

The Sale of Real Estate Assets Owned by Missing Persons in Algerian Law

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Abstract:

Through this article, the Algerian legislator has organized the provisions relating to missing persons in accordance with the Family Code. However, the procedures for the sale of their real estate assets were not addressed until the enactment of Law No. 08-09, containing the Code of Civil and Administrative Procedure. This law established specific procedures regarding the disposal of such property in an effort to protect the missing person. Nevertheless, these procedures have been characterized by certain deficiencies.

Key words: Missing Person, Real Estate, Public Auction, Protection of Real Estate Ownership.

Introduction

Disappearance is a subject of considerable importance in view of the legal problems that have arisen and continue to arise in practice concerning the legal status of the missing person and the immovable and movable assets left behind. This phenomenon is attributable to the particular circumstances resulting from the migration of large numbers of people in search of better conditions, the exceptional security situation experienced by the country and the resulting cases of disappearance that are difficult to enumerate, as well as other individual and collective cases arising from natural disasters such as the Bab El Oued floods and the Boumerdès earthquake. The phenomenon of disappearance has given rise to numerous problems, whether relating to personal or financial interests, since it is inconceivable to leave such assets without protection where the missing person has not appointed a legal representative to manage them in his absence, nor can his family be left without a provider. There may therefore arise a need to dispose of such assets, and given their value and the special legal status of their owner, the legislator has enacted specific legal procedures for their sale, classifying them among special sales.

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In order to examine this subject, the following central question is raised: what are the legal provisions governing the sale of immovable property owned by a missing person?

In addressing this question, the descriptive-analytical method has been adopted, proceeding from the relevant legislative texts and drawing upon scholarly references, according to the following structure:

Section One: The Missing Person in Algerian Law.

Section Two: Procedures for the Sale of the Missing Person's Immovable Property by Public Auction.

1- The Missing Person in Algerian Law

Disappearance is considered one of the significant issues that has raised numerous legal problems concerning the determination of who qualifies as a missing person. Accordingly, all legislative systems have moved toward establishing its provisions in order to eliminate confusion between it and similar concepts, through defining the missing person, the procedures for declaring one as such, and identifying who acts in his stead — all of which will be addressed in the first section.

1-1- Definition of the Missing Person

Article 31 of the Algerian Civil Code refers to the Family Code with respect to the matter of the missing person and the absentee, providing that: "The provisions prescribed in family legislation shall apply to the missing person and the absentee." The Family Code has regulated the provisions governing the missing person and the absentee in Chapter Six of Book Two, entitled "Legal Guardianship," specifically in Articles 109 through 115.

In view of the exceptional circumstances experienced by Algeria, the definition of the missing person was incorporated into exceptional legislation enacted under special circumstances, namely: Order No. 02/03 dated 25 February 2002 relating to the Bab El Oued floods; Law No. 03/06 dated 14 June 2003 relating to the Boumerdès earthquake; and Order No. 06/01 dated 27 February 2006 containing the Charter for Peace and National Reconciliation.

1-1-1 Definition of the Missing Person under the Family Code

The missing person is the individual who has disappeared without any trace or evidence of his existence, and this disappearance is coupled with public ignorance as to whether he is alive or dead.¹ This definition is largely consistent with the definition adopted by the Algerian legislator, who defined the missing person as the absentee whose whereabouts are unknown and whose life or death cannot be ascertained.²

A notable criticism of this legislative definition is its conflation of the concepts of the missing person and the absentee, despite the distinction between the two. The absentee refers to a person who has left his family through migration or distance while his being alive is established as a fact, unlike the missing person whose life or death is unknown. Remarkably, the Algerian legislator remedied this error elsewhere by drawing a distinction between the missing person and the absentee, defining the absentee as a person who has been prevented by force majeure from returning to his place of residence or managing his affairs — either personally or through an attorney-in-fact — for a period of one year, and whose absence has caused harm to third parties, in which case he is treated as a missing person. On this basis, the

distinction between the absentee and the missing person dissolves, and absence is converted into disappearance.

A person shall not be deemed missing except by virtue of a judicial declaration to that effect, issued after the lapse of at least one year from the cessation of news concerning the absentee.³ Although the Family Code did not specify the required period of news blackout that must elapse before a declaration of disappearance may be issued, such a declaration cannot be made unless one year has passed since the cessation of all news regarding the person. The legislator referenced this period in relation to the absentee, on the basis that the passage of such period is sufficient to render the absentee a missing person.⁴

1-1-2 Definition of the Missing Person under Exceptional Legislation

The Algerian legislator enacted special texts under urgent circumstances dictated by the floods of 10 November 2001 and the earthquake of 21 May 2003, addressing the issue of disappearance through specific rules commensurate with the circumstances in which the disappearance occurred, in addition to the text relating to the Charter for Peace and National Reconciliation.

