



Ma. Sc. Ilir Berisha*

INJUNCTIVE MEASURES

ABSTRACT

In this paper, I have tried to elaborate on injunctive measures, as a civil litigation instrument through which the Court provides legal protection to interested parties, should the case require exigent actions.

In the present paper, the reader can find an introduction, which strives to give an idea of and explain the reason for regulating this matter as well situations in which the Court may seek judicial protection via such instrument of civil procedural law.

Further on, the meaning of the injunctive measures, the legal requirements that the court may set and the procedure to be followed therein were outlined.

The final section of the present paper highlights some issues that are deemed essential for such an instrument of the civil procedural law, whose provisions constitute a novelty in the Law on Contested Procedure.

Introduction

The right to own property is guaranteed.¹⁵³ Each physical or legal person has the right to enjoy his property peacefully. Nobody should be deprived of his/her property, save when that is done in public interest and in compliance with the requirements provided by law and with the general principles of the international law.¹⁵⁴ Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an

* Ilir Berisha, candidate for judge.

¹⁵³ The Constitution of the Republic of Kosova, published in the Official Gazette dated 9 April 2008, which entered into force on 15 June 2008, Article 46 (protection of property).

¹⁵⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, adopted on 4 November 1950, and Protocol No. 1, adopted on 20 March 1952 in Paris, Article 1, which, pursuant to Article 22 of the Constitution, are directly applicable in the Republic of Kosova and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

effective legal remedy if found that such right has been violated.¹⁵⁵ Ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with the thing in any manner he sees fit, in particular possess and use it, dispose of it and exclude others from any interference.¹⁵⁶

We have started the introduction to the present paper by quoting some property protection rules of our legal system, so as to give the reader an idea of the reason for setting such legal norms, because, more than often, the right to property as a constitutional category is infringed upon by various subjects of law.

Accordingly, to protect property rights, the lawmaker has issued different provisions, which explain the path that the interested parties should follow to obtain the necessary legal protection, by adopting the Law No. 03/L-006 on Contested Procedure (hereinafter LCP).¹⁵⁷

With the exception of the general provisions on the conduct of an ordinary contested procedure, the Law contains a separate chapter from Article 296 to Article 318, which regulates the injunctive measures when interested parties seek urgent judicial protection (summary procedure).

1. Understanding injunction

The Court provides subjects of law legal protection also when there is a danger that the enforcement of the civil legal sanction will not yield the desired result. In other words, it is provided when the subjective civil right is not likely to be pursued despite application of force by the competent body. In such cases, legal protection lies in issuing an injunction as provided in the provisions of LCP. When the legal requirements are met, the said injunction may be issued not only in the course of contested procedure, but also before its introduction. Yet, though we are dealing with the provision of legal protection, it should be noted that the measure is of a temporary nature. It only lasts until the court, in the contested procedure, takes a decision rejecting the request for legal protection as ungrounded or until the creditor realizes his credit against the debtor.¹⁵⁸

Realization of private subjective rights usually takes a relatively long time. This owing to the fact that, for a civil subjective right to be realized, a regular procedure establishing the private subjective right should be conducted as a principle. And it is only following such procedure that

¹⁵⁵ The Constitution of the Republic of Kosova, published in the Official Gazette dated 9 April 2008, which entered into force on 15 June 2008, Article 54 (judicial protection of rights).

¹⁵⁶ Law nr.03/L-154 on Property and other Real Rights, published in the Official Gazette on 4 July 2009, Article 18 (property).

¹⁵⁷ Official Gazette of the Republic of Kosova No. 38 dated September 20, 2008, Pristina, Law No. 03 / L-006 on Contested Procedure, promulgated by Decree no. DL-045-2008 dated 29.07.2008 by the President of the Republic of Kosova, Dr. Fatmir Sejdiu, and amended by the Law No. 04/L-118 on Amending and Supplementing the Law No.03/L-006 on Contested Procedure dated September 13, 2012.

¹⁵⁸ Dr. Brestovci, Faik, E drejta procedurale civile I, Prishtinë 2004, fq.13 [Civil Procedural Law I, Pristina 2004, p.13].

the procedure for the factual realization of the private subjective right (enforcement procedure) can be conducted. Hence, a long time will lapse pending factual realization of the private subjective right, as a unresponsive party that does not have the will to keep his promise voluntarily may use different methods to impede, avoid or deprive the claimant/creditor from pursuing his subjective right. That is why various rules enabling the claimant/creditor to secure his/her claim have been stipulated.¹⁵⁹

Upon the application of the claimant, the court will allow injunction when there are reasons to suspect that the execution of the decision on the rights of the claimant will become impossible or difficult. Such an application is allowed in different stages of contested procedure, namely the request for injunction may be filed before the very claim is filed, during the contested procedure, in the course of appellate proceedings and after the judgment has become final. The competent court decides on the request for injunction, depending on the phase of procedure in which such a request is filed.

