

Eka Zarnadze*

Tamar Chalidze**

Realization of Vindication Claim on Immovable Property and Some Counterclaims

The article is devoted to the problems of realizing the Vindication claim as a means of protecting the right to property in the Georgian legal order, in the form of researching the procedural and material legal features of this kind of lawsuits and presenting recommendations to overcome the delay in their consideration.

Keywords: *property claim, property, ownership, unlawful possessor, Vindication claim, Vindication counterclaim.*

1. Introduction

A great wish to possess desirable property has always been one of the widespread and common characteristics of a human. However, in a legal state, it is impossible to let individuals fulfill the desires¹ that threaten the rights of others and civil turnover. The main task of the legal state² is to bring into the legal framework and subject to the law important relations for the society, establish fair rules³ related to the allocation of property. In order to ensure the right to property, the state must create an appropriate legal system, including a private legal order.⁴ The state has a positive obligation to create a legal system based on which individual property disputes can be resolved efficiently and fairly.⁵ In 2015, part 3 of Article 172 of the Civil Code of Georgia (later the Civil Code), which formed the legal basis for the institution of police eviction from real estate, was declared invalid. A heated debate followed the change.⁶ According to critics of the amendment, Section 3 of Article 172 of the Civil

* Doctor of Law, Professor of New Vision University, Associate Professor of University of Georgia, Invited Lecturer at Ivane Javakishvili Tbilisi State University, Judge of the Chamber for Civil Cases of the Tbilisi Court of Appeal.

** PhD Student of Ivane Javakishvili State University Faculty of Law, Mediator, Chief Consultant-Assistant Judge of the Chamber for Civil Cases of Tbilisi Court of Appeal.

¹ *Zarandia T.*, Property Law, Tbilisi, 2019, 28-29 (in Georgian).

² Article 4 of the Constitution of Georgia (rule of law), Constitution of Georgia, Legislative Herald of Georgia, 31-33, 24/08/1995 <<https://matsne.gov.ge/ka/document/view/30346?publication=36>> [12.01.2023].

³ *Zarandia T.*, Property Law, Tbilisi, 2019, 27 (in Georgian).

⁴ *Mikava L.*, Vindication Lawsuit as a Legal Means of Protection of the Right of Sale, the legal magazine of the Supreme Court of Georgia and the Association of Judges of Georgia “Justice and the Law”, #1(28)11, 2011, 73 (in Georgian).

⁵ *Zarandia T.*, Property Law, Tbilisi, 2019, 189 (in Georgian).

⁶ For more information on expected risks and negative consequences, see “Transparency International – Georgia” opinions and comments on legislative changes related to the eviction of illegal owners of immovable property, June 4, 2015, (in Georgian) <<https://www.transparency.ge/sites/default/files/>

Code was an important tool to protect the right of an owner to property recognized by the Constitution. It did not deprive a person of the right to assert the fact of lawful ownership and demand compensation for damages through the court.⁷ The current version of Article 172 of the Civil Code is still considered by a part of society and lawyers to be an ineffective mechanism to protect property due to the long-term limitation of the owner's right to property, which is caused by resolving the dispute in the court. The second part appreciated the change. The amendment was necessary and inevitable because in a developed democratic society, only the judicial body, the court, should have the right to decide such a controversial issue.⁸ As legal doctrine and judicial precedents develop law, they acquire the meaning of the source of law.⁹ In the present work is discussed the effect of the law provision of the Vindication claim on examples of judicial practice, accordingly, the implementation of the norm, its doctrinal definitions in practice, and the scope of realizing the goal of the legislator.

