

## COURT PROCEEDINGS IN CASES REGARDING ASCERTAINING ACQUISITIVE PRESCRIPTION OF REAL ESTATE

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### ABSTRACT

In the article, the author presents the characteristics of the proceedings for ascertaining acquisitive prescription of real estate. Acquisitive prescription is a way to gain property rights. The legislator established non-litigious proceedings in this respect, and at the same time regulated its differences only to a very narrow extent. In this study, the author attempts to comprehensively characterize the proceedings by interpreting legal provisions, discussing views of doctrine and jurisprudence and their critical analysis. The study discusses both the issues of subjects of proceedings as well as the dynamics of proceedings and the characteristics of judgments issued in them. Of particular importance are issues that give rise to doubts, such as the circle of subjects interested in the case, references to the provisions regarding the confirmation of the acquisition of an inheritance and the problem of not binding the court with an application request.

**Key words:** civil proceedings, property law, non-litigious proceedings, acquisition of property.

### INTRODUCTION

The subject of the analysis in this study will be court proceedings for ascertaining acquisitive prescription of real estate, regulated in Polish civil procedural law. Acquisitive prescription is a way to gain property rights. The legislator established non-litigious proceedings in this respect, and at the same time made a regulation which is not too detailed. In this case, the construction of the referral played a special role, because in the scope not regulated by these provisions, the legislator referred to the proper application of the provisions regarding the confirmation of the acquisition of an inheritance and specific bequest, which in practice caused many interpretation doubts

regarding the scope of this referral. These issues are significant because ascertaining the acquisition of property rights is of key importance for the security of legal transactions. It should be noted that the discussed proceeding regarding ascertaining acquisitive prescription, regulated in Art. 609–610 (The Code of Civil Procedure 1964), has a wider range of application than just real estate, however this study has been limited to the procedural aspects of ascertaining acquisitive prescription of real estate. At the beginning it should be clarified that the object of acquisitive prescription can be any real estate, in particular land property (Rudnicki 1994, p. 27), a dwelling constituting a separate real estate, as well as premises for a different purpose, building real

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estate, shares in the joint ownership of the property as well as a physically separated part of the real estate (Pietrzykowski and Pietrzykowski 2020a). This statement defines the subject-matter framework of the discussed proceedings, however, the subject of the analysis will be their equally important subjective aspects, dynamics of proceedings, taking into account the specifics of the evidentiary proceedings, as well as judicial decisions and their contestability.

The main purpose of the study is to indicate the specific features of non-litigious proceedings in cases regarding ascertaining acquisitive prescription, distinguishing them from other proceedings conducted in this mode, with an indication of the purposefulness and functions assigned to individual constructions, used by the legislator in order to develop an effective process mechanism, removing the undesirable element of uncertainty as to property rights, harmful to the security of legal transactions.

## **SUBJECTS OF PROCEEDINGS**

According to the regulation of Art. 609 § 1 (The Code of Civil Procedure 1964) anyone concerned in the case is entitled to submit an application for prescription. In this provision, the legislator did not provide a definition of the concept of the person concerned. Reference should be made here to the general provisions governing non-litigious proceedings. As follows from the provisions of Art. 510 § 1 (The Code of Civil Procedure 1964), anyone whose rights are affected by the outcome of the proceedings is a person concerned. It is appropriate to accept a broad understanding of the term of the person concerned, since there are no restrictions or interpretative guidelines in this provision. Not only the subject that is directly interested in a specific settlement of the case, but also any subjects that will be affected indirectly will be concerned (Rejda 2020).

In the case of an application for ascertaining acquisitive prescription, the person entitled to submit an application will be any person who has a legal interest in ascertaining acquisitive prescription. This may concern the legal interest in ascertaining

