MORTGAGE AND ITS VALIDITY REQUIREMENTS: A CASE BASED ANALYSIS OF THE REQUIREMENTS OF AUTHENTICATION AND WITNESSES

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ABSTRACT

The Civil Code of the Empire of Ethiopia 1960 (here after Civil Code) does not provide definition of mortgage. I assume that this is probably because the lawmaker acknowledged that the definition for mortgage might differ based on the contextual usage of the term. When we say "Mortgage", we may be referring to the juridical act, or the property that is furnished as a security or the right of the creditor on the security. Mortgage as a juridical act has distinct validity requirements though varying based on its sources. Out of these validity requirements, this work emphasizes on the requirement of authentication and witnesses which are both relevant for conventional mortgage. Authentication as a validity requirement regarding some contracts concerning immovable properties including mortgage was first affirmed by the Federal Supreme Court Cassation Bench decision on file number 21448. The Cassation bench while rendering this decision built its reasoning on the Amharic version of Article 1723 of the Civil Code. Subsequent rulings of the bench at least by majority vote of the judges were also in line with similar precedent although in some of the rulings dissenting opinion against interpretation of the majority was expressed. Latest decisions on the other hand are against these precedents and from the reading of several related cases, it is very difficult to either consider authentication as a validity requirement or not. Likewise, regarding the requirement of witnesses concerning contracts which have to be made in writing including conventional mortgage, the law being clear on the effect of non-fulfillment of witnesses' requirement and decisions of the bench affirming the same, latest precedents are against the laws and the benches' own prior interpretations. Therefore, this work is aimed at unravelling these inconsistencies in the existing precedents and provides valuable observation for subsequent decisions based on a meticulous legal analysis.

KEYWORDS: Mortgage, Validity Requirements, Authentication, Registration, Witnesses, Cassation Bench, Formality Requirement.

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MORTGAGE DEFINED

As opposed to the common real security devices the Civil Code dealt with, (Pledge and Antichresis, which are specifically defined under Art. 2866 and Art. 3117 respectively) the provisions concerning mortgage do not provide its definition. Literally, the term "Mortgage" may be understood as a juridical act, or as a security right established on an immovable property (or certain special movables) or as a security furnished to guarantee the performance of an obligation. Likewise, the authoritative legal dictionary Blacks Law also provides definitions of the term from the above differing contexts of the concept. One of the definition states "…*An estate created by a ·conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance*". [1] The preceding definition explains mortgage as a collateral estate (property). Blacks Law further provides "…*Mortgage is a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in de- fault of payment…*"[2] This later definition explains mortgage as a right of the creditor over the property(ies) of his debtor. From the perspective of understanding mortgage as a juridical act, Blacks Law also provides the following definition regarding mortgage. "…*Mortgage is a contract by which specific property is hypothecated* [3] *for the performance of an act, without the necessity of a change of possession*". This definition seems to accept that mortgage emanates from a contract alone and as such it offers a narrow understanding of mortgage as a juridical act because, the source of mortgage can either be a contract (conventional mortgage) or the law (legal mortgage) or court decision or award of an arbitration tribunal (judicial mortgage). Therefore, I assume that the Ethiopian Law maker opted silence regarding the definition of mortgage because the concept has different contextual meanings. In this

[1] Bryan A. Garner, *Black's Law Dictionary, St. Paul Minn*. West Publishing Co, 8th ed. (2004) p. 793

[2] Ibid, the civil code of the state of Louisiana also provides the definition of mortgage under Art. 3245 as "…*Mortgage is a right granted to the creditor over the property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment*". French Civil Code under Art. 2114 also states "*A mortgage is a right in rem on immovable allocated to the discharge of an obligation.*"

[3] In the Roman Law, there were two sorts of transfer of property as security for debts, namely the *pignus* and the *hypotheca.* The *pignus* or *pledge* was where anything was pledged as a security for money lent, and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. *Hypotheca,* was when the thing pledged was not delivered to the creditor, but remained in possession of the debtor. The later closely corresponds to these days' idea of a mortgage.

work, the concept of mortgage is used in all of the above-mentioned contextual meanings therefore, readers are reminded to understand the term in the context it is used.

