

Judgment due to absence and Judgment due to disobedience/non-compliance in contested procedure

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Abstract

The paper presents the research of the two legal institutes of litigious procedure: the Judgment due to absence and the Judgment due to disobedience/ non-compliance. These two judgments are foreseen by the Law on Contested Procedure of the Republic of Kosovo. We are dealing with the litigation procedure when the court issues one of these judgments

The purpose of the research is presented with particular regard to the theoretical and the judicial practice that, as the court practically applies the law when the conditions are met when issuing a judgment due to absence or a judgment due to disobedience/ non-compliance in order that, the litigation procedure be without delay, court to be efficient and civil procedure to have as little expenditure as possible.

This research will contribute to professional, scientific and institutional entities such as judges, law students, lawyer, judicial trainers and others.

Keywords: Judgment due to absence, Judgment due to disobedience/ non compliance, Law in Contested Procedure.

Introduction

The Law on Contested Procedure of the Republic of Kosovo, no. 03/L-006, of June 30, 2008, and Law no. 04/L-118, of September 13, 2012 amending the Law on Contested Procedures in its Chapter XI, which includes court rulings, where Article 142, paragraph 2, provides that court rulings, which are given in the form of judgments or decisions. Since we are dealing with judgments, the Law provides on the following types of judgments:

- Partial judgment;
- Judgments based on confirmation;
- Judgments based on withdrawal from the claim;
- Judgments due to disobedience/ non-compliance;
- Judgment due to absence;
- Judgment without a main hearing session.

Since in theory and court practice, a judgment due to disobedience / non-compliance is presented as a novelty, where the Law on Contested Procedure only introduces for the first time, by way of a provision in its Article 150, which has many similarities to the judgment due to absence, which is provided by Article 151, despite their differences and own characteristics, this is the motivation for the research.

Likewise, another motivation to explore the two legal institutes, judgment due to absence and judgment due to disobedience/ non-compliance, is to contribute to scientific knowledge and progress, since in the Republic of Kosovo, little has been

said in scientific or professional terms of this topic.

For the reader, it will be interesting to know that the defendant does not perform on his obligations towards the plaintiff, such as paying debt. Thus, the plaintiff lodges a claim suit in court, for the court to resolve such dispute between the plaintiff and the defendant. However, the defendant also becomes disobedient for the court, fails to notify the court in any way when the court summons the parties to a court session, the defendant does not appear and fails to provide any justification for his absence, and therefore, the court, pursuant to legal provisions and upon having conditions met, will issue a judgment due to absence, or a judgment due to disobedience/ non-compliance, in case of defendant failing to reply to the claim. In such judgments, the law provides that the evidentiary hearing shall not be held, since evidence has been submitted by the plaintiff in his claim suit, while the defendant is deemed to have not objected before rendering of judgment. For this reason, the principle of economization is applied by the contested court, to lower the costs, including absence of expert opinion, no further court hearings, thereby resulting in no further expenses for proxy representatives, lawyers etc.

By rendering any of the two judgments, the court will ensure enjoyment of rights of the plaintiff, and also order the defendant to pay debt to the plaintiff, therefore, the court administers justice to the matter. Contested procedure case law in Basic courts shows that such rulings may be issued in a very quick and least-cost way.

1. Judgment due to absence and judgment due to disobedience/non-compliance

The judgment due to absence and judgment due to disobedience/ non-compliance are very similar but they also have minor differences. We will present each of these judgments one by one; then we will present their similarities and differences.

1.1. Judgment due to absence

The claim suit in civil procedure law plays a key role in solving the problem, and should be always directed towards a specific person and must contain a concrete claim.¹

Based on obligational law, the typical means of insurance of obligation (as a requirement in civil law) is the civil claim - *actio*, by which the creditor claims to establish the existence of his rights in obligational relations, upon which, the debtor is ordered to perform its obligation to the creditor within a prescribed time limit. Should the debtor fail to voluntarily perform on his obligation within the prescribed period, the court would otherwise compel the debtor to fulfil such obligation.² It can be concluded that at the end of enforcement proceeding before the enforcement agent, when the creditor submits the enforcement proposal for the executive title

¹ Bydlinski, Peter, Civil law (published 2013) translated in Albanian by Morina, Iset and Sermaxhaj, Bekim, Education Centre, Tirana, Prishtina, 2016, pg. 108.