Article 296.1 and 2 of the LCP clearly stipulates the jurisdiction of the court to decide on the proposal for injunction. Accordingly, only the courts of first and second instances have jurisdiction, as opposed to the court of third instance i.e. the court adjudicating upon extraordinary remedies, for paragraph 2 of Article 296 of the LCP clearly provides that “after the decision over the claim charge is an absolute decree one it is decided by the competent court for deciding over the charge claim of the first instance” [sic!].

2. Legal grounds for imposing the injunction

In order to decide on injunction, the provisions of LCP require that two requirements are met cumulatively and that:

- when the claimant renders the existence of his claim or subjective right plausible and
- when there is a danger that, should injunction not be issued, the adversary party will render the realization of the claim impossible or difficult to a considerable extent.¹⁶⁰

Hence, the court may render a ruling on an injunctive measure:

- if the party that proposes the injunction renders the claim plausible by corroborating his/her request or subjective right with relevant pieces of evidence.

¹⁵⁹ Dr. Morina, Iset, Komentari i Ligjit për Procedurën Kontestimore, Botimi i parë, Prishtinë 2012, fq.541 [Commentary on the Law on Contested Procedure, 1st Edition, Pristina, 2012, f.541].

¹⁶⁰ Article 297, par.1 of the LPK.

(*lat. fumus boni iuris* – likelihood of success on the merit of the case – presumption of sufficient legal grounds).¹⁶¹

- If there is a danger that the pursuance of the claim will be rendered impossible or difficult without the issuance of the injunctive measure.

(*lat. periculum in mora* – danger of inevitable damage of the right).¹⁶²

However, there is a debate at present between scientists and practitioners of civil procedure regarding the notion that was used in the first legal requirements, which reads: “if the claimant of the injunction renders the existence of his claim or subjective right plausible”.¹⁶³ They have their pros and cons as to whether a court decision on injunction does or does not prejudge a decision on the principal matter.

Professor Iset Morina believes that: “In this moment, it is still unknown and cannot be prejudged who is the creditor or the debtor, pending the announcement of court decision on the merits of the case. This is the principle of justice”.¹⁶⁴

Ways to render the pursuance of the claim impossible or difficult or to deprive somebody of pursuance thereof vary and involve, in particular, alienation and hiding of own property or encumbering thereof as well as other ways that would change the current status of affairs or that would adversely affect the rights of the claimant that has filed a request for injunction.

The court may issue an injunction provided that applicant does, within the timeline set by the court, make a security deposit for the measure and the type thereof that the court has determined for the damage that may be inflicted upon the adversary party by the issuance and execution of the injunction. Otherwise, should the applicant fail to make the provided security deposit within the stipulated timeframe, the court may reject the application. However, if the applicant does not have money, he may be exempted from the duty of making a security deposit, like the local government communities were.¹⁶⁵ Such security deposit shall be reimbursed within 7 days of the expiry of the injunction.

By way of such provision, the lawmaker aims to make sure that the court also provides protection to the adversary party, because, as it is known, it may happen that his/her status may deteriorate

¹⁶¹ http://en.wikipedia.org/wiki/Periculum_in_mora, *fumus boni iuris* is a Latin phrase, used in European courts, meaning "likelihood of success on the merit of the case" (literal meaning: "smoke of a good right"). The existence of this assumption should be examined by the court which will decide according to the results of the *fait accompli*.

¹⁶² http://en.wikipedia.org/wiki/Periculum_in_mora, *periculum in mora*, Latin for "danger in delay", is one of two conditions which must be asserted in actions aimed at obtaining a protective order or injunction to be granted the relief sought (the other condition being *fumus boni iuris*). The second condition is the *c.d. Prima facie* case. The burden of proof of danger in delay falls to the person who requests the injunction or order, demonstrating the existence of both requirements, *periculum* notice, and the risk of suffering serious and irreparable damage.

¹⁶³ Article 296, paragraph 1, item a) of the LCP.