MORTGAGE HOW CREATED

As it has been briefly discussed at the introductory section of this work, one of the factors of distinction between mortgage and other real security devices is its creation or sources. As opposed to the other real security devices such as pledge and antichresis, which only result from contracts,[4] mortgage may result from the law, a judgment or be created by a contract or other private agreement.[5] The common and obvious source of mortgage is a contract [6] and because of that, mortgage, which emanates from contractual agreement is called Conventional Mortgage.[7] Therefore, it follows that, Conventional Mortgage is a contract by which a person binds the whole of his property or a portion of it only, in favor of another, to secure the execution of some engagement. Mortgage also results from the law, which is called Legal Mortgage [8] or Statutory Mortgage or Tacit Mortgage[9]. In this case, the law alone (in certain cases)[10], gives to the creditor a mortgage on the property of his debtor, without it being requisite that the parties should stipulate it.

The Ethiopian Civil Code recognizes two instances in which legal mortgage comes in to existence; legal mortgage of seller of an immovable property and legal mortgage of a co-partitioner.[11] In case of the former, the civil code provides "*Whosoever sells an immovable shall have a legal mortgage on such immovable as a security for the payment of the agreed price and for*

[4] See Arts. 2825 and 3117 of the Civil Code of the Empire of Ethiopia (1960) (here after the Civil Code)
[5] Art. 3041 of the Civil Code
[6] The Civil Code states that a contract or "other private" agreement can be a source of mortgage. The stipulation "private agreement" seems unclear because as the lawmaker puts it vividly, it gives the impression that the concept is different from conventional contracts. To the understanding of the writer of this work, if a private agreement creates mortgage, such agreement for all legal and practical reasons is not different from a contract. Besides, neither the French Civil Code (from which the Ethiopian civil code if fetched) nor the Civil Code of the State of Louisiana recognizes non-contractual private agreement as a source of conventional mortgage.
[7] Art. 2117 of the French Civil Code (Translated by Georges ROUHETTE, Professor of Law, with the assistance of Anne BERTON, Research Assistant in English (2004), and here after French Civil Code) see also Art. 3253 of the Civil Code of the State of Louisiana
[8] See Art. 3253 and 3279 of the Civil Code of the State of Louisiana
[9] See Art. 2117 and 2121 of the French Civil Code. It is called tacit mortgage, because it is established by the law without the aid of any agreement.
[10] Legal mortgage will happen only when the law provides so.
[11] See Arts. 3042 and 3043 of the Civil Code respectively

the performance of any other obligation laid down in the contract of sale".[12] The later provision of the Civil Code states "*A co-partitioner shall have a legal mortgage on the immovable allotted to his co-partitioners in accordance with the act of partition. Such mortgage shall secure the payment of any compensation in cash that may be due to him or such other compensation as may be due by the co-partitioners where he is dispossessed of any property allotted to him*". The term "co-partitioners" may refer to either co-owners or co-heirs of estates of a deceased person. As per the rule of partition in law of succession, partition shall be made in kind and as such, each heir shall receive some of the property of the succession.[13] When inequality of shares in kind happens, it shall be set-off by the payment of sum of money.[14] Therefore, until such compensation, which the other co-partitioner(s) owe to one of the heirs or the co-owners is discharged, the later will have a legal mortgage right on the shares of his co-heirs or co-owners.

The Ethiopian law only provides the aforementioned two instances of legal mortgage;[15] however, other legal systems recognize several sources of legal mortgage. For instance, independently of statutory mortgages resulting from other codes or from particular statutes, the rights and claims to which a statutory mortgage is granted by the French Civil Code include but not limited to… " those of one spouse, on the property of the other; those of minors or adults in guardianship, on the property of a guardian or statutory administrator; those of the State, of departments, of communes and of public institutions, on the property of collectors and accounting administrators; those of a legatee, on the property of the succession, under Article 1017".[16]

Mortgage can also be judicial in which a court or arbitration tribunal secures the execution of its judgments, orders or awards by granting one party a

[12]See Art. 3042 of the Civil Code. In here, it is clear that parties (seller and buyer) have already concluded valid contract of sale and therefore, title is transferred to the buyer since the seller cannot create mortgage on his own property.