2. The Nature and Scope of the Vindication Claim

The right to demand the return of the property (*rei vindicatio*) based on the absoluteness¹⁰ of ownership has a general property legal nature.¹¹ It is not subject to concession, since it is aimed at the exercise of the right to ownership and is inseparably connected with it.¹² The main right of the owner is a negative authority to exclude the use of his property by other persons.¹³ A Vindication claim is a claim by a non-possessing owner or other legal possessor against an illegal possessor for the return of a property identified by an individual characteristic and existing as a material.¹⁴ The claim applies to both movable and immovable property. It always includes only a particular property, and not the other properties that are in the place of the original property.¹⁵ On the basis of the right to reclaim the property, a legally binding relationship arises between the owner and the possessor.¹⁶ The purpose of Article 172 of the Civil Code is for the owner to regain ownership of the property that he has lost,¹⁷ and the legal result is to restore the original condition¹⁸ and the ownership of the property.¹⁹

post_attachments/shenishvnebi_da_mosazrebebi_udzravi_nivtis_aramartlzmieri_mplobelis_gamosaxlebaz_e.pdf>[12.0 1.2023].

⁷ Ibid.

⁸ Totladze L., Commentary on the Civil Code, Book II, 2018, 80 (in Georgian).

⁹ Zarandia T., Property Law, Tbilisi, 2019, 31 (in Georgian).

¹⁰ Totladze L., Commentary on the Civil Code, Book II, Chapter, 2018, 79 (in Georgian).

¹¹ Cf. §985 of the German Civil Code. “The right to request the return of the property- the owner can request the owner to return the property” .

¹² Kropholler I., German Civil Code, Study Comment the 13th revised ed., 2014, 731-732 (in Georgian).

¹³ Zarandia T., Property Law, Tbilisi, 2019, 43 (in Georgian).

¹⁴ Kochashvili K., Possession as the Basis of Presumption of Ownership (comparative legal research) Dissertation for Obtaining the Academic Degree of Doctor of Law, Faculty of Law of Ivane Javakhishvili Tbilisi State University, Tbilisi, 2012, 115 (in Georgian).

¹⁵ Zarandia T., Property Law, Tbilisi, 2019, 249 (in Georgian).

¹⁶ Ibid, 254.

¹⁷ Totladze L., Commentary on the Civil Code, Book II, Tbilisi, 2018, 79 (in Georgian).

¹⁸ Kvernadze T., The Relationship between the Owner and the Unlawful Possessor, Master's Thesis, Ivane Javakhishvili Tbilisi State University Faculty of Law, Tbilisi, 2019, 41 (in Georgian).

The freedom of ownership is limited only by the law. In Georgian law, this scope is established by Article 170 of the Civil Code.²⁰ In addition, although possession, as the actual possession of a property, is not a right, it provides defensive rights that protects the actual situation against any person. Article 172 of the Civil Code ensures rights to complete ownership of property. According to Article 168 of the Civil Code, the ownership of the property is terminated due to the claim of the owner, if the owner submits a substantiated claim to the possessor. A person who does not want another person to appropriate allegedly illegal property, he/she must make the request through the courts without acting on his/her own, independently. It makes no difference to the fault of the person acting arbitrarily. In contrast, the termination of possession based on the enforcement of a judgment does not constitute prohibited arbitrariness and, therefore, does not give rise to the possessor's defense claims.²¹

To claim a property from illegal possession by non-possessing owner, all the prerequisites following Articles 170-172 of the Civil Code must be provided: a) the plaintiff must be the owner, b) the defendant must be the possessor of the property, and c) the defendant must not have the right to possess this property.²² The plaintiff has the burden of proving these circumstances. The defendant must prove that he has a legal basis²³ to possess the property. These preconditions have to exist cumulatively.²⁴ Their simultaneous existence is the basis for a Vindication claim.²⁵ The owner, who has to prove his right of ownership and possession of another person, will be satisfied with his claim, if the possessor, in turn, cannot justify his right to possession.²⁶ The burden of proof rests with the one who disputes the ownership of the possessor.²⁷ If the subject of the dispute is an immovable property, the right to ownership is determined by an entry of public registry. A registered right to real estate is considered legal until the authorized person can freely dispose this property, as long as the basis for registration (civil transaction, administrative act, legally binding court decision, etc.) is not canceled, i.e. register entries are considered correct until their inaccuracies are proven. The presumption of correctness and completeness of public register entries is valid until the inaccuracy of the presumed fact is proven. This is reached by invalidating the transaction which was the basis of the registered right. The court must establish the fact of the existence of circumstances excluding the validity of the right but before that it is assumed that the record made as a result of registration is correct and, therefore, the right is genuine.²⁸ The exercise of the owner's authority is independent of whether he/she

