

# ADMISSIBILITY OF CORRECTION OF A JUDGMENT IN NON-CONTENTIOUS PROCEEDINGS, IN PARTICULAR IN LAND AND MORTGAGE REGISTER PROCEEDINGS

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## ABSTRACT

The study analyses the question of admissibility of correcting judgments issued in non-contentious proceedings, in particular those concerning land and mortgage registers. Doubts regarding the nature of corrections of entry errors are clarified and the legal nature of the decisions in this matter is assessed.

From the perspective of the considerations regarding the admissibility of correcting judgments in land and mortgage related proceedings, attention is also drawn to the significance of the action for reconciliation of the content of the land and mortgage register with the actual legal status and to issues concerning the admissibility of correction of a judgment by a court referendary.

Key words: register entry, correction of errors in the register entry, rectification, land and mortgage register proceeding, court referendary

## INTRODUCTION

Examination of cases in non-contentious proceedings is an exception to the general principle expressed in Article 13 § 1 of the Code of Civil Procedure (CCP), in accordance with which the court hears cases in a trial. According to Article 13 § 2,

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the provisions regulating trial proceedings shall apply accordingly to other types of proceedings regulated in the CCP, unless special provisions regulating these proceedings stipulate otherwise. Pursuant to the generally accepted principles of the 'appropriate' application of the provisions, some of them shall be applicable directly, without any modifications, others shall take into account the structure, essence and distinctiveness of the proceedings in which they are applied, and still others shall not be applicable at all.<sup>1</sup>

The non-contentious procedure is one of the two procedural modes existing in Polish civil procedure law, alongside the contentious procedure, the function of which is to examine and resolve a legal dispute and thus protect the subjective rights of the parties to this dispute.<sup>2</sup>

In light of Article 350 § 1 CCP in conjunction with Article 13 § 2 CCP, the court may rectify a decision adjudicating on the merits of the case issued in non-contentious proceedings only in the event of inaccuracies, clerical or calculation errors, or other obvious mistakes.<sup>3</sup> It is assumed in case law that the purpose of rectifying a decision is to 'remove the inconsistency between the actual will and the knowledge of the court as well as the material collected and their expression in writing resulting from technical imperfection of the wording of the court's decision, presenting the court's stance in an incorrect form or in an inaccurate, and therefore incomplete and imprecise manner'.<sup>4</sup>

Due to the differences that occur in this respect in land and mortgage register-related proceedings, the issue of admissibility of correction of a judgment issued within this proceeding is analysed.<sup>5</sup> For this purpose, an attempt is made to clarify

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<sup>1</sup> Cf. the Supreme Court ruling of 9 December 1975, I CO 9/75, *OSNCP*, 1976, No. 10, item 219 with a commentary by W. Siedlecki, 'Przegląd orzecznictwa', *Państwo i Prawo*, 1977, No. 12, p. 122, and justification of the Supreme Court resolution of 15 September 1995, III CZP 110/95, *OSNC*, 1995, issue 12, item 177; J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Tom 1. Postępowanie rozpoznawcze. Artykuły 1–124*, 6th edn, Warszawa, 2023, *LEX/el.*, <http://lex.sn.pl/#/commentary/587935734/733174> [accessed on 6 December 2024].

<sup>2</sup> Judgment of the Constitutional Tribunal of 3 July 2007, SK 1/06, *OTK-A*, 2007, No. 7, item 73.

<sup>3</sup> See the Supreme Court rulings of 25 March 1968, II PZ 21/68, unpublished, 30 April 1970, II CZ 31/70, unpublished; 10 October 1978, IV CR 144/78, unpublished; 3 July 2003, I CZ 17/03, unpublished; A. Zieliński, in: Zieliński A. (ed.), *Komentarz do kodeksu postępowania cywilnego*, Warszawa, 2012, p. 62; the Supreme Court ruling of 30 April 1997, III CKU 22/97, *OSNC*, 1997/9, item 139.

<sup>4</sup> Thus, the Supreme Court ruling of 26 January 2018, II CZ 91/17, cf. M. Rzewuski, 'Sprostowanie usterki wpisu w księdze wieczystej. Glosa do postanowienia SN z dnia 26 stycznia 2018 r., II CZ 91/17', *Glosa*, 2019, No. 1, p. 75; the Supreme Court ruling of 13 June 2013, V CZ 28/13, *LEX*, No. 1375536.

<sup>5</sup> The land and mortgage register-related proceedings are regulated in the provisions of Articles 626<sup>1</sup>–626<sup>13</sup> CCP, supplemented by the provisions of the Act on the Land and Mortgage Registers of 16 July 1982, *Journal of Laws* of 2023, item 1984; Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in an IT System of 14 February 2003, *Journal of Laws*, No. 42, item 363; and regulations: of 20 August 2003 on the mode of transferring the content of the land and mortgage register to the land and mortgage register maintained in an IT system, on founding and maintaining land and mortgage registers in the computerised systems, and of 17 September 2001 on maintaining land and mortgage registers and document collections, *Journal of Laws*, No. 102, item 1122; as well

doubts concerning the nature of the correction of errors in the register entry, and the legal nature of the judgment in this matter is assessed.

First of all, it should be emphasised that the characteristic feature of an entry in the land and mortgage register, in contrast to other registration proceedings, is that this entry is a judgment. Therefore, it constitutes a departure from the general principle expressed in Article 516 CCP, in accordance with which court judgments in non-contentious proceedings are issued in the form of rulings, unless a special provision stipulates otherwise. Undoubtedly, entries in this register should not contain errors.

Thus, in hearing a petition within this proceeding, the court is obliged not only to examine the status of the land and mortgage register in the context of the submitted request, but also the task of the court maintaining the land and mortgage register is to ensure the correctness of the entries made, regardless of whether they were appealed against or not. Thus, it is the court's task to examine the formal and substantive correctness of the entries.<sup>6</sup> It should be highlighted that an entry in the land and mortgage register in land and mortgage-related proceedings is a judgment in which the court decides on the legal status of real property. Therefore, the entry cannot be burdened with any errors.<sup>7</sup>

## THE ISSUE OF RECTIFICATION IN LAND AND MORTGAGE REGISTER PROCEEDINGS: NATURE OF ERRORS RECTIFICATION

The issues of rectification in land and mortgage register proceedings primarily concern the correction of errors in the register entry, which cannot cause the content of the land and mortgage register to become inconsistent with the actual legal status.