prescription for their own benefit, but also ascertaining that prescription for the benefit of another person (Olczak-Dąbrowska 2019). An autonomous possessor will be indisputably entitled in this respect, as well as their legal successors under the universal title and under the singular title (Flaga-Gieruszyńska 2019a). Noteworthy is the fact that in this matter the transition of autonomous possession to another person will not matter. The premise of possession is only relevant until the time of prescription, while subsequent possession regarding the acquisition of property by prescription is indifferent (decision of the Supreme Court of 3 April 2003, V CK 60/03, *Legalis* 59202). Not only the subject that believes that they has acquired property by prescription will be entitled, but also the one who will claim that by means of prescription the property has been acquired by another person for whom he or she is the creditor (Siedlecki 1988, p. 173). A person who has lost property by prescription may also have a legal interest in a claim to ascertain acquisitive prescription (Pietrzykowski and Pietrzykowski 2020a). A person who has lost ownership may thus seek to demonstrate their current property status, free themselves of the burdens that are associated with ownership, and their creditors may need the confirmation of the prescription, for example, for proving the insolvency of the debtor in connection with the pursuit of Pauline claims (Olczak-Dąbrowska 2019). On the other hand, the current owner of the property will not be able to apply for ascertaining acquisitive prescription, because the purpose of these proceedings is not to confirm ownership of the property (Studzińska 2017). Given the non-litigious nature of the proceedings for ascertaining acquisitive prescription of real estate and the fact that their purpose is to determine the ownership relationship of a special good such as real estate, one should agree with the position that a wide range of parties concerned should be allowed to participate in the case, which is to guarantee the legal protection of all persons interested in the outcome of the proceedings. The fact that the legislator provided for the possibility of revoking a final decision that would violate the rights of the person concerned

who did not participate in the proceedings, supports the admission of a wide range of subjects to the proceedings.

A person concerned in the case within the meaning of Art. 510 § 1 (The Code of Civil Procedure 1964) will also be a dependent possessor of the real estate to which the application for ascertaining acquisitive prescription relates (Flaga-Gieruszyńska 2019a). This view is also confirmed by the case law of the Supreme Court (resolution of the Supreme Court of 18 December 1974 III CZP 88/74, *Legalis* 18462 and decision of the Supreme Court of 30 January 2000, I CKN 1359/00, *Legalis* 277317). The status of the person concerned may be given, as a dependent possessor, to a tenant of the building, which is located on the real estate which is the subject of the proceedings for ascertaining acquisitive prescription. As pointed out by the Supreme Court, although there is no connection between the result of the proceedings for ascertaining the prescription and the existence of the lease agreement, there may be such a connection between the result of the proceedings and the content of the agreement. As indicated, the applicant, who asks for ascertaining the acquisition of ownership of this property for their own benefit, will be able to change the terms of the agreement, in particular to increase the rent due (decision of the Supreme Court of 30 January 2001, I CKN 1359/00, *Legalis* 277317). In the doctrine a critical stance on this view is also present, because Olczak-Dąbrowska (2019) indicates that from the point of view of the effects of the acquisition of ownership by prescription for the continued existence of rights in rem or obligation binding the right, it is not justified to distinguish two categories of legal interest within the meaning of the indicated provision – direct, applicable to the owner against whom prescription runs, and indirect, which belongs to dependent possessors. This author indicates that the dependent possessor will have a legal interest within the meaning of Art. 510 § 1 (The Code of Civil Procedure 1964), only in a situation, when they claim that the character of the possession of the thing has changed, thus becoming an autonomous possession. It seems, however, that one should agree

with the view which allows the dependent possessor to be identified as concerned in the case.

The issue of proper identification of the catalogue of persons concerned in accordance with Art. 510 § 1 (The Code of Civil Procedure 1964) is significant not only from the point of view of determining the persons entitled to submit an application, but also the circle of other participants to the proceedings. According to Art. 510 § 1 (The Code of Civil Procedure 1964) a person concerned, that is, anyone whose rights are affected by the outcome of the proceedings, has the right to participate in the case in any state until the end of the proceedings in the second instance. In this aspect, it is worth adding that the participants to the proceedings may also be owners of neighbouring land, if the settlement of the case concerns rights they claim to this property or to border strips of the land. Otherwise, their participation in the case will be superfluous (decision of the Supreme Court of 5 October 1971, III CRN 271/71, *Legalis* 15719).

The applicant in the application for ascertaining acquisitive prescription should list persons concerned in the case, which is regulated by Art. 511 § 1 (The Code of Civil Procedure 1964). However, it will be for the court to examine whether all the persons concerned in the case, as well as other persons, are or should be participants to the proceedings. In order to determine the circle of persons concerned in a given case, the court will be able to request, both from the applicant and other participants to the proceedings, information that will enable these findings to be made. If the court determines the persons concerned who are not involved in the case, it will summon them to participate. The court, when determining *ex officio* the circle of persons concerned, may also use the collections of documents, records and land and mortgage registers available to it, which in practice facilitates access to IT systems containing these information resources.

