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Mortgage as a legal instrument for enforcement of the contract of sale

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Abstract. Mortgage is a real means of securing the contract, the contracting parties, in many cases agree to finalize their agreement on a certain item by concluding a written contract, but in some cases the contracting parties can also be ensured in various ways to adhere to the rights and obligations arising from their contract. The creditor on the one hand as the pledgee and the debtor on the other hand as the pledgor are those who enter into a contract by which they create their rights and obligations arising from the contract which must be drafted in support of the provisions of the Law on Obligational Relationships. At the time of entering into the contract they can also enter into a mortgage contract as a real means of securing the contract, where the creditor is assured that if the debtor does not meet the main contractual requirement, then by mortgage as a real means of securing the contract he will realize the main requirement of the contract, i.e. through the mortgage as a real means of securing the contract the pledgee creditor manages to fulfill the main requirement of the contract which the debtor has not been able to meet by the pledgor.

Keywords. Mortgage, Contract, Creditor, Debtor, Request

Introduction

Mortgage is a real right over the foreign property, mortgage is the right of pledge on immovable property unlike pignus (hand mortgage), which is a real right on the foreign property but in movable property also the pledge of Pignus has mortgages, both of which are real rights in the foreign property, but the pledge is related to movables, while the mortgage is related to immovables.

Mortgage in the contractual aspect is a real means of securing the contract, i.e. means which secures the creditor's claims against the debtor, initially the creditor's claims were secured by transferring ownership of a certain item in the name of the creditor, later by submitting certain item in the possession of the creditor, while even later and including the current time the insurance of the creditor's claims is done even with the registration of the rights to the foreign item in real estate register in such a way that the creditor secures his claims in relation to the debtor otherwise we can also call it a mortgage.

Mortgage right in immovable property (mortgage)

Mortgage is the right of pledge on immovable property, in which the pledge is done by registering the creditor's rights in the cadastral registers in the land books or in tabulation, while

even after the mortgage is encumbered, the real estate still remains in ownership, and in the possession of the Debtor.¹ In Real Law, in addition to the right of pledge on movable property, there is also the right of pledge on Immovable property, which is known as Mortgage.²

In any case where the object of the pledge right is real estate this is called a Mortgage and in legal theory the mortgage is a real right.³ Classification of the right of pledge into movables into hand mortgages and into immovables or Mortgages was first made by Hugo Grotius sometime in the seventeenth century.⁴

According to the Kosovo LPORR (Law on Property and Other Real Rights), Mortgage means the creation by law or by an agreement of an interest in immovable property, which gives the mortgage creditor (mortgagee) the right to initiate the foreclosure proceedings for such immovable property for the purpose of fulfilling an obligation that is secured by the mortgage and has fallen due.⁵ Mortgage is a real right that is put on the property of the debtor or a third party, for the benefit of the creditor, to ensure the fulfillment of an obligation.⁶

Object of the mortgage

Mortgage is a real right in the foreign item by which the mortgagor creditor secures his claim or claims to the mortgagor's debtor, in order to secure this claim of the creditor, the debtor must pledge a certain item either movable item (hand mortgage), or immovable item (mortgage), the difference between a pledge and a mortgage is their object because it is exactly immovables that are object of the mortgage. The object of the right of pledge in general but also of the mortgage in particular is a matter of certain provisions.⁷

The object of the Mortgage in particular are the immovables with which the creditor's claim is secured, which are in cash, since the mortgage right is registered in the public registers, the creditor's claims must be determined in advance when it is registered.⁸

When it comes to the object of the mortgage, it is required to respect the principle of specificity of the principle of real rights, where according to this principle it is stated that ownership exists in each item separately, which means that the object of the mortgage can be only certain or what is considered certain item.⁹ According to the Civil Code of the Republic of Albania, mortgage items are immovables, usufruct of these items in addition to the legal usufruct of the parents, as well as the rights to property possession over these items¹⁰

According to the Kosovo LPORR, the mortgage extends to all parts of the encumbered immovable property, including the buildings that stand there or are inextricably attached to the land.¹¹ The mortgage also includes all other parts and natural fruits of the real estate, as long as

¹Aliu, Abdullah, Real Right (Ownership), Prishtine, 2004, page 219.