The legislator thus enacted Order No. 02/03 containing the provisions applicable to those missing in the Bab El Oued floods, in order to settle their legal status — a matter requiring urgency that the provisions of the Family Code were unable to address. Pursuant to this text, a declaration of missing status was made by means of a judicial police report upon the conclusion of the search operations, provided that the person's presence at the sites of the floods was established, that no trace of him could be found, that neither his life nor his death could be determined with certainty, and that his body could not be recovered following investigation by all available legal means.⁵

It is apparent that the legislator introduced additional conditions beyond those set out in the Family Code for a person to be deemed missing.

These same conditions were affirmed by the legislator under Law No. 03/06 relating to those missing in the earthquake of 23 May 2003,⁶ which additionally required that the person's presence at the location of the earthquake be established, alongside the remaining conditions.

It follows that the definition of the missing person contained in the two aforementioned texts constitutes an exception to the general definition set forth in the Family Code — an exception enacted by the legislator to address specific exceptional circumstances and for a defined period of time, in response to the large numbers of missing persons left in the wake of these two disasters.

Furthermore, under Order No. 06/01, the legislator defined the missing person as any person who disappeared under the specific circumstances arising from the national tragedy and whose body could not be recovered following investigation by all available legal means, such disappearance being established by means of an official report of constatation drawn up by the judicial police.⁷

From the foregoing, it may be concluded that the conditions set forth in the Family Code are equally present in the exceptional legislation, namely: absence, the absence of any trace, and uncertainty as to whether the person is alive or dead. The sole additional requirement introduced by these exceptional laws is that the person must have been present at the site of the disaster or within the specific circumstances arising from the national tragedy, so as to confer upon him

the status of a victim of the earthquake, flood, or national tragedy. Furthermore, these laws substituted proof of disappearance by means of an official report of constatation of disappearance in lieu of a judicial declaration of disappearance.

1-2- Legal Procedures for the Declaration of Disappearance

A person shall not be deemed missing except upon the issuance of a judicial ruling in accordance with the procedures prescribed by law, non-compliance with which renders the legal act null and void. Under exceptional legislation, however, a person may be declared missing by means of an official report of constatation of disappearance without the need for a judicial ruling. Accordingly, we shall examine the procedures applicable under the Family Code, followed by those applicable under the exceptional legislation.

1-2-1 Procedures Provided for under the Family Code and the Code of Civil and Administrative Procedure

Under ordinary circumstances, a person shall not be deemed missing until a judicial ruling⁸ to that effect has been issued. Such a ruling is issued upon the application of one of the heirs — that is, the rightful beneficiaries of the missing person from among his family members and relatives who are entitled by law to a share of the estate — as well as any interested party such as creditors and partners.⁹

The legal interest required to bring such an action must satisfy the following conditions: it must be legally grounded, based on a legal right whether patrimonial or moral in nature; it must be existing or imminent; and it must be personal and direct, meaning that the claimant must be the holder of the right sought to be protected — with the exception of those acting on behalf of others, such as an attorney-in-fact, a testamentary guardian, or a judicial administrator.¹⁰

In the absence of heirs and interested parties, the Public Prosecution may apply for a judicial declaration of disappearance. In such a case, the Public Prosecution does not assert a subjective right of its own and therefore, as a general rule, lacks legal standing in such proceedings pursuant to the general principle set out in Article 13 of the Code of Civil and Administrative Procedure.¹¹ However, the Family Code, by way of exception to this rule, confers upon the Public Prosecution the requisite standing to institute disappearance proceedings, whereby it is treated as an original party to the action.¹² Through such proceedings, the Public Prosecution seeks, on the one hand, to safeguard the assets of the missing person and, on the other, to preserve the public interest.

Such an action shall be brought after the lapse of a minimum of one year from the cessation of news concerning the missing person, before the competent court within whose territorial jurisdiction the defendant's domicile falls, specifically before the Family Affairs Division, subject to the fulfilment of a set of procedural requirements prescribed by law.

