

ESTABLISHMENT AND ACQUISITION OF THE RIGHT OF REAL SERVITUDE IN IMMOVABLE PROPERTY ACCORDING TO THE LEGISLATION IN KOSOVO

Assistant and doctoral student **Kastriote VLAHNA**¹
Regular professor **Hajredin KUÇI**²

Abstract

Servitude as a real right over a foreign thing is known, since the first laws written, as a right not so favoured by the owners of the thing. Failure to favour comes from the fact that the owner of the thing is restricted the right to exercise full right over his thing by another entity, whether natural or legal person. The law of the state recognizes the right of servitude and concretizes it as a restriction of the right of ownership, only in those cases when there are no other solutions. The important thing about the right of servitude is how to create this right and if it is created then what are the legal rules for gaining this right. Therefore, based on the importance of creating and gaining the right of servitude, in the paper I will define how the law of the state of Kosovo determines the creation of real servitude and in addition to creating how this right should be acquired, and also by looking at the implementation of legislation in practice through the case viewed in the Cadastral Status.

Keywords: *Property Servitude, Creation of Servitude, Aquisition of the Servitude, Legislation, Cadastral Status Practice*

JEL Classification: K15

1. Introduction

Servitude as a real right over a foreign thing, is considered as an older right than other real rights, even from the right of ownership, although in the laws it is written as a right and known to the public since the first laws written, but not before. As nowadays, the positive law in force defines in the provisions the right of servitude as well, and considering it as a basic right, as much as the right of ownership, but by distinguishing it from the right of ownership since as a right the holder acquires it over the foreign thing, and can never have the authorizations, which he can have on a thing considered to be the owner.

If you are the holder of the right of servitude, then by law you have the authority to use the other's thing, to maintain it, but you can never alienate (transfer-sell) it to other persons, since the right of servitude is regarding the ownership of the thing and that the right of servitude is transferred only in case the ownership of the thing is also transferred.

The important thing is how this right of servitude, especially in immovable property, can be constituted (established). It is a debatable issue, but according to the positive law in the state of Kosovo, it is emphasized that initially the right of real servitude must be created through a legal title (*iustus titulus*) and, then to gain this right it must be registered in the real estate registers (*modus aquirendi*).

The creation and acquisition of real servitudes is a debatable issue from the legal doctrine, from which two divided opinions derive, thus thinking that the right of real servitude can be created and acquired at the same time is the opinion of one doctrinal group, while the other doctrinal group thinks that the right of real servitude in immovable property must be acquired through a legal title created by legal work, the decision of a state body or by law. And in addition to the legal title, it must also be registered in the immovable property registers. Such thing is determined by the Law on Property and Other Rights in Kosovo, and also through this paper I clarify that first the right of real servitude must be created and then acquired, and never in any case creation and profit to be the same

¹ Kastriote Vlahna - doctoral student at the University "Hasan Prishtina" Pristina, Kosovo, Department of Civil Law; full time assistant in the field of civil justice, Faculty of Law, University of Prizren "Ukshin Hoti", Republic of Kosovo, kastriote.vlahna@uni-prizren.com.

² Hajredin Kuçi - full professor in the field of law of private law, Faculty of Law, University of Pristina 'Hasan Prishtina', Republic of Kosovo, hajredin.kuci@uni-pr.edu.

matter. More widely discussed in the content of the paper!

2. The right of real servitude

Legally from the first written sources, the servitude is defined as a lien placed on one property for use and the usefulness of the property of another owner.³ For the owner who has no other way to fulfill his basic obligations, the law makes a solution and that through the creation and acquisition of the right of servitude.

The most important property right is considered the right of ownership and that protected by the highest legal act of the state,⁴ to which right it is stated that the holder of the right enjoys three types of authorizations and that *ius utendi*⁵ (right of use), *ius fruendi* (right of maintenance) and *ius abutenti* (right of use - alienation - sale of the item).⁶

These three authorizations are enjoyed by the owner of the item and can not be limited by anyone other than the law. In the present case, the right of an owner over an item may be limited by law in the case of the creation of a second property right which is the right of real servitude, that the owner of the item without transferring ownership to another entity⁷ (whether a physical or legal person) passes some rights, which in this case acquires the right to enjoy the right, for example: enjoys the right to pass.