In accordance with Article 626<sup>13</sup> § 2 CCP, in land and mortgage register-related proceedings, any corrections to the register entry that cannot cause inconsistency between the content of the land and mortgage register and the actual legal status are made *ex officio*. It should be noted that this provision constitutes the equivalent

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as the Regulation of the Minister of Justice – Rules and regulations of common courts of 18 June 2019 (consolidated text, Journal of Laws of 2022, item 2514, as amended).

<sup>6</sup> Cf. the Supreme Court ruling of 16 February 2012, IV CSK 272/11, LEX No. 1215294. H. Ciepla: 'Pojęcie stanu prawnego nieruchomości', in: Ciepla H., Brzeszczyńska S., *Obrót nieruchomościami w praktyce notarialnej, sądowej, egzekucyjnej, podatkowej z wzorami umów*, Warszawa, 2018, LEX/el.

<sup>7</sup> E. Jefimko, 'Postępowanie wieczystoksięgowe jako szczególny rodzaj postępowania nieprocesowego (zagadnienia wybrane)', *Przegląd Sądowy*, 2002, No. 10, p. 55; A. Oleszko, *Obrót cywilnoprawny w praktyce notarialnej i wieczystoksięgowej*, Zakamycze, 2003, p. 127; S. Rudnicki, *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu w sprawach wieczystoksięgowych. Komentarz*, Warszawa, 2010, p. 466; A. Oleszko, 'Uzgodnienie stanu prawnego nieruchomości w zakresie podstawy dokonanego wpisu prawa własności w księdze wieczystej', *Rejent*, 2007, No. 1, p. 9; T.E. Kowalik: 'Wpis w księdze wieczystej', in: Kowalik T.E., *Zakres kognicji sądu w postępowaniu wieczystoksięgowym*, Warszawa, 2020; H. Ciepla, E. Bała-Gonciarz, *Ustawa o księgach wieczystych i hipotece*, Warszawa, 2011, p. 65; T. Henclewski, 'Podstawy ujawnienia wzmianki w księdze wieczystej', *Monitor Prawniczy*, 2010, No. 4, pp. 238–239. P. Mysiak, *Postępowanie wieczystoksięgowe*, Warszawa, 2012, p. 254.

of Article 350 CCP within land and mortgage register procedure and excludes its application in the scope of rectification of errors in the land and mortgage register entry.<sup>8</sup> As rightly pointed out in the literature, although Article 626<sup>13</sup> § 2 CCP excludes the application of Article 359 CCP in land and mortgage register procedure for the rectification of errors in the register entry, it nonetheless fulfils the function of this provision, however, only in relation to entries.<sup>9</sup> Therefore, Article 350 CCP will be appropriately applied in land and mortgage register procedure (pursuant to Article 13 § 2 CCP) in the event of obvious errors made in decisions issued in these proceedings.<sup>10</sup>

From the perspective of the analysis within the scope of this paper, it should be stated that the hypotheses of Article 350 § 1 CCP and Article 626<sup>13</sup> § 2 CCP overlap in terms of the types of irregularities they address, i.e. they include inaccuracies, clerical and calculation errors, or other obvious mistakes subject to rectification.<sup>11</sup>

However, the differences concern the types of judgments to which they may apply and in which such irregularities may appear. Thus, in the event of such irregularities occurring in the content of an entry, rectification will be made on the basis of Article 626<sup>13</sup> § 2 CCP, whereas in the case of judgments that are not entries, Article 350 § 1 CCP will constitute the basis for rectification.<sup>12</sup>

It is irrelevant whether the entry was made in writing or as an electronic record. The technique for correcting entry errors is articulated in §§ 13 and 14 of the Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001.<sup>13</sup>

It is rightly pointed out in the literature that the possibility of editing in a computer programme has rendered § 13(2) of the Regulation of 17 September 2001, pursuant to which errors in the content of entries found before they are signed shall be corrected by crossing out the incorrect text with a black line or by crossing out and entering the correct text between the lines in place of the crossed out text, generally irrelevant.

In accordance with § 14 (1) of the Regulation of 17 September 2001, the entry on the correction of errors in the register entry, as referred to in Article 626<sup>13</sup> § 2 CCP,

<sup>8</sup> Cf. the Supreme Court ruling of 21 January 2003, III CZ 128/02, unpublished, and of 26 January 2018, II CZ 91/17, unpublished.

<sup>9</sup> E. Jefimko, 'Postępowanie wieczystoksięgowe...', op. cit., p. 53; H. Ciepla, E. Bałan-Gonciarz, *Ustawa o księgach...*, op. cit., p. 219; A. Maziarz-Charuza, *Postępowanie wieczystoksięgowe. Komentarz*, Warszawa, 2008, pp. 154–155; A.J. Szereda, in: Marciniak A. (ed.), *Kodeks postępowania cywilnego*, Vol. 3, Warszawa, 2020, p. 1186; the Supreme court ruling of 21 January 2003, III CZ 128/02, LEX No. 77078; the Supreme court ruling of 26 January 2018, II CZ 91/17, LEX No. 2439957, with a gloss by M. Rzewuski, 'Sprostowanie usterki...', op. cit., pp. 75–78. The Supreme Court ruling of 20 March 2009, II CZ 15/09, LEX No. 738343.

<sup>10</sup> The Supreme Court ruling of 21 January 2003, III CZ 128/02, LEX No. 77078; thus, also H. Ciepla, E. Bałan-Gonciarz, *Ustawa o księgach...*, op. cit., pp. 219–220; K. Markiewicz, in: Ereciński T., Lubiński K. (eds), *System Prawa Procesowego Cywilnego. Tom IV. Postępowanie nieprocesowe. Część I*, Vol. 2, Warszawa, 2021.

