

THE USUCAPIO INSTITUTION IN LIGHT OF THE CHANGES BROUGHT BY THE NEW CIVIL CODE

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Abstract

The present work treats the Usucapio institution as a special means of acquiring the right of property over real estate assets, regardless of the nature of the immovable asset, whether it is a land or a construction. The work outlines the novelties of the New Civil Code in matter of extinctive prescription, both concerning the means of acquiring property by real estate usucapio and regarding the terms and forms of real estate extinctive prescription. The New Civil Code institutes two new forms of real estate usucapio, tabular and extra-tabular usucapio which, according to the manner in which they are regulated from the point of view of the terms for fulfilling the acquisition prescription, nevertheless shorten the period of time corresponding to the temporary holder's possession, regardless of the title by which it acquired possession and who can thus acquire property over a real estate asset by requesting the acknowledgement of the right of property over a period of time between 5 and 10 years, depending on the nature of the institution of the prescription invoked.

Keywords: usucapio, tabular usucapio, extra-tabular usucapio, extinctive prescription, real estate.

JEL Classification: K11

1. Preliminary considerations

The New Civil Code² brought significant changes to the usucapio institution, which although essentially remains an effect of prolonged possession in the prescribed time as per the new legal regulations³, it greatly shortens the acquisitive prescription periods provisioned in the previous legislation and it presents as an element of novelty, in the matters estate usucapio, the distinction between extra tabular and tabular usucapio.

The New Civil Code has attempted expressly to regulate all those interpretations that doctrine and jurisprudence have held, and which in recent years have become a genuine source of law in practice, and uncertainties and difficulties that the previous Civil Code brought about among law practitioners were thus cleared, not leaving room for interpretation.

The term required by law to acquire real estate property or other rights through adverse possession is 10 years in the case of extra tabular usucapio, and 5 years for tabulated usucapio.

The previous Civil Code of 1864 provisioned⁴ a 30-year usucapio if there existed uninterrupted and useful possession during this period, regardless of the good or bad faith of the owner, and a short, 20-year usucapio, when the owner possessed in good faith, and this ownership is useful and is based on a just cause, and by Decree law number 115/ 1938 the owners could acquire the real estate in 10, 20 years respectively, as per the type of usucapio and the legal conditions it fulfilled.

The criterion according to which, as per the new legal rules, the short or long term usucapio is applied, is that of the inclusion or the lack of it thereof of the holder of such property in the real estate register.

Thus, by the provisions of art. 930 of the New Civil Code the person that had right of usucapio for 10 years is recognized the right to register in the real estate register the right of property of a building and its dismemberments, if it finds itself in one of the following situations:

- a) the owner registered in the real estate register is deceased or it ceased to exist;

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² Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505 of July 15, 2011, amended by Law no. 71/2011, GEO no. 79/2011, Constitutional Court Decision no. 1514/2011, Law no. 60/2012, Law no. 76/2012, GEO no. 44/2012, GEO no. 4/2013, Law no. 54/2013, Law no. 214/2013, Law no. 138/2014.

³ Corneliu Bârsan, *Civil Law. Real property. Principles of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2013, p. 403.

⁴ Art 1890 of the 1864 Civil Code.

- b) the property waiver declaration was registered in the real estate register;
- c) the respective piece of real estate was not registered in any real estate register.

The completion of these conditions does not sine qua non lead to the owner's rightful acquisition of the property right or its dismemberments, since the acquisition of the right appears as a juridical effect of the registration of the registration petition with the Land Title and Survey Offices where the property is located. So that, when prior to the registration of their petition to register in the real estate register, a third party registered their own petition to register in their benefit, based on a legitimate cause, during or even after the completion of the usucapio period, the acquirer can no longer register a recognition or real estate registration petition of the main real right over the respective property, remaining that the invoked main real right be acknowledged by the law court, at the possessor's petition.

As per the provisions of article 82 paragraph (2) of Law no. 71/2011⁵, with subsequent amendments, in the case of possessions begun after the coming into force of the Civil Code, if real estate registers were open, until observing the conditions in art. 56 paragraph (1), extra tabular usucapio as per article 930 of the Civil Code becomes effective from the date of the application for summons by which the acknowledgement of fulfillment of the legal requirements for this mode of acquisition was requested, respectively from the date of invoking the usucapio exception, if said exception was granted.