[13] See Art. 1086 (1) of the Civil Code

[14] Art. 1086(2) of the Civil Code

[15] Some writers comment that Art. 3067 of the Civil code which discusses priority right of contractors and suppliers on proceeds of sale of a mortgaged property is a third instance of legal mortgage in Ethiopian law. For me, however, this legal provision is not adding a third instance of legal mortgage. One of the effects of mortgage as enshrined under Art. 3059(2) of the Civil Code is what is known as "priority right" or "Right of Preference" of mortgagees against other ordinary creditors on the proceeds of sale of the mortgage. However, this priority right or right of preference of mortgagees is not without limitation and one of which is the priority right of contractors and suppliers under Art. 3067. Therefore, Art. 3067 is only establishing an exceptional circumstance to the rule of priority right than establishing a third instance of legal mortgage under Ethiopian law.

[16] See Art. 2121 of the French Civil Code see also Arts 3281-3281 of the Civil Code of Louisiana

mortgage on one or more immovable the property of the other party. [17] The Civil code does not mention whether the judgment has to be final or not but the writer opines that judicial mortgage can validly be established either in a final or provisional judgments.

VALIDITY REQUIREMENTS OF MORTGAGE

Validity requirements are essential conditions, which provide legally sufficient circumstances for the valid constitution of a juridical act. If a certain legal requirement is considered as a validity requirement or essential condition, its non-fulfillment renders the juridical act unenforceable, as it produces no legal effect. Mortgage also requires the fulfillment of certain essential conditions for its valid establishment. Some of the validity requirements are specific to the type of mortgage at issue and other validity requirements are applicable for all mortgages however created. I will briefly discuss the validity requirements of mortgage in the following sections.

REGISTRATION

The civil code of the empire of Ethiopia stipulates that, "*A mortgage, however created, shall not produce any effects except from the day when it is entered in the register of immovable property at the place where the immovable mortgaged is situate".*[18] As can be grasped from the provisions of the civil code stated herein above, registration is an essential validity requirement for all types of mortgages whether conventional, legal or judicial. The time when registration has to be made is very decisive because, an entry relating to a mortgage shall be of no effect where it is made after a third party who is not liable for the payment of the debt has acquired the immovable and registered his rights in the registers of immovable property.[19] An entry relating to an immovable shall also have no effect where it is made after an action for the attachment of the immovable has

[17] See Art. 3044 of the Civil Code

[18] Id at Art. 3052 of the Civil Code. Under the Civil Code of Louisiana, registration does not affect the validity of mortgages however they are created. Art. 3314 of the same states "…these mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records kept for that purpose and in the manner hereafter directed. Therefore, it is clear from the mentioned law that registration plays the purpose of notice to third parties but the Ethiopian law in this regard vividly established what the consequence is to the mortgage however created if not registered. Nevertheless, this does not mean that registration will be a validity requirement in all juridical acts concerning immovable properties. As an illustration, one can refer Art. 2878 of the Civil Code of the Empire of Ethiopia, which states that … sale of immovable property, shall not prejudice third parties if not registered in public registers of the place where the immovable is found.

[19] Art. 3057(1) of the Civil Code

been brought and entered in the registers of immovable property or after the mortgagor has been declared bankrupt.[20]

SPECIFICATION OF SECURED AMOUNT

The central point of emphasis in secured transactions including mortgage is the amount of the claim to which security is furnished as opposed to the total claim which might be a sum total of secured and unsecured claims. If a legal action is brought based on secured transaction before court of law, the court may not be able to enforce the right of the claimant based on the relevant laws if such claim is not certain in money and sufficiently established. And because of that, a contract of mortgage shall not produce any effect unless it specifies in Ethiopian currency the amount of the claim secured by mortgage.[21] Likewise, in judicial mortgage, the court judgment or the arbitral award should specify the amount of the claim secured by mortgage and the immovable or immovables to which such mortgage applies.[22] Even if the later provision does not tell the effect of failure to specify the secured amount in the judgment or the award, the word "shall" in the legal provision makes it mandatory and if not, as it can be inferred from the reading of the related articles of the civil code, the judgment or the award may not establish a judicial mortgage sustainable in the eyes of the law. The French civil code under Art. 2132 also contains a similar rule that states "…*A conventional mortgage is valid only where the sum for which it is granted is certain and determined by the instrument*…"[23] This Validity requirement also affects registration. The Ethiopian Civil Code regarding the implication of failure to specify the secured amount states "the *amount of the debt secured by a mortgage shall be indicated in Ethiopian currency. Where the amount of the debt is undetermined, the registration shall be made for a fixed sum representing the maximum of the security of the immovable. Failing agreement with the person whose immovable is affected by the mortgage, such sum shall be fixed by the court"*.[24]

TITLE OR AUTHORITY TO DISPOSE

To have a validly established conventional mortgage, ownership title or a special authority[25] to dispose of the immovable by mortgage is necessary.