Foremost among these procedural requirements is the filing of an introductory petition containing a statement of the full names and surnames of the parties to the dispute, along with a concise presentation of the facts, the claims, and the legal grounds upon which the action is based, as well as a reference to the supporting documents and evidence. The court clerk shall then register the petition in a dedicated register in order of receipt, assign a case number, fix the date of the first hearing, and serve notice upon the defendant.¹³

The defendant, who was not defined under Article 114 of the Family Code, is, by reference to the general rules, the person against whom the claimant's submissions are directed — namely,

the missing person himself. Since the missing person is unable to conduct his own affairs by reason of his absence, nor is he able to defend himself, the action cannot be brought directly against him; rather, it is instituted against him in the presence of the Public Prosecutor,¹⁴ in his capacity as representative of the public interest. Where all the requisite conditions are satisfied and the judge is persuaded that the application for a judicial declaration of disappearance is well-founded, on the basis of the arguments, documents submitted to him, and the investigation he has conducted, he shall declare the state of disappearance by means of the ruling he issues.¹⁵

1-2-2 Procedures Provided for under Exceptional Legislation

The general rule provides that a person shall not be deemed missing except upon the issuance of a judicial ruling. However, an exception to this rule was introduced, whereby a person may be declared missing by means of an official report of constataction drawn up by the judicial police, without the need for a judicial ruling, in view of the exceptional circumstances in which the disappearance occurred.

With regard to the Bab El Oued floods, Article 02-02 of Order No. 02/03 provides that: "The judicial police shall draw up an official report of constataction of the disappearance of the person concerned upon the conclusion of the search operations, and this report shall be delivered to the rightful beneficiaries of the missing person or to any interested party within a period not exceeding four months from the date of the disaster."

Accordingly, the legislator substituted the judicial ruling with an official report of constataction drawn up by the judicial police upon the conclusion of the search operations. The declaration of missing status is then made by virtue of this report, provided that the period from the commencement of the search operations to the time of drawing up the report of constataction of disappearance does not exceed four months. The report shall be delivered to the rightful beneficiaries of the missing person and to any interested party within a period not exceeding four months from the occurrence of the disaster.

The Algerian legislator determined that the provisions of this Order shall enter into force from the date of occurrence of the disaster.¹⁶ Accordingly, pursuant to the wording of the article, the reports of disappearance should have been delivered to the relatives of the missing person or to any interested party within a period not exceeding four months from the date of the disaster, meaning that all reports should have been delivered by 10 March 2002 — that is, ten days after the Order's publication in the Official Gazette.

However, compliance with this time limit was not practically feasible.¹⁷ It would therefore have been more appropriate for the legislator to set the commencement of the period as of the date on which the judicial police were notified by those entitled to apply for a judicial declaration of death.

With regard to those missing in the Boumerdès earthquake, the legislator prescribed the same procedures but established a longer time limit commensurate with the particular situation of those missing as a result of the earthquake. The judicial police report shall be delivered to the persons concerned within a maximum period of eight months from the date of the disaster.¹⁸ These reports shall carry absolute evidentiary weight, as they substitute for the judicial ruling, and may only be challenged on grounds of forgery. Such reports shall be delivered to the rightful beneficiaries of the missing person or to any interested party.

The legislator likewise enacted special provisions applicable to those missing as a result of the national tragedy, which arose from the terrorist acts that occurred in Algeria. The law

relating to National Reconciliation contained several provisions for establishing the state of disappearance in light of the exceptional circumstances experienced by Algeria. As a condition for proving the state of disappearance, the legislation required the submission of an official certificate of constatation drawn up by the judicial police following their search and investigation operations.¹⁹ The report shall be delivered to the rightful beneficiaries or to any interested party, and the legislator stipulated that this must be completed within a period not exceeding one year from the date of publication of this Order in the Official Gazette, being 28 February 2006. Thereafter, the rightful beneficiaries of the missing person or any interested party shall have no recourse other than to apply to the courts for the issuance of a judicial declaration of disappearance.²⁰

In all of these cases, the missing person is presumed to be alive, and his estate shall not be distributed among the heirs. It is therefore necessary to appoint a person to act in his stead to administer his movable and immovable property pending his return or his death, whether actual or presumed by judicial declaration.

1-3- Determination of the Person Acting in Place of the Missing Person

The missing person may leave behind immovable or movable property that cannot be disposed of except by his legal representative, who shall be appointed in accordance with the legal procedures prescribed by the legislator.