So over one thing we can become the owner of the thing, but we can also enjoy rights over the thing of another, called as property rights over the foreign thing (*iura in re aliena*). The right of servitude is considered as the oldest real right over the foreign thing.⁸ Although known since antiquity, the unique notion of servitudes was formed in the time of Justinian, specifically in the Justinian Civil Code,⁹ and not since the law of XII Tables¹⁰ did not recognize the servitude as a legal relationship,¹¹ while according to Justinian the servitude is considered as a real right over the foreign thing in which it enables its holder to use the other's thing or to request that the owner of the thing be limited in the use of his right, in the interest of the right holder of servitude.¹²

The real servitude must always provide some benefit to the holder of the servitude, otherwise the servitude is not allowed.¹³ The restriction of the thing could be done by the owners of the thing and that of their own free will. The restriction of the thing could be done by the owners of the thing and that of their own free will.¹⁴ Also in some other reasonable cases, this restriction may be made by the law itself.

Thus, according to Roman law as well as the current positive law, the right of servitude can be accepted to be created as a right by the will of the owner of the service item, as well as by law.¹⁵ So in any case, when the owners voluntarily or according to the will of their ancestor were obliged to tolerate the interference of foreign persons in their belongings and allow them to use any sector of property right without having legal possibilities to prevent this, these authorizations of non-owners were called *iura in re aliena*, or real rights over foreign property, and in this category servitudes were included.¹⁶

³ See: Galgano, Franqesko, *E Drejta Private*, Tirana, 1999, p. 175.

⁴ See: Constitution of the Republic of Kosovo. Prishtina, 2008, article. 46, paragraph 1.

⁵ See: Law no. 03 / L-154: On Property and Other Real Rights, Prishtina, 2008, article 18, paragraph 1.

⁶ Shih: Aliu, Abdulla, *E Drejta Sendore*. Prishtina, 2014, p. 92.

⁷ See: Shehu, Avni, *Pronësia*, Tirana, 2000, p. 73.

⁸ See: Statovci, Ejup, *E Drejta e Servituteve (comparative aspect)*, Prishtina, 1985, p. 3.

⁹ See: Selmani, Bashkim, *E Drejta Romake*, Tetovo, 2013, p. 443.

¹⁰ Jolowicz, H. F. *Historical Introduction to the Study of Roman Law* (Cambridge, 1952), p. 108.

¹¹ A legal relationship is a social relationship that exists between at least two subjects of law, whether physical or legal persons, who have mutual rights and obligations in relation to any object of that legal relationship. Thus, the relationship created between the subjects of law to which the right (law) intervenes, that relationship takes on the character of a legal relationship, e.g. if the social relationship is regulated by civil laws such as the relationship of obligations, then that relationship is called a legal-civil relationship.

¹² See: Aliu, Abdulla, *E Drejta Sendore*. Prishtina, 2014, p. 233.

¹³ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008, article 252, par. 2.

¹⁴ Owners can accept such restrictions themselves for various reasons: as, due to better economic use of their belongings; to get some reward for the sector left; due to the fulfillment of certain social or family obligations, etc.

¹⁵ See: Galgano, Franqesko, *E Drejta Private*, Tirana, 1999, p. 197.

¹⁶ Arta Mando. *E Drejta Romake*, Tirana, 2011, p. 304.

Apart from the fact that a right of servitude could be created without the will of the owners of the thing, that right could also be created with the will of the owner of the service property. So, the right of servitude at the moment of creation is divided into servitudes over objects and persons, and almost the most important and most debatable in practical life is the real servitude, this is the reason I will address it in this paper.

The real servitude is considered a real right over the foreign thing, from which the holder of the service property (the owner of the thing) must endure the holder of the dominant property (the winner of the servitude right) to use his thing to fulfill his own needs. And in the positive law of the state of Kosovo, the servitude has a legal and practical importance as the ownership has, since both are considered property rights, along with the other three property rights that are: the right of pledge, lien real estate, the right to build.¹⁷

3. Creating a real estate servitude

Like other real rights, the right of servitude as well, to be considered a subject of law (physical or legal person) entitled to the right, it must first be created with a legal basis (*iustus titulus*) and then creation must be obtained (*Modus Aquirendi*) by registering in the public real estate registers.¹⁸ The real servitude is always created taking into account the requirements of the ruling property, with which the requirement must be foreseen, the favorable and appropriate use of which can be made possible,¹⁹ through the use of service land.