² Dauti, Nerxhivane/ Berisha, Ruzhdi/ Vokshi, Adem/ Aliu, Abdulla, Commentary on the Law on obligational relations, Prishtina, 2013, pg. 3

(*titulus executionis*), we refer in this case to the judgment due to absence or judgment due to disobedience/ non-compliance, when the ruling is final, the enforcement authority: court of private enforcement agent, will compel the debtor to perform on his obligation towards the creditor. Thus, the enforcement procedure develops according to the law on enforcement procedure, where these two judgments will be applied, if the parity deadline has expired for the debtor to voluntarily perform his obligation towards the creditor within the set deadline.

In the judgment due to absence, one has to deal with an unjustified absence of the defendant in contested procedure litigation.

Since we are dealing with the absence of a party in a court session, we will elaborate on the concept of absence. According to the Law on Contested Procedure, the absence of a litigant implies not only the physical absence of the party in the hearing, but also cases in which the party may physically be present, but fail to respond when required by the court. Likewise, the party is absent in the legal sense even when it lacks postulate capacity. The party has no postulate capacity when it is required to be represented by a lawyer, and fails to have a present lawyer.³

Regarding the procedures in various states there are differences in civil law, related to authorised representatives, the plaintiff's lawyer should investigate and complete the possible grounds of the claim suit. When he considers that there is sufficient information, he forms an opinion on the extent of the damages caused to the plaintiff, the lawyer may initiate negotiations with the defendant to resolve the case. If the defendant does not respond with an adequate offer, the plaintiff's lawyer must prepare a complaint statement and information on the case. He submits it to the Supreme Court, the Division of Law. The plaintiff's lawyer will then prepare a subpoena for the defendant personally by sending the subpoena and the appeal. The defendant party must submit a "reply to claim" within the set deadline.⁴ If a reply to appeal is not filed within due time, so the procedure against the defendant can be initiated because the defendant is absent.⁵

If, the defendant fails to respond to the subpoena of the plaintiff, the plaintiff can further file with the court to render judgment due to absence of defendant. Prior to the issuance of such a judgment, the court may request that it provide sufficient evidence to substantiate the claim and amount for the damages claimed. Judgments due to absence are generally disadvantaged and even if given at the discretion of the court, the judgment may be annulled later if the defendant, having a strong reason and based on his conviction, requests an annulment⁶. Once a judgment has been delivered, it must be presented in a written form on the court record, usually called a court decision. The direct effect of the challenged verdict is the dismissal of the claim suit. The effect of a verdict, with the exception of the declaratory judgment, for

³ Morina, Iset/ Nikçi, Selim, Commentary on the Law on contested procedures, Prishtina 2012, pg. 315.

⁴ Vercammen, Keneth, Judgment by default in civil cases. Associates, A Law Office with Experienced Attorneys for Your New Jersey Legal Needs, USA, 2014, pg. 1.

⁵ Ibid. pg. 1, within 35 days.

⁶ Hall L. Kermit/ Clark S. David/ Ely W. James/ Grossman B. Joel/ Hull N.E.H, Judgements, The Oxford Companion to American Law, Oxford-New York, 2002, Oxford University Press, 2002, pg. 439, Article 55, Rule Federal of Civil Procedure.

the plaintiff is to require the defendant to pay a sum of money, to act or refrain from action, special action.⁷

When the defendant has not been served with the claim, is not sent for answer, but it is sent only together with the invitation for the preparatory hearing, and he doesn't come for the session until it's finished, or in the first session for the main elaboration, if the timing for the preliminary session was not determined, the court with proposal from the plaintiff or *ex officio*, issues a judgment due to absence, thereby approving the claim, if the following conditions are met:

- a) the defendant is regularly summoned to the hearing;
- b) the defendant has not objected the claim by means of a submission;
- c) the request of claim is grounded upon evidence provided in the claim;
- d) facts that support the claim are not in contradiction with evidence presented by the claimant or notorious facts;
- e) there are no notorious circumstances by which one may conclude that there are justifiable reasons preventing the defendant from appearing in the hearing.⁸

There are cases in practice in which the court does not serve the claim upon the defendant party at all, but schedules a hearing and summons the responding party to attend the hearing⁹. It may be assumed that in this case, the court would violate the court proceedings, since the defendant must be notified of the subject matter. Even though he does not come to the hearing, the defendant must know why he has been summoned to court and the subject matter of the case, so the claim suit must be filed together with the summon.

Therefore, the court, always based on the provisions of Articles 386 and 394 of the LCP serves the claim suit on the defendant¹⁰. The defendant does not reply to the claim suit and also does not attend the court.