¹⁹ *Mikava L.*, Vindication Lawsuit as a Legal Means of Protecting the Right to Sale, the Legal Magazine of the Supreme Court of Georgia and the Association of Judges of Georgia "Justice and the Law", #1(28)11, 2011, 73 (in Georgian).

²⁰ *Zarandia T.*, Property Law, Tbilisi, 2019, 229 (in Georgian).

²¹ *Ibid.*, 174.

²² Cf. The decision of the Great Chamber of the Supreme Court of Georgia of September 9, 2002 on case No. 3k/624-02 (in Georgian).

²³ Among many others, see. Decision of the Supreme Court of Georgia of March 31, 2021 on case No. AS-102-2021; Judgment of the Supreme Court of Georgia on April 15, 2022 on case No. AS-110-2022.

²⁴ *Zarandia T.*, Property Law, Tbilisi, 2019, 247 (in Georgian).

²⁵ *Ibid.*, 247.

²⁶ *Ibid.*

²⁷ *Ibid.*, 13.

²⁸ Cf. Decision of the Supreme Court of Georgia of February 18, 2021 on case No. AS-320-2020.

wants to use the property or not.²⁹ Non-use of the property, or only seasonal use, does not deprive the owner of the right not to allow another person to use this property.³⁰ The subjection of the mentioned right of the owner to the statute of limitations contradicts to the function of ownership, its absolute nature, the norms of the Constitution and the Civil Code of Georgia, and the interests of civil turnover.³¹ Ownership is not lost by failing the exercise of the right, instead, it is acquired by possession (acquired ownership by statute of limitations). The right of an owner to property is hindered not due to the failure of exercising the right or the expiry of the period for exercising his right, but by the recognition of the right of an possessor to property, which has replaced owner's right.³²

3. Procedural Legal Arrangement of the Vindication Claim

Effective implementation of the Vindication claim is impossible without proper procedural and legal arrangements. In this regard, it is important what guarantees the procedural legislation provides.

a) Case review form

Submission of a Vindication claim to the court and its consideration is provided following the general rules. The court starts considering the case with the statement of the person who applies to it to protect his right or interests stipulated by the law.³³ It is the same in the case of a counterclaim, when the defendant arises the counterclaim against the Vindication claim. In the appellate instance, as an exception, the Vindication case can be considered in by one judge (as a case adjudicated by a magistrate judge) and/or without an oral hearing³⁴, for which the parties must be informed in advance.³⁵

b) Duration of the review

According to the Code of Civil Procedure, Vindication claim of immovable property are considered no later than 1 month from the date of receipt of the claim.³⁶ The mentioned rule should be applied to the appeal instance because no other special rule is provided by the law. The total time for receiving a cassation complaint and making a decision on Vindication claim of immovable property is 2 months.³⁷ In the first instance, the issue of accepting a claim for consideration is decided within 5 days from the registration of the case. A 10-day period of admissibility applies to the appeal.³⁸ The issue of admissibility of a cassation appeal must be decided by the cassation instance within 1 month.³⁹

²⁹ *Zarandia T.*, Property Law, Tbilisi, 2019, 213 (in Georgian).

³⁰ *Ibid*, 213.

³¹ *Ibid*, 253.

³² *Ibid*, 220.

³³ Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, 1106, 14/11/1997, Article 2, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [12.01.2023].

³⁴ *Ibid*, Articles 14, 25 and 41.

³⁵ *Ibid*, Article 376¹.

³⁶ *Ibid*, Article 59.

³⁷ *Ibid*, Article 391(6).