²Aliu, Abdullah, Real Right (Ownership), Prishtine, 2014, page 353.

³Ibid, page 353.

⁴Statovci, Ejup, Real Right (Ownership), Prishtine, 2009, page 221.

⁵Civil Code of the Republic of Albania no 7850, <https://qbz.gov.al/previeë/f010097e-d6c8-402f-8f10-d9b60af94744>, Official Gazette of the Republic of Albania,, Tirana, 1994, article 560, page 135.

⁶Civil Code of the Republic of Albania, No.7850, <https://qbz.gov.al/previeë/f010097e-d6c8-402f-8f10-d9b60af94744>, Official Gazette of the Republic of Albania,, Tirana, 1994, article 560, page 135.

⁷Aliu, Abdullah, Real Right (Ownership), Prishtine, 2014, page 361.

⁸Statovci, Ejup, Mortgage Law, Prishtine, 2009, page 235.

⁹Aliu, Abdullah, Civil Law, Prishtine, 2013, page 39.

¹⁰Civil Code of the Republic of Albania, No 7850, <https://qbz.gov.al/previeë/f010097e-d6c8-402f-8f10-d9b60af94744>, Official Gazette of the Republic of Albania,, Tirana,, 1994, article 561, page 135.

¹¹Law on Property and other Real Rights, no 03/L-154, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2643>, The Assembly of the Republic of Kosovo, June 2009, article 176.1, page 38.

these are not separate from the main item. The mortgage also includes all the accessory items of the real estate which are owned by the owner of the real estate.¹² If the property is leased, the mortgage also extends to the lease claim of the owner of the property. As long as the claim is achievable, the claim is released from liability twelve months after the beginning of the expiration of the term, except that the mortgage debtor has previously marked the sequestration.¹³ In a part of co-ownership or joint ownership, a mortgage cannot be put without the consent of other co-owners or joint owners.¹⁴ In addition to immovable property, in certain cases, the object of the mortgage can also be movable property with registration. The legal system foresees what are those movable items which allow to obtain the right of mortgage by registering in adequate registers similar to that of immovable property, so it happens with ships, planes, and other objects in which the right on mortgage is acquired by registration in the appropriate special public registers, on which the mortgagee acquires the right of mortgage on ships, aircraft even though they are movables.¹⁵

Ways to get a mortgage

The right of pledge on immovable property is acquired in the same way as on movable property by means of a legal title (just titulus) and the mode of acquisition (modus acquirendi), the legal title is needed both for the acquisition and the need for a pledge right in movable property as well, even in immovable property, they are expressly provided by law, they are: legal actions (contracts), court decisions and by law. The way of gaining (modus acquirendi) of the right to pledge on real estate includes registration in public registers.¹⁶

According to the Kosovo LPORR, the mortgage is created through a Contract between the owner of the encumbered immovable property and the mortgage creditor, as well as through registration in the immovable property registers.¹⁷

Contracted Mortgage

As a legal basis for the establishment of the mortgage is the Contract by which the right of pledge is created in movable and immovable property, concluded between the creditor on the one hand and debtor or the owner of the real estate on which the mortgage is encumbered, on the other hand, the contract is made in written form, by which the debtor or the third person is obliged to allow the mortgage creditor to register his mortgage right in the public real estate registers.¹⁸ According to the Civil Code of the Republic of Albania, the mortgage is entered into by contract or by law. The mortgage contract must be made by a notary deed.¹⁹ The contracted mortgage is voluntary because it is created based on the will of the creditor and the debtor, respectively the debtor agrees to leave the mortgaged property to secure the creditor's claim to

¹²Law on Property and other Real Rights, no 03/L-154, <https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=2643>, The Assembly of the Republic of Kosovo, June 2009, article 176.1, page 38.

¹³Ibid, article 178.1.2, page, 38.

¹⁴Ibid, article 179, page, 38.

¹⁵Statovci, Ejup, The Right of Pledge, Prishtine, 2009, page 236.

¹⁶Poaty, faqe, 252.

¹⁷Law on Property and Other Real Rights, no 03/L-154, <https://gzk.rks.gov.net/ActDocumentDetail.aspx?ActID=2643>, The Assembly of the Republic of Kosovo, June 2009, article 173, page 37.

