructed by private investments failed to be registered as property of apartment owners.

However, in this regard we have to mention that ownership right on common property shares is being valid without being registered in the Real Estate Register. Thus, art. 37^6 paragraph (1) of the Law on Real Estate Cadastersprovides that the right acquired by the effect of a legislative act is valid without being registered in the real estateregister.

This article also addresses and solves the situations when the owner is not motivated to undertake registration procedures of real estate.

Thus, according to the Law on Condominium in Housing Fund, art. 6 (3), the homeowners are the rightful owners of the common property. According to this law, common property includes all parts of the building of common use (ground, walls, roof terraces, chimneys, stairways, hallways, basements, cellars and technical floors, garbage pipes, elevators, engineering equipment and systems inside or outside the house (rooms), serving more houses (rooms) adjacent land borders with

[5]*Law on Real Estate Cadastrenr*. 1543 from 25,02,199, nr.44-46 from 25.05.1998.
[6]*Law on Real Estate Cadastre* nr. 1543 from 25,02,199, nr.44-46 from 25.05.1998.

greening elements and other facilities for servicing the condominium property).

The same rules are found in the Civil Code: Article 355 (1)[7] states: "If in a building there are spaces for housing or other destinations, having different owners, each of them holds a shared ownership right, forced and perpetual, on the parts of building which relates to use of spaces that cannot be used otherwise but in common.

Therefore, these two laws comprise provisions confirming the shared ownership right on the common parts of the apartment building and the Law on Real Estate Cadasters determines this right without being registered in the Real Estate Register.

Thus, we are witnessing a confusing situation, contradictory to legal provisions mentioned above, when the shares of common property owned by apartment owners (private individuals and legal entities, state) are registered in the Real Estate Register as owned by the state. This has given to municipal enterprises all responsibility for housing management, as the buildings are registered on the balance sheet of local authorities (state), which, *de facto and de jure*, should not belong to the state (municipality).

Why this happens? Why public authorities do not transmit the real estate to the rightful owners and continue to retain them as state property, to manage them, using considerable resources, both financial and administrative, rather than being concerned with the areas that have not been privatized.

The main reason claimed by the local authorities is that condominium associations were not created and that there are no formalized entities entitled to such property. It is, actually, a half-truth. Art. 24 of the Law on Privatization of Housing Fund provides for the transmission in management by associations of free spaces and not of common parts of buildings.

Associations, indeed, failed to be created for various reasons (and here we must mention the ineffectiveness of local governments), having available only the status of rightful owners of common property - the owners of privatized apartments, and in the new buildings - the owners

[7]*Civil Code of theRepublic of Moldova* nr. 1107from 06.06. 2002, nr. 82-86 from 22.06.2002.

who funded / purchased apartments. This is recognized by the Law on Condominium in Housing Fund (Article 6 (3)) and the Civil Code (art. 355). However, authorities are trying to argue their own inaction with respect to art. 8 (1) of the Law on Privatization of Housing Fund that stipulates that "owners of privatized apartments are co-possessors of engineering installations and communications, places of common use of the building, and the adjacent land to this building".

So, in their view, they are not owners of the building, but co-possessors, so the buildings must not be registered for the benefit of apartment owners. This contradiction with the Law on Condominium explains why the cities, especially Chisinau, are suffocated by the maintenance problem of the housing fund, while delaying the complete transfer of the buildings to owners. And here the half-truth is being speculated.

Indeed, the Law on Privatization of Housing Fund recognizes the apartment owners' right to possess the common property and says nothing about co-ownership right on such property. But there are none of any provision in any of laws expressly indicating that ownership on common property belongs to the state. And, if one takes into account the existence of the aforementioned rules and also applies to doctrines, the one must make clear that possession is a statement of fact, while the ownership is a statement of right. Then, when the possessor is the owner as such, the possession becomes an attribute of ownership right. In this case, the actual exercise of the fact overlaps the exercise of the right, and the person who holds the property has a double role - as possessor and owner, - possession being not considered as a separate exercise[8]. So, possession, which actually involves the factual exercise of ownership prerogatives by the possessor, cannot exclude in any case the holder's ownership right.

As a conclusion, the provision of Article 8 (1) of the Law on Privatization of Housing Fund does not preclude that the possessor of the common property is also the owner of the common property. Most often, the possession as statement of fact is exercised by an entitled owner of

[8] Joseph R. Urs**,** *Considerations on regulating possession and precarious detention in the new Romanian Civil Code*, , Law, new series (2008), http://analedrept.utm.ro/Numere/Anale%202008%20final.pdf

that property. While the Law on Privatization of Housing Fund does not fully cover the status of common property as a property belonging to apartment owners, we apply to the Civil Code and the Law on Condominium in Housing Fund.