The creation and acquisition of real servitudes, throughout history has evolved and has not always been the same. Thus, looking at Roman law, the law of real servitudes was created with a valid legal work, by decision of state bodies (court or administration), as well as by law. So based on Justinian's Civil Code,²⁰ it was emphasized that the right of real servitude could be created with a legal title (*iustus titulus*), and also that right was acquired without the need for delivery of the thing or possession of the thing (*quasi-traditio*) and without the need for that created right to be registered (*modus-aquirendi*) in the public books of real estate.²¹ And now from the positive law in the state of Kosovo, the right of real servitude is created on the basis of a legal work, a decision of a state body or a law.²²

In order to create a right of real servitude, a legal work must initially be created²³ be it a contract or a will; a legal work which must be legally valid, so that it can be considered as a legal title (*iustus titullus*), and then through the legal title to gain the right of real servitude by registration in the public books of real estate. Servitudes created on the basis of legal affairs, whether contract or will, are known as voluntary servitudes, because the basis of their creation is the will of the parties.²⁴ Law on Property and Other Real Rights (LPORR) of Kosovo, provides that when the servitude is created based on legal work, a contract is required for the creation of the servitude, and that the contract must provide the content of the servitude.²⁵

So when the real servitude is created with legal work - contract, and in the contract as a legal basis is the sale, the gift, and therefore²⁶ it is also stated that the contract does not acquire the right of real servitude,²⁷ but it is the basis for obtaining the servitude, since in order to gain the right created by the contract either through the sale or the gift of the thing, the registration in the land books must

¹⁷ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

¹⁸ See: Galgano, Francesco, *E Drejta Private*, 1999, Tirana, p. 178.

¹⁹ See: Koziol, Helmut Koziol und Eelser, Rudolf, *Grundriß des bürgerlichen Rechts, Band II*. Wien, 1996, p. 162.

²⁰ Arta Mandro, *E Drejta Romake*, Tirana, p. 306.

²¹ See: Statovci, Ejup, *E Drejta e Servituteve (comparative aspect)*, Prishtina, 1985, p. 154.

²² See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

²³ Clarification: Legal work is a legal tool for the transfer of subjective-civil rights from one subject to another. So legal work in fact represents the declaration of free will of the natural or legal person, who has full or repetitive legal capacity (ability) to act that enables the creation, change, termination or transfer of subjective civil law. See more: Aliu, Abdulla. *E Drejta Civile (general part)*, Prishtina, 2013, p. 355.

²⁴ See: Nuni, Ardian. Hasaneziri, Luan, *E Drejta Civile (Pronësia)*. Tirana, 2010, p. 305.

²⁵ See: Aliu, Abdulla, *E Drejta Sendore*. Prishtina, 2014, p. 624.

²⁶ See: Dauti, Nerxhivane, *E Drejta Kontraktore*, Prishtina, 2012, p. 85.

²⁷ See: Gams, Andrija, Bazat *E Së Drejtës Reale*, Prishtina, 1958, p. 143.

be done.²⁸ In addition to the contract, the will is as a legal work on the basis of which the right of real servitude can be created.²⁹

A will as a legal act which, if it produces legal effect, can be considered as a legal title (*iustus titullus*)³⁰ same as the contract, to enable the subject to whom the will has been left. Specifically, the rights and obligations on the testator's property, may acquire the right of real servitude, or he is obliged to allow it to another subject to acquire the right of real servitude over the thing he has inherited. So, the acquisition of servitude based on legal action is the most common gain but also the most common from practice.

When we talk about a legal title or legal action, we should know that it contains both contracts (of sale, donation, etc.) and a will, and for that I can say that the right of real servitude can be created by will, since the LPORR of Kosovo itself³¹ says: that the right of servitude can be created by legal work, and in this case the legal work of one side is the will.³² A servitude can be created by will as a legate rather than a provision on the legate. It should be noted that according to the LOI (Law on Inheritance) of Kosovo, a will may contain an order that the testator obliges the testamentary recipient to fulfil an obligation to someone else, otherwise this fulfilment is called legacy.

So according to the LOI it is stated that: The testator can bequeath one or more certain items or any rights to a certain person; to order the heir or any other person, to whom he leaves something from what is left to him, to give something to a certain person, pay him a sum of money, release him from some debt and support him or generally do something; refrain from any action or gain anything in his favor.³³

According to this legal provision, it is clearly noticed that the servitude can be created by will, at the moment, when and according to the law, it is said that the testator can leave things or any rights to a certain person. In the present case, a real servitude created in this way always represents the legates or prolegates.