³⁸ *Ibid*, Articles 186 and 274.

³⁹ *Ibid*, Articles 401 (3) .

In relation to the procedural terms, the plaintiff is obligated to provide the defendant with a court message by post, through a court courier or by a different method of delivery on the agreement of the parties, or to send it by e-mail in compliance with the rules established by Articles 70-78 of the Code of Civil Procedure within 2 months⁴⁰ from delivery. After receiving a claim statement and copies of the attached documents, the defendant is obliged to submit to the court within the period determined by the court (which should not exceed 21 days), his reply (relevant) to the lawsuit and the issues raised in, as well as a document confirming the sending of the reply and copies of the attached documents⁴¹ to the plaintiff. A similar rule applies to submission of appeal and cassation arguments in appeal and cassation instances. It is true that the submission of the objection is not mandatory for the defendant in the higher instances, however, the court is still obliged to set a reasonable deadline for the party to act so.

The defendant with a Vindication claim has the right to file a counterclaim against the plaintiff from the date of delivery of the copy of a claim statement to the end of the preliminary preparation for the oral hearing of the case, with the original claim. After passing this period, the defendant may file a counterclaim before the trial if it could not be submitted before the end of the preliminary preparation for the oral hearing for good reason.⁴² The opposing party can submit a counter-appeal within 10 days after the reception of the appeal, regardless of whether it has declared or not the refusal to file the appeal. If the appeal is rejected or left unconsidered, the contested appeal will not be considered.⁴³

c) State Duty

According to procedural legislation, the price of the subject to the dispute is determined by 4,000 GEL, if in a property-legal dispute (property encroachment or other interference, neighborhood dispute, etc.) it is impossible to accurately define the price of the subject to the dispute. Magistrate judges consider property disputes in the first instance, if the cost of the claim does not exceed 5000 GEL; The amount of the State Duty considered by the magistrate judge, is halved in the courts of all instances. In accordance with the established court practice, in the first instance, as a State Duty for a Vindication claim is paid half of the amount of 3% of 4000 GEL, in the appeal instance – half of 4% of 4000 GEL, in the court of cassation – half of 5% of 4000 GEL.⁴⁴ The law also establishes additional special benefits for Vindication lawsuits, if there is no reason for exemption from the payment of the State Duty, it is postponed for the plaintiff trying to requite the immovable property from illegal possession until the end of the case review. This rule also applies to the defendant if he initiates a counterclaim.⁴⁵

⁴⁰ Law of Georgia “Civil Procedure Code of Georgia”, Legislative Herald of Georgia, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [12.01.2023], Article 2.

⁴¹ Ibid, Article 201.

⁴² Ibid, Article 188.

⁴³ Ibid, Article 379.

⁴⁴ Law of Georgia “Civil Procedure Code of Georgia”, Legislative Herald of Georgia, 1106, 14/11/1997, Article 25, 39, 41 <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [12.01.2023].

⁴⁵ Ibid, Article 48 (2) (in Georgian).

d) Provision of a claim

The plaintiff with a counterclaim (the Vindication defendant) as security for the claim, usually requests the owner to be prohibited from alienating the disputed property/encumbrance (Articles 191-192, 198 of the Civil Code). It is in the interest of a plaintiff not to let other new persons into his property because he has arisen a claim against a particular defendant, however, this cannot be controlled within the scope of the claims provision institution. The defendant is allowed, at any time, accommodate other persons in the real estate in his actual possession. In fact, the practice of using a provision measure in Vindication claims is not common.