We must take into account that the Law on Privatization of Housing Fund, which sets the rules for the privatization process of housing fund, the principles and conditions of privatization, does not substitute all applicable civil legislation regulating civil relations among owners. Moreover, the Civil Code, the Law on Condominium in Housing Fund[9]are organic laws, so in this sense, these laws have the same legal power as the Law on Privatization of Housing Fund, however, given the time of their adoption, these laws have superiority over the latter one.

It was clearly pointed out above, that the apartment owners are also the owners of the common parts of apartment buildings in accordance with the provisions of that two laws. Therefore, as stipulated by the Law on Privatization of Housing Fund, the co-possessors are concomitantly the co-owners of that common parts being attributed all rights and obligations arising from this right. Their right, however, is limited by actions of local public authorities which do not transfer the assets, and moreover, continue to use this property without owners' consent. As examples are the permits related to construction approvals for attics, superstructures, annexes to buildings, placement of advertisements on building facades, thus - illegal privatization and use of common parts of buildings…. All these actions can be approved only by owners and in no case by the authorities, who fraudulently assumed the owners'role over the others property.

Following the judgment of above, in order to exercise their ownership right on the building and ensure the management of common property, the registration of the owners' right on shares in the common property is not being mandatory. But things are not so simple - it should be understood that the owners are very indolent in terms of fulfilling the requirements to carry out maintenance works which are strictly necessary to maintain the safety and comfort of housing block. Even under such circumstances, the public authorities must transfer the buildings to the

[9]*Law on Condominium in Housing Fund*, nr. 913 from 30.03.2000. M.O.nr.130-132 from 19.10.2000.

rightful owners and find the mechanism by which to persuade the owners to accept "the gift". In this respect there could be two ways:

1) Homeowners Associations (HOAs)have to be created and the authorities shall subsequently transmit the building to HOA for management (administration), taking into account that ownership of the building belong to apartment owners of that building, under the laws. In this case, the HOA, using specific tools and acting on behalf of the owners, calculates the sizes of shares in the common property for each owner and organizes their registration in Real Estate Register.

2) The authorities organize the entire process of calculating the shares and transmit the buildings to apartments owners with subsequent registration of common property shares in the Real Estate Register in accordance with the legislation. After that, the owners decide on the establishment of the HOA and management method of the assets they have in common ownership.

Both ways require substantial involvement of public authorities, by carrying out actions requiring considerable resources. But it is necessary to recognize that without consistent actions undertaken by authorities, the organization of buildings' maintenance on a qualitative level will not be possible.

In conclusion, in authors' opinion there are no impediments for the registration of ownership right on the common parts of the building for the benefit of apartment owners living in these buildings. Moreover, public authorities must take certain steps for the transmission of buildings to rightful owners by organizing all necessary processes - inventory, calculation of shares for each owner, registration in the Real Estate Register.

The delay of process will further aggravate the already critical situation in the housing area, while the owners being fully excluded from the management process of assets belonging to them.

The fact that the HOAs were not created can not be a reason for not registering the ownership of buildings by those who have ownership right on the apartments in that building. The building and its common elements belong to apartment owners, as shared common property, but not to HOAs. Owners may delegate the management to the established HOA which will undertake the building maintenance activities, on behalf of owners and in accordance with the owners'decisions.

Obviously, these actions require substantial financial resources, and nobody should admit that the owners will finance the process. Public authorities should identify necessary resources in public budgets, as the owners apparently are very reluctant to any additional costs, considering that their responsibility will increase while registering their property.

The authors would like to underline that the registration of ownership rights over common property should not be seen as an end in itself. The recognition of the validity of ownership of each owner over the common parts of the building is required in order to impose responsibility, including obligations for maintenance of these buildings. To set these activities up, it is necessary to elaborate also technical mechanisms specifying the conditions and procedures for officers who will perform the work in question. These mechanisms can and have to be developed by the competent authorities, with the identification and approval of necessary budgetary resources, both from the state and local budgets.

Afterwards, the public authorities would remain with control functions over the technical conditions of privatized housing fund, use according to its destination and execution of necessary maintenance works under normative legislation - a huge responsibility which should not be substituted by the direct management of buildings belonging to private owners, moreover - taking decisions for the rightful owners.

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