Due to complete passivity of the defendant, may be issued a judgment due to absence, upon a plaintiff's proposal, based on the presumption that the passive defendant accepts allegations of fact filed with the claim suit.¹¹ For this reason it is necessary to divide and address separately the specific postulates of procedural and material law that relate to the presumption that the defendant accepts the veracity of factual allegations set forth in the claim suit, namely the claims that make the grounds of such presumption.¹²

Assumptions in procedural law are: absence of a defendant regularly summoned to the hearing and a copy of the claim suit served, where the defendant does not dispute the claim, lack of any notorious facts, upon which it emerges that the defendant was justifiably prevented from appearing before the hearing. Opposing evidence is missing for the plaintiff to ground his case, while evidence he has presented or facts that are notorious, the court case may proceed with claims that parties may

⁷ Ibid., pg. 439, Article 58, Rule Federal of Civil Procedure.

⁸ Article 151, paragraph 1, of the Law on Contested procedures of the Republic of Kosovo, no. 03/L-006 dating June 30 2008

⁹ Morina, Iset/ Nikçi, Selim, Ibid, pg. 315

¹⁰ Ibid, p. 315

¹¹ Cizmic, Jozo, Presuda zbog izostanka u građanskom parničnom postupku, PhD dissertation, Faculty of Law, Split, 2001, pg. 155.

¹² Ibid, pg.156.

freely dispose, upon a proposal of the plaintiff to render judgment due to absence. The hypotheses of material law regarding the approval of the claim would be based on the claim arising from the facts cited in the claim suit.¹³ It can be thought that, the defendant is negligent against court proceedings due to his own absence or the absence of his proxy representative in the court hearing, and his failure to justify his absence, and on such grounds, it follows that the defendant has failed to perform on obligations against the claimant as per the claim suit. For this reason, in drafting the law, experts have provided a possibility, with the provisions of Article 151, to render judgment due to absence.

1.2. Judgment due to disobedience/ non-compliance

The Law on Contested Procedure of the Republic of Kosovo, in its Article 150.1. determines when the court renders judgment due to disobedience/ non-compliance: If the defendant does not submit a reply to the claim suit before the court within the deadline set by this law, the court may render judgment due to disobedience/ non-compliance, thereby approving the claim suit, if the following conditions are met:

- a) if the claim and summons to reply to claim has been appropriately served to the defendant;
- b) if the claim is founded on the evidence provided in the claim;
- c) if the facts that support the claim are not in contradiction with evidence submitted by the claimant himself, or notorious facts.

Based on Article 394 of the LCP, the court is required to serve on the defendant party the claim of the plaintiff. Pursuant to Article 395, par. 1 of the LCP, the defendant party is obliged to submit a reply to the claim suit a reply to the claim suit within 15 days upon receiving the claim suit. Pursuant to Article 395, par. 2 of the LCP, the defendant party is notified with procedural and substantial consequences of failing to submit the reply to the claim suit. A procedural law consequence in case of no reply to a claim suit is the rendering of a judgment due to disobedience/ non-compliance, according to the provisions of Article 150, par. 1 of the LCP. In terms of grounds of the claim, based on the facts stated in the claim suit, it follows that the court would deem the facts submitted by the plaintiff to be true. Hence, there is a legal assumption that all facts presented by the plaintiff are true to reality and they do not need to be reviewed. Even with regard to the evidence provided by the plaintiff, there is a legal assumption that these are true and that the administration of the evidence is not necessary.¹⁴

Should the court find that the facts presented by the claimant counter the evidence submitted, cannot be issued a judgment due to disobedience/ non-compliance. The same holds true in cases when the allegations put forward by the plaintiff contradict notoriously known facts.¹⁵

The court would not render judgment due to disobedience even despite conditions being met, should the court find that the claim is made on a matter of no disposal.

¹³ Ibid, pg.156.

¹⁴ Morina, Iset/ Nikçi, Selim, also there pg. 311.

¹⁵ Also there pg. 312.

The issuance of a judgment due to disobedience/ non-compliance will be postponed if there is a need for proper ascertainment of the circumstances. If the claim based on the facts presented is considered unfounded, the court will initiate a preparatory hearing and if during that proceeding the plaintiff does not change the claim, the court renders a decision by which the claim is refused. One cannot appeal against the court ruling rejecting the plaintiff's proposal to render judgment due to disobedience/ non-compliance. Such a judgment due to disobedience/ non-compliance can be rendered even without hearing.¹⁶

Before the preparatory hearing is scheduled, the presiding judge may request the defendant to file a reply to the claim suit and the commercial litigation procedure the claim suit shall always be sent to the respondent. Upon receiving the claim suit, the court prepares for the main hearing. This preparation includes the preliminary examination of the claim suit, submitting the claim suit for the response, the preparatory hearing and the scheduling of the main hearing. The Presiding Judge will issue a decision on issues that he is authorized to decide on the preliminary examination procedure of the claim suit, if there is sufficient evidence and continuity in such suit for such a decision. The presiding judge is not obliged solely on the basis of the claim suit to issue a decision, if the preliminary examination of the claim suit is decided. If he thinks that there are no sufficient grounds to issue a ruling on a particular matter during the preliminary examination of the claim suit, the presiding judge will avoid making a decision after receiving a response in the claim suit or at the preparatory hearing.¹⁷

