

The role of the judicial provisions that transfer and declare the original real rights in proving the private real property

دور الأحكام القضائية الناقلة والمصرحة للحقوق العينية العقارية الأصلية في إثبات
الملكية العقارية الخاصة

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abstract:

The Algerian legislator provided for a set of official documents that prove the private real property and serve as evidences in judicial disputes over property. In this regard, the documents help the judge take correct decisions, which shall be a poof of private real property, if not a proving document, mainly if the judicial decision is issued by a court with territorial and subject-matter jurisdictions in accordance with the administrative and legal procedures regarding the registry of the property and the issuance of the land register.

Keywords: judicial provisions; real rights; customary contract; real property; promise to sell.

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ملخص :

نص المشرع الجزائري على العديد من السندات الرسمية المثبتة للملكية العقارية الخاصة، والتي تكون دليلا لصاحبها في إثبات ملكيته والاحتجاج بها ومواجهة كل من ينازعه فيها، خاصة في المنازعات المعروضة أمام الجهات القضائية، فهي تنير القاضي في حكمه الفاصل، وغالبا ما تكون أحكام القضاة في حد ذاتها سببا لإثبات للملكية العقارية الخاصة

لمن صدر الحكم لصالحه إن لم نقل سنداً مثبتاً لها ، خاصة إذا كان الحكم القضائي صادراً من جهة قضائية مختصة إقليمياً ونوعياً ، واتبعت فيه جميع الإجراءات القانونية والإدارية المتعلقة بشهره لدى المحافظة العقارية و صدور دفتر عقاري بشأنه تكون له القوة في مواجهة الكافة .

Introduction:

The judicial decisions and provisions regarding the private real property are among the most important judicial documents, as the legislator classified them as official documents that prove property in the surveyed and non-surveyed regions in case of real judicial disputes. Such documents are an evidence for the litigants, as they declare, reveal, or transfer the original real rights. Based on what was said, we raise the following problematic, “what is the role of the judicial provisions that transfer and declare the original real rights in proving the private real property?”

1. The concept of judicial provision:

The judicial provisions are issued in Arabic so as not to be automatically abolished by the judge. They refer to the judicial orders, provisions, and decisions¹. The paragraphs add that the judicial provisions in this law refer to the judicial decisions, orders, and provisions. The Article did not define the judicial provision; rather, it discussed the language to be used in issuing the provision to avoid its abolition, and showed the types of the judicial provisions, that manifest in the judicial decisions, provisions, and orders.

Thus, the question of defining the judicial provision was left to the jurisprudents, who see that it is the decision of the court regarding a dispute, in accordance with the shape determined by the law in the end or during the litigation, regarding either the subject of litigation or procedural issues². The judicial provision issued by courts that have territorial and subject-matter jurisdictions is an evidence of the private real property in judicial disputes if the registry procedures are respected.

2. The judicial provisions that transfer and declare the original real rights:

Disposal may establish, transfer, adjust, or end real rights, unlike the judicial decisions and provisions, which cannot establish, adjust, or end a real property. In this regard, the provisions and decisions are originally provisions that transfer or declare rights, except the judicial decisions that establish real rights³. In this paper, we focus on the judicial provisions that transfer and declare the original real rights. The final judicial provisions may transfer property and the real rights, such as the provision of auction award in selling property and the provision about the preempt right⁴. In addition, they may be declaring provisions, such as the provisions about division, peace, and property by statute of limitations. All these judicial provisions must respect the registry procedures and conditions⁵.

a. The judicial provisions that transfer the original real rights:

The judicial decisions and provisions are often official documents that prove the real property and rights, as long as they are final and registered, and all the ordinary appeal methods are extinguished. These provisions include auction award in selling property, and the provision about the preempt right.

1. The provision of auction award:

Article 762 of section 12 of chapter 05 of the Administrative and Civil Procedures Law⁶, on executive seizure of registered real properties and rights, provides that the rights of the debtor to the property, the real rights sold in auction, and all the related issues, are transferred to the successful bidder, and the auction award provision is a document of property. The judicial officer must record the auction award at the estate governorate to register it within 02 months of its issuance.

