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Judicial protection of rights on real estate in non-contentious proceedings

1. Introduction

The main aim of this article is to present Polish non-contentious proceedings concerning real estate. Therefore the article consists of chapters which discuss the scope of non-contentious proceedings in this matter, comparison with contentious proceedings, administrative proceedings and court-administrative proceedings. These analyses could show the advantages and disadvantages of this kind of civil proceedings. The final chapter concerns the principle of effectiveness in non-contentious proceedings. In connection with this topic, the author proposes amendments in regulations currently in force in Poland. The additional aims are:

- 1) to give a description of failure which emerges in non-contentious proceedings,
- 2) to put forward a proposal of amendments to achieve effective non-contentious proceedings.

The author uses the formal-dogmatic method and analysis of judgments of the Supreme Court in Poland. Moreover, the method of comparative law is also used in the article. The regulations of the German, Slovenian or Latin American non-contentious proceedings are very interesting, especially to compare with the Polish non-contentious proceedings. Besides, it is worth discussing the American, Australian, Canadian, New Zealander and British institutions.

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2. The scope and nature of non-contentious proceedings

Non-contentious proceedings involve cases concerning different rights on real estate for instance: ownership connected with declaration of acquisitive prescription, certificate of acquisition of inheritance and specific bequest, the dissolution of co-ownership, partition of estate or division of marital property upon termination of community property between spouses, administration related with co-ownership and usufruct, making an entry in the land and mortgage register and in the National Court Register, the limited proprietary rights as establishing servitude right of way necessity, necessity passage or transmission easement right. This catalog covers a variety of cases. One group of them concerns registration of rights, like making an entry in land and mortgage register and in the National Court Register. The others are based on the construction called substitution of the specified declaration of intent of the participant of non-contentious proceedings by the decisions of the court ruling on the merit of the case.¹ This conception is right, because the party of the substantive legal relation could enter the agreement to regulate their dispute before the commencement of non-contentious proceedings. However the ineffective attempt to resolve the dispute amicably or when this option is not possible, the only way is the commencement of non-contentious proceedings. Substitution of the specified declaration of intent of the participant of non-contentious proceedings by the decision of the court ruling on the merit of the case exists in most cases considered in this kind of civil proceedings, especially concerning declaration of acquisitive prescription, certificate of acquisition of inheritance and specific bequest, the dissolution of co-ownership, partition of estate or division of marital property upon termination of community property between spouses, administration related with co-ownership and usufruct, establishing servitude right of way necessity, necessity passage or transmission easement right. The common feature of this situation is connection with real rights. The decision ruling on the merit of the case is constitutive. It develops legal situations of the party of substantial legal relation, too.²

Moreover, the decision ruling on the merit of the case is the complex adjudication of the court. It does not only develop the legal situation of the participants of non-contentious proceedings, but also determines the exist-

¹ K. Korzan, *Orzeczenia konstytucyjne w postępowaniu cywilnym*, Warszawa 1972, p. 174.

² Z. Fenichel, *Powództwo o ukształtowanie stosunku prawnego w kodeksach polskich*, „Polski Proces Cywilny (PPC)” 1935, nr 11-12, p. 349 and 350; T. Kipp, *Die Verurteilung zur Abgabe von Willenserklärungen*, Lipsk 1892, p. 16; K. Korzan, *Orzeczenia konstytucyjne op. cit.*, p. 175-179, K. Korzan, *Orzeczenia zastępujące oświadczenia woli w sądowym postępowaniu cywilnym*, Warszawa 1977, p. 52 and 53; E. Warzocha, *Ustalenie stosunku prawnego lub prawa w sądowym postępowaniu cywilnym*, Warszawa 1982, p. 24-26 and 31-34.

tence or non-existence of a legal relationship or law or charge due amount. It is a result of Article 618 of the Polish Act of 17 November 1964 on the Code of civil procedure,³ which constituted that in proceedings involving dissolution of co-ownership, the court shall also hear disputes concerning the right to petition for the termination of co-ownership and the right of ownership of a thing as well as the counterclaims of respective co-owners related to the possession of the things. The court may issue a preliminary decision to settle a dispute concerning the right to petition for dissolution of co-ownership or the right of ownership of a thing.