This means that the owner of the service item with a will-expression of his last will orders the creation of an easement for the benefit of the current owner of the dominant item, who now appears as a legatee.³⁴ In addition to legal work, the right to real servitude is created by a decision of a state body. In the past, as well as according to the LPORR of Kosovo, the real servitude can be created by decision of the state body³⁵, which implies that it is not only the decision of the court but also any other decision that can be created by another state body.

Therefore, according to the expression decision of the state body, it means that the right of real servitude can be created by a decision of the Court as well as by a decision of an administrative body. The real servitude, as a real right to be created, is allowed by the law itself, and this real right is created by a decision of the Court. Based on the fact that the right of servitude is a real right, and that the real right is the main branch of Civil law, then any right that belongs to civil law in cases allowed by law, can be acquired by decision of Judges in both Contested Procedure and Non-Contested Procedure. But, in order to initiate civil proceedings, according to the CPL (Civil Procedural Law) it is stated that the parties themselves must initiate the letter³⁶ (lawsuit or proposal) to conduct the proceedings in court.³⁷

The parties claiming to acquire a servitude right through the Judicial system must first submit the document to the Court. This letter can be a lawsuit, in case the person who wants to acquire the right of real servitude has obstacles and disagreements (dispute) with the person from whom he wants to gain that right (specifically from the owner of the service item), since disagreements arise between

²⁸ See: Law on Property and Other Real Rights. Article 253 par 2.

²⁹ Will means the expression of the last will given in the form provided by law, by which the testator orders how to deal with his property after his death.

³⁰ See: Statovci, Ejup, *E Drejta e Servituteve (comparative aspect)*, Prishtina, 1985, p. 165.

³¹ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

³² See: Law no. 2004/26 On the Heritage of Kosovo, Prishtina, 2004, article 93.

³³ Ibid.

³⁴ See: Statovci, Ejup, *E Drejta e Servituteve (comparative aspect)*, Prishtina, 1985, p. 188.

³⁵ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, and 3.

³⁶ See: Law no. 03/L-006 on Contested Procedure, Prishtina, 2008, article 143, par 1.

³⁷ See: Brestovci, Faik. Morina, Iset. Qehaja, Rustem, *E Drejta Procedurale Civile (Procedura Kontestimore)*, Prishtina, 2017, p. 227.

the parties, so that the owner of the service land does not allow the owner of the dominant land to use his property to meet his needs, thus e.g. the right to cross into the land of the landowner, since the person who wants to acquire this right has no choice but to go through the road of the landowner. In such cases, the court creates the necessary passage even against the will of the owner of the service item.³⁸

These cases of necessary passage according to the practice occur in cases when the joint ownership is established.³⁹ According to the case law, when dividing the land, they are obliged to provide the necessary passage for each part of the divided land.⁴⁰ In all cases in which the parties can not enter into an agreement, i.e. where there is no legal work (contract or will) then to gain the right of real servitude, the party who must acquire the right of servitude must file a lawsuit in court. Lawsuits which may be filed by the parties and which may have the servitude as the object of the lawsuit are: binding lawsuits⁴¹, lawsuit recognition of the right of real servitude⁴².

While the right of servitude is considered a legal-civil relationship, then in general terms this right can be created through the courts by filing a lawsuit of the law of obligations, and that binding lawsuit and the lawsuit for recognition of the right, but not the lawsuit of change of law, since in this case we are talking about the creation of a right of servitude, and such a thing can not be created with a lawsuit of change since through this lawsuit a change of the existing law should be sought.⁴³

Always after the administration of evidence and the factual situation, the judge of the contentious case makes a decision by which he can approve the claim of the plaintiff, but he can also reject it. In case the claim of the plaintiff is approved, then the right of real servitude is created for the plaintiff, and that by taking the decision, respectively by the finality of the decision taken by the court.⁴⁴

The decision becomes final from the moment when the deadline for the appeal expires,⁴⁵ specifically it is said that the decision becomes final.⁴⁶ From the moment the decision becomes final, it is considered that the right of real servitude has been created by a decision of the state body, and this state body in this case is the court. The right of servitude created by the court decision is considered as a legal title and has a declarative character of the right of servitude. So, it only states that a right claimed by the plaintiff has been created.