One must emphasize that the defendant may encounter with legal consequences, because the court already infringes the law when serving the defendant with a summon, claim or even judgment, only through the court notice board. When the court accepts that the claim suit has been presented and the judgment is executed on a regular basis through the court announcement table, then the legal matter for the defendant is the most difficult. When the court issues the judgment due to absence or judgment due to disobedience/ non-compliance, the defendant only acquires knowledge of such a decision only in execution proceedings, or for example, when his bank account is frozen. In the reasoning of the judgment it is ascertained that the defendant was summoned properly and that he did not come and the claim was not challenged. How could the defendant appear before the court and challenge the claim when he did not know that contested proceedings are on going, because the claim had never been delivered personally.¹⁸

¹⁶Article 150, paragraph 2 (article 3, paragraph 3 of this law), paragraph 3 (linked to paragraph 2), paragraph 4, 5, paragraph 6 (linked to paragraph 3) of the Law on Contested Procedure of the Republic of Kosovo and Law no. 04/L-118 dating September 13, 2012 amending the Law on Contested Procedure, where Article 6 provides an amendment to Article 150 of the basic Law, and in the following text, the word 'contumacious' is replaced with the word 'due to disobedience.'

¹⁷Cizmic, Jozo, Presuda zbog ogluha, nova presuda u hrvatskom parnicnom postupka, research published HPR 2003/9 and Inf. Novi 3003/ 5168, pg. 2, based on the Law on Contested Procedures of the Republic of Croatia, article 285 paragraph 1, article 485 paragraph 1, article 277, paragraph 1 and 2, 283, also the Law on Contested Procedures of the Republic of Kosovo, article 151, article 388.

¹⁸Sesar, Milijan, Dostavljanje Oglasnom plocom suda u parnicnom postupku", zbornik radova Pravnog Fakulteta u Split 2/2006, pg. 49. The defendant did not know there was a procedure against him, since he never personally accepted a lawsuit. This presents a contradiction to article 142.1 of

Based on the above, one may think that mistakes are being made in judicial practice, as the court is violating the law by not serving the defendant with a summon attached to the claim suit. Here, the provision of the LCP Article 110.1 is violated, since this provision explicitly provides that the claim suit, reply to the claim suit, summon for the hearing, payment order, judgment and decision, against which a special appeal is allowed, the challenging remedy against the ruling is served personally to the party, respectively its legal representative or proxy representative. Other documents will be served to the address in person, when so expressly provided for by this law or when the court finds that due to the original documents being attached to the documents to be served, or for any other reason, more attention is required.

Likewise, the plaintiff may change the suit in (preparatory) session which is not attended by the defendant, the procedure should be continued, and therefore, the court may postpone the session and hand over to the defendant a copy of the minutes of that session, so that he can prepare for the next session to amend the claim suit, and in this case a judgment due to disobedience or due to absence cannot be rendered, because even despite absence, it cannot be assumed that the defendant has accepted facts that have not been communicated to him. The claim suit must be served on the defendant. The court may order the plaintiff to notify the defendant with a submission on the amended claim. In the new session, the court will have to summon both parties. Only if a new absence of the defendant is confirmed at the (preparatory) hearing, the amended claim suit gives way to a judgment due to absence or due to disobedience/non-compliance.¹⁹

2. Differences and similarities of judgments due to absence and judgments due to disobedience/ non-compliance

2.1. Similarities

We consider that similar to judgments due to absence, judgments due to disobedience/non-compliance have a special enacting clause in the claim suit, and for this reason, a judgment due to disobedience cannot not be allowed if it regards a claim that is not at the parties disposal, since this is in contradiction with mandatory provisions and public morality. There are thoughts that in this case, the court issues a judgment due to absence, but it can only be rejecting, thereby rejecting the claim suit.²⁰

Our Law on Contested Procedure expressly states in Section 3:

3.1 The parties may freely dispose of their civil-law claims they have filed during the proceedings.

3.2 Parties may abandon their claims, and accept the opposing party's claim and reach an agreement in court, regarding their contest.

3.3 The court will not approve dispositions of the parties that contradict with:

a) legal order;

the LCP of Croatia.

