Division of Judicial Jurisdiction in Resolving Land Disputes: Novel Legislation

by Yevgeniya O. RUZHENTSEVA

The issue of land dispute jurisdiction division by the courts in the process of making decisions regarding claim acceptance for proceedings still remains one of the most topical and problematic issues in judicial practice. The absence of uniform court practice in this field can be explained, first of all, by the large variety of existing land relations and disputes arising from these relations that can be considered by general and commercial as well as administrative courts.

Most problems arise in determining jurisdiction in a land dispute when one of the parties is an authorized state authority. Sometimes it is very difficult to solve these problems because state authorities make a party both in the administrative and in the economic (civil in its nature) proceedings. Therefore, depending on the situation, they are submitted to the jurisdiction of either administrative or commercial courts.

Explanations and recommendations of the highest courts play a very important role in dispelling doubts regarding application of the law.

Over the last six months, several novel regulations were added to legislation on land disputes.

Thus, at the beginning of the year, the Supreme Commercial Court of Ukraine released *Summarization of Judicial Practice of Proceedings on Land Relations Disputes by Commercial Courts of 1 January 2010*. In February, the Presidium of the Supreme Commercial Court of Ukraine published its recommendations on land law application by commercial courts (No.04-06/15 of 2 February 2010). Parliament amended *Commercial Procedural Code of Ukraine* in the part related to the jurisdiction of cases on land relations involving economic entities (Act No.1914-VI of 18 February 2010). Plenary Assembly of the Supreme Court of Ukraine "corrected" and amended its Resolution No.7 of 16 April 2004 *On Application of Land Law in Civil Cases by Courts* (Resolution No.2 of 19 March 2010). The Constitutional Court of Ukrai-

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ne clarified the jurisdiction of land disputes between individuals and legal entities with local authorities (power entities) as for appeal of its decisions, acts or inactivity (Resolution of the Constitutional Court of Ukraine No.10-рп/2010 of 1 April 2010).

However, many issues related to judicial proceedings on land disputes remained "under control" or "at the disposal" of judges or to be discussed by lawyers. For instance, there is no unanimity on resolving the issue of jurisdiction of land disputes involving economic entities and individuals, on jurisdiction of a large number of disputes to which one of the parties is a state authority, etc.

As stated above, at the beginning of this year, the Supreme Commercial Court of Ukraine (hereinafter — SCCU) aired its opinion about the jurisdiction of land disputes. Determining the jurisdiction of commercial and administrative courts for resolving land disputes one party to which is a state or local authority, is one of the main topics of the Recommendations of the SCCU Presidium *On Application of Land Law by Commercial Courts No.04-06/15 of 2 February 2010*. It is admitted there, that in many cases this issue is solved in the wrong way. Land relations is a field where differentiation of power authorities into public power entities and authorities realizing state land laws, territorial communities and Ukrainian people in general as land owners is an issue of paramount importance.

According to Kateryna Nastechko, PhD in law, junior research associate of V. M. Koretsky State and Law Institute, the procedure of settling disputes over land plots should have several levels for each person to select the most acceptable one. Ms. Nastechko also thinks that disputes over land plots can be settled through land managing bodies, local authorities, executive authorities regulating land issues, courts, and arbitration courts.

The claimant's right to choose the authority for settling the dispute is advocated by other researchers and lawyers referring to the opinion of the Supreme Court of Ukraine (Resolution of the Plenary Assembly of the Supreme Court of Ukraine *On Application of the Ukrainian Constitution in Rendering Justice No.9 of 1 November 1996*). Thus, the SCU clearly states that the court has no right to refuse a claim from a citizen only because of the possibility of prejudicial consideration; therefore, land dispute settlement pursuant to the administrative (out-of-court) procedure can be regarded as an alternative solution, not the imperative one. However, it should be borne in mind that while making the decision or accepting the claim the court, apart from its convictions, adheres to the law, first of all, while instructions of the Plenary Assembly (the highest authority though) are taken into consideration only when in line with the applicable law.

Our interests lie in court procedure and jurisdiction in land disputes. Researcher Dr. Olexiy Pogribny considers this very procedure mainframe in settling the above disputes: "... even though legislators did not approve any regulations on solely the court procedure for settling land disputes, practice proves its mainframe..." This researcher supports the above because it is the land dispute settling court procedure that can realize fundamental principles of equality, rule of law, fairness, reason and integrity.