This right created by a court decision to have a constitutive (founding) character⁴⁷ must be registered in the public registers of immovable property, since according to the law on property and other real rights, every created right must be registered, since in addition to the legal title (*iustus titulus*) it must also be registered (*modus aquirendi*). Based on the past, regarding the creation of the right of servitude with a court decision some opinions of the authors are given, and their opinions are divided in two groups.

The first group thinks that in case that the right of servitude is created by a court decision, that right is also acquired at the moment of creation, so the court decision has a constitutive character at the moment of entry into force,⁴⁸ considering that there is no need to be registered in the real estate

³⁸ See: Statovci, Ejup, *E Drejta e Servituteve*, Prishtina, 2009, p. 209.

³⁹ Joint ownership is part of the property which is not individually owned or public property, but in which an inseparable interest is held by the owners of individual units (apartment or premises).

⁴⁰ See: Statovci, Ejup, *E Drejta e Servituteve*, Prishtina, 2009, p. 210.

⁴¹ Clarification: The obligatory lawsuit is presented: in cases when the owner of the service item can not create an agreement with the owner of the dominant land, in these cases the owner of the dominant item has the right to the law on ownership and other property rights, to create a right over the item of the owner of the service item.

⁴² Clarification: the recognition lawsuit is presented: in cases when the owner of the dominant thing has in possession the right of servitude over the thing in good faith and for several years in a row, but has no right created, neither by legal work nor by decision of the body state, therefore through the lawsuit of recognition claims that after receiving the decision from the court, the same owner to gain the right of real servitude in public registers. See: Morina, Iset. Nikçi, Selim, *Komentari i Ligjit të Procedurës Kontestimore*, Prishtina, 2012, p. 295.

⁴³ Brestovci, Faik, *E Drejta Procedurale Civile I*, Prishtinë, 2006, p. 154.

⁴⁴ Shih: Morina, Iset. Nikçi, Selim, *Komentari i Ligjit të Procedurës Kontestimore*, Prishtinë, 2012, p. 334-335.

⁴⁵ See: Brestovci, Faik. Morina, Iset. Qehaja, Rrustem, *E Drejta Procedurale Civile (Procedura Kontestimore)*, Prishtina, 2017, p. 384.

⁴⁶ See: Morina, Iset. Nikçi, Selim, *Komentari i Ligjit të Procedurës Kontestimore*, Prishtina, 2012, p. 334-335.

⁴⁷ See: Gashi, Haxhi, *Revista e Drejta*, no B5, Prishtina, p. 77. More extensively on the website : <https://juridiku.uni-pr.edu/getattachment/Revista--E-Drejta-/3--Haxhi-Gashi-B5-73-88.pdf.aspx>.

⁴⁸ See: Aliu, Abdulla, *E Drejta Sendore*. Prishtina, 2014, p. 263.

registers, notwithstanding only the decision of the court (state body) is enough to create the right of servitude and at the same time to gain that right.⁴⁹

The second group of authors claim that the right of servitude is created with a legal title, which in this case is the decision of the court, a decision that takes a declaratory character at the moment of its validity, and then with the registration in public books of real estate the right of the creation of the real servitude is obtained, and from the moment of registration it takes on a constitutive character.⁵⁰ I join the second group of authors based on the Law of Property and other property rights of Kosovo, which states that for any property right, if we want to create and acquire that right, we need a valid legal title (legal work, decision of a state body or by law) as well as registration in real estate registers.⁵¹ So from the moment of registration of the created right, the right of servitude is gained.⁵²

From the moment that the right of servitude is registered in the immovable registers, that right of servitude has a constitutive (founding) character.⁵³ According to the Law on Property and other real rights, it is clearly stated that all real rights as well as the right of real servitude are created on the basis of a legal work, a decision of a state body or a law,⁵⁴ and that for the creation and acquisition of a right of real servitude by a court decision, the court decision and registration in the Register of Immovable Property Rights is necessary. The third paragraph of the LPORR states that the Provisions in paragraphs 1 and 2⁵⁵ of this article shall apply in all cases unless otherwise provided by administrative decision or special law.⁵⁶ In this case, according to the interpretation of these provisions, it is clearly stated that in all cases of creating a servitude, whether through legal work, a decision of a state body or by law, registration must be made in public books to gain that right created.