[20] Art.3057 (2) of the Civil Code
[21] Art 3045(2) of the Civil Code
[22] Art. 3044(2) of the Civil Code
[23] The Civil Code of Germany under Art. 1115 states "*Upon the registration of the mortgage, the creditor, the amount of the claim and, where the claim bears interest, the rate of interest, and if other supplementary payments are to be made, their amount, must be stated…"*
[24] Art. 1618(1)-(3) of the Civil Code
[25] Art. 2205 of the Civil Code

Regarding this condition, the Civil code states "a mortgage shall be valid where it is created by a person who is the owner of the immovable under a title deed issued to him by the competent authorities".[26] Strengthening the same rule, the Civil Code further stipulates, "*A person may not secure his debt by mortgage unless he is entitled to dispose of the immovable for consideration*".[27] In line with the aforementioned legal provisions Art. 3050(1) of the civil code also explains, "*A mortgage shall be of no effect where it is created by a person who is not entitled to dispose of the immovable as provided in Art. 3049"*. Equivalent legal provisions are incorporated in the civil codes of the State of Louisiana and France. The former under Article 3267 states, "*Conventional mortgages can only be agreed to by those who have the power of alienating the property which they subject to them*". Similarly, the French Civil Code under Article 2124 established that "*cconventional mortgages may be granted only by those who have the capacity of conveying the immovable which they burden with them*". Mortgage may also be created by a person who does not have title over the property but authority to dispose of the property in mortgage. Regarding this the civil code under Article 3049 (3) stipulates, "*A person may secure the debt of another by mortgage where he is entitled to dispose of the immovable gratuitously"*. The title or the authority to subject a property in mortgage will not produce any effect if it is acquired subsequently: therefore, the title or the authority to dispose of a property in mortgage must exist at the time of its creation.[28] As the above-discussed legal provisions vividly explain, it appears that title is a prerequisite for conventional mortgage alone. Nevertheless, it has to be made clear that mortgage whether conventional, legal or judicial shall be established on the property of a person who has valid title on it.

EXISTENCE OF THE MORTGAGE

To render mortgage valid, it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovable on which the mortgage is granted.[29] Such act shall specify in particular the commune in which the immovable is situate the nature of the immovable and, where appropriate, the number of the immovable in the cadastral survey plan and where the immovable is situate in an area where there is no cadastral survey plan, not less than two of its boundaries should be specified.[30] The judgment or award creating judicial mortgage as well must indicate the immovable or

[26] Art. 3051 of the Civil Code
[27] Art. 3049 (2) of the Civil Code
[28] Art. 3050(2) of the Civil Code
[29] Art. 3048(1) of the Civil Code
[30] Art. 3048(2&3) of the Civil Code

immovables to which such mortgage applies.[31] Registration of the mortgage also requires these descriptions concerning the immovable mortgaged. [32] In order to provide all these information, the existence of the immovable is a mandatory requirement. Regarding this essential condition of mortgage, the Civil Code under Article 3050(3) states that "*A mortgage shall be of no effect where it relates to future immovable"*. The French Civil code on the same matter contains the following under Article 2130.

"Property to come may not be mortgaged. Nevertheless, where existing and unencumbered property is insufficient to secure the claim, a debtor may, in admitting that insufficiency, agree that each property which he may subsequently acquire be specially allocated thereto as the acquisitions proceed".

Unlike Ethiopian Law, French Law as can be understood from the above provision considers future property which is furnished to compensate for the insufficiency of the security which already exists.

WRITTEN FORMALITY

Written formality is not a principle in the formation of contracts in Ethiopia as can be inferred from the provisions of Article 1719 (1). General contracts laws further explain under Sub Article (2) of the same that where a special form is expressly prescribed by law, such form shall be observed. As regards the effect of non-observance of formality prescribed either by the law or by the contract, Article 1720(1) established that there shall be no contract but a mere draft of a contract.