<sup>11</sup> M. Rzewuski, 'Sprostowanie usterki...', op. cit., pp. 75–78. E. Jefimko, 'Postępowanie wieczystoksięgowe...', op. cit., p. 53.

<sup>12</sup> E. Jefimko, 'Postępowanie wieczystoksięgowe...', op. cit., p. 53.

<sup>13</sup> Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001, Journal of Laws of 2001, No. 102, item 1122, as amended.

shall be made immediately after they are noticed, simultaneously with the issuance of a decision on the rectification of those errors, i.e. without waiting for the decision to become final.

According to § 14(2) of the Regulation of 17 September 2001, the record of a correction made, together with references to the reference number of the entry being corrected, is placed in the appropriate section and column in which the entry is disclosed, including the reference number of the provision constituting the basis for the correction.<sup>14</sup>

In turn, in the computerised register, in accordance with § 97 of the Regulation of the Minister of Justice on Founding and Maintaining Land and Mortgage Registers in the Telecommunications Systems of 15 February 2016,<sup>15</sup> corrections of the entry errors referred to in Article 626<sup>13</sup> § 2 CCP shall be made immediately after they are noticed. At the same time as the decision on the correction of entry errors is issued, appropriate changes shall be made in the relevant fields. If the correction is made in sections I-Sp, II or IV, the fields to which the correction applies shall be indicated, and it shall be disclosed that the correction is in the field 'type of change': 1.11.1.7 in section I-Sp, 3.4.1.7 in section III, or 4.4.1.15 in section IV.<sup>16</sup>

What is important is that, once the entry has been made, i.e. the moment it is recorded in the central database of the land and mortgage registers (pursuant to Article 626<sup>8</sup> § 2 CCP), the correction of the error already requires the issuance of a decision on the correction of errors in the entry.<sup>17</sup>

The above-described method for correcting an entry error applies to decisions issued in accordance with Article 626<sup>13</sup> § 2 CCP, but it may also be applied if the entry correction is made under the provision of Article 350 § 1 CCP. Of course, the above considerations concern the correction of an entry error noticed by the court at the time of examining a complaint against a court referendary's ruling.

However, it is not excluded that a court referendary may correct an error in the entry if it is noticed before a complaint against their ruling is filed. In such a case, Article 626<sup>13</sup> § 2 CCP is applied accordingly.<sup>18</sup>

In correcting the entry error, the court should proceed with particular caution, limiting its interference to the most obvious mistakes, because the correction must not in any case lead to a change in the ruling.<sup>19</sup> Furthermore, in its case law, the Supreme Court

<sup>14</sup> Cf. judgment of the Voivodeship Administrative Court in Szczecin of 17 March 2021, II SA/Sz 899/20, LEX No. 3168130.

<sup>15</sup> Journal of Laws, item 312, as amended.

<sup>16</sup> J. Ignaczewski, P. Siciński, '3.3. Sprostowanie omyłki', in: Ignaczewski J., Siciński P., *Komentarz do wpisów w księgach wieczystych*, Warszawa, 2013.

<sup>17</sup> A. Maziarz-Charuza, 'Podstawa faktyczna i sposób rozstrzygnięcia skargi', in: Maziarz-Charuza A., *Skarga na orzeczenie referendarza sądowego w postępowaniu wieczystoksięgowym*, Kraków, 2006, LEX/el.; Supreme Court ruling of 5 December 1980, III CRN 133/ 80, OSNC, 1981, No. 6, item 115 with a gloss by W. Siedlecki, 'Głos do postanowienia SN z 5 grudnia 1980 r., III CRN 133/80', *Państwo i Prawo*, 1982, issue 12, p. 100.

<sup>18</sup> Thus, A. Maziarz-Charuza, 'Podstawa faktyczna...', op. cit., p. 192.

<sup>19</sup> The Supreme Court ruling of 13 November 2024, III USK 355/23, LEX No. 3784360; and Supreme Court judgments: of 6 March 2019, I CSK 87/18, LEX No. 2630624; of 10 November 2017, V CSK 41/14, OSNC, 2018, No. 10, item 101; and the Supreme Court ruling of 19 January 2018, I CSK 176/17, LEX No. 2482574.

emphasises that the institution of judgment correction may not be used to eliminate substantive errors in case ruling and must not lead to a change in the decision.<sup>20</sup>

In addition, as rightly pointed out in the literature, the right to correct an error should not be made dependant on the scope of the complaint. It should be noted that the correction of an obvious error does not change the essence of the entry, which is why it may be done *ex officio* and at any time, even in relation to a valid entry, as it serves to maintain the authority of the justice system.<sup>21</sup>

## RECTIFICATION VERSUS ACTION FOR RECONCILIATION BETWEEN THE CONTENT OF THE LAND AND MORTGAGE REGISTER AND THE ACTUAL LEGAL STATUS

From the perspective of the analysis concerning the admissibility of the correction of a ruling in land and mortgage register proceedings, it is necessary to take into account the significance of a claim for reconciliation of the content of the land and mortgage register with the actual legal status.

First of all, the view should be approved that making an entry in the wrong section does not cause a discrepancy between the legal status disclosed in the register and the actual legal status. It should be pointed out that, already under the Mortgage Law of 1818, it was considered that the mortgage register, which was the equivalent of today's land and mortgage register, constituted one whole (Articles 14 and 17 of the Mortgage Law of 1818). Therefore, when checking whether any rights encumbered the property, it was not enough to state that these rights were recorded in the appropriate section of the register, but it was also necessary to ensure that entries in other sections of the register had not introduced any significant changes. It seems that this principle should still be considered applicable, although with the formalised IT system of maintaining land and mortgage registers, it will be much more difficult to make such a mistake. One example would be the erroneous placement of a claim for establishment of a mortgage in section III, like all other claims, instead of section IV, which, as is known, is intended only for entries concerning mortgages.<sup>22</sup>

Next, it should be borne in mind that the jurisdiction of the land and mortgage register court is limited solely to the examination of the content and form of the petition, the documents attached, and the content of the land and mortgage register. The Supreme Court's case law indicates that land and mortgage register proceedings cannot be used to resolve legal disputes or serve as a basis for a decision, because the appropriate path for this is a trial. As the Supreme Court explained: 'The contentious procedure is by its nature better suited to resolving disputes, and the action regulated in Article 10 of the Land and Mortgage Register Act is in this

<sup>20</sup> Judgment of the Supreme Court of 6 March 2019, Case No. I CSK 87/18, LEX No. 2630624.