Thus, the right of real servitude can be created by a court decision and this decision can be a judgment, in case the parties have filed a lawsuit and with the filing of the lawsuit a contentious civil procedure has been conducted, which ends with the issuance of the judgment, after that the contentious procedure always ends with a judgment except in two cases with a ruling and that when we are dealing with a lawsuit for obstruction of possession, and a lawsuit for a payment order,⁵⁷ which means that in the case of a lawsuit for the creation of an servitude, a judgment is always rendered.⁵⁸ Also, the right of real servitude can be created by taking a decision, in all those cases when the parties that are interested in creating a right of servitude before the judicial system submit a proposal, with which the uncontested procedure takes place. In all cases of contentious procedure, the procedure begins with a proposal and ends with a ruling,⁵⁹ and that even in the case of obtaining the servitude, the ruling has only a declarative effect, and by registering in the real estate books it acquires a constitutive (founding) character.

According to the Law, it is stated that the right of real servitude is created by a decision of the state body, which we emphasized that this decision may be the decision taken by the court, but since the law uses the term decision of the state body, then we can think about any other state body which may decide to establish the real servitude. In this case, another state body that can create a real servitude is the administrative body.⁶⁰

Since the jurisdiction of the court in creating the real servitude, with its decision, can create the servitude in all cases that have to do with the impossibility of using the dominant thing, of cases of real and property character, while the other state body ie the administration with its decision creates the real servitude in other cases, which the law has called "as well as other cases defined by law". In

⁴⁹ See: Statovci, Ejup, *E Drejta e Servituteve (cooperative aspect)*, Prishtina, 2009, p. 207.

⁵⁰ See: Gashi, Haxhi, *Revista e Drejta*, no B5, Prishtina, p. 75. More extensively on the website: <https://juridiku.uni-pr.edu/getattachment/Revista--E-Drejta-/3--Haxhi-Gashi-B5-73---88.pdf.aspx>.

⁵¹ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

⁵² See: Law no. 2002/5 on the register of immovable property rights, Prishtina, 2008, article 2, par. 1.2.

⁵³ Gashi, Haxhi, *Revista e Drejta*, no. B5, Prishtina, p. 75. More extensively on the website: <https://juridiku.uni-pr.edu/getattachment/Revista--E-Drejta-/3--Haxhi-Gashi-B5-73---88.pdf.aspx>.

⁵⁴ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008, article 253, par. 1

⁵⁵ Ibid. Article, 253 par.2.

⁵⁶ Ibid. Article, 253. par 3.

⁵⁷ See: Morina, Iset, Nikçi, Selim, *Komentari i Ligjit të Procedurës Kontestimore*, Prishtina, 2012, p. 295.

⁵⁸ See: Law no. 03/L-006 on Contested Procedure, Prishtina, 2008, article, 143, par 1.

⁵⁹ See: Law no. 03/L-007 on Uncontested Procedure, Prishtina, 2009, article, 17 par 1.

⁶⁰ Statovci, Ejup. *E Drejta e Servituteve (comparative aspect)*, Prishtina, 2009, p. 209.

these cases, the servitude is not constituted (established-acquired) by a court decision, but by a decision of another state body that is the administrative body (e.g. in land consolidation, incomplete expropriation, etc.)⁶¹.

4. Acquisition of real servitude

According to the legal system in Kosovo, as noted above, the right of real servitude to be established (constituted) must first be declared as a right, which means that it must be created through a legal title whether legal work (contract, will) or by decision of the state body (court or administrative), and after the creation (declaration) to be registered in the immovable registers. So, in order to gain a servitude right, it must first be created and then acquired.

As in the past, today as well, the current laws state that in order to acquire a property right, you definitely need a legal title (*iustus titulus*) and registration in the real estate books (*modus acquirendi*).⁶² As in the law of property and other property rights in Kosovo, property rights, as for the right of ownership,⁶³ as well as the right of servitude as a real right, must first be created by a legal work, a decision of a state body or by law, and then this created right to be registered in real estate registers,⁶⁴ otherwise it cannot be considered that a right of real servitude has been acquired, if that right does not appear in the immovable registers.

As noted above, the right of servitude can be created with a legal title. The legal title in this case can be created from a legal work (which can be a contract and a will), the decision of the state body (which can be the decision of the court and the decision of the administrative body), as well as the legal title created by law. According to LPORR-s in order to gain a servitude right, it must be registered.

