



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

Application no. 46344/08
Nataliya Vasilyevna MAZNENKO
against Ukraine
lodged on 18 September 2008

STATEMENT OF FACTS

The applicant, Ms Nataliya Vasilyevna Maznenko, is a Ukrainian national, who was born in 1967 and lives in Kyiv.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 8 October 1996 I.Y. sold his one-room flat to V.K., who re-sold it to O.N. a few days later. Both contracts were certified by notary R.

On 18 October 1996 O.N.'s title to the flat was recorded in the municipal real estate owners' register of the Technical Inventory Bureau.

On 1 November 1996 the applicant bought the above flat from O.N. for USD 6,500 (United States dollars) at the Real Estate Bourse (an intermediary brokerage organisation) and on 6 November 1996 her title was recorded in the municipal real estate owners' register.

Having renovated the flat, in December 1996 the applicant moved in to live there with her son Y.Y., born in 1987, and registered the flat as the family's permanent residence.

In 1999 law-enforcement authorities contacted S.Y., I.Y.'s son, in connection with a criminal investigation against O.N. and several other persons on suspicion of fraudulent transactions in real estate. S.Y. was informed that his father was in a psychiatric hospital and that the police were investigating, in particular, whether he had been deprived of his flat against his will.

In July 1999 I.Y. underwent forensic assessment of his legal capacity. Following this assessment, the Kyiv Forensic Experts Bureau concluded that I.Y., who was suffering from schizophrenia and chronic alcoholism, had had an impaired ability to understand and control his actions at the time of the expert assessment and that this would also have been the case on 8 October 1996, when he had signed the sales contract.

On an unspecified date O.N.'s co-defendants in the above criminal proceedings, including V.K. (the first buyer of the flat), were committed to stand trial before the Zhovtnevy District Court of Kyiv.

On 20 April 2000 the court convicted them of several episodes of illegal dealings in real estate. V.K. and V.B. were convicted, in particular, of having fraudulently divested I.Y. of his flat, jointly with O.N., the proceedings against whom had been disjoined, as his whereabouts had not been established. The court found that V.K., V.B. and O.N. had convinced I.Y., who had been struggling financially and suffering from alcoholism, to make money by selling his flat in exchange for a smaller one. After having sold his flat, I.Y. had temporarily moved into a rented accommodation, from which he had eventually been expelled and became homeless. The court sentenced V.K. and V.B. to eight years' imprisonment and ordered confiscation of all their personal property. It left without examination I.Y.'s civil claim for damages lodged within the framework of the criminal proceedings and notified him of his right to lodge it in civil proceedings.

On 29 June 2000 the Kyiv City Court of Appeal upheld this judgment.

On 5 February 2001 the Leningradskyy District Court of Kyiv divested I.Y. of legal capacity and appointed his son S.Y. as his guardian. According to the applicant, S.Y. did not take care of I.Y., and the latter often lived in the basement of the building, in which his former flat was situated, where neighbours brought him food and clothes.

On 5 October 2001 the Svyatoshinskyy District Prosecutor instituted reclamation proceedings on behalf of I.Y. against the applicant, O.N., V.K. and V.B., seeking that all the transactions concerning it be quashed.

Following I.Y.'s death in December 2001, the prosecutor continued to support the reclamation action on behalf of S.Y. as his father's heir.

On 3 December 2002 the Svyatoshinskyy Court heard the case in the absence of the applicant and other defendants and annulled the three sales contracts concerning I.Y.'s former flat. It ordered O.N., V.B. and V.K. to pay the applicant a restitution fee of UAH 34,645 (hryvnias), which amount was equivalent to the USD 6,500 paid by her for the flat according to the official exchange rate as of the date of the judgment.

This judgment was not appealed against within the applicable time-limit and became final.

On 23 December 2003 S.Y. registered his title to the flat in the municipal real estate owners' register as I.Y.'s heir.

On 9 June 2004 S.Y. instituted civil proceedings against the applicant seeking her eviction and cancellation of her registration in the flat.

On 18 June 2004 the Svyatoshinskyy Court examined this claim in the applicant's absence and found that she had to be evicted from the flat, as there was no longer a legal basis for her to live in it. It further ordered cancellation of the registration of the applicant's residence in the flat.

This judgment was not appealed against within the applicable time-limit and became final.