The same article 82 of law no. 71/2011, clearly states, under paragraph 1, that the dispositions of art. 930 - 934 of the Civil Code regarding real estate usucapio only apply to the cases in which the possession began after its coming into force. For cases where possession commenced before this date the provisions for adverse possession in force on the date of commencement of possession are applicable. The buildings for which the commencement date of possession, before the entry into force of the Civil Code, land and real estate registers were not open, the usucapio provisions of the 1864 Civil Code remain applicable.

By dispositions of article 763 of the NCC the extra tabular usucapio effects are restricted only to positive incidents by which the owner of the dominant fund exercises a part of the property right on the incidental fund, such as the right of way, while by tabulated usucapio any incidents can be acquired.

2. Usucapio in light of the changes brought by the new Civil Code

The tabular and extra tabular usucapio concepts are not new, as they existed as exceptional situations for the acquisition of the property right as per the provisions of Decree Law 115/1938, which was however rescinded with the coming into force of Law no. 7/1996⁶ of the land title and survey. Through this special law regulating the organization of the land register at national level regarding the description of buildings and real estate entries concerning genuine rights, personal rights, acts, facts or legal relations regarding the buildings. Thus, from this moment onwards – March 3rd 2006 – the usucapio dispositions relating to real estate register aspects of Decree- law no. 115/1938, which had been applied in the areas where said Decree came into force and was applied – Transylvania, Banat and Northern Bukovina, could no longer yield juridical effects but for possessions commenced prior to this moment.

The doctrine⁷, underlined that for possessions commenced after March of 2006, even in these regions, the usucapio dispositions of the Civil Code in force on the respective date were applied.⁸

Recognizing the efficiency of the real estate register system, the New Civil Code revives the regulations regarding extra tabular usucapio, which provisioned that the person who was in

⁵ LAW No. 71 of June 3rd, 2011, for the application of Law no. 287/2009 regarding the Civil Code.

⁶ Law no. 7/1996, published in the Official Gazette No. 201 of March 3rd, 2006, republished in the Official Gazette of Romania, Part I, no. 83 of February 7, 2013, Law no. 127/2013 amended by Law no. 214/2013, Law no. 221/2013, Law no. 187/2012, GEO no. 8/2014, GEO no. 11/2014, Law no. 68/2014.

⁷ Corneliu Bîrsan, *quoted work*, p 403.

⁸ Dispositions of art. 1890 and the following ones in the 1864 Civil Code.

possession of the building could request the registration of the respective right after the death of the owner registered in the real estate register, or the person who legally possessed a non-movable good for 20 years, counted from the registration in the real estate register of the declaration to waive the property, could request said registration.

Besides these situations there arises the need for social and legal assistance to provision not only the death of the individual owner but also the termination of the legal person which holds the acquisitive prescription right and also the factual situation where a property was not included in any land registry, case often met in areas where real estate advertising was done through transcriptions and inscriptions records kept by person and not by real estate.

The 10 term of this usucapio only begins after death date or, as per case, the cessation of the owner legal existence, prior to the date of registration of the property waiver declaration respectively, even if the coming into ownership took place on a previous date, same as the provisions of art. 28 of Decree-Law no. 115/1938.

Even if the conditions on deadline and possession are fulfilled, they do not lead to the emergence of acquisitive prescription right in the holder's patrimony if he does not expressly wish to invoke usucapio. Thus, we consider that the holder has an option right⁹ to request or not the acknowledgment of acquisitive prescription as a way of finding entitlement invoked formally request real estate advertising possession to give legal effect as fact.

Once the holder manifests the desire to acquire the primary real estate right through adverse possession, he must apply for registration of his right in the land register.

If it is obvious that admitting the registration petition produces a constitutive effect of rights¹⁰ in the holder's patrimony, it is obviously necessary to impose the express regulation of the judicial procedure to attain this, since the jurisdictional procedure made by the land registrar cannot regulate the administration of proof necessary to show factual aspects such as useful possession of 10 years by the person invoking it.

Thus, the New Civil Code¹¹ in Title XII regulates „*The procedure regarding the inscription of rights acquired based on the usucapio right*”.

Under these rules the special judicial procedure applies to 'any' applications for registration in the land register of real estate rights acquired under a usucapio basis. The application of said usucapio petition is submitted to the court in whose jurisdiction the property is situated by the owner as the owner of the real estate showing date of possessing property, the basis for usucapio, whether the property possessed is registered or not in the land register, and the name or denomination of the former owner or his successor, if known to the petitioner. It is required to supplement the application with a series of documents issued by certain institutions and the list of data of at least two witnesses intended to assist the court to determine whether the usucapio conditions are met.