Thus, the acquisition of the right of real servitude in real estate is done in case the right of servitude is created, and then that created right must be registered in the books of real estate. At the moment when the created right is registered in the books of real estate of the cadastral status, then we can say that we are the holder of the right of servitude.

When we say that we are the holder of a right of servitude then we have full rights to use that right without being hindered by anyone, and in case of any obstacle then we can approach the judicial system to seek legal assistance on the grounds that the right of servitude is violated by any physical entity.

5. Acquisition of real estate servitude by registration in real estate registers

The servitude registration system is as important as the creation (legal title), since the registration creates the created right. In Kosovo, the registration system has changed from the past until today. Comparing the past of 1858 with the present years, the registration system had changes in the acquisition and change of real estate rights.

The initial system derives from the Ottoman regime where as a document in which the registration of property rights in immovable property Land Patent; the same system continued in the time of Yugoslavia and that with the issuance of the law on Land Patent in 1931.⁶⁵ The Yugoslav legal system then had approximations from Austrian law. In Kosovo, at that time as the province of the former Yugoslavia, only Cadastral register was created, containing cadastral records such as property name, location, encumbrances on property, etc., which in fact contains the same records as the land register, from which no land patent but only the possession list which was considered as a

⁶¹ Purner, Stefan, Alu, Abdulla, *Komentar juridik i ligjit për themelimin e një regjistri për të drejtat e pronës së paluajtshme*, Prishtina, 2004, p. 14.

⁶² See: Selmani, Bashkim, *E Drejta Romake*, Tetovo, 2013, p. 443.

⁶³ Statovci Ejup. *Pronësia-Origjina dhe zhvillimi (comparative study)*, Prishtina, 2009, p. 319.

⁶⁴ See: Law no. 03/L-154, on property and other property rights, Prishtina, 2009, art. 253, par. 2 and 3.

⁶⁵ See: Statovci Ejup, *Marrëdhëniet pronësore juridike në pronën e paluajtshme në Kosovë*, Prishtina 1976, Re-published in 2009, p. 273.

document declaring the right of immovable property of the holder.⁶⁶

After this period, in 2002 in the state of Kosovo, the Law on the Establishment of the Register for Registration of Immovable Rights (Land Registry) was created⁶⁷ and this law was amended in 2003 and 2011⁶⁸; associated with this law, the law on Cadastre of 2003 amended in 2011 was established.⁶⁹

Today in the state of Kosovo, property rights, such as the right of ownership, the right of servitude, the right of pledge, the right of encumbrance, the right of construction, are acquired by registering in public registers of immovable property and to declare that are registered by the cadastral body, a certificate of property right is issued. In order to issue a certificate for the real right that in the concrete case for the right of servitude, first the created right (by legal work, decision of the state body or by law) must be registered in the real estate books.⁷⁰ And in the registration of the right of servitude in the cadastral situation, some conditions must be met, specifically a procedure must be passed as defined by the law on the establishment of the register of immovable property rights.⁷¹

So, to be considered as the acquired right of real servitude in real estate, that right must necessarily be registered in the public books of real estate,⁷² which are located in the Cadastral Status of the Municipality at the local level. Initially, in order to register a real servitude right, the party must have the legal title as a basic document which justifies that the right has just been created and has a legal basis,⁷³ but in order to gain this right, in addition to the legal title, the registration in the public books of real estate is also required.⁷⁴ So, the subject of law (physical or legal person⁷⁵), who has a legal title created by legal work, decision of state bodies or by law, must first formulate a written Request, with the object of the request: registration of immovable property rights⁷⁶ and in this case, the registration of the right of real servitude in the real estate.⁷⁷

The request is submitted to the Cadastral Status Office (MCO) in the territory where the immovable property is located.⁷⁸ Upon receipt of the request from the interested party, the MCO will confirm the date and time of receipt of the request for registration. The registration takes effect when the decision to register by MCO is placed in the Register.⁷⁹

The party who wants to obtain the real servitude must attach to her request the act of creating the servitude.⁸⁰ In case the servitude was created by contract, then the request is attached to the contract as a legal title to prove that the real servitude has been created. In case the servitude is created by a court decision, either by a judgment or a ruling, the decision must be accompanied by a court decision or some other administrative body, as if the official who accepts the request notices that the request is not attached to the legal title, then the MCO rejects the registration stating that the submitted documentation is not sufficient and that the documentation is not complete and does not provide a basis for registration⁸¹.