Particular significance of determining the persons concerned in the case for ascertaining acquisitive prescription by the court occurs when the applicant has not indicated as concerned the owner or co-owners of the property which is the subject of the proceedings.

The owner's participation in the proceedings is necessary, so if the applicant fails to indicate them, the court should *ex officio* take action to determine them. If the determination is not possible on the basis of land and mortgage registers and other evidence, then they should be called upon to participate in the case by means of an announcement provided for in Art. 609 § 2 and 3 (The Code of Civil Procedure 1964) (decision of the Supreme Court of 05 March 1996, II CRN 211/95, Legalis 386463 and decision of the Supreme Court of 18 February 2015, I CSK 82/14, Legalis 1242081).

If the applicant has not indicated other persons concerned and at the same time the court has not been able to determine them, then the decision in the case will be made only after summoning other persons concerned under the procedure notifying the creditors of share capital reduction. The court may summon other persons concerned in the case also in other situations if it deems it advisable. An optional summoning may take place, for example, when the persons concerned have been identified, but there are reasonable doubts as to whether there are other persons concerned besides those persons. In particular, whether the ownership of the property was transferred to another person before the end of the prescription period (Art. 609 Marciniak). However, this only applies to situations when the applicant does not identify the persons concerned because they are not known to the applicant and will not relate to situations where only their whereabouts are not known. In this case, according to general principles, appointment of a guardian ad litem should be considered (decision of the Supreme Court of 19 February 1966, II CZ 50/66, Legalis 12583).

When referring to the above mentioned procedure, it should be noted that in terms of content of the announcement, in addition to the provisions of Art. 609 and 610 (The Code of Civil Procedure 1964), the provisions regarding the confirmation of the acquisition of an inheritance and the subject of the specific bequest, to which the legislator refers in Art. 610 § 1 (The Code of Civil Procedure 1964) will apply accordingly. For matters not regulated in chapter 2.

Ascertaining acquisitive prescription reference should be made to the provisions of Art. 673–675 (The Code of Civil Procedure 1964). The announcement should specify the thing to be prescribed in such a way as to allow its identification and indicate the name of the possessor of the thing and its last owner. Another necessary element of the announcement is a call for persons concerned to declare and prove their rights to the thing (in this case real estate) within three months from the date indicated in the announcement, otherwise the court will announce acquisitive prescription if it finds grounds for issuing such a decision (Flaga-Gieruszyńska, 2019b). According to Art. 674 in conjunction with Art. 610 §1 (The Code of Civil Procedure 1964) the announcement should be placed in a magazine popular throughout the entire territory of the country, and also made public in the place where the thing is located, in the manner adopted at that place. The legislator also provided for the possibility of withdrawing from publication of the announcement, however, this is only possible if the value of the thing is insignificant, which will not be the case with real estate.

As a consequence, not only the importance of the initiative of the applicant and other participants to the proceedings should be noted, but also the *ex officio* activity of the court, the purpose of which is to correctly determine the subjects of the proceedings, ensuring legal protection to all those directly or indirectly concerned in settling the matter regarding ascertaining acquisitive prescription of real estate.

## **APPLICATION TO COMMENCE PROCEEDINGS AS A PROCEDURAL WRIT**

Proceedings for ascertaining acquisitive prescription of real estate are non-litigious proceedings initiated only by an application that any person concerned may submit. The application for ascertaining acquisitive prescription of real estate should satisfy the general requirements of the application to commence non-litigious proceedings referred to in Art. 511 (The Code of Civil Procedure 1964). Pursuant to this provision, the application must comply with

the provisions regarding the lawsuit, with the exception that instead of the defendant, persons concerned should be indicated. The application should include indication of the property to which the proceedings relate, in such a way that it can be identified. The court with jurisdiction to hear the case will be the district court of the location of the real estate in question (Art. 507 in conjunction with Art. 606, The Code of Civil Procedure 1964).