1-3-1 Appointment of the Curator

If the missing person had appointed an attorney-in-fact prior to his disappearance, the judge shall confirm him in his capacity by judicial ruling, and the power of attorney shall remain in force, entitling the attorney-in-fact to exercise all powers within the scope of the authority granted to him. However, following the institution of proceedings by the interested parties, any interested person, or the Public Prosecution, the law obliges the judge to appoint a person to safeguard the assets of the missing person. In such a case, if the attorney-in-fact satisfies the legal conditions prescribed for a curator, the judge shall confirm him in that capacity and extend the scope of his authority to encompass the management and preservation of all the missing person's assets. If, however, he does not satisfy the requisite legal conditions, his power of attorney shall be terminated,²¹ and a curator shall be appointed to act in place of the missing person by means of an ex parte order, upon the application of one of his relatives or any interested party by way of a petition, or upon the request of the Public Prosecution, after the judge has ascertained the consent of the prospective curator prior to issuing the order.²²

The Algerian legislator did not specify, under the Code of Civil and Administrative Procedure, the persons upon whom curatorship may be conferred, whereas the Family Code indicates that the judge shall appoint a curator from among the relatives or others, and the judge proceeds to appoint the curator within the same ruling relating to the declaration of disappearance.²³

The legislator further provided that the curator shall stand in the position of the testamentary guardian and shall be subject to the same provisions.²⁴ Accordingly, the same conditions required of the testamentary guardian are required of the curator: he must be Muslim, of sound mind, of full legal age, capable, trustworthy, and of good conduct. The judge may remove him if these conditions cease to be satisfied.²⁵

The curator is obliged to preserve the assets of the missing person by exercising the care of a prudent person,²⁶ and shall be held liable for any failure to exercise due diligence and caution

in managing the missing person's assets, as well as for any negligence in safeguarding his property and protecting his interests.

1-3-2 Limits of the Curator's Authority over the Missing Person's Assets

When issuing a ruling on disappearance, the judge must inventory the missing person's assets and appoint, within that ruling, a curator from among the relatives or others to manage the missing person's property and to receive on his behalf any inheritance or donation to which he may be entitled, pursuant to Article 111 of the Family Code. Article 115 of the same law further provides that the missing person shall not be declared a testator, nor shall his assets be distributed, except upon the issuance of a judicial declaration of his death.

It is evident from the wording of these two articles that the Algerian legislator confined the curator's authority to the management of the missing person's assets and the receipt of any inheritance or donation due to him, and that his assets shall not be treated as an estate nor distributed among the heirs until a judicial declaration of death has been issued.

However, by reference to Article 100 of the Family Code, which provides that the curator is subject to the same provisions applicable to the testamentary guardian, and to Article 95 of the same law, which provides that the testamentary guardian holds the same authority as the legal guardian in matters of disposition, in accordance with the provisions of Articles 88, 89, and 90 of that law — it follows that the testamentary guardian holds the same authority as the legal guardian in matters of disposition and is subject to the same provisions. Consequently, the relationship between the legal guardian, the testamentary guardian, and the curator becomes a transitive relationship, whereby the curator shall have the authority to dispose of the missing person's immovable property with the prior authorization of the judge.²⁷ In this respect, the position adopted by the Algerian legislator is contradictory.

In this regard, the Supreme Court issued a ruling dated 24 December 2008 concerning the acts of disposition performed by the curator, the operative part of which reads as follows:

The action seeks, on behalf of the respondent, the annulment of a contract of sale concluded between the intervening party and the appellants, relating to two plots of land, on the ground that they are subject to a waqf by virtue of a notarial deed of endowment.

— Whereas it is established by both Sharia and law that a waqf constitutes the perpetual dedication of property to the effect that it is removed from private ownership for the benefit of any person in perpetuity and for charitable purposes, and that no act of disposition transferring ownership of the endowed property shall be permitted.

— Whereas it is further established that the heirs of the missing person may not take possession of his assets except upon the issuance of a judicial declaration of his death.

It being established in the case that the intervening party disposed of the respondent's immovable property by way of sale solely on the basis of the ruling declaring disappearance, their acts of disposition are therefore null and void, even if judicial authorization for the sale had been obtained, on the ground that the curator's disposition of the missing person's assets shall only be valid if based on a judicial declaration of death, which was not present in the case at hand.

For these reasons, the Supreme Court decided to dismiss the appeal, founding its ruling on the basis that the appellants' invocation of a violation of the provisions of Article 115 of the Family Code was misplaced, given that no judicial declaration of death had been issued in respect of the respondent, and that there was accordingly no scope for the application of that

article. This is correct, since it would have been more appropriate to invoke a violation of Article 100 of the Family Code, which provides that the curator stands in the position of the testamentary guardian and is subject to the same provisions, and Article 95 of the same Code, which provides that the testamentary guardian holds the same authority as the legal guardian in matters of disposition. Consequently, pursuant to Article 88 of the Family Code, the curator is entitled to dispose of the missing person's assets with the diligence of a prudent person, subject to obtaining the judge's prior authorization for the sale of immovable property.