The writing formality as enshrined under Article 1727of the Civil Code comprises of two elements: (1) it has to be supported by a special document that has to be signed by all the parties bound by the contract; and (2) It has to be attested by two witnesses (this will be discussed in detail later in this work). Among the juridical acts that require mandatory writing requirement mortgage is one. The contract or other agreement creating a mortgage shall be of no effect unless it is made in writing.[33]

Contrary to what the Ethiopian Law envisages, writing requirement at common law is contained in the Statute of Frauds, originally enacted to curb the subornation of perjured testimony. Some commentators have viewed the Statute of Frauds as a rule of evidence rather than a substantive element of a

[31] Art. 3044(2) of the Civil Code
[32] Arts. 1605&1606 of the Civil Code
[33] Art. 3045(1) of the Civil Code

valid contract.[34] If a contract required by the Statute to be in writing is not written, it is unenforceable, but not void for all purposes. Likewise, in France, the writing requirement is included in the French Civil Code along with the provisions on proof of obligations.[35] Failure to reduce a contract to writing where required has no effect on the obligations themselves, but only on the parties' ability to prove them. Therefore, the French writing requirement also performs an evidentiary function.[36]

AUTHENTICATION

In the law of evidence, authentication is the act or mode of giving authority or legal authenticity to a statute, record, or other written instrument, or a certified copy thereof, so as to render it legally admissible.[37] Both in Civil Law as well as in common law legal system, certain contracts require authentic act for their constitution. In the Civil Law, it is an act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register.[38] Under the Civil Code of Louisiana, the authentic act, relating to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least of fourteen years, or of three witnesses, if the party be blind. If the party docs not know how to sign, the notary must cause him to affix his mark to the instrument.[39]

In Ethiopia, authentication as an independent validity requirement of certain contracts concerning immovable properties including mortgage was first established by the Federal Supreme Court Cassation Bench decision on file number 21448. As this particular decision was the basis for subsequent controversial legislation and precedents, it is worth discussing the facts of the case and the reasoning of the court in reaching conclusion. Even though the legal issue resolved by file number 21448 was a case of sale of immovable properties, interpretation was given on Article 1723 of the Civil Code which is applicable to mortgage as well.

[34] M. Thomas Arceneaux, *Writing Requirements and the Authentic Act in Louisiana Law: Civil Code Articles 2236, 2275, & 2278*, 35 La. L. Rev. p.764 (1975) Available at: http://digitalcommons.law.lsu.edu/lalrev/vol35/iss4/4
[35] See Art 1315 ff of the French Civil Code
[36] Supra note 32 p. 765
[37] Supra note 1 p.112
[38] Ibid
[39] Art. 2231 of the Civil Code of Louisiana

FACTS OF FILE NUMBER 21448

This case was between W/ro Gorfe G/hiwot (applicant) and two respondents W/ro Aberash Dubarge and Ato Getachew Nega. The case was first initiated by the applicant at Federal First Instance Court in relation to a claim for succession. In her application to the first instance court W/ro Gorfe claimed that while her deceased father was living in marriage with the first respondent (W/ro Aberash), they have in common acquired a house. And as the deceased was not survived by any other heir except the applicant, half of the estate which belongs to the deceased must pass to W/ro Gorfe. The court after looking in to the facts of the case and the relevant laws resolved the case in favor of the applicant declaring her heir to the portion of the estate. But the second respondent based on Article 358 brought in another fact to the case and alleged that, the deceased while he was alive and his wife (W/ro Aberash) have sold part of the immovable which the applicant in the present case claims it as an estate belonging to her father. For this latter allegation by the second respondent the applicant brought the following defenses. She raised that the second respondent does not mention the house number which he claimed to have brought from her deceased father and his wife, he did not present title certificate to prove his title, at the time when the alleged contract of sale of the house was concluded (1993), there was no house built in the premises, even if contract of sale is alleged, the deceased while concluding the contract was sick and helpless and was not in a position to conclude a valid contract and the finger print which was alleged to have been given by the deceased cannot be proven and until the year 2000, the name of the second respondent was not known in official documents registered concerning the disputed house. But the first respondent admitted that her deceased husband and herself had sold and transferred the house to the second respondent at the indicated year.

The Lower Court after looking in to the evidences (documentary and personal) partly reviewed it decision by ruling that there existed a valid contract of sale on the alleged house between the deceased and his wife on the one hand and the second respondent. Dissatisfied by the ruling of the First Instance Court, the applicant appealed her case to Federal High Court but the court affirmed the decision of the lower court. Finally, the applicant brought her claim for the Cassation Bench of the Federal Supreme Court requesting a reverse decision regarding the validity of the contract of sale of the house.