The application for the prescription of real estate should include the request, and thus specify the real estate for which the prescription is being requested and the date on which the ownership of that real estate was acquired by prescription. A case regarding the prescription is a property case, therefore the application for ascertaining acquisitive prescription of real estate should include the determination of the value of the subject of the dispute, which will usually be the value of the right which is the subject of the prescription (Wagemann 2011).

The application for ascertaining acquisitive prescription of real estate should include documents referred to in Art. 609 (The Code of Civil Procedure 1964). If the application concerns real estate which is disclosed in the land and mortgage register or for which a set of documents is kept, then a copy of the land and mortgage register or certificate of legal status resulting from this set of documents should be attached.

The application for ascertaining acquisitive prescription of real estate is subject to a fixed court fee, which is defined in Art. 40 (Law on Court Costs in Civil Cases 2015) and it amounts to PLN 2,000.

It is possible that more than one application for ascertaining acquisitive prescription will be submitted by different persons for the same real estate based on different factual grounds. Then, as indicated by the Supreme Court in the resolution of 12 June 1986, it is advisable to combine these cases pursuant to Art. 219 in conjunction with Art. 13 § 2 (The Code of Civil Procedure 1964) for joint examination in the manner referred to in Art. 609–610 (The Code of Civil Procedure 1964) (resolution of the Supreme Court of 12 June 1986, III CZP 28/86, *Legalis* 25360).

In the event that the application contains formal defects or is not duly paid, the provisions of Art. 130–130<sup>2</sup> in conjunction with Art. 13 § 2 (The Code of Civil Procedure 1964) will apply. If a party has submitted to the court an application for ascertaining acquisitive prescription of real estate that has formal defects that prevent it from taking further course or the court fee has not been paid in the correct amount, then the chairperson summons the party by order, to correct or supplement it or to pay for it, under the pain of returning the application within one week of delivery of the order. If the party supplements the indicated defects within this period, then the application has legal effects from the date of its initial submission to the court. However, after the ineffective expiry of the time limit, when the applicant does not remove the formal defects, the chairperson returns the application which has no legal effects. In the event of submitting an application with formal defects or without paying the court fee in the correct amount, when the application is submitted by a professional representative, then such an application, by way of an order, is returned without a request to correct formal defects. If the representative within a week from the date of delivery of the order returning the application corrects the formal defects indicated in it, then the document will take effect from the date of the original submission.

Despite the fact that the legislator did not specify separate requirements for the application for ascertaining acquisitive prescription of real estate, but merely referred to the general provisions regarding the application initiating non-litigious proceedings, it should be noted that the specificity of these proceedings forces the emphasis on a precise determination of the claim. Especially if the real estate is not disclosed in the land and mortgage register or for which no set of documents is kept, it is particularly important to accurately identify the real estate, as well as identify the person who acquires the property and indicate the date on which the prescription happened. It should be remembered that the subject of the proceedings here is real estate, i.e. an object whose possibility of reliable, individual identification and indication of its owner is particularly important for the security of legal transactions.

## PROCEEDINGS FOR ASCERTAINING ACQUISITIVE PRESCRIPTION OF REAL ESTATE

Non-litigious proceedings in cases considering property law require a hearing. A case regarding ascertaining acquisitive prescription of real estate is, in accordance with Art. 608 (The Code of Civil Procedure 1964), examined at a hearing. In the event of summoning persons concerned through an announcement in accordance with Art. 675 (The Code of Civil Procedure 1964), in order to examine the claims, the court will set a hearing after three months from the date of the announcement, for which it will also summon persons who have submitted claims and provided their place of residence.

Due to the fact that the legislator has specified a special non-litigious procedure, it will not be possible to ascertain the presumption in the trial for establishing the right or removing inconsistencies between the state disclosed in the land and mortgage register and the actual legal status. In turn, it is possible that the acquisition of property by prescription may be proved as a premise for another resolution without the need for prior determination of this fact in accordance with the procedure provided for in Art. 609 and 610 (The Code of Civil Procedure 1964). However, this is permissible only if establishing this fact does not belong to the resolution in a given case, but only constitutes its premise. Such a situation may occur, for example, in a process in which the plaintiff pursues a vindicative claim, and in a demarcation case. On the other hand, it is unacceptable to replace proceedings for the acquisition of real estate by prescription with proceedings in which the resolution is essentially limited to ascertaining the prescription itself. Therefore, it will not be possible to ascertain the prescription in the process for establishing the right or removing inconsistencies between the state disclosed in the land and mortgage register and the actual legal status (resolution of the Supreme Court of 20 March 1969, III CZP 11/69, *Legalis* 13899).