<sup>21</sup> Thus, A. Maziarz-Charuza, 'Podstawa faktyczna...', op. cit., p. 191.

<sup>22</sup> J. Ignaczewski, P. Siciński, 'Struktura księgi wieczystej i jej elementy', in: Ignaczewski J., Siciński P., *Komentarz do wpisów w księgach wieczystych*, Warszawa, 2013; S. Rudnicki, *Ustawa o księgach...*, op. cit., footnote to Article 25.



case a way to bring the legal status disclosed in the land and mortgage register into compliance with the actual legal status.<sup>23</sup>

Therefore, in the event of an inconsistency between the legal status of the real property disclosed in sections II, III and IV of the land and mortgage register and the actual legal status, a person whose right is not entered, is entered incorrectly, or is affected by an entry of a non-existent encumbrance or restriction, may request the removal of the inconsistency in accordance with Article 10(1) of the Land and Mortgage Register Act (LMRA). An action for the removal of an inconsistency between the legal status of the real property disclosed in the land and mortgage register and the actual legal status may be brought only by a person authorised to submit a petition for an entry in the land and mortgage register – these will therefore be persons indicated in Article 626<sup>2</sup> § 5 CCP, i.e. the owner of real property, the perpetual usufructuary, a person in whose favour the entry was made, or the creditor, if they hold a right that may be entered in the land and mortgage register.<sup>24</sup> In addition, in accordance with Article 10 LMRA, the court cannot take action *ex officio*.

It is worth citing the Supreme Court ruling of 17 November 2006, V CSK 284/2006, in which the Supreme Court indicated that an inconsistency between the legal status disclosed in the land and mortgage register may result, *inter alia*, from the entry of a right with a scope different from the actual one. As a result of disclosure in the land and mortgage register, such a right benefits from the presumption of existence and, importantly, in the scope in which it was entered (Article 3(1) LMRA). Thus, the claim for removal of an inconsistency between the legal status of real property disclosed in the land and mortgage register and the actual status serves to overturn the presumption of credibility of land and mortgage registers. On the other hand, the condition for the application of Article 626<sup>13</sup> § 2 CCP is the correction of such errors in the entry that cannot cause an inconsistency between the legal status of the land and mortgage register and the actual legal status. Therefore, the institution regulated in Article 626<sup>13</sup> § 2 CCP cannot replace an action to determine the content of the land and mortgage register in conformity with the actual legal status.<sup>25</sup>

At the same time, it should be borne in mind that the action provided for in Article 10(1) LMRA, which is aimed at changing the legal status disclosed in the content of the land and mortgage register, cannot, by its nature, concern entries in section I-O. Section I-O of the land and mortgage register is not intended for entries of rights, but for entering actual data concerning the number, area, location and manner of use of the real property. The content of entries in this section should be consistent with the data from the real property cadastre; these entries are not subject to the presumption of truthfulness under Article 3 LMRA and may be corrected in accordance with Article 626<sup>13</sup> § 2 CCP *ex officio* or upon request or, in the event of inconsistency between the data in the real property cadastre and the designation

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<sup>23</sup> Thus, the Supreme Court ruling of 27 July 2010, II CSK 122/10, LEX No. 607251.

<sup>24</sup> I. Heropolitańska, 'Niezgoda treści księgi wieczystej', in: Heropolitańska I., *Prawne zabezpieczenia zapłaty wierzytelności*, Warszawa, 2014, LEX/el.

<sup>25</sup> II CZ 91/17, LEX No. 2439957.

of the real property in section I-O of the land and mortgage register, on the basis of Article 27 LMRA.<sup>26</sup>

This provision, as *lex specialis* in relation to Article 626<sup>13</sup> § 2, concerns the correction of the designation of the real property in section I-O and implements the postulate of a strict connection between the data covered by the content of entries in this section and the data of the land and building cadastre. These defects do not cause inconsistency between the content of entries in the land and mortgage register and the actual legal status, and the data of the land and building cadastre are the starting point.

The opinion prevailing in the Supreme Court case law, that the inadmissibility of a cassation appeal is inadmissible in this type of cases, should be endorsed.<sup>27</sup> As explained, an entry correcting the designation of the real property in the land and mortgage register based on the data from the real property cadastre does not prejudice the right of ownership, is not covered by the guarantee of public faith in land and mortgage registers, and does not cause the content of the land and mortgage register to be inconsistent with the actual legal status. The correction provided for in Article 27 LMRA serves only to implement the postulate of a close connection between the data contained in section I-O of the land and mortgage register and the data from the real property cadastre. An authorised person may at any time request a correction of the data concerning the designation of the real property, which also supports the view that the ruling on this correction does not have the nature of a resolution ending the proceedings in the case.<sup>28</sup>

Therefore, as doctrine and case law rightly assume, entries in section I-O of the land and mortgage register do not establish the legal status of the real property. However, in a situation where, as a result of undisclosed changes in the legal status, the land and mortgage register includes a separated part of real property to which the right is held by a person other than the one entered, and that part constitutes a distinct, separate real property within the meaning of Article 46 § 1 CC, the defectiveness of the land and mortgage register does not concern the data contained in section I-O, but the erroneous entry in section II. In such a case, the application of the public faith in the land and mortgage register is not excluded. As the Supreme Court explained, in such a case, 'the entry / deletion of the designation disclosed in section I-O of a given land and mortgage register must be perceived as one concerning the rights of the person entered in section II of that land and mortgage register and the rights of a third party not previously disclosed in the

<sup>26</sup> Cf. the Supreme Court ruling of 15 April 1997, I CKN 26/97, LEX No. 30900.