¹⁹ Cizmic, Jozo, Preinaka tužbe, zbornik radova Pravnog Fakulteta u Rijeci, vol. 28, 1/2007, pg. 7. Neni 190, par. 7, LCP of Croatia.

²⁰ Cizmic Jozo, Presuda zbog ogluha, nova presuda u hrvatskom parničnom postupku, also there pg. 11.

- b) legal dispositions;
- c) rules of public morality.

In relation to this, we can conclude that this legal disposition does not only cover these two judgments, but all kinds of judgments in contested procedure.

A similarity in these judgments is that they both apply principles of efficiency and economization. Article 10.1 of the LCP provides that the court is obliged conduct proceedings without any unnecessary delays and expenses, but also make efforts to prevent any abuse of procedural rights of the parties granted by this law.

In fact, the judgment due to disobedience is a special form of judgment due to absence of the defendant party. It would seem that the legislators meant to improve efficiency of the judiciary and adding measures to safeguard the principle of economization in civil litigation, when introducing this new provision. Although the judgment due to disobedience is in fact a form of a judgment due to absence of defendant, this type of judgment is regulated in particular and independently of the Article 150 of the LCP.²¹ A common issue of in both court judgements is that the defendant should be summoned regularly. The legal basis of the case must be brought about by the facts set out in the content of the claim suit.²²

Likewise, there is a similarity due to the fact that a judgment due to absence cannot be rendered in family and marital disputes, and this is defined in Article 85, paragraph 2 of Law on Family no. 2004/34 of the Republic of Kosovo. Although not mentioned in this law, it may be concluded that the same is foreseen in the case of judgment due to disobedience / non-compliance, in that the judgment cannot be rendered in family and marriage disputes, because the Law on Contested Procedure of the Republic of Kosovo, no. 03/L-006, came later, where the judgment due to disobedience is presented as a novelty.

In terms of application of the *ex officio* principle of adherence to the relevant evidence and facts, Article 85, par. 2 of this Article also provides the rule that in court proceedings in family disputes, there cannot be judgment due to absence or judgment based on confirmation. In this procedure, the court cannot issue a decision due to absence or confirmation, as can be the case in other contested proceedings, for example: confession of debt, ownership validation, etc.

In marital disputes, even in cases of absence of the defendant, despite regular summon, and cases of failure to submit written justification, the court proceeds with the case by reviewing all relevant facts necessary for the rendering of a ruling. The same applies in ascertaining a fact. The court proceeds with the evidentiary hearing despite parties' claims, but no ruling can be made solely on the basis of the party's assertion, without establishing the veracity of the facts.²³

There are also similarities regarding challenging remedies, blow to appeal, both in judgments due to absence and judgment due to disobedience/ non-compliance.

The judgments which cannot be challenged on all grounds, but appeals are allowed,

²¹ Morina, Iset/ Nikçi, Selim, also there pg. 310.

²²Qehaja, Rrustem/ Preteni, Bashkim, Judgments based on disobedience (non-compliance) and due to absence in contested procedure according to legislation of Kosovo, Civil Procedure Review Ab Omnibus Pro Omnibus, ISSN 2191-1339, vo1 5 n.1, January-April 2014 , pg. 15.

²³ Gashi, Haxhi/ Aliu, Abdulla/ Vokshi, Adem, commentary on the Law on Family, Prishtina, 2012, pg. 222.

one may categorize them as dispositional judgments, and they would include judgments due to absence and judgments due to disobedience/ non-compliance. A judgment due to absence and judgment due to disobedience/ non-compliance cannot be challenged on grounds of erroneous or incomplete ascertainment of the factual situation, and therefore, *a contrario*, it may be concluded that they can be challenged on grounds of violation of contested procedure provisions and erroneous application of the material law.²⁴

Regarding the procedure before an arbitration tribunal, similar to a judicial proceeding, various rulings may be rendered, depending on criteria that are taken as grounds for their classification.²⁵ LCP provisions on types of decisions may be of service as a subsidiary source. An arbitration tribunal cannot render ruling due to a party's absence. Thus, provisions of the LCP will not apply, not even as *analogia iuris*, in rendering an arbitration ruling. The Article 26, par. 2 of the Law on Arbitration explicitly provides that the absence of a reply to a claim suit by the defendant shall not be considered acceptance of claims of the plaintiff. In such cases, the procedure continues further pursuant to general rules, despite the fact that there is no reply to the claim suit by the defendant. This marks a difference between the proceedings before regular courts and proceedings before an arbitration tribunal.²⁶ Thus, as mentioned above, in proceedings before the arbitral tribunal, no ruling may be rendered due to absence. Again, there cannot be a ruling due to disobedience/ non-compliance, since the procedure shall continue despite the absence of a reply to the claim suit by the defendant.