The court during the proceedings examines the substantive and legal premises of prescription, which

are set out in the provisions of Art. 172–176 of the Act of 23 April 1964 – the Civil Code. Firstly, uninterrupted possession of the property by an autonomous possessor for 20 years if the possession was obtained in good faith, and in a case of possession obtained in bad faith – for a period of 30 years. Secondly, the court should examine whether the person against whom the prescription period is running is not a minor or the period of 3 years since this person reached the age of majority has not elapsed, which excludes the possibility of ascertaining the prescription. Only the possessor who does not own the real estate acquire it by prescription (judgment of the Court of Appeal in Warsaw of 10 June 2015, VI ACa 37/15, *Legalis* 1337295).

An issue that raises significant doubts and divergences in both doctrine and jurisprudence is the issue of the extent to which the adjudicating court is not bound by the claims of the participants. Two opposite views emerged as to whether the court can ascertain acquisitive prescription of real estate in favour of the person who did not apply for it. The discrepancies result from a different understanding of the referral from Art. 610 §1 (The Code of Civil Procedure 1964). According to the first view, the proper application of the provisions on the acquisition of an inheritance consists in the application of Art. 677 § 1 (The Code of Civil Procedure 1964) without any modification. According to this view, the court should ascertain acquisitive prescription of real estate, in accordance with the results of evidentiary proceedings, in favour of a person who has acquired the property right in this way, even if it was a different person than then one indicated by the participants to the proceedings. On the basis of this position, Krej (2020) indicates that the referral in question refers to Art. 677 (The Code of Civil Procedure 1964) in the scope of not binding the court with a claim referring to the determination of another purchaser, another date of purchase, or other subject-limited scope of purchase of property. However, the court cannot rule on another matter or right that was not the subject of the claim. A similar view has K. Flaga-Gieruszyńska (2019b), who indicated that ascertaining acquisitive prescription

takes place in favour of the person concerned even this person is not the applicant, the court also determines the date on which the real estate was acquired, regardless of the date indicated in the application. In addition, the specific nature of the proceedings for ascertaining acquisitive prescription is emphasized because their purpose is to determine the ownership relations of the real estate. As she claims, this is the reason why the proceedings are conducted in a non-litigious way, and the court is not bound by the claim contained in the application and has the obligation to issue a judgment that will correspond to the legal status resulting from the findings made in the course of the proceedings. This view is also reflected in the case law of the Supreme Court (decision of the Supreme Court of 27 March 2013, V CSK 202/12, *Legalis* 736743, decision of the Supreme Court of 12 September 2014, I CSK 626/13, *Legalis* 1092028, decision of the Supreme Court of 26 February 2014, I CSK 243/13 *Legalis* 1160414).

According to the second view, which appears as to whether the court is bound by the application, the proper application of the provisions regarding the acquisition of an inheritance must take into account the different specifics of these proceedings. Therefore, in the light of this position, it is not possible to apply Art. 677 §1 (The Code of Civil Procedure 1964) directly, which means that the court will be bound by the indication made by the participants to the proceedings of the person in favour of whom the acquisitive prescription is to be ascertained.

In turn, Pietrzykowski and Pietrzykowski (2020b) believe that Art. 610 § 1 (The Code of Civil Procedure 1964) contains only a partial referral to the provisions regarding the confirmation of the acquisition of an inheritance, because it is only about ‘announcement’ and ‘judgment’, but the principle of court’s *ex officio* action to determine authorized persons cannot be adopted except for the announcement provided for in Art. 609 § 2 (The Code of Civil Procedure 1964). From this referral, it cannot be inferred that the court will ascertain the acquisition of real estate *ex officio* without an application of an authorized person in a substantive and legal sense. According to these