<sup>27</sup> Cf. the Supreme Court rulings: of 13 January 1998, II CKN 529/97, OSNC, 1998, No. 7–8, item 128, 17 December 2001, IV CKN 1369/00, unpublished, and of 13 November 2014, V CZ 74/14, unpublished.

<sup>28</sup> The Supreme Court ruling of 21 March 2018, V CZ 12/18, LEX No. 2495974; the Supreme Court ruling of 8 July 2003, IV CZ 74/03, unpublished; the Supreme Court ruling of 13 January 1998, II CKN 529/97, OSNC, 1998, No. 7–8, item 128; P. Borkowski, J. Trześniewski-Kwiecień, in: Ereciński T., Lubiński K. (eds), *System Prawa...*, op. cit.; H. Ciepla, E. Bałan-Gonciarz, *Ustawa o księgach...*, op. cit., p. 219; A. Maziarz-Charuza, *Skarga na orzeczenie...*, op. cit., p. 144. See P. Siciński, 'Zgodność oznaczenia nieruchomości w księdze wieczystej prowadzonej w systemie informatycznym z danymi katastralnymi', *Nowy Przegląd Notarialny*, 2004, No. 1, pp. 26 et seq.



land and mortgage register, and cannot be the result of a correction pursuant to Article 626<sup>13</sup> § 2 CCP or Article 27 LMRA, but requires reconciliation in accordance with Article 10 LMRA.<sup>29</sup>

## NATURE OF RECTIFICATION OF THE ENTRY ERRORS

In the context of Article 626<sup>13</sup> § 2 CCP, doubts may also arise, *inter alia*, regarding the nature of the rectification of entry errors. There appears to be agreement that rectification is not an entry but is made on the basis of a ruling.<sup>30</sup> Undoubtedly, the ruling on rectification is appealable, though the debate concerns the type of appeal available if the court makes the correction. According to the first view, an appeal may be lodged against the given decision, treated as a ruling on the merits of the case.<sup>31</sup> In this respect, it is argued that rectification is of a substantive nature and constitutes one of the rulings concluding the proceeding.<sup>32</sup> The second view holds that the ruling on the removal of the entry error in the land and mortgage register proceedings constitutes the equivalent of the procedural regulation under Article 350 CCP, and therefore a complaint remains the appropriate means of appeal.<sup>33</sup>

Case law indicates that a judgment issued based on Article 626<sup>13</sup> § 2 is not a resolution of a proceeding concerning the subjective rights related to the land and mortgage register system; it does not have the attribute of a ruling ending the proceeding within the meaning of Article 519<sup>1</sup> CCP, and therefore it is not subject to a cassation appeal.<sup>34</sup> As a result, the ruling issued pursuant to Article 626<sup>13</sup> § 2 CCP is not a ruling on the merits of the case within the meaning of Article 519<sup>2</sup> § 1 CCP.<sup>35</sup>

<sup>29</sup> Thus, the Supreme Court ruling of 17 November 2006, V CSK 284/06, LEX No. 607575; A. Maziarz-Charuza, *Postępowanie wieczystoksięgowe...*, op. cit., p. 153.

<sup>30</sup> E. Jefimko, 'Postępowanie wieczystoksięgowe...', op. cit., pp. 55–56.

<sup>31</sup> Cf. J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 3. Postępowanie rozpoznawcze*, 5<sup>th</sup> edn, Warszawa, p. 438; K. Flaga-Gieruszyńska, in: Zieliński A. (ed.), *Komentarz do kodeksu postępowania cywilnego*, Warszawa, 2012, Article 626-13, margin number 2.

<sup>32</sup> J. Gudowski, in: Ereciński T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom 3. Postępowanie rozpoznawcze*, 5<sup>th</sup> edn, Warszawa, 2016, p. 482, allows for an appeal and points to the controversial nature of the issue regarding the admissibility of a cassation appeal; in turn, E. Gniewek, *Księgi wieczyste. Art. 1–582 KWU. Art. 626<sup>1</sup>–626<sup>13</sup> KPC. Komentarz*, Warszawa, 2017, p. 632, argues that this constitutes a decision on the merits of the case concluding the proceeding; similarly, T. Czech, *Księgi wieczyste i hipoteka. Komentarz*, Warszawa, 2014, p. 446; M. Kučka, in: Pisuliński J. (ed.), *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu wieczystoksięgowym. Komentarz*, Warszawa, 2014, p. 447.

<sup>33</sup> S. Kostecki, in: Ryłski P. (editor-in-chief), Ołaś A. (editor of part III), *Kodeks postępowania cywilnego. Komentarz*, 2<sup>nd</sup> edn, Warszawa, 2023; see A. Antkiewicz, in: Szanciło T. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2023, Article 626<sup>13</sup>, margin number 21; J. Zawadzka, in: Pisuliński J. (ed.), *Ustawa o księgach wieczystych i hipotece. Komentarz*, Warszawa, 2014, p. 1367; T. Demendecki, in: Jakubecki A. (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. 4, Warszawa, 2012, p. 819; H. Ciepla, E. Bałań-Gonciarz, *Ustawa o księgach...*, op. cit., p. 220.

<sup>34</sup> See the Supreme Court rulings: of 21 January 2003, III CZ 128/02, LEX No. 77078, of 23 October 2013, IV CZ 67/13, LEX No. 1388477, and of 26 January 2018, II CZ 91/17, LEX No. 2439957.

<sup>35</sup> See the Supreme Court ruling of 20 March 2009, II CZ 15/09, unpublished.