In the event of issuing partial or preliminary decision ruling of the merit of the case, the court has to pass the final decision ruling of the merit of the case as regards remaining issues, for example the decision as to the remaining claim, amount of the claim as well as to the awarding costs. These possibilities are the result of Articles 317 and 318 in connection with Article 13, Clause 2 established in the Polish Act of 17 November 1964 on the Code of civil procedure. The first one constitutes that the court may issue a partial decision ruling of the merit of the case in non-contentious proceedings if only a part of a claim or some claims included in a petition may be adjudicated. The second article constitutes that the court, by recognizing the principle of a claim to be justified, may issue a preliminary decision ruling on the merit of the case in this kind of civil proceedings as to the principle only and order another trial or the trial as to the disputed amount of the claim to be adjourned. When another trial is ordered, a decision ruling on the merit of the case in non-contentious proceedings as to the amount of the claim as well as to the awarding of costs may only be issued after the preliminary judgment has become effective. Even though there are possibilities of issuing many decisions ruling on the merit of the case in non-contentious proceedings, it seems that they form a whole. Still, the decision is not always contained in one document. On the account of a discrepancy of the effects, one can assume that decision ruling on the merit of the case in non-contentious proceedings has the nature of complex adjudication, which consists of many conclusions. For this reason the jurisprudence accepts the conception of complex adjudication. It is connected with the dominant idea existing in the jurisprudence of the civil proceedings, which is considered in civil proceedings as a complex legal act. This construction provides structural and functional unity between civil proceedings and adjudication.⁴

³ Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. z 2018 r. poz. 1360 ze zm.).

⁴ K. Piasecki, *Wyrok pierwszej instancji w procesie cywilnym*, Warszawa 1981, p. 48 and 49; A. Miączyński, *Skuteczność orzeczeń w postępowaniu cywilnym*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace Prawnicze”, z. 67, 1974, p. 47.

It is to be noted that the Supreme Court in Poland does not deny issuing the preliminary decision ruling on the merit of the case in non-contentious proceedings. However, this court deems that it is not admissible to determine the way of dissolution of co-ownership by the preliminary decision ruling on the merit of the case in non-contentious proceedings.⁵

Regarding the legal systems adopted in other countries, it is worth noticing that non-contentious proceedings concerning real estate are also regulated in Slovenia. But in Great Britain or in the United States of North America this kind of civil proceedings is unknown.⁶

3. Non-contentious proceedings and proceedings

In Poland, cases are considered by court in non-contentious proceedings, the proceedings being a kind of civil procedure. The latter are proceedings which are established in the Polish Act of 17 November 1964 on the Code of civil procedure.

The court considers cases in which the participants of non-contentious proceedings do not appear as a party in the proceedings. This discrepancy is very important, because the plaintiff and the defendant have to act in the proceeding. This demand does not apply in non-contentious proceedings. On the one hand, in non-contentious proceedings, only the applicant may act or many participants, or even hundreds of participants. They each could submit a different claim. For instance, a participant who is a co-owner could demand severance the co-ownership of real estate by a division of the thing. On the other hand, the second participant could demand granting the real estate to one of the co-owners, along with the duty to pay off the other ones. The third participant could demand that the real estate should be sold pursuant to the provisions of the Code of civil procedure. The fourth participant could not demand severance of the co-ownership. He may claim that such entitlement is excluded by the juridical act for a period of time not exceeding five years. These are typical situations in non-contentious proceedings. In regular proceedings this is not admissible, because there are only two parties: the plaintiff and the defendant. Of course, the plaintiff or the defendant could represent many natural and legal persons, but their claims have to be the same.⁷

⁵ Decision of the Supreme Court of 25.11.1999, II CKN 750/98, OSNC 2000, No. 6, item 107 (Pozostanowienie SN z dnia 25.11.1999 r., II CKN 750/98, OSNC 2000, nr 6, poz. 107).