authors, the referral does not include the obligation provided for in Art. 670 (The Code of Civil Procedure 1964) to determine *ex officio* the circle of authorized persons. This view is also reflected in the case law of the Supreme Court (resolution of the Supreme Court of 12 June 1986, III CZP 28/86, *Legalis* 25360, decision of the Supreme Court of 15 September 2011, II CSK 657/10, *Legalis* 459005, decision of the Supreme Court of 20 March 2014, II CSK 279/13 *Legalis* 994512). In the light of the resolution adopted in a composition of seven judges of the Supreme Court on 11 June 2015, the second view should be considered correct. The Supreme Court held that ascertainment of acquisitive prescription of real estate is possible only in favour of the person indicated by the applicant or another participant to the proceedings. In addition, it was pointed out that if it is clear from the evidence that ownership of the property was acquired by means of prescribed by a person other than that resulting from the application, the court should allow the claim to be modified, and if that person does not participate in the case, summon them to participate (resolution of the Supreme Court of 11 June 2015 CZP 112/14, *Legalis* 1249407). In a case regarding a confirmation of the acquisition of an inheritance, the court *ex officio* watches over the correctness of the issued decision, in turn in a case regarding ascertaining acquisitive prescription, the adjudicating court only needs to determine who acquired the property by means of prescription. Inheritance is subject to constitutional protection; hence the court must regulate the legal situation of the testator. On the other hand, in the matter of ascertaining the prescription of real estate, there are no grounds for public interest and legal order protection to require an *ex officio* decision on the acquisition of property by prescription, even if there is no application from the person concerned (Garlińska 2017, pp. 9–10).

The court adjudicating in the proceedings for ascertaining acquisitive prescription of real estate may take all evidence that will be necessary to demonstrate that the premises for the prescription are met, both requested by the applicant and other persons concerned, but it may also take evidence which was not

requested by any of the indicated subjects (Krej 2020). In this respect, it will be of fundamental importance to outline the framework of evidentiary proceedings, including means of evidence as to the facts relevant to the resolution of the case. In this category of cases, a problem, which appears most frequently is the problem of using the most cost-intensive and time-consuming means of evidence, which is the opinion of an expert, which the court is required to use if it finds that special knowledge is necessary to resolve the case correctly. This particularly applies to the participation of an expert surveyor. It is argued in the doctrine that not every case regarding ascertaining the prescription of real estate requires taking evidence from an opinion of an expert surveyor. If the object of the proceedings is real estate which is a plot of land with fixed boundaries disclosed on the main map, then there is no need to take such evidence. However, if as a result of acquisitive prescription only ownership of a part of the plot of land is to be acquired, then in order to reveal the boundaries of the plot on the map and in the field, evidence from the opinion of an expert surveyor will be necessary (Olczak-Dąbrowska 2019).

Attention should also be paid to legal presumptions relevant to establish the factual and legal status relevant to ascertaining or refusal of ascertaining, in connection with which in these circumstances there will be no need to take evidence. In such a situation, the burden of proof will rest only with those subjects that want to refute the facts covered by the presumption. The above-mentioned presumptions are indicated in the Civil Code norms and these are: the presumption of the autonomous possession (Art. 339, Civil Code 1964), the presumption of the continuity of possession (Art. 340, Civil Code 1964), the fiction of the continuity of possession, which has been reinstated (Art. 345, Civil Code 1964), the presumption of good faith (Art. 7 in conjunction with Art. 172 § 1 (Civil Code 1964). The above-mentioned presumptions relate to the premises of prescription of real estate; therefore, they will have a significant impact on the scope of the evidentiary proceedings in a case regarding acquisitive prescription.

In proceedings for ascertaining acquisitive prescription of real estate, it is permissible to refute the presumption that results from the entry of the current owner in the land and mortgage register. An entry in the land and mortgage register as the owner, of a person who in fact is not the owner, does not constitute a negative premise for prescription. A decision ascertaining the acquisition of property by means of prescription will refute this presumption. This ruling is the basis for removing inconsistencies between the current entry and the actual legal status (Strzelczyk 2019).