Case law also states that a ruling of the court of second instance concerning the correction of a judgment, or a judgment issued in a non-contentious proceeding on the merits of the case that substantively alters that judgment, is subject to appeal by means of a cassation complaint.<sup>36</sup> It is worth mentioning the Supreme Court's position that if the court of second instance issues a ruling on the rectification of a judgment, but in fact changes the substance of that judgment, then such a ruling is subject to an appellate measure.<sup>37</sup> It is also worth referring to the judgment of 4 November 2010, IV CSK 188/10,<sup>38</sup> in which the Supreme Court explained that if the ruling of the court of second instance concerning the rectification of a judgment in fact changes the substance of that judgment, it is subject to appeal not by means of a complaint, but by means of an appeal or a cassation complaint, unless a cassation complaint is not available in the case.

With regard to the above issues, it should be noted that, as a result of the addition of Article 394 § 1(5<sup>1</sup>) CCP,<sup>39</sup> a complaint against a ruling of the court of first instance on the rectification or interpretation of a judgment, or their refusal, has acquired a devolutive nature, meaning it can be lodged with the court of second instance. Therefore, the legislator has included rulings on the rectification or interpretation of a judgment, or the refusal thereof, among the decisions that do not conclude proceedings in the case but can be appealed before the court of second instance. Such a conclusion may also be drawn from a systemic interpretation.

Formerly, it had a horizontal nature (it was available to a different composition of the court of first instance). This resulted from Article 394<sup>1a</sup> § 1(8), which was repealed as part of the amendment to the Code of Civil Procedure of 2023. The change in the regulations in this field should be assessed positively, because devolutive appeals ensure greater procedural guarantees, and therefore it should be a rule that a complaint against the ruling of the court of first instance may be lodged with the court of second instance.<sup>40</sup>

However, it should be noted that the provisions of the Code of Civil Procedure do not provide for a further complaint to the court of second instance. There is no such provision, either in the chapter on court sessions (Articles 148–163 CCP), or in the chapter on complaints (Articles 394–398 CCP). In such circumstances, taking into account the principle adopted in the Code of Civil Procedure, according to which a complaint against a ruling that does not conclude a proceeding may be lodged only in cases provided for by statute, it should be considered that such a complaint is inadmissible.<sup>41</sup> Therefore, it should be assumed that a cassation appeal is not

<sup>36</sup> Cf. judgment of the Supreme Court of 4 November 2010, IV CSK 188/10, *OSNC*, 2011, No. 7–8, item 86.

<sup>37</sup> Judgment of the Supreme Court of 4 November 2010, IV CSK 188/10, *LEX* No. 672688; judgment of the Supreme Court of 6 February 2018, IV CSK 60/17.

<sup>38</sup> *OSNC*, 2011, No. 7–8, item 86 with a commentary by Z. Strus, 'Przegląd orzecznictwa', *Palestra*, 2011, No. 1–2, p. 124.

<sup>39</sup> Act of 4 July 2019 amending Act – Code of Civil Procedure and Certain Other Acts, *Journal of Laws*, item 1469, as amended.

<sup>40</sup> M. Dziurda, in: *Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023 roku*, Warszawa, 2023, Article 394, <http://lex.sn.pl/#/commentary/587934181/731621> [accessed on 6 January 2024].

<sup>41</sup> K. Flaga-Gieruszyńska, A. Zieliński, *Kodeks postępowania cywilnego. Komentarz*, Warszawa, 2024 – Article 394; see the Supreme Court ruling of 7 October 1966, I CZ 104/66, *Legalis*.

available against the appellate court ruling on rectification of errors in the entry in the land and mortgage register pursuant to Article 626<sup>13</sup> § 2 CCP.<sup>42</sup>

Summing up this thread, although there is currently no doubt that the ruling of the court of first instance on the correction of a judgment is appealable by means of a complaint, such a nature cannot be attributed to the judgments of appellate courts, and for that reason a party cannot appeal in any way against a ruling on the correction of a judgment issued by the court of second instance. Exceptionally, however, it is admissible to appeal against the ruling on the correction of a judgment issued by the court of second instance by means of a cassation appeal, provided that there was an actual interference in the substantive sphere of the judgment, and thus contrary to the essence of rectification, which can only serve to correct obvious clerical errors and inaccuracies.

At the same time, just on the margin of present considerations, special attention should be drawn to the fact that correcting the basis of an entry and supplementing the content of an entry in the land and mortgage register by means of filling in an empty space in the land and mortgage register are two completely different activities.<sup>43</sup> Two judgments illustrate this problem very well.

In one of them, i.e. the Supreme Court ruling of 20 March 2009, II CZ 15 / 09,<sup>44</sup> the grounds for entry that had been formerly disclosed in the land and mortgage register were corrected. The rectification consisted in entering the correct court rulings instead of the incorrectly cited ones. The Supreme Court stated that, in the light of Article 626<sup>13</sup> § 2 CCP, the correction of a defect in the land and mortgage register entry concerning the citation of the grounds for making the entry is not excluded in cases where the entry was made in compliance with the actual legal status. Approving of this stance, the Supreme Court rightly explained in its ruling of 5 December 2008, III CZP 121/08, LEX No. 490497, that ‘for determining the actual legal status of the real property, it is irrelevant whether the grounds for an entry that has become final and binding were correct. However, what is important is whether there were substantive grounds for making the entry and whether this entry is consistent with substantive law.’<sup>45</sup>

However, the situation will be different in the case where, as in the actual status of the case covered by the Supreme Court ruling of 26 January 2018, II CZ 91/17,<sup>46</sup> field 8.C of the land and mortgage register had not been filled in at all by the Regional Court when disclosing the mortgage in section IV of the land and mortgage register. In such a situation, there are no grounds for rectification of any error in the entry, because there is no entry to be corrected, as the field has not been filled in.<sup>47</sup> It is, of course, possible in such a situation to supplement its content, but only upon the appropriate request made by a participant in the proceeding.

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<sup>42</sup> The Supreme Court rulings: of 21 March 2018, V CZ 12/18, Legalis; of 12 January 2018, II CZ 97/17, Legalis; of 21 January 2003, III CZ 128/02, Legalis.

<sup>43</sup> M. Rzewuski, ‘Sprostowanie usterki...’, op. cit., pp. 75–78.

<sup>44</sup> LEX No. 738343.