On the basis of procedural actions taken in preparatory session, rulings can only be rendered for matters, the factual basis of which is not established by evidence reviewed, and those are judgment due to absence of the defendant²⁷, as well as judgment due to disobedience/ non-compliance.

Therefore, we may conclude that there are similarities in these two judgments, because there is no evidentiary hearing before the court, because it does not develop hearings for the issuance of evidence procedure since the plaintiff already files all proof in his/her claim suit, based on the documentation, whereas convincing evidence for the court would push the court to decide positively in favour of the plaintiff by supplementing; the conditions for issuing Judgment due to the absence under Article 151 and Article 150 for the Judgment due to disobedience / non-compliance. The judgment due to absence and the judgment due to disobedience/ non-compliance consist of their sections: introduction, enacting clause and reasoning, and also legal remedies, as per Article 160. Sections of the judgment, the enacting clause and the reasoning of both judgments, are written pursuant to the provisions of Article 150 and 151 of the LCP.

There are similarities in the reasoning part, in the judgment due to the absence and the judgment due to disobedience/ non-compliance, because only reasons justifying the rendering of such judgments, which are laid down in Article 160 paragraph 6 of the LCP.

²⁴ Morina, Iset, Arbitration and its procedures, Arbitration Tribunal of Kosovo, Prishtina 2015, pg. 213

²⁵ Ibid., pg. 213-214.

²⁶ Brestovci, Faik, Civil Procedure Law, Faculty of Law, University of Prishtina, 2006, pg. 213

²⁷ Morina, Iset/Nikçi, Selim, also there pg. 311

2.2 Differences

Pursuant to the Law on Contested Procedure, regarding meeting of conditions for a judgment due to the absence, under Article 151, and a judgment due to disobedience/ non-compliance under Article 150, there is a difference.

Pursuant to Article 150, par. 1 of the LCP, the court may render a judgment due to disobedience/ non-compliance if the defendant party does not answer the claim suit. There cannot be a judgment due to disobedience/ non-compliance, if the defendant has accepted the claim suit, but has not been notified of the procedural legal consequences in case of failure to reply to the claim suit. This is clear from the wording of the provision of Article 150, par. 1, sub-paragraph a) of the LCP, that the claim suit was filed to the defendant on a regular basis and they have been *summoned to submit reply* to the claim suit. Regarding the regular submission of the claim suit to the defendant (*that is, together with the warning of procedural legal consequences in case of failure to reply to the claim suit*); this is taken care of by the court *ex officio*.²⁸ One may conclude that this is where the essential difference lies, that in this judgment it is necessary for the defendant to file a reply to the claim suit, where the court, without the presence of the parties, may render a verdict that the respondent(defendant) responds to the claim suit and serve it on the respondent; if the respondent does not submit a reply to the claim suit within the prescribed time limit, then the court will, when conditions are met, render a judgment due to disobedience/ non-compliance. Whereas, in the judgment due to absence, the court does not issue a verdict for the respondent in terms of reply to the claim suit.

Let us address a concrete case of a court verdict on the reply to the claim suit. When filing the claim suit with the Basic Court, the plaintiff requested the court to order the defendant to compensate material and immaterial damages. The judge of the case rendered a verdict of the reply to the claim suit, ordering the defendant to submit, within a deadline of 15 days from the the date of receipt of the claim with all submissions to the case attached to this verdict, a reply to the claim suit, in written. The defendant was ordered by the court to file any eventual procedural objections in its reply to the claim, and declare whether or not it accepts or disputes such claims of the plaintiff. If it disputes the claims, the reply to the claim suit should contain all necessary proof and facts. The reply to the claim suit should contain all elements set out in Article 99.3 of the LCP. If the reply to the claim suit is incomprehensible and incomplete, in order to eliminate the defects, the court will act according to Article 102 LCP. The respondent is warned that if within the deadline of 15 days, as outlined above, there is no reply to the claim suit, the court will render a judgment due to disobedience /non-compliance, if conditions set out in Article 150, paragraph 1, items a, b, c, and e of the LCP, are met. No complaint is allowed against this verdict. However, in this case, a reply to the claim suit was filed and there was no judgment due to disobedience/ non-compliance. If the reply to the claim suit would not have been filed, the court would render a judgment due to disobedience/ non-compliance.²⁹

²⁸ Verdict by Basic Court in Prishtina, Gllgoc branch, C.no. 79/ 2010 dating July 18 2013, Lawsuit and response, case C.no. 79/2010.