¹⁸Aliu, Abdullah, Real Right (Ownership), Prishtine, 2004, page 226.

¹⁹Civil Code of the Republic of Albania, No 7850, <https://qbz.gov.al/previcë/f010097e-d6c8-402f-8f10-d9b60af94744>, Official Gazette of the Republic of Albania, Tirana, 1994, article 562, page 153.

the debtor, it must be taken into account that the whole object of the contracted mortgage is real estate.²⁰

Mortgage Contract

The contract is an agreement of two or more parties that aim to create change or extinguish a legally binding relationship.²¹ The legal relationship, which the contract creates, amends or terminates, must be a property relationship, i.e. it must have personal items or liabilities as its object which can be assessed economically.²² The contract is considered as a part of the group of bilateral legal affairs and it is a legal instrument which creates obligations with the will of the parties.²³ The French Civil Code states that a Contract is an agreement by which one or more persons enter into, to one or more other persons, to transfer, to do or not to do something.²⁴

From what was said above we understand that for the contracting parties to enter into a contract they must have their purpose of why they are entering into the contract and what the object of the contract is which is a movable or immovable property, item which taken from the aspect of real means of securing the contract is movable item (hand mortgage) and immovable item (Mortgage). The mortgage contract is one of the legal basis for the acquisition of the mortgage, which is concluded between the mortgagee creditor and the mortgage debtor on the other hand, by which the creditor requests that the claim be secured by means of the item left in the mortgage where in case of non-fulfillment of the claim by the debtor then he realizes his right before the fulfillment of the claim by selling the immovable property and leaving it in the mortgage. The object of the mortgage contract are immovables.

How to enter into a mortgage contract

A mortgage that is created (established) on the basis of a contract (with legal work) is called a contracted mortgage.²⁵

The mortgage contract is concluded between the contracting parties, the mortgagee on the one hand and the mortgagor on the other, where the mortgaged object is immovable property, where the creditor through this contract secures his claims against the debtor, thus providing the main claim, the contract is concluded in writing and it is signed by the contracting parties.

Mortgage document:

“In order to be valid, the mortgage document must be in written and certified in the same way as other real estate transactions in compliance with applicable legislation. A valid mortgage document will include : (a) the name, address and details of the pledgor and the pledgee; (b) a description of the obligations secured by the mortgage, or, if the obligation is set out in a separate principal agreement, the exact reference to the principal agreement; (c) a sufficient description that reasonably identifies the mortgage collateral, including the cadastral number of the immovable property, and the name of the municipality where the real estate is located; (d) the relevant possession list, or equivalent; (e) the relevant building permit, if any;

²⁰Aliu, Abdullah, Real Right (Ownership), Prishtine, 2014, page 363.

²¹Gojani, Skender, Curri Granit, Contractual Right, Prishtine, 2020, page, 19.

²²Ibid, 19.

²³Dauti, Nerxhivane, Contractual Right, Prishtine, 2013, page, 12.

²⁴French Civil Code, <http://www.fd.ulisboa.pt/ep-content/uploads/2014/12/Codigo-Civil-Francia-French-Civil-Code-english-version.pdf>, 21 shkurt 2004, Article 1101, page 145.

²⁵Gojani, Skender, Curri Granit, Contractual Right, Prishtine, 2020, page, 253.

(f) the relevant exploitation permit if any; (g) the maximum amount of the financial liability or possible future financial liabilities secured by the mortgage; (h) a bold statement indicating that the mortgage execution procedure may lead to the seizure of the property and the eviction of the mortgagor from the property; (i) the means of sending the documents to the pledgor in the event of non-compliance with the obligation or the procedures for the execution of the pledged property; (j) the date when the mortgage document was signed; signatures authorized by or on behalf of the pledgor and the pledgee; (k) such other provisions as may be required by this law and applicable legislation".²⁶

According to the LPORR of the Republic of Kosovo:

"1. The mortgage contract must be concluded in writing. The signatures of the real estate owner and the mortgage creditor must be certified according to the same rules as other real estate legal affairs. 2. The mortgage contract must contain at least the following data" 2.1. the names and addresses of the real estate owner as well as of the debtor of the secured claim, in case he is not at the same time the owner of the real estate encumbered; 2.2. accurate description of the encumbered immovable property by location, street and the house number or 2.3. other accurate data about the position as well as the cadastral number; 2.4. a possession list and certificates about the use of the real estate, if necessary; 2.5. the amount of claim secured by the mortgage, including interest; eventually the maximum contracted amount is given; 2.6. a written warning in capital letters, that in case of delay in payment or in case of other contracted conditions the mortgagee will initiate the execution procedure, which may lead to loss of ownership in the real estate encumbered and abandonment of house and real estate 2.7. the parties make other agreements, if required by this law or other laws; 2.8. the parties may make other agreements, as long as the imperative rules allow; 2.9. the date of signing the contract 2.10. certified signatures of the owner of the encumbered immovable property and the mortgage creditor."²⁷

When the debtor is unable to fulfill his obligation to the creditor, according to the contract for the mortgaged debt, then the creditor is authorized in legal proceedings to request the sale of the mortgaged real estate and to realize his claim.²⁸

Contracting parties in the Mortgage Contract

We said that the Contract is an agreement of two or more persons who intend to establish change, or terminate a legal relationship of obligation. The persons who participate in this agreement and enter into a contract to create, change or terminate a relationship of obligations are also called a contracting entity or party.²⁹ Contracting parties can be natural persons and legal entities, but in order to produce legal effect the agreement of the contracting entities must then meet certain conditions, such as: working ability of the parties, the will, the subject of the contract and the basis of the contract.³⁰

In order to be a party in a Contractual relationship which also applies to the Mortgage Contract as well as to many other contracts without distinction the parties must first have the ability to work which is reached at the age of 18 or by emancipation when a person has entered

²⁶Law on mortgage.2002/4<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2429>The Assembly of the Republic of Kosovo, December, 2006, article 5, page, 12.

²⁷Law on Property and other Real Rights, no. 03/L-154, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2643>, The Assembly of the Republic of Kosovo, June, 2009, article 173, page 37.

²⁸Gojani, Skender, Curri Granit, Contractual Right,, Prishtine, 2020, page, 253.

²⁹Dauti, Nerxhivane, Law of Obligations, Prishtine 2013, page 54.

³⁰Po aty, faqe, 54.

into marriage in 16 years of age with the permission of the competent body.³¹ Persons under the age of 15 who are in a working relationship and have their own income, have limited working abilities, as well as persons under the age of 14 who do not have the ability to work and do not meet the condition to be a contracting party.³² In order for the legal entities to be a contracting party in a legal relationship as well as a party in the mortgage contract they must be represented by natural persons, the natural person who enters into a contract for the legal entity as well as have full working capacity and authorization to enter into the contract.³³

The Rights of the Contracting Parties in the Mortgage Contract

The Mortgage contract is concluded after the conditions provided by law for the conclusion of the contract are met, as well as the rights of the mortgage creditor and the mortgage debtor are defined by law, which right can be protected only after the conclusion of the contract.

Mortgage Creditor Rights

The mortgage creditor, as the holder of the Mortgage, has several authorizations, respectively some rights, which are: the right to realize his claim from the item left in the mortgage, the right of priority in the realization of the claim, the right not to allow the reduction of the value of the mortgaged item, the right to transfer the mortgage, the creditor has the right to oppose the actions of the mortgagor debtor by which actions the value of the mortgaged item is reduced and this jeopardizes the fulfillment of the main requirement, the right of creating over the mortgage, etc.³⁴

Mortgage Debtor Rights

The Mortgage Debtor is also the owner of the item left in the mortgage, as we know that the mortgage is obtained by registration and without delivery of the item and this means that the mortgage item is in the possession and ownership of the debtor, because only the owner of the item can leave his own item mortgaged and no one else.

The owner of the immovable property (Debtor) has certain rights over the property he owns and is mortgaged, such as: use of the item and collection of fruits, the right to having the pledged item, the right to meet the debtor's claim, the right of objection in relation to the secured claim.³⁵

Conclusion

In this Scientific Research I have tried to carry out a study on the right of pledge in real estate (mortgage) and the ways of obtaining the Mortgage, earlier herein we stated that the mortgage entered into the right of pledge and the mortgage itself is a pledge, but the mortgage is a pledge in real estate as compared to a hand mortgage which is a mortgage on movables.