¹⁶⁴ Dr. Morina, Iset, *Komentari i Ligjit për Procedurën Kontesitimore, Botimi i parë, Prishtinë 2012, fq.543* [Commentary on the Law on Contested Procedure, 1st Edition, Pristina 2012, p. 543].

¹⁶⁵ Article 297 of the LCP.

or he/she may face potential limitations or even suffer eventual damages, and, should the claim be found ungrounded by a final decision, he or she will be entitled to reparation from the security deposit.

In addition, we consider that the legal requirement for the applicant to make a security deposit so that the adversary part does not suffer damages and that, in case he or she does, he or is compensated from the security deposit, makes the application of the first even more credible to the court, because neither party can know the truth about the subject of dispute and no one can feel the danger from the adversary party with regard to the subject of dispute better than the applicant. Therefore, his/her readiness to offer (make) a security deposit indicates, at the same time, the credibility of his/her claim and his or her resolve to seek judicial protection for the subject of his/her claim.

With regard to the way the security deposit is made, the provision refers to the Law on Enforcement Procedure. According to the law, in cases for which a security deposit is provided, the security deposit is made in cash. The court may allow a security deposit in the form of a bank deposit, securities and valuable items the market value of which can be established easily and which can be quickly converted into cash.

3. Types of injunction

Law on Contested Procedure regulates, but does not limit itself to three main forms of injunction, which was not the case with the Law on Contentious Procedure of 1976 (old law). The following presents three main forms of injunction as well as their types, which cover the disputes arising from civil legal relations quite well.

a) Injunction in cash¹⁶⁶

The court may impose the following measures for injunction in cash:

- prohibition of adverse party from alienating, hiding, encumbering or possessing a certain property up to the value of the claim;
- protection of property from the adversary party, applicant or a third person;
- prohibition of accommodation of request or delivery of the item to the debtor or adversary party;
- establishment of the right to mortgage over an immovable property up to the value of the claim.

¹⁶⁶ Article 299 of the LCP.

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The court issues an injunction, which is sent to the adversary party or to the debtor of the adversary party and, in certain cases, to the public registry, if it relates to such a measure, which is considered enforced as of the moment when the ruling is served. **b) *Injunction in items***¹⁶⁷

To secure the claim towards a certain item or a part thereof, the court may impose the following measures:

- prohibition of adverse party from alienating, concealing, encumbering or possessing a property against which the claim was filed;
- protection of property from the adversary party, applicant, a third person or its deposition in the court;
- prohibition of the adversary party from carrying out actions likely to damage a part of property;
- authorizing the applicant to carry out certain activities on the given object.

Injunction measures should cover the claim that is secured through such injunction measures in its entirety.

c) *Injunction of other rights*¹⁶⁸

The following measures may be imposed to secure other rights or protect the current state of affairs:

- prohibition of adversary party from performing certain activities without an order for performance of such activities;
- authorizing the applicant to undertake certain activities;
- leaving a certain property of the adversary party under the protection and care of a third person;
- other measures required to secure the claim.

Upon the imposition of the prohibition and until injunction becomes effective, registration with public registries or any other change is not possible, otherwise that will be subject to liability as per rules of civil law. On the other hand, any action taken while the decision is in force has no legal effect.

The court may allow the claim be secured with some of the various types of injunction measures, for a certain value or item, but not exceeding the value of the claim.

¹⁶⁷ Article 300 of the LCP.

¹⁶⁸ Article 301 of the LCP.

4. Application for injunction

The procedure of imposing injunctive measures starts with lodging a written (submission) or oral (in the course of proceedings i.e. court session) application. The written application or verbal application made during the court session should contain all elements stipulated in the provisions of Article 304 al.3 of the LCP.¹⁶⁹

However, owing to the fact that application for injunction may be filed at any stage of proceedings, it can also be made orally during the court session, but by always giving plausible reasoning of underlying grounds. In addition, the application should state the proposed injunctive measure and the means and subject thereof clearly.

The court imposes the injunction measure mainly after the adversary party has made a statement thereon, save cases when this is not possible, namely when the applicant renders the claim that the injunctive measure is grounded and exigent and that any postponement would fail to serve its intention plausible. The adversary party has the right to file a reply in writing about the issuance of the injunctive measure within 7 days.