The Article tells that the person who wins the bidding has all the rights of the debtor, including the properties and real rights. In addition, he gets a property document subject to the procedures of registry at the territorial competent estate governorate by the judicial official within 02 months of issuing the provision. Thus, the provision is a cause to acquire private real property and a document to prove it. In addition, it is unappealable, according

to Article 765 of the Administrative and Civil Procedures Law. Among the cases of auction sale, we find:

- Article 89 of the Family Law⁷ states that, in permission, the judge must consider the case of necessity and interest, and the real property must be sold in auction. Thus, the 1st case is selling the real funds of children.
- Article 728 of the Civil Law⁸ states that if division is impossible, or may cause a big decrease in the value of the funds to be divided, the funds are sold in auction as shown in the Civil Procedures Law. It adds that the auction is limited to the shareholders alone if they ask for.
- The Articles 753 to 759 of the Administrative and Civil Procedures⁹ Law on seizing the real properties.

2. The final provision of the right to preempt:

It is the provision issued in cases where the holder of the right to preempt raises case against the seller and the purchaser. In this context, Article 803 of the Civil Law states that the final provision that establishes the right to preempt is a property document for the holder of the right to preempt, in accordance with the rules of estate registry. The Article shows that the preempt provision establishes a real right, as it grants the holder of the right to preempt a property document, as long as the provision is registered for notification and information.

In this regard, the right to preempt shall be only used in the real sale contracts, and is established by Article 795 of the Civil Law for the benefit holder if the whole or part of the property is sold, for the partner in common if part of the property is sold to a foreigner, and for the holder of the usufruct if the whole or part of the benefit is sold. In this context, Article 798 of the Civil Law provided for the exceptions where the right to preempt cannot be used¹⁰.

In addition, the preempt case must be raised within 30 days of declaring the will at the court whose territory holds the property. It must be raised against the buyer and seller according to Article 802 of the Civil Law. Article 863 of the Civil Law considers the final provision that establishes the right to preempt as a property document, without violating the estate registry rules.

b. The judicial rights that declare the original real rights:

These provisions include the provision about dividing an in common property, the provision that proves the validity of the customary contract, the peace provision, the provision that proves property by statute of limitations, and the provision that proves the promise to sell.

1. The provision about dividing an in common property:

Article 713 of the Civil Law provides that if two or more people possess something, without determining the share of each, they are partners in common and have equal shares if no opposite evidences are submitted. Thus, according to the common property law, the multiple real right holders create property in common, as shown by Article 714 of the Civil Law. Article 722 of the Civil Law allowed the owner in common to divide the common property using the satisfactory division, while Article 724 tackles the judicial division.

In case a provision is issued to establish the right to preempt and gives each partner his share using draw, the court proves this in a record and issues a provision that gives each partner his share. This provision must be registered at the estate governorate to have authority in courts.

2. The provision that proves the validity of the customary contract:

The real customary contracts issued before 01/03/1961 are officialized by providing certificates by the underwriters from the city hall that prove that the real property is not part of the Agricultural Revolution or the estate reserves. These contracts are proved by judicial provisions that are deposited and registered at the estate governorate, and have an absolute evidencing power if legally officialized.

As for the customary contracts with a fixed date before 1971, they are correct as long as the properties are registered. Such officialized contracts are transformed into land registers. As for the customary contracts without a fixed date, they must be submitted to the court to fix their date and register them. In this context, the judge must make sure of:

- The personal condition, i.e., checking the identity of the contract writer through checking his full name, address, date and place of birth, profession, and nationality.

- The real property subject to contract must be within a territory that has not been surveyed.
- The date of the customary contract must be before 01/01/1971, i.e., before the documentation law came into force.
- It is necessary to check the contract conditions, namely the satisfaction, the location, the cause, and the exact identification of the real property to avoid ignorance of its name, location, surface, and borders.
- It is necessary to hear the contract witnesses and issue a record.
- The property asset must be checked by asking the property document from the original seller to check if disposal was transferred from a real owner, and the negative certificate to express the state of the property and the related rights.

If the conditions are met, the judge validates the customary contract and the provision gains authority. Then, the real property is registered at the competent department and at the real estate governorate¹¹.

3. The provision that proves the promise to sell:

If a person promises to underwrite a contract, but does not keep his promise, the 2nd party can sue him to keep the pledges. If the contract conditions are met, mainly regarding the form, the provision substitutes the contract. The last paragraph provides that the provision may prove the property, including the private real property, if a judicial case is raised, mainly if the judge makes sure of all the legal conditions. Thus, the promised shall register the property at the competent governorate to have a legal authority document, as confirmed by the decision of the Algerian Supreme Court no^o 145760¹² of 17/04/1996, which states that if law allows the judge to issue a final provision that substitutes the contract if the promiser does not keep his promise, the formal conditions in the promise to sell must be met.