It follows that the acts of disposition of immovable property performed by the intervening party by way of sale, based solely on the ruling declaring the respondent's disappearance, are not null and void but rather valid, provided that judicial authorization was obtained, pursuant to Article 88 of the Family Code.

However, based on the facts as established in the case, the two plots of land that were sold were subject to a waqf deed, and given that no act of disposition transferring ownership of endowed property is permissible, the acts of disposition performed by the intervening party are null and void on this ground, and not on the ground of disposition of the missing person's assets prior to the issuance of a judicial declaration of death.²⁸

The position of the Supreme Court was thus unequivocal in granting the curator the authority to dispose of the missing person's assets.

2- Procedures for the Sale of the Missing Person's Immovable Property by Public Auction

The Algerian legislator was not content with merely requiring the curator to obtain judicial authorization for the disposition of the missing person's assets; he went further in order to guarantee protection for the missing person by requiring that the sale of immovable property be conducted by public auction, as this constitutes a safeguard for the missing person — particularly with regard to the fairness of the price — in addition to ensuring that the judge personally supervises the sale process. With regard to the applicable procedures, these were set out in the Code of Civil and Administrative Procedure under the heading "Real Property Sales of the Missing Person, the Person of Limited Legal Capacity, and the Bankrupt," within a chapter entitled "Special Real Property Sales," organized according to the following classification:

2-1- Pre-Sale Procedures for the Sale of the Missing Person's Immovable Property

The immovable property or properties of the missing person shall be sold by public auction, a mechanism introduced by the Algerian legislator under Article 783 and the subsequent articles of the Code of Civil and Administrative Procedure.

In order to initiate the procedures for the sale of immovable property owned by the missing person, judicial authorization for the sale must first be obtained, as previously indicated.

2-1-1 Preparation of the Conditions of Sale List

The judicial officer shall prepare a conditions of sale list for the immovable assets of the missing person, at the request of the curator, the legal guardian, or the testamentary guardian, in the form of an official instrument containing the terms and conditions for the sale of the immovable property by public auction.²⁹ This document shall be lodged with the registry of the court within whose territorial jurisdiction the property is located, and must contain a set of

essential particulars, namely: the authorization issued by the judge where he determines that the sale is connected to the interest of the missing person or that a necessity warranting it exists; a precise description of the property that excludes any uncertainty; a determination of whether the property is held in co-ownership or in severalty; the conditions of sale; and the reserve price, which shall be determined by a certified real estate expert. The property may be divided into separate lots where legally feasible, in order to facilitate the determination of a reserve price for each lot and to enhance the overall value of the property by increasing the value of each individual lot. The list shall also include the registration references of the official instruments establishing ownership of the property.³⁰

It is noteworthy that the legislator did not require the date and venue of the public auction session to be specified in the conditions of sale list, unlike the approach adopted in relation to other types of real property sales.³¹ Where the date and venue of the public auction session have not been specified in advance, they shall be determined by the president of the court by way of an order on petition, at the request of the judicial officer or any interested party.³²

The conditions of sale list, upon lodgement, must be accompanied by an extract from the land tax register, an extract from the title deed, the authorization to sell where applicable, and the land registration certificate,³³ which shall be endorsed by the territorially competent president of the court, who shall also fix the time and date of the objection hearing.³⁴

2-1-2 Official Notification of the Lodgement of the Conditions of Sale List

The judicial officer shall formally notify the secured creditors holding real security interests of the lodgement of the conditions of sale list for the missing person's immovable property, and shall likewise notify the Public Prosecution,³⁵ so that they may exercise their right to request the cancellation of the conditions of sale list by filing an objection before the president of the court at least three days prior to the hearing.³⁶

It is noteworthy that the Algerian legislator did not provide, under Article 785 of the Code of Civil and Administrative Procedure, for notification of co-owners holding property in undivided co-ownership, unlike the express provision made in Article 740 of the same Code — this being relevant given that the missing person may hold property in undivided co-ownership. The legislator similarly failed to specify the time limits for notification, unlike the same article which mandatorily fixes a period of fifteen days following the lodgement of the conditions of sale list with the court registry.

Following the determination of any objections, or in the event that no objections are filed, the judicial officer shall issue a certificate of non-objection in order to proceed to the next stage.