e) Appeal of court decision

Vindication claims are generally reviewed by three instances. According to the CPC, the deadline for filing an appeal is 14 days, for a cassation complaint – 21 days. The extension/restoration of this period is not allowed and it starts from the moment of transferring a copy of the substantiated decision to the party. Such a moment is considered to be the delivery of a copy of the reasoned decision to the party in accordance with Articles 70-78 or Article 2591 of the Civil Code.⁴⁶ If a person with the right to file an appeal/cassation complaint attends the announcement of a reasoned decision, the term for filing an appeal/cassation complaint starts from the moment of its announcement.⁴⁷

f) Enforcement of court decision

The writ of an execution is issued upon a legally binding decision.⁴⁸ At the request of the parties, the court can provide the decisions on requiring the immovable property from illegal possession for immediate execution in whole or in part. While allowing the immediate execution of the decision, the court may demand the plaintiff to ensure the reversal of the execution of the decision in case of annulling the court decision. The immediate enforcement of the judgment shall not be permitted if it is impossible to calculate the loss accurately an opposing party may suffer, due to which the other party cannot guarantee⁴⁹ it. Because of this rule immediate enforcement is rarely established in practice for Vindication disputes.

4. Common Futile Counterclaims

After the amendment which canceled the institution of “police eviction”, several “popular” arguments of the defendant appeared in court practice, which contribute to delaying the realization of the Vindication claim and the consideration of the case. There are several modes of counterclaims: the counterclaim against fraud dealing, socio-economic counterclaims and the counterclaims against the interests of juveniles.

⁴⁶ Ibid, Article 259¹ 369 (in Georgian).

⁴⁷ Law of Georgia “Civil Procedure Code of Georgia”, Legislative Herald of Georgia, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [12.01.2023], Article 259¹, 397 (in Georgian).

⁴⁸ Ibid, Article 264, 267 (in Georgian).

⁴⁹ Ibid, Article 268 (in Georgian).

4.1. The Counterclaim based on Fraud Agreement

A plaintiff, bringing a Vindication claim, has acquired a right to real property under a contract of sale with a right of redemption. Defendants indicate that in its essence, this sort of contract is a loan and mortgage transaction, which is not indicated by the parties, since based on Article 286 of the Civil Code it is prohibited to enter into such an agreement, and defendants often require making it annulled with a counterclaim for its hypocrisy (Article 56 of the Civil Code).

Discussing one of the cases, the appellate court explained that to prove hypocrite agreement, it is essential to indicate the desire for entering into another contract and the existence of all prerequisites necessary for this hidden agreement.⁵⁰ On this occasion, various applications are utilized to figure out fraud agreements. The Appeals Chamber explained that only the purchase price, even if it is lower than the market price, cannot be the basis for making a purchase agreement void, if there are no other compelling evidences. The law provides taking into consideration the right of redemption but the redemption period (even if it is short in the opinion of the party) does not create a reason to doubt the authenticity of the agreement. As for the issue of leaving the property of purchase in the possession of the seller, as a rule, the right to its use also extends to the redemption period by the agreement of the parties. And after the expiration of this term, if the seller does not buy back the property, he already owns the property without a reasonable basis. Thus, this argument cannot serve for making an agreement invalid. The court also explained that any restriction which a law imposes means that addressees must obey it without seeking the ways to evade it.⁵¹ The “temporary” nature of the contract indicates that the seller has to redeem the property of purchase within a specific period, in this case, within 5 months. Regarding the reference to the fact that the buyer has not got the property of purchase, the court noted that the parties enjoy the right to freely enter into the contract and determine its content. Following the agreement of the parties, the seller is granted the right to use the property of purchase. This is derived from the nature of the legal relationship of purchase with the right of redemption as the seller is provided with the right to redeem the property of purchase within a specific period. Accordingly, the right of seller to use the property is limited to the period in which he is granted the right of redemption.⁵²

4.2. Counterclaim with Social-economic Factors

The defendant of the Vindication claim often mentions his/her difficult economic and/or health condition, the status of a socially vulnerable person and/or pensioner, lack of other housing. The court has repeatedly explained that a serious health and/or serious financial condition does not constitute a basis for lawful possession of another's property. They may give a rise to the right of certain demands towards the state, however, not the obligation for any individual or legal entity of private law to have a

⁵⁰ cf. Decision of the Supreme Court of Georgia, June 17, 2015 on case No. AS-487-461-2015 and Decision of the Supreme Court of Georgia of January 23, 2015 on case No. AS-1142-1088-2014 (in Georgian).