⁶ K. Lubiński, *Istota i charakter prawny działalności sądu w postępowaniu nieprocesowym*, Toruń 1985, p. 64; B. Lurger, W. Faber, A. Moraitis, M. Costa, A. Greco, M. Lilja, E. Weiker, R. Cascao, *Principles of European Law, Acquisition and Loss of Ownership of Goods*, Munich 2011, p. 290, 299-303.

⁷ W. Siedlecki, *Zarys postępowania cywilnego*, Warszawa 1968, p. 11-12.

There is usually no legal dispute in non-contentious proceedings.⁸ For instance, cases without legal disputes include the certificate of acquisition of inheritance and specific bequest or making an entry in the land and mortgage register and in the National Court Register. However a legal dispute appears in non-contentious proceedings in specific situations, for example when the owner protects his right in the proceedings concerning declaration of acquisitive prescription. The same situation occurs when the petition is not unanimous in the proceedings concerning the dissolution of co-ownership, partition of estate or division of marital property upon termination of community property between spouses. In contrast, the court always resolves legal disputes in proceedings.

Moreover the Code of civil procedure uses different notions, for example a complaint in proceedings is called a petition in non-contentious proceedings. There is no judgment in non-contentious proceedings. Instead of this notion, the Code of civil procedure uses the term the decision of the court ruling on the merits of case.⁹

In view of the public interest present in non-contentious proceedings, the judge should be more active than in the regular proceedings.¹⁰ The judge ought to admit evidence which has not been presented by participants, when the participant is trying to evade the law, for example the regulations concerning limitation of acquisition of agricultural real estate, or reserved portion for the descendants of the spouse and the parents of the descendant who would be entitled to inheritance by the statute. Besides, in the land registration proceedings the court shall make an entry of warning notice *ex officio* if the court discovers any discrepancy between the legal status reported in land and mortgage register and the actual legal status. In contrast, mistakes in an entry in the land and mortgage register, which cannot cause a discrepancy between the content of the land and mortgage register and the actual legal status shall be corrected *ex officio*.

Non-contentious proceedings are more flexible than regular proceedings. For this reason cases are transferred to non-contentious proceedings. The court has more opportunities to rule specific cases in a better way than in proceedings. Therefore the court could act *ex officio*.¹¹ The range of cases, which are recognized in non-contentious proceedings is still extended.

⁸ A. Międzyński, *op. cit.*, p. 54.

⁹ J. Lapierre, J. Jodłowski, Z. Resich, T. Misiuk – Jodłowska, K. Weitz, *Postępowanie cywilne*, Warszawa 2016, p. 56.

¹⁰ K. Korzan, *Postępowanie nieprocesowe*, Warszawa 2004, p. 20-22; K. Knoppek, *Postępowanie cywilne w pytaniach i odpowiedziach*, Warszawa 2008, p. 498; K. Lubiński, *op. cit.*, p. 127; in German literature: W. Merk, *Deutsches Verwaltungsrecht*, Berlin 1962, t. 1, p. 72-73.

¹¹ A. Międzyński, *Specyfika postępowania nieprocesowego* (in:) red. E. Łętowska, *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci Profesora J. Jodłowskiego.*, Wrocław 1989, p. 417, 418.