⁶⁶ See: Aliu, Abdulla, *E drejta sendore (pronësia)*, Prishtina 2014, p. 449.

⁶⁷ See: Law no.2002/5 on the Establishment of the Registry of Immovable Property Rights, promulgated by UNMIK Regulation, 2003/27, 18.08.2003.

⁶⁸ See: Law 2003/13 on amending law no. 2002/5.

⁶⁹ Law no.04/L-009 on amending law 2002/5, on the establishment of the register of immovable property rights, Official Newspaper of the Republic of Kosovo, no. 7/10 August 2011.

⁷⁰ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

⁷¹ See: Law no. 2002/5 on the Establishment of the Registry of Immovable Property Rights. Prishtina, 2008.

⁷² See: Kondili, Valentina, *E Drejta Civile II, (pronësia, të drejtat reale të përkohshme dhe trashëgimia)* Tirana, 2008, p. 30.

⁷³ The legal basis is considered, the legal title on the basis of which it is claimed to acquire the right of real servitude in immovable property, and whether that legal title is based on civil laws, the basis in civil laws is considered the legal basis in this case. For example: The legal basis in the contract for the creation of a servitude is the legal provisions of the Law on Obligations in Kosovo, ie looking at whether that contract is concluded in accordance with the law, if at that time it is considered that the contract (legal title) has legal basis.

⁷⁴ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

⁷⁵ See: Aliu, Abdulla, *E Drejta Civile (general part)*, Prishtina, 2013, p. 235 and 251.

⁷⁶ See: Law no. 2002/5 on the Establishment of the Register of Immovable Property Rights, Prishtina, 2008, Article 3, paragraph 1.

⁷⁷ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

⁷⁸ Clarification: in the specific case where the real estate servitude is located (eg: if the real servitude is located in the municipality of Prizren, then the request must be sent to the Cadastral Registry based in the Municipality of Prizren).

⁷⁹ See: Ibid. Article 3.6.

⁸⁰ See: Ibid, article 3, par 1.

⁸¹ See: Law no. 2002/5 on the establishment of the register of immovable property rights, Prishtina, 2008, Article, 3.4.

In case the documentation is complete, i.e. there is the request and the legal title, then the MCO registers the right over the immovable property, within fifteen (15) days from the day of receiving the request for registration and will notify the applicant.⁸² From the moment the right is registered in the immovable register, it is considered that the right of real servitude over the certain immovable property has been acquired,⁸³ otherwise if it is not registered but is only created with a legal title then it is not considered that the right of servitude is acquired,⁸⁴ and no subject of the right can be considered the holder of the right of real servitude in case that right is not registered in the immovable registers.⁸⁵

6. Conclusion

From the past until today, the right of real servitude is considered as the most unwanted right for the subjects of law, especially for the owners of real estate, who are obliged to allow their property to serve another entity insofar as it does not suffer irreparable damage.

With some changes from the past, the right of servitude in the present time is more legally defined and is protected, with the aim of coming to the aid of all subjects of law, whether physical or legal persons, which cannot meet their basic needs through real estate that they own.

It is legally defined that to be considered the holder of the right of servitude, every real right as well as the right of real servitude, in case it is claimed to be acquired, it must first be created through a legal title, and after the creation of legal title it must also be registered in the real estate register.

The creation and acquisition of the right of real servitude in real estate is discussed in the content of this paper, as the creation and acquisition are of special importance to establish a right which is claimed to exist. The content of the paper discusses how to create a right of real servitude in real estate as defined by the positive right in the state of Kosovo and that by separating creation from profit, as I think that the right of servitude should first be created as it is said by the Law on Property and Other Real Rights (LPORR) which states that it is created through a legal title such as legal affairs (contract, will), through state bodies (court or administration) or by law, and always in addition to the legal title, in order for that created right to be gained, it is also necessary to be register in the real estate books.

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⁸² Ibid. Article 3.6.

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⁸⁴ See: Law no. 03/L-154: On Property and Other Real Rights, Prishtina, 2008. Article 253, par 2, 3.

⁸⁵ See: Gashi, Haxhi, *Revista e Drejta*, no. B5, Prishtina, p. 75. More extensively on the website: <https://juridiku.uni-pr.edu/getattachment/Revista--E-Drejta-/3--Haxhi-Gashi-B5-73-88.pdf.aspx>.

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