⁵¹ Decision of the Supreme Court of Georgia of May 14, 2015 on case No. AS-167-155-2015 (in Georgian).

⁵² Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/783-22.

person in need use his/her property, especially for free.⁵³ Obviously, the court cannot consider the status of a displaced defendant or the duration of using the disputed property to determine the legality of ownership. The appellants indicated that they had no other residence and they owned the disputed real estate for 25 years, the court clarified that it is not an obstacle for the owner to requisite his real estate from the unlawful owner. The argument that the owners have no other residence apart from the disputed real estate, even if such a fact is confirmed, cannot be taken into account.⁵⁴

4.3. Counterclaim against the interests of juveniles

There is often met the interests of a child in Vindication lawsuits. In one of the cases, a juvenile claimant requested being granted the right to use the real estate owned by his grandmother from his father's side until he reaches adult age. The claim was based on the factual circumstances that the child's father and grandmother, who did not take moral and financial responsibility for the plaintiff, filed a claim to the court to evict the plaintiff's (child) mother from the apartment, which led to turning out the juvenile plaintiff of the apartment where he was adapted. Changing the living place was against the best interests of the child. In addition, mother could not afford to create other appropriate housing conditions. The documents of the case proved that after having the decision of the court entered into legal force, the immovable property belonging to the grandmother and the defendant in the given case, was requested from the illegal possession of the juvenile's mother. The Appeals Chamber agreed with the reasoning of the court that the grandparents' alimony payment is based on close family ties, but their alimony payment has an additional, subsidized nature compared to the primary obligations of the first-line family members. According to the explanation of the court: it must be determined that it is impossible for the parents to create necessary living conditions⁵⁵ for the child and the grandparents have sufficient financial support. Simultaneously, the law envisages the alimony duty of grandparents of both sides, and even in case of filing a lawsuit against one of the parties, the court must define the amount of alimony to be paid to the grandchild taking into account the duties of the grandparents from another parent's side (regardless of the existence of a lawsuit against them).⁵⁶ In this case, arising a claim by juvenile occurred on the grounds of the motivation that the enforcement of the legally effective decision to satisfy the Vindication lawsuit would create obstacles. In this regard, it is also important the explanation of the Court of First Instance that filing a lawsuit should not be done with the expectation that the decision will stop the enforcement of a legally binding decision made within another dispute. The legal force of the decision implies that its annulment or modification is allowed only in the manner established by law, and that the parties, as well as their successors cannot

⁵³ Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of August 16, 2022 on case No. 2b/2938-22.

⁵⁴ Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of July 6, 2017 on case No. 2b/685-17.

⁵⁵ Decision of the Supreme Court of Georgia May 5, 2017 on case No. ac-454-426-2017.

⁵⁶ Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/2650-22.

reapply to the court for the same claims or dispute the facts and legal relations established by the decision in another process.⁵⁷

In another case, a person filed a Vindication claim against a daughter-in-law (son's wife) who lived in the plaintiff's apartment with her young son, the plaintiff's grandson. The defendant did not acknowledge the claim and indicated that she had no other residence or any income. The Court of First Instance satisfied the claim but the result was changed by the Court of Appeals with this explanation: In the conditions when the interest of the owner did not overlap with the interest of the defendant and the juvenile living with her, the plaintiff applied the right of the owner in an illicit manner; This is not only the relationship between the owner and the illegal possessor, but it is also the relationship between the grandmother and the grandson, that is why the best interests of the child "precede" the right to ownership.

