

Turkish Courts Change their Approach to the Delicate Balance of Protecting Matrimonial Homes

24 Jan 2017

The Turkish Constitutional Court recently considered a claim¹ seeking to remove a lien in favour of a bank, which the plaintiff's spouse had placed over the "matrimonial home" without her consent.

Traditionally, Turkish courts have ruled in favour of banks on this topic, reasoning that if the matrimonial home right is not annotated on the title deed, a bank's good faith must be protected. However, an April 2015 decision by the highest body within the Court of Cassation changed this reasoning, instead placing the onus on banks to act as prudent merchants and undertake necessary examinations of the relevant real estate to determine whether it is a matrimonial home.

However, in the case at hand, the Constitutional Court found that the decisions under appeal had been finalized before the change in judicial approach, so should stand in favour of the bank. Given the change in judicial sentiment though, banks should make best efforts to conduct investigations into whether the subject property is a matrimonial home, even if there are not notations on the property's title.

Legislative Provisions Regarding the Matrimonial Home

In 2002, the Civil Code introduced a limitation on actions regarding the matrimonial home, in order to protect the family life and the non-owner spouse. "Matrimonial home" is defined in the Civil Code's preamble as an area, filled with memories, in which a man and wife share their life in bitter-sweet days.

A spouse cannot transfer the matrimonial home, nor restrict any rights, without express consent from the other spouse (Article 195 of the Civil Code). Matrimonial home rights can be annotated to the title registry, allowing the non-owner spouse to claim his/her matrimonial rights against third-parties. However, if a third party acquires ownership or other limited property right by relying in good faith on the title registry, their acquisition will be protected (Article 1023 of Civil Code).

Analysis by Lower Courts

Discussions at lower court levels focused on whether to protect the bank's goodwill (since the matrimonial home right was not annotated to the property's title), or the plaintiff's right to a matrimonial home.

The First Instance Court (Izmir 13th Family Court) accepted the plaintiff's claim and ruled to discharge the lien. The Court determined the property was proven beyond reasonable doubt to be a matrimonial home and the bank could have learnt this fact via simple research during the lien procedures. Hence, the Court rejected the bank's good faith claim on the basis that it did not exercise the due care required from a prudent merchant.

The bank appealed the decision to the 2nd Civil Chamber of Court of Cassation in January 2012, which reversed the lower Court's decision. The reversal decision was finalized in April 2014. The Court noted that the

parties must prove the matter in line with Article 6 of the Civil Code (claimant must prove his/her claim) and there had been no title annotation in this case. It held that the bank's good faith must be accepted because the plaintiff could not prove otherwise. The Court based its reasoning on Article 3 of the Civil Code which states that "*where the law makes a legal effect conditional on the good faith of a person, there will be a presumption of good faith primarily.*"

The Judicial Approach to Matrimonial Homes

Traditionally, the Court of Cassation has ruled in favour of banks on this topic, reasoning that if the matrimonial home right is not annotated on the title deed, a bank's good faith must be protected.

However, in April 2015 the highest body within the Court of Cassation (the General Assembly of Civil Chambers; "**General Assembly**") ruled in one case that the matrimonial home has the feature of a house for family, regardless of whether this right is noted on the title.² It went on to state that banks are expected to act as prudent merchants and make necessary examinations of the relevant real estate to determine whether it is a matrimonial home. In a dissenting minority opinion, certain judges stated that it is not possible in the regular flow of life for a spouse to be unaware that a lien has been placed over on the matrimonial home.

Therefore, the General Assembly recently altered the traditional judicial approach to matrimonial home cases.

Consideration by the Constitutional Court

The plaintiff applied to have the case reviewed by Constitutional Court. The Constitutional Court had jurisdiction to determine any violation of rights granted under the Turkish Constitution or European Convention on Human Rights. It cannot consider whether other courts have duly applied relevant legislation. The Constitutional Court's exclusive objective is to determine and abolish any violations of rights.

The Constitutional Court noted the right to receive respect for family life (Article 8 of the European Convention on Human Rights; Article 20 of the Turkish Constitution). It also noted that the Turkish Constitution requires the State to take necessary measures and establish necessary organizations to protect peace and welfare of the family (Article 41).

Hence, the Constitutional Court noted that the Constitution imposes both negative (Article 20) and positive (Article 41) obligations on the State, which are closely linked. When considering the State's obligation to protect family life, it is important to establish a balance between an individual's interests, public interest, as well as related legislation.

In the case at hand, the Constitutional Court concluded that the lower courts had adequately balanced party interests. Despite the General Assembly's April 2015 decision, the lower courts' decisions in the case at hand were made and finalized before this date. Therefore, the Constitutional Court held that the lower courts had not exceeded their judicial discretion and no violation had occurred regarding the right to respect for family life.

* * *

Despite consideration by a range of courts the concept of a matrimonial home is a relatively new legal institution for Turkey, compared with some other countries. The General Assembly's decisions are binding upon lower courts. Therefore, the recently altered precedent will become mandatory for merchants in future cases. Therefore, merchants (particularly banks) which intend to place lien over real estate in Turkey should

be careful to conduct investigations into whether the subject property is a matrimonial home.

1. Decision Date 13 October 2016, Application Number: 2014/17751.
2. Decision dated 15 April 2015 and numbered 2013/2-2056, 2015/1201 K.

Related Practices

- Real Estate and Construction
-

Related Attorneys

- BURAK BAYDAR
-