2-1-3 Publication and Posting Procedures Specific to the Sale of Immovable Property Owned by the Missing Person

The publication and posting procedures applicable to the sale of seized immovable property shall apply to the sale of the missing person's immovable property,³⁷ involving the publication of an extract of the conditions of sale list and the publication of the public auction sale notice for the property owned by the missing person.

a- Publication of an Extract of the Conditions of Sale List

Following the lodgement of the conditions of sale list, the judicial officer shall publish an extract thereof with a view to attracting the largest possible number of bidders in order to secure the best offer. Publication shall be effected in a national daily newspaper, and the extract shall

be posted on the court's notice board within the eight days following the last formal notification of the lodgement of the conditions of sale list.

The purpose of this procedure is to afford any person wishing to consult the conditions of sale list the opportunity to do so by attending the office of the judicial officer or the registry of the competent court.³⁸

b- Publication of the Public Auction Sale Notice for the Immovable Property

Drawing from the content of the enforcement instrument and the conditions of sale list, the notice shall contain the following particulars: the full name of both the missing person and his legal representative, together with the domicile of each; a description of the property as set out in the conditions of sale list; the reserve price for each lot of the property; the date and time of the public auction; and the designation of the court in which the sale is to be conducted or any other sale venue — all to be published not more than thirty days and not less than twenty days before the auction session. The notice shall be signed, and the judicial officer shall publish the public auction sale notice at the expense of the party seeking enforcement.³⁹ In cases where the legislator did not indicate who bears these costs, it is because the party requesting the sale is the legal representative of the missing person.

The public auction sale notice shall be drawn up in the form of an extract containing the relevant particulars. An extract of this list shall be published in one or more national daily newspapers, depending on the significance of the property, and shall be posted on the notice board of the court in which the sale is to be conducted.

It shall likewise be posted on the notice boards of the tax collection office and the municipality within whose jurisdiction the property is located, and may further be posted in public squares and public places, or in any location likely to ensure the attendance of the largest possible number of bidders,⁴⁰ with a view to achieving the best possible results.

Creditors and co-owners holding property in undivided co-ownership may file a petition with the president of the court requesting the cancellation of the publication and posting procedures at least three days before the auction session, failing which their right to do so shall lapse. The president of the court shall rule on the cancellation request on the day of the sale and prior to the opening of the public auction, by way of an unappealable order. Two scenarios may arise:

— Either the president orders the cancellation of the publication and posting procedures, with the sale being adjourned to a subsequent session, and directs the judicial officer to recommence the procedures at his own expense.

— Or, in the event that the cancellation request is dismissed, the president orders the opening of the bidding process.⁴¹

2-2- Procedures Applicable at the Public Auction Session

The public auction session comprises a set of procedural steps, which shall be examined after determining the conditions for its valid convening, as follows:

2-2-1 Conditions for the Valid Convening of the Session

For the session to be opened, participants must possess full legal capacity and their consent must be free from any vitiating defects. The bidding process shall be conducted in a public session presided over by the president of the court or the judge designated to conduct the sale proceedings, at the seat of the court with which the conditions of sale list was lodged, on the date and at the time fixed for that purpose. The session shall be held in the presence of the

judicial officer, the court clerk, the secured creditors holding real security interests, the possessor, and the surety holding a real guarantee, if any, as well as a minimum of three bidders.⁴²

With regard to the attendance of the legal representative of the missing person, the legislator made no reference to this requirement, despite the fact that his presence is presumed to be necessary.

2-2-2 Opening of the Public Auction Session

The president shall order the opening of the public auction session after verifying the regularity of the formal notification, publication, and posting procedures, and shall announce the conditions of sale, the nature of the immovable property offered for sale, the reserve price, the fees, and the costs. The president shall also determine the minimum bid increment based on the significance of the property, provided that it shall not be less than ten thousand dinars (DZD 10,000) for each successive offer.⁴³

The session shall then commence, and each bidder may participate in person or through an attorney-in-fact. In the event that the number of bidders fails to reach the legally required quorum, or where no offer reaches the reserve price within fifteen minutes of the opening of the bidding, the judge may adjourn the sale at the same reserve price, noting this in the session register. The date of the subsequent sale session shall be fixed at a period of not less than thirty days and not more than forty-five days from the date of the adjournment order, in order to allow for the repetition of the publication and posting procedures.⁴⁴ At the subsequent session, the president of the session shall not attach importance to the number of bidders. If the offers submitted at the second session are below the previously determined reserve price, the president shall order the adjournment of the session, reduce the reserve price by one-tenth, and recommence the publication and posting procedures. At the following session, the property shall be sold to the highest bidder even if the offer is below the reserve price.⁴⁵