<sup>45</sup> The Supreme Court ruling of 5 December 2008, file number III CZP 121/08, LEX No. 490497.

<sup>46</sup> LEX No. 2439957.

<sup>47</sup> Thus, rightly: M. Rzewuski, ‘Sprostowanie usterki...’, op. cit., pp. 75–78.

Therefore, it should be emphasised that the scope of the institution of rectification covers only obvious inaccuracies, clerical or calculation errors, or other mistakes. Their obvious nature means that they must arise as a result of the court's actual and unquestionable will not being appropriately reflected in the judgment; that they are objectively and undoubtedly noticeable in the content of the judgment or result directly from the juxtaposition of this content with the content of the files; and that they arose due to the technical imperfection in the wording of the court's decision, the presentation of the court's position in an incorrect form or in an inaccurate, and therefore incomplete and imprecise manner.<sup>48</sup>

Thus, in this respect, it is necessary to take into account the correct position of the Supreme Court, which clearly draws attention to the need to examine each time the effects of a specific entry on the subjective rights in relation to the land and mortgage register.<sup>49</sup>

## ADMISSIBILITY OF RECTIFICATION OF A JUDGMENT BY A REFERENDARY

In the context of the considerations conducted, attention should be paid to an important issue concerning the admissibility of correcting a judgment by a court referendary.

A court referendary [in Polish: *referendarz*] is an independent judicial body performing functions of a judicial nature, but not belonging to the judicial authority and not exercising the administration of justice.<sup>50</sup>

There is a stance developed in the doctrine that the activities entrusted to referendaries are in fact jurisdictional activities, but they do not constitute the administration of justice in the strict sense, because it is the exclusive privilege of courts and independent judges, but should be classified as auxiliary activities of the administration of justice.<sup>51</sup>

In accordance with Article 47<sup>1</sup> CCP, a court referendary may perform activities in civil proceedings in cases specified by statute. However, the provision does not constitute grounds for the performance of specific activities by a referendary, as this always results from a special provision.<sup>52</sup>

The competences of a court referendary in non-contentious proceedings result from Article 509 CCP. In this respect, what should be noted is the generally unlimited competence of a referendary in the examination of cases within the scope of land and mortgage register proceedings and in registration-related matters.

<sup>48</sup> Cf. judgment of the Supreme Court of 17 June 2014, I CSK 422/13, LEX No. 1532772.

<sup>49</sup> See the Supreme Court ruling of 21 May 2004, V CZ 42/04, OSNC, 2005, No. 5, item 93.

<sup>50</sup> Cf. the Supreme Court resolution of 19 September 2002, III CZP 56/02, OSNC, 2003, No. 6, item 80; M. Misztal-Konecka, 'Kompetencje referendarza sądowego w cywilnym postępowaniu egzekucyjnym a wymierzanie sprawiedliwości', *Monitor Prawniczy*, 2017, No. 8.

<sup>51</sup> S. Rudnicki, 'Nowy urząd referendarza sądowego – głos w dyskusji', *Monitor Prawniczy*, 1996, No. 11, p. 395.

<sup>52</sup> P. Ryłski: (editor-in-chief), A. Olaś (editor of part III), *Kodeks postępowania cywilnego. Komentarz*, 2<sup>nd</sup> edn, Warszawa, 2023, Article 47-1 CCP.

Under Article 626<sup>8</sup> §§ 6 and 8 CCP, 'in the land and mortgage register proceeding, an entry in the land and mortgage register is a judgment (...)', and 'an entry in the land and mortgage register signed by a judge or a court referendary is deemed to have been made at the moment of its entry in the central database of land and mortgage registers.' Consequently, the position of a court referendary has been equated with the position of the court examining a specific case. Thus, a referendary has all court powers to examine a case.

Therefore, the possibility of correcting a court referendary's judgment may arise when an error is their's and not the party's. The rectification of a referendary's judgments may take place *ex officio* or at the request of a party, and such a request may be filed at any time regardless of the validity of a given judgment, because the rectifying judgment does not constitute a change or annulment of the judgment. Any entity affected by the judgment has the right to file such a request.

Doubts that may arise in connection with this issue concern the question of which body is competent to perform the activity of rectifying a judgment issued by a court referendary in a proceeding. The problem may concern a payment order, decisions, and rulings that a court referendary may issue.

On the one hand, it is indicated that a court referendary does not have the competence to issue a ruling on the rectification of a judgment in a procedural mode. According to A.M. Arkuszewska, the fact that the legislator has provided for a complaint against a certain type of judgments issued by a court referendary does not mean that it has enabled him to issue them in a proceeding. A court referendary may issue judgments and rulings only in cases expressly specified in the provisions laid down by statute. For this reason, the author believes that only courts are entitled to correct or interpret a judgment issued by a court referendary or to refuse them.

T. Wiśniewski<sup>53</sup> presents a different view. According to him, the material scope of a court referendary's competence includes issuing judgments on rectification or interpretation of judgments or their refusal, referred to in Article 394 § 1(5) CCP, since a complaint about the judgment may be lodged in accordance with Article 398<sup>22</sup> CCP. Therefore, these provisions may constitute legal grounds for issuing such judgments by court referendaries, because they are the only ones that clearly concern this issue. At the same time, such interpretation of the indicated provisions of the Code of Civil Procedure does not violate the provisions of Article 47<sup>1</sup> CCP. This approach to the analysed issue suggests that Article 398<sup>22</sup> § 1 CCP provides grounds for extending the competences of a court referendary with regard to these activities; however, we do not find in this position an answer to the question of whether this applies to all proceedings or only to those that a court referendary may conduct entirely independently.