Adoption of the *Administrative Code of Ukraine* caused a number of problems in the division of

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competence between administrative and other courts (general and commercial), and, first of all, this applies to the issue of jurisdiction of cases arising from material legal relations in those branches where both private and public law are applicable. It is obvious that jurisdiction issues also arise for land relations disputes.

This issue is very important because it is common knowledge that all procedural codes contain the same rule: if the court's jurisdiction does not apply to the dispute, it is necessary to close the case.

As for land disputes, division of powers between the courts is regulated by the provisions of procedural codes. This is partially set out by Articles 15 and 16 of the *Civil Procedural Code of Ukraine*, Articles 1 and 12 of the *Commercial Procedural Code of Ukraine* and Articles 2 and 17 of the *Administrative Code of Ukraine* envisaging the competence of general and specialized (commercial and administrative) courts.

According to Clause 1 of Article 15 of the *Civil Procedural Code of Ukraine*, courts can initiate civil legal proceedings in cases concerning protection of violated, unrecognized or disputed rights, freedoms or interests arising from civil, housing, land, family, and labor relations as well as from other legal relations, except for cases when such cases are tried under a different law. Present court practice shows that land disputes between legal entities and individuals (entrepreneurs) are also settled by commercial courts, while the jurisdiction of such cases is regulated by Articles 1 and 12 of the *Commercial Procedural Code of Ukraine*.

According to Part 1 Clause 1 of Article 17 of the *Administrative Proceedings Code*, the competence of administrative courts extends to disputes of individuals and legal entities with power authorities as to appealing against the latter's decisions (regulatory acts and legal act of individual act), acts or inactivity. Thus, taking the above into consideration land disputes, one party to which is a body of authority, are to be settled by administrative courts.

According to Part 7 Clause 1 of Article 3 of the *Administrative Proceedings Code*, power entity shall be state authority, local authority or their official, or other authorized entity. Thus, a case where one of the parties is a state or local authority shall be considered administrative only on condition that this authority is carrying out administrative functions.

It should be pointed out that Article 2 of the *Commercial Code of Ukraine* states that apart from economic entities, state and local authorities with economic powers shall be regarded as participants of economic relations.

In connection with the above, in this case, it is necessary to differentiate between them as power entities and economic entities, and jurisdiction (administrative or commercial) depends on their role in each dispute.

Power authorities exercise their managerial functions in land use management relations. Such issues as setting and changing borders of administrative-territorial formations, land use planning, land development, land use and protection control, land monitoring, implementation of the state land registry and land conservation are under the jurisdiction of administrative courts.

Disputes arising from legal relations where power authorities act as land owners, such as disposal of state or community-owned land plots (execution, amendment and termination of sales and lease agreements, easement establishment or execution of other agreements concerning land plots) belong to the jurisdiction of commercial courts.

Here we can refer to the illustrative resolution of the Constitutional Court of Ukraine No.10-рп/2010 of 1 April 2010 on the jurisdiction of land disputes between individuals/legal entities with a local authority as a power entity. SCU judges are of the opinion that land disputes between individuals/legal entities with a local authority as a power entity as to appeal against its decision (regulatory acts and legal act of individual act), acts or inactivity are to be settled in administrative courts, save for public legal disputes for which another court procedure is provided for by law.

However, it is difficult to disagree with the professor of Civil Law of the Shevchenko's Kiev National University, Dr. Natalia Kuznetsova, that the distinction between public and private interests is rather relative, and its setting out in legislature depends on social convictions tending to change depending on the actualization of certain social conditions.

Practicing lawyers also think that in order to solve the issue of land dispute jurisdiction it is necessary to analyze not only the object and composition of the parties, but also the cause of the claim revealing the nature of disputable legal relations between the parties and pointing out the equality or administrative subordination of the parties. For instance, the applicant's mentioning about violation of provisions of the *Civil* or *Commercial Codes of Ukraine* as a cause of the claim indicate its private nature and so it belongs to the jurisdiction of commercial courts.

Fouling up with jurisdiction issues is very often caused by the participants themselves making claims with the wrong wording. Vague or wrongfully worded material and legal requests very often result in an incorrect decision by the court, such as refusal to initiate proceedings or erratic acceptance.

It is stated in Clause 1 of Article 15 of the *Civil Procedural Code of Ukraine* that the article itself is not comprehensive in regulation of jurisdiction (land disputes in particular), thereby suggesting that the courts initiate civil proceedings for respective cases except for those tried under other law. However, neither the *Civil Procedural Code*

of Ukraine, nor *Administrative Proceedings Code* envisage economic or administrative jurisdiction for cases arising from land relations.