4. Non-contentious proceedings and administrative proceedings

It is also worth comparing non-contentious and administrative proceedings regulated in the Act of 14 June 1960 on the Code of administrative proceedings.¹² The party in administrative proceedings in accordance with Article 28 of the Code of administrative proceedings is each person, whose legal interest or duty the proceedings concern or who requests the authority's action due to his legal interest or duty. This definition is similar to the definition regulated in Article 510, Clause 1 of the Code of civil procedure. The interested party is each person, whose rights are affected by the outcome of non-contentious proceedings which may join the case and his becoming a participant. There is not usually a legal dispute in non-contentious proceedings; neither there is one in administrative proceedings. Moreover, the court rules administrative issues connected with geodetic division in non-contentious proceedings concerning dissolution of co-ownership, partition of estate or division of marital property upon termination of community property between spouses, even though this competence usually belongs to the city president, mayor of the town or municipality.¹³

However, the court more often rules matters of the civil law, which is based on the principle of equivalence and autonomy of natural or legal persons. In contrast, the administrative law governs relations between the authority and a subordinate citizen.¹⁴ What is crucial is that the court which is independent from the government should protect human rights and property in a better way than an administrative body which is dependent on the government.

The possibility of emergence of a dispute and the subject concerning the right in the sphere of private law justify that non-contentious proceedings are regulated in the Code of civil proceedings not in the Code of administrative proceedings.¹⁵ In view of the constitutional principle of protection

¹² Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego (Dz.U. z 2017 r. poz. 1257 ze zm.).

¹³ E. Stefańska [in:] S. Krupa, M. Krzyński, G. Lang, J. Lang, J. Maćkowiak, E. Stefańska, *Prawo geodezyjne i kartograficzne. Komentarz*, red. J. Lang, J. Maćkowiak, E. Stefańska, Warszawa 2013, p. 369.

¹⁴ M. Kamiński, *O istocie sprawy sądownoadministracyjnej*, „Przełąd Prawa Publicznego”, 2009, nr 10, p. 14, 15.

¹⁵ K. Lubiński, *op. cit.*, p. 126-128, 132 and 134. Similar views exist in German literature: K. Hellwig, *System des deutschen Zivilprozessrechtes*, Leipzig 1912, p. 75 and 76; in French literature: H. Motulsky, *Les actes de juridiction gracieuse en droit international privé*, „Travaux du Comité Français de droit International Privé 1948-1952”, Paris 1953, p. 17 and in Italian literature: G. Moro, *Contributo Alla nozione di giurisdizione volontaria*, „Rivista del Notariato” 1968, p. 53.

of the ownership right, the other crucial element is transfer of such a case to the jurisdiction of the courts and judges that are independent.¹⁶

5. Non-contentious proceedings and administrative-court proceedings

Administrative-court proceedings are also similar to non-contentious proceeding in that the case is recognized by the court. The court is entitled to take actions *ex officio* in the both proceedings. But administrative-court proceedings precede administrative ones. There is a legal dispute between the citizen and the administrative body before the administrative court. Non-contentious proceedings do not precede administrative proceedings. There is usually no legal dispute in this type of proceedings.

6. The principle of effective judicial protection in non-contentious proceedings

The principle of effective judicial protection in non-contentious proceedings is based on Article 6 of the Code of civil procedure. This provision states that the court should prevent prolongation of proceedings and endeavor to judge a case at the first hearing without detriment to the enquiry. However, cases are rarely judged at the first hearing in practice in Poland. It is the judge and not the participant of non-contentious proceedings who determines the calendar of litigation. The court decides on the course and plan of litigation by court time limits. The court is entitled to pass the decision and order to obligate the participant and their attorney to present an answer to the petition, facts or evidence. Issuing the fair decision ruling on the merit of the case is the common task of the court and participants of non-contentious proceedings.¹⁷ But the lack of influence of the participants of non-contentious proceedings on the course of litigations often causes the court not to acquire relevant information. For this reason the effective judicial protection of rights is not often achieved in non-contentious proceedings. Participants often use this situation to evade the law, for example the regulation concerning limitation of disposal of agricultural real estate. The court could also issue faulty decisions or orders, which sustain the litigation instead of reducing it. This situation appears, especially when the partici-

¹⁶ A. Schönke, H. Schröder, W. Niese, *Lehrbuch des Zivilprozessrecht*, Karlsruhe 1956, p. 73-75 and 77; J. Bärmann, *Freiwillige Gerichtsbarkeit und Notarrecht*, Berlin-Heidelberg-New York 1968, p. 35.