### **DECISION OF THE COURT REGARDING ASCERTAINMENT OF PRESCRIPTION**

In cases regarding ascertaining acquisitive prescription of real estate, the court issues a decision in which it states that a given person has acquired property by prescription of the identified property or dismisses the application. The decision stating the acquisition of property by prescription is declarative and it is effective *erga omnes*, and the acquisition of property is of primary nature (Malczyk 2020). The decision of the court will therefore only confirm the legal effect that arose by virtue of law itself. Challenging such a decision and dismissing the application for prescription means that the subject seeking ownership by means of prescription has never acquired that ownership because it did not meet the statutory requirements (judgment of the Supreme Administrative Court of 25 March 1999, I SA 1306/98, unpublished). Thus, the acquisition of ownership of real estate by prescription is not dependent on the court proceedings initiated before the court, nor on its ascertainment in the decision. Acquisition of ownership by means of prescription will occur as soon as the statutory premises for prescription are met, so the decision does not create a new legal status, but merely confirms the existing legal status.

Due to the specificity of the proceedings in question, it is necessary to indicate the necessary elements of the content of the decision issued by the court in these cases. The decision ascertaining acquisitive



prescription specifies the date on which the real estate was acquired, specifies the new legal status of the real estate from the indicated date, regardless of the effects of subsequent events that could shape this status differently. Moreover, the subsequent sale of the real estate by its original owners is not an obstacle for ascertaining acquisitive prescription (decision of the Supreme Court of 3 April 2003, V CKN 60/03, *Legalis* 69807).

The decision should accurately identify the real estate, which is acquired by means of acquisitive prescription according to the rules provided for in the provisions on keeping land and mortgage registers, which will allow to reflect the content of the decision in the land and mortgage register. If the object of the acquisition is the entire real estate that has a land and mortgage register or set of documents, it will be sufficient to identify it by referring to the designation of that register or set of documents.

In the decision, the court must also indicate the subject that will acquire ownership of the real estate by prescription. A legally binding decision stating the acquisition of ownership by prescription is the basis for entry in the land and mortgage register of a person acquiring the ownership of real estate by prescription as the owner. A legally valid copy of the decision is sent by the court to the competent authority, which keeps the land register and notifies the appropriate land and mortgage register department.

In practice of applying the law, unusual cases of the subjective party to the decision were also resolved. If there is a situation that the purchaser of the real estate by means of prescription will be several co-owners, then the decision also indicates the amount of their shares. It is presumed that, unless the circumstances of the case indicate otherwise, the amount of these shares is equal. If ownership by means of acquisitive prescription will be acquired by spouses who are subject to a system of joint ownership, then both of them will be indicated as purchasers, with the indication that the acquisition will be on a joint basis. On the other hand, if only one of the spouses fulfils the features of autonomous possession of property, then only this spouse will be mentioned in the conclusion

of the decision, even if the acquired property, in the light of Art. 31 §2 (The Family and Guardianship Code 1964), became an element of joint assets (resolution of the Supreme Court of 28 February 1978, III CZP 7/78, *Legalis* 20714).

Cases regarding ascertaining acquisitive prescription of real estate may also end with a decision rejecting the application. However, a legally binding decision refusing to ascertain the prescription of real estate will not prevent, in the event of a change in circumstances, re-submission of the application in this regard. The court in the re-opened case will not be bound by the findings that result from the justification of the decision dismissing the application to the extent to which they are not relevant for the decision (resolution of the Supreme Court of 12 March 2003, III CZP 97/02, *Legalis* 56169).

The determination by the court in a decision that a given person has acquired a specific real estate by means of prescription does not prejudice this person's current title to the real estate, if after the date of acquisition of the real estate specified in the decision events resulting in a change of title occurred (Dziczek 2011).

Consequently, it is irrelevant for the issuance of this decision whether the person from whom the ownership was acquired continues to own the real estate at the time of the decision, and whether the purchaser is still an autonomous possessor. The decision merely specifies that at a given time a specific person has met the premises of prescription and has acquired ownership of specific real estate. Despite the declarative nature of this decision, it is of significant importance in legal transactions, since only this decision can constitute the basis for entering a new owner in the land and mortgage register.

## **CHALLENGING A DECISION ASCERTAINMENT ACQUISITIVE PRESCRIPTION**

In proceedings for ascertaining acquisitive prescription of real estate against a decision of the court of first instance resolving the matter as to its substance, an appeal may be lodged. For appeals

in non-litigious proceedings, the provisions of Art. 367–391 (The Code of Civil Procedure 1964) will apply accordingly. An appeal may be lodged by any participant to the proceedings. The decision may be also appealed against by a person concerned who has not yet been a participant to the proceedings. It will become a participant when an appeal is lodged, which will be treated as an application to participate in the case. The person concerned, who has not been a participant to the proceedings so far, may lodge an appeal until the expiry of the time limit for filing it set for all current participants to the proceedings. However, the appeal will not be admissible against a part of the decision that does not include a resolution on a part of the real estate covered by the applicant's claim (resolution of the Supreme Court of 11 December 2014, III CZP 94/14, *Legalis* 1180280).