Mortgages have also existed under Roman law, according to Roman law in slave-owning times where large tenants gave land to work for small tenants, and thus to secure the claims of large tenants the lack of a mortgage contract became apparent. thus having no small rents to secure the demand of the large tenants, then arose the right to transfer the right without possession otherwise known as the Mortgage. Based on this research, it turns out that the

³¹Dauti, Nerxhivane, Law of Obligations, Prishtine 2013, page 54.

³²Ibid, 55.

³³Ibid, 55.

³⁴Aliu, Abdullah, Real Right (Ownership), Prishtine, 2014, page 387.

³⁵Ibid, page 393.

Mortgage is regulated by the Law on Mortgages, as well as according to the LPORR of Kosovo, where the LPORR of Kosovo shows that the mortgage is a real right over the foreign item which is acquired through the legal title (Contract for Mortgage) and then by registering in the immovable property registers.

The Mortgage Contract is a contract concluded according to the legal provisions of the LCTs of the Republic of Kosovo, where the contracting parties are the creditor and the debtor, but in the mortgage contract the mortgagee enters into a contract with the mortgagor to secure the main claim if the claim is not met by the debtor in the phases of the creditor then the creditor having as legal basis the mortgage contract, has the right to request the sale of the mortgaged item on the basis of the contract through the courts to realize his main claim.

The object of the mortgage contract is immovable property or real estate, the debtor is the owner of the mortgaged item and its possessor, and the object of the mortgage contract is always in the ownership and possession of the debtor until the expiration of the term of fulfillment of the main demand. The mortgage contract contains information about the Creditor, information about the debtor, it contains the object of the contract, the purpose of signing the contract, the rights of the debtor, the rights of the creditor and finally it contains the signatures of the contracting parties. Other titles besides the contract for obtaining a mortgage are the law and court decisions, as well as always at the end the registration in the immovable property registers, since legal titles are only documents on the basis of which the mortgage is obtained.

Based on the research findings we have come to the conclusion that in the Republic of Kosovo, the mortgage can be obtained through legal titles such as contracts and by the way of obtaining, registration of immovable property rights in cadastral registers.

References

- [1] Aliu, Abdullah, E Drejta e Sendore (Pronësia), Prishtinë, 2004.
- [2] Aliu, Abdullah, E Drejta Civile, Prishtinë, 2013.
- [3] Aliu, Abdullah, E Drejta e Sendore, Prishtinë, 2014.
- [4] Gojani, Skender, Curri Granit, E Drejta Kontraktore, Prishtinë, 2020.
- [5] Dauti, Nergjivane, E Drejta Kontraktuese, Prishtinë, 2013.
- [6] Dauti, Nerxhivane, E Drejta e Detyrimeve, Prishtinë, 2013.
- [7] Puhan, Ivo, E Drejta Romake, Shkup, 1968.
- [8] Statovci, Ejup, E Drejt e Pengut, Prishtinë, 2009.
- [9] Gjeçovi, Shtjefën, Kanuni I Lekë Dukagjinit, Shkodër, 1933.
- [10] Kodi Civil i Republikës së Shqipërisë, Nr.7850, <https://qbz.gov.al/preview/f010097e-d6c8-402f-8f10-d9b60af94744>, Fletorja Zyrtare e Republikës së Shqipërisë, Tiranë, 1994.
- [11] Civil Code of France, <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf>, 21 shkurt 2004.
- [12] Ligji për Pronësinë dhe të Drejtat të Tjera Sendore, nr. 03/L-154, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2643>, Kuvendi i Republikës së Kosovës, Prishtinë, Qershor 2009.
- [13] Ligjin për Hipotekat nr.2002/4 <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2429> Kuvendi i Republikës së Kosovës, Dhjetore, 2006.
- [14] Ligji Për Trashëgiminë i Kosovës nr.204/26, [javascript:doPostBack\('ctl00\\$MainContent\\$srAktet\\$ctl00\\$lblAn','\)](javascript:doPostBack('ctl00$MainContent$srAktet$ctl00$lblAn',')), Kuvendi i Republikës së Kosovës, Shkurt; 2005.