5. Urgent injunction

The court may, upon application, issue an injunction without having received the statement of the adversary party. The adversary party is entitled to challenge the injunction within 3 days of its receipt, file a reply and challenge its grounds. On the other hand, the court, having received the reply, has to schedule the session within 3 days, summon the parties, hear their allegations and render a ruling on the injunctive measure approving or rejecting the application for injunction.¹⁷⁰

Indeed, the court, in issuing the injunction, determines the type of injunctive measure, the means by which it will be enforced and the subject thereof, by, of course, abiding by the rules of enforcement procedure.

Hence, the foregoing indicates that the court sends the injunction to the competent enforcement court in order to execute it and register it in the Immovable Property Rights Register.

If injunction is issued before the claim is filed, the ruling imposing the injunction measure also sets a timeline which may not be shorter than 30 days and within which the applicant may file a claim and provide the court with evidence indicating that he/she has acted as per its recommendations.¹⁷¹

Injunction remains in force pending another decision on its revocation and at least for 30 days after the requirements for compulsory enforcement are met. If the claim is rejected, the injunction

¹⁶⁹ Sylejmani, Shukri, *Procedura Kontestimore, Pjesa e dytë, Ligjërata të autorizuar nga Instituti Gjyqësor i Kosovës, Prishtinë 2014* [Contested Procedure, Part II, Lectures authorized by Kosova Judicial Council, Pristina 2014].

¹⁷⁰ Article 306 of the LCP.

¹⁷¹ Article 308 of the LCP.

remains in force until the judgment becomes final. On the other hand, the court usually expunges the injunction from public registries.¹⁷²

6. Legal remedies

A complaint against injunction may be filed within 7 days of its receipt. The adversary party may file a reply to the complaint within 3 days of its receipt. On the other hand, the court of second instance must, within 15 days, decide on the complaint filed against the injunction. Complaint against injunction does not stay the execution thereof.¹⁷³

Pursuant to the provision of Article 312 and in agreement with the adversary party, the right to mortgage over a given item may be established instead of issuing an injunction.

7. Costs

Costs incurred in the course of injunction proceedings shall be borne by the applicant beforehand. However, should the applicant fail to pay for the costs within the timeline set in the injunction, the court shall terminate the proceedings and annul the actions taken. The court shall render such a decision even when the circumstances on account of which the injunction was issued have ceased to exist or changed and rendered the further existence thereof unnecessary. As to the adversary party, the court shall terminate the proceedings and annul the actions performed even when:

- the adversary party deposits the required sum for the claim that is secured by interest rate and expenses,
- renders the realization or the injunction plausible,
- it is confirmed, by a final decision, that the application was not filed or had been rejected.

8. Damages

According to the general rules of property rights, both applicant and adversary party are entitled to damages inflicted by the failure to observe the injunction and if it is established that the approval of [application for] injunction was ungrounded or unjustified. Claims for damages are status barred within 1 year from the day of the expiry of injunction.

Injunctions are implemented by the court that would be competent to execute the final judgment.

¹⁷² Article 309 of the LCP.

¹⁷³ Article 310 of the LCP.

9. Conclusion

- Injunction as an instrument in the version provided by the Law on Contested Procedure is undoubtedly a novelty among many others that the Law has brought, as opposed to the old Law on Contested Procedure of 1977 (SFRY Official Gazette No. 4/77), which has not regulated such an instrument of civil procedure. However, this field was regulated by the provisions of the Enforcement Procedure Act of 1978 (SFRY Official Gazette No. 20/78).
- In addition to general provisions on the conduct of an ordinary contested procedure, the Law on Contested Procedure has a separate chapter regulating injunction when parties involved seek urgent judicial protection (summary procedure).
- The court issues the injunction when two requirements are met cumulatively: when the applicant renders the existence of the claim or his/her subjective right plausible and when there is a danger that, should injunction not be issued, the adversary party will make the realization of the claim impossible or difficult to a considerable extent.
- The injunction issued by the court cannot and may not prejudge the outcome of the principal matter, as, even if the court issues an injunction favoring the claimant, he/she may lose the case.
- There is a substantial difference between interim measure and injunction, because the court may render a ruling on interim measure upon claimant's application without having received the statement of the adversary party. The adversary party may challenge the ruling on interim measure and grounds thereof within 3 days of its receipt. On the other hand, the court, having received the reply, must schedule the session, summon the parties, hear the allegations of both parties and render a ruling approving or rejecting the application for injunction within 3 days.
- In order to give leeway to the court, depending on the circumstances of a given case, the lawmaker has provided several injunctive measures so as to serve the final purpose – injunction's efficiency and efficacy.

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