On 21 July 2004 a writ of execution was issued in respect of the applicant's eviction and cancellation of her registration.

On 6 August 2004 the State bailiffs instructed the applicant to vacate the flat within ten days.

On 13 August 2004 the applicant requested the Svyatoshinsky Court to suspend execution of the judgment of 18 June 2004, as she had been deprived of an opportunity to take part in the relevant court proceedings and had only found out about the eviction order from the bailiffs. It appears that this request was not followed up.

On 16 August 2004, in the applicant's absence, S.Y. escorted by the bailiffs broke into the flat and replaced the locks. The bailiffs prepared a list of the applicant's belongings in the flat and entrusted them to S.Y. for safe-keeping until the applicant claimed them.

On an unspecified date the registration authority annulled the applicant's and her son's permanent residence registration in the disputed flat.

On 18 August 2004 the enforcement proceedings were terminated on the basis that the judgment had been enforced in full. Subsequently (on 2 November 2004) the Kyiv City Department of Justice dismissed the applicant's complaint, in which she alleged that the bailiffs had acted unlawfully in evicting her.

On the same date (18 August 2004) the Svyatoshinsky Court restored the time-limit for the applicant to appeal against the judgment of 18 June 2004, as she had not been informed of it in good time.

On 19 August 2004 eight residents of the building, where the disputed flat was situated, signed a petition to the President of the Svyatoshinsky Court in support of the applicant. They alleged, in particular, that granting the flat to S.Y. had been unfair, as he had been partly responsible for the fact that his father had lost it. According to their submissions, S.Y. had never taken care of his father, either before the sale or after it. I.Y. had lived on the street and had died on the stairs of their building. The applicant, on the other hand, had acquired the flat in good faith, had no other home, had invested time and funds in its renovation and had been actively involved in a project for rehabilitation of the staircase in their building.

On unspecified dates the applicant appealed against the judgments of 3 December 2002 and 18 June 2004, claiming, in particular, that she had not been notified of the time of the hearings.

On 16 November 2004 the Kyiv City Court of Appeal allowed the applicant's appeal against the judgment of 18 June 2004 on the basis that she had not been able to take part in the proceedings and remitted the case to the Svyatoshinsky Court for a fresh examination.

On 14 January 2005 the Svyatoshinsky Court heard the case in the applicant's presence and upheld the order concerning her eviction and cancellation of residence registration as she had occupied the flat without a legal basis.

On 5 May 2005 the Kyiv City Court of Appeal quashed the judgment of 3 December 2002, which had divested the applicant of the title to the flat, having found that she had not been duly apprised of the date and time of the final hearing. It remitted the case to the Svyatoshinsky Court for a fresh consideration.

On 20 May 2005 the Kyiv City Court of Appeal quashed the judgment of 14 January 2005 ordering the applicant's eviction on the ground that the judgment depriving her of the flat had been quashed and that her son had to be admitted to the proceedings as he had become of age.

On 24 June 2005 the Svyatoshinskyy Court joined the two sets of proceedings against the applicant.

On 19 November 2007 the Svyatoshinskyy Court heard the case, having found that it was possible to examine it in absence of O.N. (who was still on the wanted list), V.K. and V.B. (who were serving their prison sentences). It next quashed all the transactions in the flat referring to Articles 55, 57 and 145 of the Civil Code of 1963 in force at the material time, to the expert assessment of 1999 concerning I.Y.'s mental incapacity to understand the meaning of his actions and to the findings of the criminal proceedings, according to which I.Y. had been deceived by O.N., V.K. and V.B., who had promised him a suitable accommodation in exchange for his flat. The applicant's objections were dismissed, the relevant part of the judgment reading as follows:

“...Regard being had to the fact that the court has established with certainty that the [disputed] flat... left I.Y.'s possession against his will, as at the time of signing by him of the sales contract concerning [it] on 8 October 1997 he was unable to understand the meaning of his actions, their legal consequences and to control them consciously in view of his medical condition, as well as he was defrauded..., [this and further contracts] ... should be annulled, and the prosecutor's claims should be found well-founded and allowed on the basis of Articles 55 and 57 of the Civil Code of Ukraine of 1963.

...