²⁹ Judgment due to disobedience/non-compliance of the Municipal court in Vushtrri, C.no. 139/

Thus, it can be thought, that the mail delivery slip is evidence sufficient to corroborate the time of receipt of the claim suit by the defendant, including the decision on the reply to the claim suit.

We present here a case from the case law of the Basic Court, which rendered a Judgment due to disobedience/ non-compliance, in which judgment, with its enacting clause, the court orders the defendant to pay the plaintiff a certain amount of money due to utilization of fixed telephony services. It also ordered the defendant to pay the costs of the contested procedure, all within 15 days from the finality of judgment, under the threat of enforcement. In its reasoning, the court argues that it had served the claim and decision on reply to claim suit to the defendant, which required the defendant to file a reply to the claim suit within 15 days from the date of receipt. From the mail delivery slip, the court found that the claim suit and the reply to the claim suit had been received by the defendant where there are more than 15 days, and it is proven in case files that the defendant failed to submit a reply to the claim suit within the 15-day deadline.

In its review of case files, the Court found that evidence provided by the plaintiff support the grounds of the claim, and that evidence presented by the plaintiff in its claim are not in contradiction with the evidence proposed by the plaintiff, and the court found that in the present case, there are no claims that the parties would not be free dispose with, as per Article 3.3 of the LCP. Also, at the end of the judgment, there is an instruction on legal remedies, and it is stated that the appellant may file an appeal with the court of second instance.³⁰

Now in terms of a judgment due to absence, we will present a case from the Basic Court case law, where a Judgment due to absence was rendered. In its enacting clause, the court approved the claim of the plaintiff and ordered the defendant to pay the plaintiff an amount of money in relation to compensation of damages, including interest rate, and to compensate procedural costs, all of these within 15 days from the day of the receipt of this judgment, under threat of enforcement. Also, in its reasoning, the court reviews the matter submitted by the plaintiff's claim suit. It is submitted in the reasoning that the defendant failed to appear in the preparatory hearing until its conclusion, despite regular summoning, and on the proposal of the plaintiff, the court renders a judgment due to absence, because conditions as per Article 151 of the LCP, are met. The decision on costs of contested procedure is grounded on the provisions of Article 151 LCP. Also, at the end of the judgement, there is an instruction on legal remedies, thereby allowing appeal before a court of second instance.³¹

The content of some legislation, which may bring about an application of double standards in terms of a "claim suit" and a "reply to claim suit", in terms of ensuring

2009 dating October 10 2012.

Judgment due to disobedience/non-compliance of the Municipal court in Vushtrri, C.no. 419/ 2009 dating October 10 2012. Judgment due to disobedience/non-compliance of the Municipal court in Vushtrri, C.no. 439/ 2009 dating October 18 2012. Judgment due to disobedience/non-compliance of the Municipal court in Gjakova, C.no.231/ 2010 dating January 10 2012.

³⁰ Judgment due to absence of the Basic Court in Prishtina, C.nr. 12/13 dating April 1 2013. Juristi. info Praktikum, Civil right forms, pg. 46, Judgment due to absence C.nr. 428/ 2010 dating October 25 2011 of the Municipal Court in Vushtrri.

³¹ Qehaja, Rrustem/ Preteni, Bashkim, pg. 13.

removal of uncertainties or flaws in replies to claim suits, so if the latter has the meat, it shall be considered not served at all. This treatment is not equitable between the plaintiff and the defendant, and it may be considered to be a violation of the principle of equality of arms in contested procedure, and an application of double standards against parties. Within this context of judgments we have chosen to address, but also in a comparison between legal systems that only recognize judgments due to disobedience/ non-compliance, we still find elements of a judgment due to absence. This occurs in cases when a defendant fails to appear in a preparatory hearing scheduled to hear proposals of parties for the main hearing.³²