The Resolution *On Changes and Amendments to the Resolution of the Supreme Court of Ukraine No.7 of 16 April 2004 On Application of Land Law in Civil Cases by the Courts No.2* of the Plenary Assembly of the Supreme Court of Ukraine from 19 March 2010 states that land and land-related property disputes, parties to which are legal entities and also citizens carrying out economic activities without creation of legal entity registered as entrepreneurs in accordance with the established procedure, are to be settled by commercial courts, while all the rest — by civil courts, save for disputes concerning appeal against decisions, acts or inactivity of power entities in the process of exercising managerial functions in the field of legal relations concerning land that are to be settled in administrative courts in accordance with Parts 1 and 3 Clause 1 of Article 17 of the Ukrainian *Administrative Proceedings Code*.

Thus, interpreting the provisions of procedural codes with regard to clarifications of the highest judicial authority of Ukraine, it is possible to conclude that civil jurisdiction applies to land disputes parties to which (at least, one) are individuals — Ukrainian citizens or apatrides (stateless persons).

As for division of substantial law regulations in the settlement of land disputes, civil proceedings, for example, face the problem of determining the correlation of regulations of *Civil* and *Land Codes* of Ukraine. Both codes contain regulations on civil-legal use of land plots, acquisition and change of rights for land. However, the basic principles of legal status of these issues in these codes are different, which makes their practical application problematic.

Professor Kuznetsova says, in order to solve *Civil/Land Code* correlation problems, "*lex specialis* principle should be used firstly". Under this principle, the *Civil Code* remains general in relation to the *Land Code*, which sets out the main principles for property relations. The *Land Code* itself is a specialized code that, using the basic principles of civil law and specializing them, regulates a wide range of land relations that exist at present.

However, it should be borne in mind that *lex specialis* is a comprehensive normative act provisioning full regulation. However, taking into consideration the large number of discrepancies and blanket norms *Land Code* contains as a specialized normative act, it is difficult to call it comprehensive.

Nevertheless, adhering to the common principle of law under which a special regulation prevails over a general one (providing they have equal legal power), it can be said that in case of discrepancies in the regulation of certain issues under *Civil* and *Land Codes* in settling land disputes, the latter should prevail.

Apart from the above, according to researcher Vasyl Yanitsky, PhD in law, criminal procedural provisions can apply to land relations in the event of a crime. If a crime is proven, criminal law should apply pursuant to the procedure regulated by criminal procedural norms.

Land law is of a complex nature because its peculiarities (it regulates relations aiming not only at securing the right to land for its subjects, but also at rational use and conservation of the land) bring about rather difficult issues for procedural law. When land disputes are settled in courts, the issue of correlation of public and private interests in land law gives rise to a number of problems of division of authority of economic and other courts as for settlement of such disputes.

At the same time, there are different opinions about the complexity of this issue. Some specialists say that the problem of jurisdiction division between administrative and commercial courts is overestimated.

Thus, Dr. Yevgeniy Pershikov, a judge of the Supreme Commercial Court for disputes related to state regulation of economic relations, believes that in order to understand the division of jurisdiction "one just needs to read the *Administrative Proceedings Code* stating that relations connected with the ma nagement function come under the administrative jurisdiction. However, it is necessary to understand that the managerial function is connected with managing certain activity, not property. If we are dealing with property issues, we are entering civil and land relations to which v either civil or economic jurisdiction applies, depending on the composition of the parties".

Besides, many researchers think that in Ukraine we not only have division of court jurisdiction, but also competition of specialized jurisdictions. And though modern Ukraine is not England in the XVII-XIX centuries, where the courts "were competing" for cases (when more cases meant income for judges) by extending jurisdiction through the development of new procedures and other means and by competing with parliamentary jurisdiction, some characteristic features of that competition are now seen in modern legal practice.

Thus, the issue of division of jurisdiction cannot be solved solely through clarifications of the higher courts because, firstly, the number of issues to be regulated is high, and the form of such regulation would obviously remind a normative act, and, secondly, existing competition of jurisdictions hinders coordination of law application principles. Therefore, regulation of the issues of jurisdiction and competence in different land disputes should be provided not only as clarifications, recommendations, information releases and practice summaries by the highest courts, but also through respective amendments and clarifications in legislation.

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