... objections... that [the applicant] was a *bona fide* acquirer of the disputed flat, invested money in it, has no other accommodation together with the defendant Y.Y., cannot be a legal ground for rejecting the prosecutor's claim, since the lawful owner of the flat I.Y. had neither intention, nor will to alienate [it], the flat had left his possession in breach of the law, in defiance of his will; and the rejection of the claim would breach the inheritance, pecuniary and housing rights of the plaintiff S.Y., as the son and heir of his father's property.”

The title to the flat was awarded to S.Y. as I.Y.'s heir, while O.N., V.B. and V.K. were jointly obliged to pay the applicant UAH 32,825, the amount equivalent of the purchase price she had paid for the flat. S.Y.'s claims concerning the applicant's eviction and cancellation of her registration were rejected as redundant as the applicant and her son no longer lived in the flat and their registration had already been cancelled.

On 14 January 2008 the Kyiv City Court of Appeal upheld the trial court's judgment and dismissed the applicant's and her son's appeals.

The applicant and Y.Y. appealed in cassation, alleging, in particular, that it was unfair to divest them of the flat which they had lawfully acquired and in which they had resided for eight years. They maintained that a 1999 expert assessment of I.Y.'s mental state was a doubtful ground for making a retrospective conclusion that he had not been able to enter into a valid sales contract in 1996. This assessment had to be weighed against the fact that the contract had been certified by a notary, obliged under the law to verify the lawfulness of the transaction. As the notary had certified the sale, it meant either that I.Y. was acting lucidly, in which case Articles 55 and 145 of the Civil Code would not apply, or that the notary had acted in bad faith, in which case she should be answerable for the damage. S.Y. was also partly responsible for the fact that his father had become a victim of the fraudsters, as he had not taken care of him, contributing to his miserable state, and had subsequently established guardianship only with a view to pecuniary gain. It

would have been fair to disinherit him, or at least to have him settle any claims for damages with the parties responsible for the fraud, as his father's former guardian and heir. In the meantime, by awarding him the flat, the court had not taken into account that, unlike the applicant and her son, he already had another flat registered in his name, in which he had resided before the proceedings. In fact, the Court had resolved S.Y.'s problems at the applicant's and her son's expense, having passed the burden of financial responsibility for the crime on the most innocent parties. Although de-jure they had been awarded a monetary compensation, its amount was grossly insufficient to purchase a new flat, since the real estate prices had significantly increased over time. Moreover, it was highly unlikely that this sum could in fact ever be recovered, as one of the debtors had been missing for years and the remaining two had been in prison and were insolvent. None of the three debtors had been present at the hearings, and there was no evidence that they had been properly informed of them, which was also undermining the validity of the judgment.

On 26 March 2008 the Supreme Court of Ukraine rejected the applicant's and her son's requests for leave to appeal in cassation.

B. Relevant domestic law

1. Civil Code of Ukraine of 1963 (repealed with the effect of 1 January 2004)

Article 55. Invalidity of a transaction concluded by a citizen unable to understand the meaning of his/her actions

"A transaction concluded by a legally capable citizen, who was in such a state at the moment of its conclusion, that he/she was unable to understand the meaning of his/her actions or control them, may be invalidated by the court upon application of this citizen.

In the event of invalidation of such a transaction, each of the parties shall be obliged to return to the other party everything received in connection with the transaction, and should this be impossible to return the received in-kind – to compensate the value thereof. ..."

Article 57. Invalidity of a transaction concluded as a result of fraud, coercion, threat, ill-intentioned agreement between the representative of one party with the other party or in arduous circumstances

"A transaction concluded as a result of fraud, coercion, threat, ill-intentioned agreement of the representative of one party with the other party, as well as a transaction, which the citizen was compelled to conclude on extremely unprofitable terms as a result of coincidence of arduous circumstances, may be invalidated upon application by the injured party or by a State or public organisation.

In the event the transaction is invalidated on one of the aforementioned grounds, the injured party shall be returned by the other party everything that he/she had received in connection with the transaction, and, in the event of impossibility to return the received in-kind – shall receive compensation of its value. ..."

Article 145. Reclamation of property by the owner from a bona fide acquirer

"If property is acquired in exchange for a consideration from a person, who had no right to alienate it, which fact was not known and could not have been known to the acquirer (bona fide acquirer), the owner shall be entitled to reclaim the property from

the acquirer only if the property ... had been lost... stolen ... or had left their possession in another manner beyond their will.”