In addition, the postulate of the rationality of the legislator's actions is indicated, and thus, since a court referendary can issue a judgment on their own, then, in accordance with the *argumentum a maiori ad minus*, they can all the more correct it or

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<sup>53</sup> T. Wiśniewski, in: Dolecki H., Wiśniewski T. (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2013, pp. 273 et seq.; T. Wiśniewski T., in: Dolecki H., Wiśniewski T. (eds), *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warszawa, 2010, p. 231.

subject it to interpretation based on the principles provided for in the provisions of the Code of Civil Procedure.<sup>54</sup> It seems that this is also the judicial practice, although it should be noted that it is not directly reflected in the provisions of the Code of Civil Procedure. Bearing in mind the postulate of a restrictive interpretation of the provisions on the competences of referendaries, one should rather conclude that if the legislator does not directly grant such competences to referendaries, then only the court may perform such an action. Therefore, Article 398<sup>22</sup> CCP may be applied only to those proceedings that a court referendary may conduct as a whole independently, and such proceedings concerning the substance of the case are not available in the procedure. Thus, the rectification or interpretation of a judgment issued by a court referendary should only be made by way of a ruling issued by the court.<sup>55</sup>

It should also be noted that the legislator, in a manner different from that provided for in Article 626<sup>13</sup> CCP, based on Article 18 Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in the IT System,<sup>56</sup> allows referendaries to correct any errors that occurred during the migration of the land and mortgage register. As the Supreme Court explained in its rulings, 'it is a special mode, different from the way of rectifying an entry provided for in Article 626<sup>13</sup> § 2 CCP, because it does not contain a limitation on the possibility of correcting migration related errors *ex officio* only to such defects that cannot cause the content of the land and mortgage register to be inconsistent with the actual legal status.'<sup>57</sup> It should be noted, however, that the correction of migration-related errors applies to situations where they arose as a result of transferring the content of the previous register to its electronic form. If the errors had existed in paper registers and, as a result of their migration, had occurred in the register maintained in the IT system, the grounds for rectification should be Article 626<sup>13</sup> CCP and not Article 18(1) of the Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in the IT System.

Moreover, it is not possible to exclude such errors in the course of land and mortgage register migration that, in terms of effects, led to the acquisition of rights that were incorrectly disclosed in the land and mortgage register but did not actually exist. However, the issue does not fall within the scope of the court's jurisdiction in the land and mortgage register proceedings, and in such a situation it will be necessary to apply the action provided for in Article 10 LMRA.<sup>58</sup> It is also rightly pointed out in the Supreme Court's case law that the possibility of correcting a migration-related error on the basis of Article 18 (1) of the Act on transferring the content of the land and mortgage register to the land and mortgage register maintained in the IT system

<sup>54</sup> A.M. Arkuszewska, *Referendarz sądowy w postępowaniu cywilnym*, Warszawa, 2011, p. 231.

<sup>55</sup> Also see K. Markiewicz, in: Gudowski J. (ed.), *System Prawa Procesowego Cywilnego. Tom 3. Środki zaskarżenia. Część I*, Warszawa, 2013, pp. 583 et seq.

<sup>56</sup> Act on Transferring the Content of the Land and Mortgage Register to the Structure of the Land and Mortgage Register Maintained in an IT System of 14 February 2003, Journal of Laws, No. 42, item 363, as amended.

<sup>57</sup> The Supreme Court ruling of 13 August 2015, I CSK 766/14, LEX No. 1771235; judgment of the Supreme Court of 6 June 2019, II CSK 224/18, LEX No. 2688850.

<sup>58</sup> Cf. the Supreme Court ruling of 13 August 2015, I CSK 766/14, LEX No. 1771235.



‘does not cause the exclusion of the application of the guarantee of public faith in the credibility of land and mortgage registers (Article 5 LMRA) in relation to the content of the land and mortgage register maintained in the telecommunications system, provided that at the moment a legal activity is performed the error has not been corrected yet. A contrary conclusion would in fact destroy the essence and purpose of transferring land and mortgage registers from the paper form to the telecommunications system’.<sup>59</sup>

There is one more situation to be considered, in which an entry does not contain a signature.

In accordance with Article 626<sup>8</sup> § 3 CCP, in land and mortgage register proceedings, an entry in the land and mortgage register is a judgment, and therefore it shall be signed by the court bench, which is a judge (Article 509 in conjunction with Article 324 § 3 CCP), or a court referendary (Article 509<sup>1</sup> § 1 CCP). Moreover, § 10(1)(6) of the Regulation<sup>60</sup> specifies that an entry should include ‘the first and last name, the position of the judge or court referendary, and their legible signature’. Therefore, in a situation where the entry does not include the signature of the judge or court referendary, it should be assumed that such an entry does not exist. As a result, in such a situation, one cannot speak of any error or defect in the entry that would be subject to correction under Article 626<sup>13</sup> CCP.<sup>61</sup>

## CORRECTION OF ERRORS IN DELETED ENTRIES

The last issue that may still occur in the context of the discussed topic concerns the correction of errors in deleted entries. There is no doubt that deletion is also an entry in the land and mortgage register (Article 626<sup>8</sup> § 7). In addition, Article 3(2) LMRA contains a legal presumption that the deleted right does not exist. The scope of this presumption does not include the reason for deletion, i.e. whether the right has expired or has never come into being.<sup>62</sup> Therefore, it should be assumed that since a deleted entry does not exist, it is not possible to correct errors in deleted entries either. By the way, it should be noted that the IT system also does not provide for such a possibility. Thus, it has been rightly pointed out in the literature that ‘the decision to dismiss the petition for such correction should be based on the provisions of a statute and not derived from the imperfection of the system.’<sup>63</sup>

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<sup>59</sup> Similarly, judgment of the Supreme Court of 6 June 2019, II CSK 224/18, LEX No. 2688850.

<sup>60</sup> Regulation of the Minister of Justice on maintaining land and mortgage registers and document collections of 17 September 2001, Journal of Laws of 2001, No. 102, item 1122, as amended.

<sup>61</sup> A. Oleszko, *Obrót cywilnoprawny...*, op. cit.

<sup>62</sup> Thus, also the Supreme Court in its ruling of 25 April 2012, II CSK 461/2011, OSNC, 2013, No. 1, item 8.

<sup>63</sup> A. Stefańska, *Elektroniczna księga wieczysta*, LexisNexis, 2011.

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