Also, according to the case law, the Constitutional Court of the Republic of Kosovo, in its decision³³ regarding constitutional review of the Judgment of the Supreme Court of Kosovo and the notification of the state prosecutor, rejected the Referral of the applicant (the defendant) as inadmissible. The District Commercial Court of Prishtina issued a judgment due to absence that the defendant was absent, based on Article 151 of the LCP. The defendant filed a complaint with the Supreme Court of Kosovo against the judgment due to absence. In the present case, the Constitutional Court found that, upon a thorough examination of the facts of the case, the Supreme Court had, in a well-substantiated decision, found that the Applicant had received the summon for the relevant procedure, therefore the Applicant's (the defendant) failure to appear before the District Commercial Court in Prishtina could only be attributed to the applicant's negligence. In other words, if the applicant had acted with caution, he would have been able to attend the public hearing. In this regard, the Constitutional Court notes that the Applicant has exhausted all available remedies provided by the Law on Contested Procedure, by filing an appeal against the Judgment due to absence rendered by the District Commercial Court in Prishtina, and that the Supreme Court in Prishtina had reviewed and responded to his complaints on all counts of the law. In conclusion, the Applicant failed to build the case on violations of any of his rights guaranteed by the Constitution, and also failed to provide *prima facie* evidence of such violation. Thus, the Constitutional Court rejected the Referral as inadmissible.³⁴ Since we currently have such a legal solution as it is, which in our opinion is wrong and against the system, there are hardly any recommendations to be given for getting out of this situation. This is due to the fact that provisions of Article 151, par. 1 LCP expressly and very clearly stipulate that the court may render a judgment due to absence of the defendant if the elementary condition is met. The basic condition is that the claim has not been served on the defendant. This condition is hardly ever met in practice since the claim suit is always sent to the defendant by the court. An adequate solution could be sought only through substantial revision of the provisions regarding the judgment due to absence, pursuant to Article 151 LCP. Referring to the aforementioned considerations in connection with this Article, in this case there is no further explanation regarding the other conditions to be met for the issuance of the judgment due to the absence.³⁵

³² Decision on inadmissibility, no. KI 53/13 of the Constitutional Court of the Republic of Kosovo, ref. no. RK 481/13, dated October 14, 2013.

³³ Also there.

³⁴ Also there, pg.316.

³⁵ Qehaja, Rrustem, Replying to a claim suit, Law Magazine, no. 2- 2011, Faculty of Law, University

3. Characteristics of judgments due to absence and judgments due to disobedience/ non-compliance

It is characteristic to mention that the only sanction for not replying to a claim suit by the defendant is the probability of rendering judgment due to disobedience, or a judgment due to absence, if the defendant is not present at the scheduled hearing, despite having verified that the person has received the summon for the hearing on a regular basis, and his absence has not previously been justified.³⁶ It is characteristic that the court always submits the claim suit to the defendant, based on the provisions of Articles 386 and 394 of the LCP. The new LCP does not foresee any case, either expressly or implicitly, for the court not serving the claim on the defendant. Therefore, in cases of judgment due to absence, the provision of Article 151 LCP is in conflict with the concept and the system of the LCP as a whole.⁹

It is characteristic that the judgment due to absence and judgment due to disobedience/ non-compliance cannot be rendered in family and marital disputes, extramarital affairs, disputes of affirmation and objection of paternity, in disputes of affirmation and objection of maternity. A judgment due to absence and a judgment due to disobedience/ non-compliance can not be rendered by an arbitration tribunal, which we have discussed on pages 7 and 8 of the paper above.

As we mentioned above on page 8 of the paper, there is a characteristic feature in terms of legal remedies of appeal against judgment due to absence and judgment due to disobedience/ non-compliance: they cannot be challenged due to erroneous or incomplete ascertainment of the factual situation, from which, *a contrario*, it may be concluded that they may be challenged on grounds of violation of provisions of contested procedure and erroneous application of the material law.

It is characteristic that these two judgments only have very few differences, as mentioned above, and with amendments to the LCP, improvements would be made. Thus, we think that we have presented the characteristics of the judgment due to absence and judgment due to disobedience/ non-compliance.

Conclusions

In this paper we dealt with two judgments: the judgment due to absence and judgment due to disobedience/ non-compliance, with their similarities, differences and characteristics.

We conclude that this paper, we have clarified the court proceedings in LCP, when rendering judgments due to absence and judgments due to disobedience/ non-compliance.

Recommendations

- Provisions of the Law on Contested Procedure, Articles 150 and 151, should be amended with regard to uncertainties, and improved in terms of judgment due to

of Prishtina, pg.41.

³⁶ Morina, Iset/Nikçi, Selim, also there pg. 315.

absence and judgment due to disobedience/ non-compliance.

- Also, courts should be more efficient in reviewing claim suits and scheduling preparatory hearings, since currently, claim suits are submitted to the court by the plaintiffs, and cases remain pending for several years. The parties to the proceedings are not served their summons for hearings, failing to take any procedural action. I would recommend that there is no excessive prolongation of proceeding scheduling preparatory hearings. This is one of the conditions for the court to render a judgment due to absence, and a judgment due to disobedience/ non-compliance.
- To organize seminars on contested proceedings, regarding judgment due to absence and the judgment due to disobedience/ non-compliance, since they are rarely organized on this topic.
- To provide a new subject matter at the Faculty of Law, and the subject would be named Civil Procedure Law – Judgments. This course would be a subject for students to learn and address extensively all the Judgments, focusing more on judgments due to absence and judgments due to disobedience/ non-compliance.

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