¹⁷ A. Łazarska, *Sędziowskie kierownictwo postępowaniem cywilnym przed sądem pierwszej instancji*, Warszawa 2013, p. 175, 182, 183, 187, 209-210, 215, 216, 289, 290, 293.

pants do not submit evidence in accordance with good practice, truthfully, and without concealing anything.

The Supreme Court stated that the court could establish the right of passage across the owner's real estate, which was not indicated in the petition. This was possible if this owner was summoned to join the case.¹⁸

It seems that it is necessary to enact amendments in the regulation and change the practice of their application, which is connected with granting more powers to court clerks (*referendarz sądowy*) and assistants to judges. This is the best solution to reduce judges' workload.

In Germany, court clerks have broad powers to act in the case of certificate of acquisition of inheritance, of estate or division of marital property upon termination of community property between spouses, which are recognized in German non-contentious proceedings. They cooperate also with the Court Registry. Court clerks perform technical activities and thus relieve judges.¹⁹

In countries of South America like Chile, Peru, Argentina, Colombia, Bolivia, Brazil, Ecuador and Uruguay they introduce amendments which provide realization of the principle of effective judicial protection of rights in non-contentious proceedings. They are based on redefining the role of the judge. The judge becomes the manager of the procedure, leaving behind the previous passive role which was essentially limited to ruling. For this reason the establishment of hearings should be combined with the best oral and written procedures, assure the direct participation of the judge and favor the immediacy principle. The judge is now able to seek evidence by his own initiative and is capable of taking all the measures needed to prevent non-contentious proceedings from stalling. The judge also has powers and duties regarding procedural control, direction and both prevention and declaration of annulments in an *ex officio* capacity. In any case, the judges' impartiality remains an essential requirement of jurisdiction. This regulation is in force in Poland, too. Some countries of South America have regulated the duty of truthfulness (or the procedural good faith principle), thereby the participant of non-contentious proceedings has the duty of truthfulness: if they should refuse to state facts they know are not true, there are specific penalties (fines, court fees, disciplinary sanctions, etc.) that are defined by each country's regulation. It is important to note that in many

¹⁸ Decision of the Civil Law Division of the Supreme Court of 28.05.1971, III CRN 109/71, OSNCP 1972 nr 1, poz. 13; Decision of the Civil Law Division of the Supreme Court of 21.12.1971 r., III CRN 403/71, OSPiKA 1972 nr 11, poz. 208. (Postanowienie SN – Izba Cywilna z 28.05.1971 r., III CRN 109/71, OSNCP 1972 nr 1, poz. 13; postanowienie SN – Izba Cywilna z 21.12.1971 r., III CRN 403/71, OSPiKA 1972 nr 11, poz. 208).

¹⁹ H.L. Graf, *Nachlassrecht Erbfolge, Testament, Erbvertrag, Pflichtteilsrecht, Rechtspflege in Nachlasssachen, Nachlassinsolvenz, Nachlassverfahren sowie Erbschaftsteuer*, München 2014, p. 288-290.

systems, the judge, while ruling, has to evaluate the procedural conduct of the participant.²⁰ A similar regulation exists in Poland. The duty of truthfulness is regulated in Article 3 in connection with Article 13, Clause 2 of the Polish Code of civil procedure, which states that participants in non-contentious proceedings are obliged to provide explanations as to the circumstances of the case and to submit evidence in accordance with good practice, truthfully, and without concealing anything.