2-2-3 Adjudication of the Auction

The auction session shall open with a public call, and the judge shall accept the bid of the highest bidder where no higher offer is made following three successive calls. The successful bidder shall be required, at the same session, to pay one-fifth of the price together with all costs and expenses due. The remaining balance shall be paid within a maximum period of eight days from the date of the sale at the court registry. In the event of failure to pay within the specified period, the successful bidder shall be formally put on notice to pay within the following five days, failing which the property shall be resold by public auction at his own expense.⁴⁶

Furthermore, where the successful bidder fails to pay the balance of the adjudicated price, he shall be required, at the subsequent session held within eight days from the date of the original adjudication session, to pay the difference if the property is resold at a price lower than the price at which it was originally adjudicated. He shall have no right to any surplus if the property is resold at a higher price, as a consequence of his failure to pay the balance of the adjudicated price.⁴⁷

2-3- The Adjudication Ruling

The judge shall effect the transfer of ownership to the successful bidder by means of an adjudication ruling, which constitutes a title deed after being registered by the judicial officer with the land registry office within whose territorial jurisdiction the property is located, for the purpose of its publication within a period of two months from the date of its issuance.⁴⁸

The adjudication ruling shall contain, in addition to the standard particulars of judgments and the names and surnames of the parties: the authorization to sell; a description of the property sold, its components, and any easements attached thereto, if any, as set out in the conditions of sale list; the reserve price of the property and the date of payment; the public auction procedures; the full identity of the successful bidder, whether a natural or legal person; the obligation of the curator to deliver the property; and the adjudication ruling shall not be subject to any form of challenge.⁴⁹

Conclusion

From the foregoing, it is evident that the Algerian legislator addressed the provisions governing the missing person in accordance with the Family Code, and subjected the sale of his immovable property to specific procedures determined under the Code of Civil and Administrative Procedure. The legislator required that such sale be conducted following the issuance of a judicial authorization, by way of public auction under judicial supervision — departing from the rules governing ordinary sales — with a view to ensuring the protection of the missing person's immovable assets and the rights of all interested parties. Notwithstanding, certain shortcomings remain, including: the conflation of the terms "absentee" and "missing person"; the failure to address the status of an attorney-in-fact appointed prior to the disappearance; inconsistency regarding the limits of the curator's authority over the missing person's assets; and deficiencies in the procedures prescribed for the sale of his immovable property. Specifically, Article 785 of the Code of Civil and Administrative Procedure does not specify the time limits for filing objections to the conditions of sale list, but merely refers to the application of the provisions of that Code; nor does the same article specify the time limits for notification, unlike Article 740 of the same Code; it also fails to provide for notification of co-owners, given that the missing person may hold property in undivided co-ownership; and it does not expressly require the attendance of the legal representative of the missing person at the public auction session, despite such attendance being presumed necessary.

Accordingly, the following legislative amendments are proposed:

- Clarification of the terms "absentee" and "missing person" in Articles 109 and 110 of the Family Code.
- Elimination of the inconsistency regarding the limits of the curator's authority over the missing person's assets by amending Article 111 of the Family Code so as to bring it into conformity with Articles 95 and 100 of the same Code.
- Amendment of Article 785 of the Code of Civil and Administrative Procedure to incorporate a provision requiring notification of co-owners in cases where the property is held in undivided co-ownership.
- Specification of the time limits for filing objections to the conditions of sale list.
- Amendment of Article 753 of the Code of Civil and Administrative Procedure to expressly require the attendance of the legal representative of the missing person at the auction session.