The Court of Cassation pointed out: the defendant does not have another residential apartment and she lives with her son in the contested apartment, which the owner does not use; raising and maintaining a child means not only taking the alimony obligations of grandmother, but also creating a healthy living environment for the grandson; the purpose of regulating Article 1225 of the Civil Code is not only supplying the juvenile with material support, but providing him with housing, while the child cannot receive this benefit from his parents.⁵⁸

In one of the cases, the Court of Cassation pointed out: taking into account the established factual circumstances, on one side of the dispute there is a legitimate interest in protecting the property of the plaintiff (on the legal basis of Article 19 of the Constitution and Article 1 of the First Additional Protocol to the European Convention, Articles 170-172 of the Civil Code) while on another side is presented the urgent need of the owner's juvenile grandchildren for a residence (shelter) where they will be able to live and grow up in a family environment with their mother; the starting point when making decision is the best interests of the child (Article 81 of the Code of Children's Rights). Accordingly, in the residential house of the plaintiff, there is an acute social need to temporarily limit the constitutional right to property which is caused by the commitment to provide housing for the owner's grandchildren; Considering that the third floor of the disputed house is used for living, the second floor can be rented out, and the first floor is not used for living, it is possible that both the plaintiff and the defendant with their juvenile children live separately from each other in the disputed house.⁵⁹

5. Conclusion

The Constitution of Georgia affirms ownership as a basic human right, which at the same time obliges the owner. Thus, the right to property has a moderate and necessary social function.⁶⁰ The relationship between the social and public legal necessity of restricting right and freedom of property

⁵⁷ Cf. Decision of the Chamber for Civil Affairs of the Tbilisi Court of Appeal of November 30, 2022 on case No. 2b/2650-22.

⁵⁸ *Berulava N.*, Vindication lawsuit against a juvenile, *Georgian-German Journal of Comparative Law*, 1/2022, Tbilisi, 2021, 48; (in Georgian); Cf. Judgment of the Supreme Court of Georgia of May 5, 2017 on case No. AS-454-426-2017

⁵⁹ Decision of the Supreme Court of Georgia of June 16, 2022 on case No. As-1375-2021 (in Georgian).

⁶⁰ *Zarandia T.*, *Property Law*, Tbilisi, 2019, 180-181 (in Georgian).

should not be understood that at the expense of limiting the right of each owner to individual property can be achieved social well-being, the fulfillment of social obligation of the state and large-scale protection of the rights of people with social needs. The social goals of the state will not be achieved by limiting and reducing the protection of the owner's rights.

The owner has the right to use the legal means of protection of the right to return the property, but it should be Vindication and not arbitrariness.⁶¹ The legal dispute arising between the formal owner and the actual possessor is considered and decided by judicial authority, based on the principles of disposition of proceedings, competition and equality of the parties. The inadmissibility of extrajudicial eviction applies to a dispute arising within the framework of private legal relations, when the alleged violation of the right to property does not go beyond the scope of a civil delict, and if the right to property is violated by means of a public (administrative or criminal) delict, the law enforcement authorities, in the form of the public function to prevent crime, are obliged to evict from the property the person who illegally invaded it and avert criminal infringement of the right to property.⁶²

The analysis of court practice revealed that an owner, setting a request for Vindication to protect the right to property, faces a number of difficulties, including delays in the review time. For example, it is true that a court decision on handover of immovable property from illegal possession or prevention of other interference belongs to the category of immediately enforceable decisions, which makes it possible to evict a person before the court decision enters into legal force, immediately (after the completion of the first instance case), however, in the mentioned practice It is an exceptional case.

Due to overloaded court system it is impossible to comply with the procedural deadlines established by the procedural legislation. The period of the pandemic also had a negative impact on the interests of the owners. Judicial consideration of the case by three instances often works in favor of the illegal possessor. It was revealed that the legislator is clearly inclined to enhance the protection of the possessor's rights, at least in the procedural provisions. This is evidenced by the actual cancellation of the State Duty barrier at the stage of accepting the counterclaim to the Vindication claim (Article 48.2 of the Civil Code).⁶³ If the possessor of the disputed property has any claim against the owner, he can always file a lawsuit, and his activeness only after filing the Vindication lawsuit against him leaves the impression that arising counterclaim only serves to delay the consideration of the Vindication case, which is supported by the opportunity to postpone paying the State Duty for the counterclaim.