Poland does not introduce a discovery. This is an institution, one of the most successful tools of the reforms in countries of South America, which lessens the burden of presenting or offering, when filing a lawsuit or the response, all the evidence that the participant has in order to avoid surprises and unfounded claims. It is essential to incorporate new technologies into the system design and management, electronic records, electronic notifications and the method of introducing evidence digitally in non-contentious proceedings. In Costa Rica, a lawsuit can be filed electronically, without having to go to the office in person; other countries, like Uruguay, have implemented an electronic notification system and several countries are working on the electronic record. Naturally, this leads to a better access to justice, facilitating transparency and resulting in significant saving of time and costs. In Latin America, some cases are transferred to non-contentious proceedings, resulting in a benefit, as it tends to lighten the workload of the courts.²¹ The Polish Code of civil procedure has also incorporated electronic records and introduced evidence digitally in non-contentious proceedings.

American jurisprudence notes that the judge should not be passive, but act as a case manager. It is justified by the increasing number of complex and protracted cases. Mismanagement or non-management of cases can cause a considerable delay, leading to uncertainty in business and personal affairs and often crushing expense to one or more parties. Some pretrial procedures are vital for minimizing delay and expense in litigation and achieving a just, speedy and inexpensive determination of every action. By defining the contested issues, mapping out a plan for discovery, forcing attorneys to prepare themselves and promoting settlement, pretrial procedures streamline litigation and thereby cut costs and help equalize the financial positions of the parties. In a pretrial conference the judge receives extensive information which has not been filtered by the rules of evidence. At this stage attorneys and judges can discuss discovery schedules and explore settlement proposals without the constraints of the formal courtroom

²⁰ S.P. Campos, A.P. Ledesma, *Justice System of Latin America: the challenge of civil procedure reforms*, "Legal Information Management", 2015 (2), p. 95-98.

²¹ S.P. Campos, A.P. Ledesma, *op. cit.*, p. 98-99.

environment. However, there appears a threat to judge's impartiality, connected with a pretrial conference.²²

In New Zealand, Australia, Canada and England, civil procedures are also based on pretrial conference and discovery, which is ordered by court. It is noted that electronic records can generate a very large number of documents by major legal corporations. In order to keep litigation down and provide effective judicial protection of rights, judges have to refuse taking documents as evidence, which are irrelevant in the case.²³ It is noted that this problem exists also in Poland.

7. Conclusion

Analyses of cases considered in non-contentious proceedings concerning real estate show that this kind of civil proceedings is necessary in the Polish legal system. A complex adjudication of the court and substitution of the specified declaration of intent of the participant of non-contentious proceedings by the decision of the court ruling on the merit of the case are typical features. I want to postulate enacting non-contentious proceedings in Great Britain, the USA, Canada, Australia, New Zealand, because the judge as the manager of litigation could act better when this kind of civil proceedings is regulated.

To conclude, non-contentious proceedings should be amended. Granting more powers to court clerks (*referendarz sądowy*) and assistants to judges, as well as pretrial conferences should be introduced. After these amendments are made, the principle of effective judicial protection will be increased in non-contentious proceedings concerning real estate in Poland.

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²² A.L. Levin, P. Shuchman, C.M. Yablon, *Civil procedures cases and materials*, New York 2000, p. 604-606.

²³ J. Turner, *Civil procedure*, „New Zealand Law Review” Issue 4, 2014, p. 709-713, 715, 723.

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JUDICIAL PROTECTION OF RIGHTS ON REAL ESTATE IN NON-CONTENTIOUS PROCEEDINGS

Abstract: The article presents the rights concerning real estates, which are considered in non-contentious proceedings by the court. The author defines non-contentious proceedings, which are a kind of civil proceedings. The scope of non-contentious proceedings involves cases concerning different rights on real estate, for instance: ownership, co-ownership, servitude right of necessity of passage, establishing the necessity of passage, making an entry in the land and mort-

gage register and in the National Court Register. Besides, there is – in this article – a comparison between non-contentious and contentious proceedings and administrative proceedings. The article describes also the principle of effective judicial protection in non-contentious proceedings. The author proposes amendments in the regulation and in the practice of their application, which are connected with granting more powers to court clerks (*referendarz sądowy*) and assistants to judges.

Keywords: NON-CONTENTIOUS PROCEEDINGS, REAL ESTATE