Footnotes

1. Ajja Al-Jilali, *Introduction to Legal Sciences, Theory of Rights, Volume II*, First Edition, Dar Houma, 2011, p. 84.

2. Article 109 of Law No. 84/11 dated 09 June 1984 containing the Family Code, as amended and supplemented by Order No. 05/02 dated 27 February 2005, Official Gazette No. 15, issued in 2005, p. 04.
3. Articles 109 and 110 of the Family Code.
4. Mohammed Said Djafour, Introduction to Legal Sciences, Volume II, Lessons in the Theory of Rights, Dar Houma, First Edition, 2011, p. 327.
5. Article 02 of Order No. 02/03 dated 25 February 2002 containing the provisions applicable to those missing in the floods of 10 November 2001, Official Gazette No. 15, 2002, p. 26.
6. Article 02 of Law No. 03/06 dated 14 June 2003 containing the provisions applicable to those missing in the earthquake of 21 May 2003, Official Gazette No. 37, 2003, p. 09.
7. Articles 27 and 30 of Order No. 06/01 dated 27 February 2006 containing the Charter for Peace and National Reconciliation, Official Gazette No. 11, 2006, p. 06.
8. Article 109 of the Family Code.
9. Article 114 of the Family Code.
10. Hussein Friha, Essential Matters in the Code of Civil and Administrative Procedure, University Publications Office, 2010, p. 15.
11. Law No. 08/09 dated 25 February 2008 containing the Code of Civil and Administrative Procedure, Official Gazette No. 21, issued on 27 February 2008.
12. Article 03 bis of the Family Code.
13. Hussein Friha, op. cit., p. 18.
14. Court of Ain Boucif, Family Affairs Division, ruling dated 27 April 2010, unpublished.
15. Ali Filali, Theory of Rights, National Institution for Printing Arts, Algeria, 2011, p. 198.
16. Article 04 of Order No. 02/03: the provisions of this Order shall enter into force as of 10 November 2001.
17. Court of Bab El Oued, Personal Status Division, ruling dated 17 July 2002, Case No. 1394/2002, unpublished.
18. Article 02 of Law No. 03/06.
19. Article 30-02 of Order No. 06/01.
20. Article 02 of Presidential Decree No. 06/93.
21. The Algerian legislator made no reference to this situation despite its significance.
22. Articles 470 and 471 of the Code of Civil and Administrative Procedure dated 23 April 2008, Official Gazette No. 21, issued on 25 February 2008.
23. Article 111 of the Family Code.
24. Article 100 of the Family Code.
25. Article 93 of the Family Code.
26. Article 88 of the Family Code.
27. Article 88 of the Family Code.
28. Supreme Court, Civil Chamber, ruling dated 24 December 2008, Case File No. 435190, Judicial Review, Issue No. 2, 2009, pp. 130–131.
29. Al-Qarawi Sarhan, Enforcement Procedures in Algerian Legislation and Comparative Law, Doctoral Thesis, Faculty of Law, University of Algiers, 2014, p. 538.
30. Article 783 of the Code of Civil and Administrative Procedure.
31. Article 737 of the Code of Civil and Administrative Procedure.

32. Article 747 of the Code of Civil and Administrative Procedure.
33. Article 784 of the Code of Civil and Administrative Procedure.
34. Article 737 of the Code of Civil and Administrative Procedure.
35. As an original party to family affairs cases, the Public Prosecution serves as the legal representative of the public interest pursuant to Article 03 bis of the Family Code.
36. Article 785 of the Code of Civil and Administrative Procedure.
37. Article 789 of the Code of Civil and Administrative Procedure.
38. Article 748 of the Code of Civil and Administrative Procedure.
39. Article 749 of the Code of Civil and Administrative Procedure.
40. Article 750 of the Code of Civil and Administrative Procedure.
41. Article 751 of the Code of Civil and Administrative Procedure.
42. Article 753 of the Code of Civil and Administrative Procedure.
43. Article 754 of the Code of Civil and Administrative Procedure.
44. Article 755 of the Code of Civil and Administrative Procedure.
45. Article 754-05 of the Code of Civil and Administrative Procedure.
46. Article 757 of the Code of Civil and Administrative Procedure.
47. Article 758 of the Code of Civil and Administrative Procedure.
48. Article 762 of the Code of Civil and Administrative Procedure.
49. Article 765 of the Code of Civil and Administrative Procedure.

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A – Books

1. Abdesslam Dib, The Code of Civil and Administrative Procedure: A Translation of the Fair Trial, Second Edition, Mofem Publishing, Algeria, 2011.
2. Ajja Al-Jilali, Introduction to Legal Sciences, Theory of Rights, Volume II, Berti Publishing, Algeria, 2009.
3. Ali Filali, Theory of Rights, National Institution for Printing Arts, Algeria, 2011.
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B – Theses

6. Al-Qarawi Sarhan, Enforcement Procedures in Algerian Legislation and Comparative Law, Doctoral Thesis, Faculty of Law, University of Algiers, 2014.

C – Legal Texts

7. Code of Civil and Administrative Procedure dated 23 April 2008, Official Gazette No. 21, issued on 25 February 2008.
8. Law No. 84/11 dated 09 June 1984 containing the Family Code, as amended and supplemented by Order No. 05/02 dated 27 February 2005, Official Gazette No. 15, issued in 2005, p. 04.

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