4. Peace provision¹³:

Parties may fail to make peace contract regarding original real rights in friendly ways. Therefore, they can resort to justice for a judicial provision that establishes peace. This provision declares original real rights. Therefore, it

must be registered to raise effects¹⁴. In this regard, Article 459 of the Civil Law provides that peace is a contract by which two parties end a dispute or avoid a potential dispute. It requires both parties to mutually waive their rights.

It must be written at court in an official record issued by the judge and signed by the two parties. It has the power of an executive document and is called the judicial peace. If the contract covers real rights, it must be registered to gain authority¹⁵. Thus, the peace contract reveals the private real property according to Article 463 of the Civil Law¹⁶. It must be registered and cannot be appealed, as provided for by Article 465 of the Civil Law.

5. The provision that proves property by statute of limitations:

The Algerian legislator considered the statute of limitations as one of the methods to acquire real property if the legal conditions are met¹⁷. In this regard, if possession of a real property or a real right takes place with a good intention based on a correct document, the statute of limitations must be 10 years.

Thus, the real right can be acquired if the possession conditions are met, all along with good intention and a document, even if it is a customary document with a fixed date. This possession can be protected by a judicial provision that proves the statute of limitations and validity of possession. This provision declares and reveals a pre-existing state, as long as the legal conditions, including registry, are respected.

Third: Registry of the judicial provisions that transfer and declare the original real rights:

The judicial provisions and decision are documents that prove the real property, like the other documentary or administrative documents. Thus, the Algerian legislator provided for registering them at the competent department to raise their legal effects, as provided for by paragraph 03 of Article 14 of Order 75-74, supplemented and complemented, and Article 16 of the same law. The two Articles show that all what is related to real property and rights, including the judicial provisions, must be subject to registry after the provision is final, regardless its transferring or declaring nature. This is also provided for by Articles 66 and 90 of Decree 76-63¹⁸. The 1st provides that the provision

must include the technical information of the real property and rights while the 2nd obliges the notary, register, and administrative authorities to register all the contracts and judicial decisions they issue, or help issuing, within deadlines.

To register a judicial provision, procedures must be followed. First, the provision must be submitted to the competent estate governorate, according to Article 90 of Decree 76-63, which exclusively obliges the mentioned parties to submit and register all documents related to the real property, including the judicial provisions. However, this Article did not determine who must register the judicial provision. Therefore, the judge has to mention the party that must submit the judicial provision. After the estate governor receives the judicial provision according to Article 41 of Decree 76-63, the governor must have a record to register daily, according to the numerical order, the submission of judicial decisions and contracts to enforce the registry procedures.

In this context, he investigates the provision, and in case of a prior registry according to Article 02 of Order 75-74, supplemented and complemented, he ratifies the map of the real property subject of the judicial decision, taking into account Articles 107 and 108 of Decree 76-63¹⁹. In case of registering the judicial provision, it gains authority against its parties and the others. Therefore, each party that holds a real property judicial provision must submit it to the notary for registry. In case of the provision's statute of limitations, the estate governor may refuse to register it because the Algerian legislator neither tackled the question of judicial provision statute of limitations that needs register nor provided for its regulation.

Conclusion:

The Algerian legislator enacted many rules that regulate the right to private real property and the proving documents. In addition, he limited the freedom of the owner in choosing the proof of property, as he conditioned officiality, unlike the past where he just provided for satisfaction to underwrite customary real contracts. Thus, the legislator limited the methods of proving to a written contract that meets the conditions of officiality and formality.

In addition, he regulated a set of real property documents to prove the private real property. He considered the documents issued before limiting the

proving documents with conditions. In this context, he considered the customary documents with fixed dates before 1971 in the non-surveyed regions, and the official documents, including the registered contracts and administrative documents. As for the surveyed regions, only the land register counts.

The judicial provisions are also limited by the procedures of estate registry to gain authority in proving the private real property. Then, a land register can be issued after the notary registers a contract. This was practically speaking. As for the legal side, the legislator did not identify the competent party to submit the judicial provisions to the estate governorate. After submission, the estate governor checks the legal conditions as mentioned in Article 02 of Order 75-74 and, then, issues the estate card.