The court will dispose the performance of the summoning procedure through advertising of the holder of the rights registered in the land register or his successors at the expense of the applicant.

If no opposition is made within 6 months from the issuance of the latest publication or if the person registered in the land register is deceased or has ceased to exist in law or has ceased the property the next step is to take said request to court, the court ruling in closed session after hearing the complainant and witnesses and verification of the conditions required by law to acquire a petitioned right applicant on usucapio basis, through session closure. Even if there is opposition or

⁹ Corneliu Birsan, *quoted work*, p 406

¹⁰ Art 1052, p. 3, NCPC., The plaintiff is considered owner from registration date, as per the legal provisions, in the land or real estate register of the property right acquired based on usucapio”.

¹¹ Law no. 134/2010, republished in the Official Gazette of Romania, Part I, no. 545 from August 3rd, 2012, with subsequent amendments: Government Emergency Ordinance (GEO) no. 44/2012, Law no. 206/2012, GEO no. 4/2013, Law no. 2/2013, Law no. 72/2013, Dec. C.C.no. 473/2013, Law no. 85/2014, Dec. C. C. no. 348/2014, Law no. 138/2014, Dec C. C no. 462/2014 and no. 558/2014, that came into force on February 15, 2013.

not, the court will examine whether the requirements of the Civil Code for entitlement under usucapio of the petitioned right are met, giving a ruling or judgment subject only to appeal.

Only with this conclusion or final decisions to accept the application which is not final, given in the first instance, the applicant may request provisional registration of the usucapio right. However, these decisions remain devoid of legal effect, without the registrar of the land registry entry being able to dispose the right under usucapio if it was provisionally tabulated or registered for the benefit of another person, even after expiry of the usucapio term. If there was only one note made, the registration of the right will be possible, without it being opposable to the person who requested the registration.

Tabular usucapio previously provisioned in art. 27 of Decree Law no. 115/1938 established that if 'legal rights were registered without a legal cause, rights which can be attained through usucapio, they will remain legally acquired if the right's holder possessed them in good faith, legally, for 10 years'.

The New Civil Code comes to regulate this type of usucapio provided for in Article 931 maintaining the existence of a legitimate cause as well as the existence of good faith reported both to the submission of the registration petition as well as at the time of entry into possession. Good faith in these two moments is 'necessary and sufficient'. 'From registration date the 5-year uncorrupted possession term starts, and the fact that the applicant possessed the real estate before that moment is irrelevant. We thus find also the conditions for short-term usucapio of 10-20 years as per the 1864 Civil Code, excluding the period that is different both in scope and in calculation method.

Law no. 7/1996 republished and amended also reiterates in its art 39, paragraph 8, the fact that the real rights which can be acquired based on usucapio will remain validly acquired, if the right's holder possessed them in good faith, as per legal provisions, for 5 years from the possession registration in the land or real estate register.

If good faith is presumed by law- *bona fidae presumitur*, the applicant must prove there exists a just title, hence the requirement also in the case of tabular usucapio to undergo a judicial procedure following which a registration with constitutive effect can be entered (only for the future) of the real estate right in favor of the usucapio holder, even if by validating the previously made registration in the land register, the court gives practical effectiveness to the void or annulled act under which the entry was made.

Regarding cases of relative nullity of the document transferring the property under which the owner made the entry, the action is prescribed under special provisions, but at the latest within a period of 3 years from the date on which its holder became aware of the cause of nullity¹², so that those periods usually fall into the 5-year term of the acquisitive prescription.

The same judicial procedure, with publicity, and the same deadlines apply for tabular usucapio, no simplification or procedural particularity being provided.

3. Conclusions

In conclusion, the legislature ordered in practice and in connection with the usucapio provisioned in the New Civil Code, the resumption of older institutions, however adapted to the current society, considering their proven efficiency and the jurisprudence of the courts that have applied the dispositions of Decree-Law no. 115/1938.

The regulation method and the special arrangements by which a real estate right may be acquired by usucapio, is trying to lighten and clarify for the holder the steps which they must take, in full transparency, in order to benefit from the legal effects of acquisitive prescription, without undermining the right to property as a fundamental human right.

¹² The deed made by a spouse without the other spouse's agreement (art 347 NCC), a document drawn up infringing the special incapacities as per art. 991 of NCC, a document regarding another person's property, the document drawn up by a person without judgment (art 1205NCC), the document drawn up when the agreement of the right's transmitter was viciated by error or duress, art. 2529 N.CC

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6. 1864 Civil Code
7. New Civil Code