In turn, against a decision of the second instance regarding the merits of the case and against a decision of the second instance on the rejection of the application and discontinuance of proceedings, if they end the proceedings in the case, pursuant to Art. 519<sup>1</sup> §1 (The Code of Civil Procedure 1964), as cases of property law, a cassation appeal to the Supreme Court may be lodged.

Revocation of a final judgment regarding ascertaining the ownership of real estate by prescription, will also be possible if this decision violates the rights of the person concerned who was not a participant to this proceeding. This person may then pursue their rights only by resuming proceedings in this case, as stated in Art. 524 § 2 (The Code of Civil Procedure 1964) (resolution of the Supreme Court of 13 September 1967, III CZP 60/67, *Legalis* 13200). It should be emphasized that it is not sufficient that the person concerned did not participate in the proceedings, and each time it should also be examined whether this resulted in a real violation of that person's rights as a part of the terminated proceedings (Akińcza 2006). Failure to summon to participate in the case regarding ascertaining the acquisition of ownership of real estate by prescription does not invalidate the proceedings (order of the Supreme Court of 18 November 2003, II CK 233/02, *Legalis* 222833).

## CONCLUSIONS

Proceedings for ascertaining acquisitive prescription are a separate type of non-litigious proceedings, however, despite distinguishing a particular type of proceedings, as a result of scarce regulations, in many cases a reference should be made to general provisions regarding non-litigious proceedings and properly applied provisions regarding proceedings for the acquisition of an inheritance and specific bequest. However, even when referring to the general provisions of non-litigious proceedings, due to the special nature of these proceedings, certain features characterizing these proceedings can be distinguished.

A person concerned in a case regarding ascertaining acquisitive prescription of real estate is anyone whose rights are affected by the outcome of the proceedings. Such a person will undoubtedly be the autonomous possessor of real estate, a person who has lost ownership by means of acquisitive prescription, but also other subjects, such as creditors of the previously indicated subjects. Although this issue raises doubts in legal doctrine, it should be assumed that dependent possessors are also persons concerned in the case. The adoption of a broad understanding of the notion of the person concerned in the proceedings for ascertaining acquisitive prescription of real estate is also supported by the fact that determining the owner of the real estate is of particular importance for the certainty of legal transactions. Participation in the case of all persons concerned with the resolution of the case guarantees them the opportunity to defend their rights.

The purpose of the proceedings for ascertaining acquisitive prescription is to obtain a court decision that confirms that the person named therein acquired ownership of the identified real estate on a given date. Acquisition of ownership of real estate by prescription is by virtue of law, and the decision is only declaratory, but it is important because only this decision can constitute the basis for the disclosure of the new owner in the land and mortgage register. Proceedings in this regard are pending only on an application which must meet the general requirements of the

application in non-litigious proceedings. The court on its own initiative will not be able to go beyond the claim of participants to the proceedings and determine the acquisition of property in favour of another person. However, it should allow modification of the claim during the proceedings, and if the evidence indicates that the person who is not involved in the case has acquired ownership, the court should summon this person to participate in the case. The legislator has provided for a separate non-litigious procedure for ascertaining the prescription, therefore it will not be possible for the court to decide on this matter in other proceedings. However, it is permissible for the court to examine the fact of acquisitive prescription in other proceedings if this fact is one of the premises for the resolution. In this case the court in the conclusion of the decision will not indicate that a given person has acquired ownership of the property but will merely cite this fact in the justification as a premise for a specific resolution of another case.

The decision ascertaining the prescription can be challenged. Against the decision resolving the case as to the substance, on general principles for non-litigious proceedings, in the first instance an appeal can be lodged, and in the second instance a cassation appeal can be lodged. An additional possibility to revoke a final decision is resumption of proceedings when the decision violates the rights of the person concerned, who was not a participant to the proceedings.

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