It would be better if the Vindication lawsuits were procedurally considered in a more simplified manner: it is conceivable how necessary it is to extend the rule of three instances to such disputes; examining and shortening the review and appeals deadlines can be a kind of solution. Along with the appeals deadline, the target dates for preparing a reasoned decision are also important for the court.⁶⁴ It

⁶¹ See <Explanatory card of the draft <https://factcheck.ge/wp-content/uploads/2015/10/file003.pdf>> [16.01.2023] (in Georgian).

⁶² See, Ibid.

⁶³ “If there is no reason for exemption from paying the State Duty, in the case of requisitioning the immovable property from illegal possession, the payment by the plaintiff will be postponed until the decision is made. This rule applies to the defendant as well if he initiates a counterclaim”.

⁶⁴ Law of Georgia “Civil Procedure Code of Georgia”, Legislative Herald of Georgia, 1106, 14/11/1997, <<https://matsne.gov.ge/ka/document/view/29962?publication=149>> [12.01.2023]; 257 Section 2 of the

is also taken into account that the court is obliged to send the decision to the parties as a result of considering the case without an oral hearing, and the countdown to the appeal period starts from the delivery of the decision. In such disputes, the problem of handing over the text message to the party is relevant (often the defendant avoids handing over the court message). This ultimately leads to a delay of considering the case and entering the decision into legal force. Accordingly, it should be appropriate for the legislator to define a shorter time limit for the parties to appear in court to receive the decision made as a result of an oral hearing of the case. In addition, the obligation to appear in court should apply regardless of whether the party is exempted from paying the State Duty or not, which, following the general rule, obliges the court to send a reasoned decision to the party.

The possibility of filing counterclaims and counterappeals is also often used to delay the consideration of the case. The stage of preparing the case (including admissibility) is often much longer than the deadlines for the full consideration of the case. Especially, in the appellate instance, on appeal and cross-appeal due to the existence of an institute of flaw.

On the basis of judicial practice, it is also worth noting that the realization of the protection of property rights within the civil legal framework within the framework of Vindication lawsuits creates obstacles and is delayed by the frequency of futile counterclaims. Futile counterclaims include fraud dealing, socio-economic factors and the interests of juveniles. In relation to appealing fraud agreements, the civil proceedings are based on the principle of competition, the court is deprived the opportunity to determine the objective truth of the case. The defendant, as a rule, does not have any evidences except for the own oral explanation. It is supposed that the legislative change regarding the restriction of providing loans with the property financed as collateral for the repayment of the debt between individuals, has significantly led to the abundance of Vindication lawsuits.

It is also worth noting the attempts of the owners, in order to avoid court proceedings, they change the door/lock of the property or vacate the space in another way which is sometimes done by violent means and increases the risk of physical confrontation between citizens.

It is also a common practice to use and manipulate juveniles by unlawful possessors, which violates the best interests of the child. There are met a number of delays when the decision of the court is executed in favor of the possessor. Participation in the case of a juvenile should not be understood in such a way that “all owners” are bound by a relational obligation to “all children”. A part of the aforementioned cases including the element of a child referred to the occurrences when, in addition to the possessor-owner relationship, the parties were connected by other family legal/alimony relationships. In those particular cases, the best interest of a child outweighed the interests of the owner. Even the need to manage such affairs through judicial proceedings justifies the abolition of the institution of police eviction. Unlawful violation of “temporary” possession may lead to irreparable consequences and cannot be compensated for damages by a claim. In the way of prohibiting arbitrariness and protecting the owner, the law prevents violence and guarantees peaceful relations. Therefore, protection of possession is provided regardless of whether an owner or a possessor has a right to possess the property.⁶⁵

Article: Within 14 days from the introduction of the resolution part of the decision, the court prepares a reasoned decision for the parties.

⁶⁵ *Zarandia T.*, Property Law, Tbilisi, 2019, 174 (in Georgian).

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