2. Code of Civil Procedure of 1963 (repealed with the effect on 1 January 2005)

Article 13. Participation of the prosecutor in civil proceedings

“The prosecutor shall take part in civil proceedings initiated by him with a view to represent the interests of the State or rights and lawful interests of citizens, who are not capable of defending their rights regard being had to the state of their health or other important reasons.

The prosecutor, who takes part in civil proceedings, shall foster execution of the requirements of the law concerning comprehensive, full and objective examination of the cases and the taking of the court decisions based on law, while observing the principle of independence of judges. ...”

3. Code of Civil Procedure of 2004 (in effect since 1 January 2005) (as worded in the material time)

Article 45. Participation in the civil proceedings of the authorities and persons, who have right to defend rights, freedoms and interests of other persons pursuant applicable law

“...

2. The prosecutor shall represent the interests of a citizen or the State according to the procedure established by the present Code and other laws and can act as a representative at any stage of the civil proceedings.

...”

4. Order of the Ministry of Justice of Ukraine no. 18/5 of 14 June 1994 “On approval of the Instruction on the rules of execution of notary acts by the notaries of Ukraine” (repealed by the Order no. 20/5 of 3 March 2004)

“31. ... If a notary has grounds to suppose that a participant of a transaction is unable to understand the meaning of his/her actions or control them in view of a mental illness or amentia, or [that he/she] is putting his family in a precarious financial state as a result of abuse of alcoholic beverages or narcotic substances, and there is no information as to whether this person was divested of or restricted in legal capacity, the notary shall suspend the certification of the transaction and shall find out whether there is a court judgment divesting the person of legal capacity or restricting it. If such a decision has not been taken by a court, the notary shall communicate his/her assumption to one of the persons or authorities, ... who are authorised to institute court proceedings with a view to divesting this person of legal capacity or restricting it.

In his/her letter, the notary shall request to be notified of the decision taken. Depending on the decision taken by this person or authority, the notary shall either certify the transaction, or suspend the execution of the notary act until the resolution of the case in court.”

COMPLAINTS

The applicant complains that she was arbitrarily divested of the title to a flat purchased by her in good faith and evicted from her home as a result of unfair court proceedings.

In addition, the applicant complains that the bailiffs acted unlawfully in evicting her and her son from the flat; that she was deprived of her possessions left in the flat, including her documents; that in view of the loss of the documents and cancellation of her residence registration she and her son were deprived of a possibility to exercise basic rights, including to vote and to receive education.

The applicant refers to Articles 6 and 13 of the Convention and Article 1 of Protocol no. 1 in respect of the above complaints.

QUESTIONS TO THE PARTIES

1. Did annulment of the applicant's title to the flat amount to an interference with peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1 (see e.g. *Gladysheva v. Russia*, no. 7097/10, § 71, 6 December 2011)?

2. If so, was that interference lawful within the meaning of Article 1 of Protocol no. 1? In particular:

(a) Was the applicable legal and regulatory framework sufficient to ensure legal certainty of the transactions concerning the sale of flats? In particular, did notarial certification and/or title registration in the real estate owners' register imply verification of the title to the property and the parties' legal capacity and intent to transfer and accept it?

(b) If so, was the interpretation of applicable legal and regulatory provisions by the domestic courts in the applicant's case "foreseeable"? In particular:

(i) Was there sufficient evidential basis to conclude that the original seller lacked mental faculties to understand the meaning of the sales contract?

(ii) Was the aforementioned conclusion compatible with the finding that he had also been deceived?

(c) What was the legal basis for the prosecutor's participation in the proceedings following the death of the original seller?

3. Did annulment of the applicant's title impose on her a disproportionate individual burden (see *Immobiliare Saffi v. Italy*, [GC], no. 22774/93, § 59, ECHR 1999-V)?

4. Did the applicant have a fair hearing in the determination of the eviction claim lodged against her, in accordance with Article 6 § 1 of the Convention, regard being had that that claim was decided in her absence? In particular, were the merits of this claim reviewed in the ensuing proceedings?

5. Was the applicant's eviction lawful and necessary in a democratic society within the meaning of Article 8 of the Convention (see e.g. *McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008, *Kryvitska and Kryvitsky v. Ukraine*, no. 30856/03, §§ 43-44 and 48-52, 2 December 2010 and *Gladysheva v. Russia*, no. 7097/10, § 95, 6 December 2011)?