Our findings show that:

- The legal provisions that transfer and declare the original real rights are a tool to prove the private real property through the real judicial case in real disputes, and to get judicial provisions that culminate in a land register.
- The judicial provisions in the non-surveyed regions are official documents to prove the private real property.
- The judicial provisions in the surveyed regions can be proofs after registry, and turn into land register, which is a registered official contract. Before its registry at the estate governorate, the provision is an evidence in litigations, and after registry, it is a proof against the others.

1- Book:

- 1- Abd al Hafidh Ben Abida, proving the real property and real rights in the Algerian law, Vol. 05, Houma house, 2006.
- 2- Ahmed Henidi, the law of civil and commercial litigations: dispute, provision, and appeal, new university house for publication, Egypt, 1995.

- 3- Jamal Bouchenafa, registry of the real transactions in the Algerian law, al Khaldounia house, Algeria, 2006.
- 4- Hamdi Bacha Omar, protecting the private real property, Vol. 07, Houma house, Algeria, 2009.
- 5- Majid Khalfouni, the system of estate registry in the Algerian law, Vol. 03, Houma house, Algeria, 2011.

2- Legal texts:

- 1- Executive Decree 76-63 of 25/03/1963 on establishing the land register, supplemented and complemented by Executive Decree 93-123 of 19/05/1993, official gazette 34, 1993.
- 2- Law 08-09 of 25/02/2008 on the Administrative and Civil Procedures, official gazette 21, 2008.
- 3- Order 75-58 of 26/09/1975 on the Civil Law, supplemented and complemented, official gazette 78, 1975.
- 4- Order 75-74 of 12/12/1975 on the general survey of lands and the establishment of the land registers, supplemented and complemented by Law 14-10 of 3/12/2014 on the Finance Law of 2015, official gazette 78.
- 5- Order 84-11 of 09/06/1984 on the Algerian Family Law, supplemented and complemented, official gazette 24, 1984.

3- Judicial journals:

Judicial journal, issue 01, 1996.

Judicial journal, issue 02, Algeria, 2004.

¹ See Paragraphs 03 and 04 of Article 08 of the Administrative and Civil Procedures Law.

² Ahmed Henidi, the law of civil and commercial litigations: dispute, provision, and appeal, new university house for publication, Egypt, 1995, p. 425.

³ Jamal Bouchenafa, registry of the real transactions in the Algerian law, al Khaldounia house, Algeria, 2006, p. 72.

⁴ Omar Hamdi Bacha & Zerrouki Leila, the estate registry disputes, Vol. 13, Houma house, Algeria, 2011, p. 65.

⁵ Abd al Hafidh Ben Abida, proving the real property and real rights in the Algerian law, Vol. 05, Houma house, 2006, Algeria, p. 72.

⁶ See Law 08-09 of 25/02/2008 on the Administrative and Civil Procedures, official gazette 21, 2008.

⁷ Order 84-11 of 09/06/1984 on the Algerian Family Law, supplemented and complemented, official gazette 24, 1984.

⁸ Order 75-58 of 26/09/1975 on the Civil Law, supplemented and complemented, official gazette 78, 1975.

⁹ See Articles 753 to 759 of the Administrative and Civil Procedures Law.

¹⁰ See Article 798 of the supplemented and complemented Civil Law.

¹¹ Hamdi Bacha Omar, protecting the private real property, Vol. 07, Houma house, Algeria, 2009, p. 61.

¹² Judicial journal, issue 01, 1996, p. 39.

¹³ Article 459 of the Civil Law provides that peace is a contract that ends a dispute or prevents a potential one through mutually waiving rights.

¹⁴ Jamal Bouchenafa, op cit., p. 88.

¹⁵ This is confirmed by decision 274325 of 21/07/2004 by the Algerian Supreme Court, which states that peace that covers real property is subject to officiality, judicial journal, issue 02, Algeria, 2004, p. 287

¹⁶ See Article 463 of the Civil Law, supplemented and complemented.

¹⁷ Majid Khalfouni, the system of estate registry in the Algerian law, Vol. 03, Houma house, Algeria, 2011, p. 48.

¹⁸ Executive Decree 76-63 of 25/03/1963 on establishing the land register, supplemented and complemented by Executive Decree 93-123 of 19/05/1993, official gazette 34, 1993.

¹⁹ See Article 108 of Decree 76-63, supplemented and complemented.