According to the cassation bench, the issue which required legal resolution was “what legal formality (ies) are required to validly establish contract of sale of immovable properties?” The cassation bench assessed that the lower courts particularly the First Instance Court based its decision only on the

fact that there is a written document which attests the existence of the agreement of the parties without the need to look in to whether other formalities are fulfilled or not. Therefore, the cassation bench established that the lower court should have gone extra miles and determines whether the contract, which is alleged to have existed by testimony of witnesses and documentary evidence, is valid in the eyes of the law or not. The bench made it clear in its analysis of the same file that among other validity requirements, contract of sale of immovable property has to be reduced in to writing attested by two witnesses. The court, however, added that the general contracts provisions provide an additional validity requirement under Article 1723 of the Civil Code. According to the reasoning of the cassation bench, failure to register contract of sale of immovable properties does not affect its validity as enshrined under Article 2878 which states that "the sale of immovable shall not affect third parties unless it has been registered in the registrars of immovable property in the place where the immovable sold is situate". Even though apparently the English Version of the Civil Code Article 1723 looks inconsistent with Article 2878 of the special contracts provisions, there is no contradiction as the former is meant to refer to "authentication" while the later concerns registration. The cassation bench discussed that this fact will be clearer when one reads the Amharic version of Article 1723, which says:

የማይንቀሳቀሱ ንብረቶችን የሚመለከቱ ውሎች

(1) የማይንቀሳቀሱ ንብረቶችን ባለቤትነት ወይም ባንድ በማይንቀሳቀስ ንብረት ላይ የአለባ ጥቅም መብት ወይም የመያዣ መብት ወይም የሌላ አገልግሎት መብት ለማቋቋም ወይም ለማስተላለፍ የሚደረጉት ውሎች ሁሉ በጽሑፍና በሚገባ አኳኋን በፍርድ ቤት መዝገብ ወይም ውል ለማዋዋል ሥልጣን በተሰጠው ፊት መሆን አለባቸው።

(2) እንዲሁም የማይንቀሳቀስ ንብረትን የሚመለከቱ የክፍያ ወይም የማዛወር ስምምነቶች ሁሉ በጽሑፍና በሚገባ አኳኋን በፍርድ ቤት መዝገብ ወይም ውል ለማዋዋል ሥልጣን በተሰጠው ፊት መሆን አለባቸው።

The cassation bench further explained that, even though agreement of parties suffices to establish a contract as per Ethiopian law, certain contracts specially those involving immovable properties as subject matters, must follow strict formalities like "authentication". This special attention is particularly given because the law maker believes that immovable properties are most valued assets for individuals as well as for the nation. The cassation bench explained that this formality is not only unique to Ethiopia and serves different purposes in addition to its evidentiary purpose. Among others, authentication attests the agreement of the parties; it is a means to verify title of the transferor of the property; it proves the date of conclusion of the contract and thereby protects the property rights of persons, and

finally yet importantly, it ensures security of legal transaction. As per the provisions of Article 1723, contracts, which require authentication, are, contracts for assignment of rights in ownership or bare ownership on immovable properties or an usufruct, servitude and mortgage. Therefore, in the case under consideration, even though lower courts were able to establish based on evidence that there was agreement for sale of the immovable property, such agreement alone even though reduced in to writing is not adequate as long as it is not made before a notary or court registry. The lower courts once it is established that the requirement of authentication is missing should have considered the agreement only as a draft contract than a binding law between the contracting parties. Thus: the decision of the lower courts was reversed and the applicant was entitled to 50% of the estate left by her father as sole heir.

THE IMPLICATIONS OF FILE NUMBER 21448 ON CONTRACT OF MORTGAGE

At least for two solid years, file number 21448 established a very firm precedent regarding the requirement of authentication in contracts concerning immovable properties. Lower courts as well as regional courts followed the same precedent for some contracts concerning immovable properties.[40] File number 21448 has also caused the promulgation of Civil Code Amendment Proclamation Number 639/2009. This proclamation was enacted two years after the Supreme Court pronounced its decision on file number 21448. The proclamation particularly refers to mortgage contract concluded by banks and micro finance institutions and it states in its preamble that the formality provided under the Civil Code (authentication or notarization as per the wording of the proclamation) for the conclusion of mortgage contracts exerts negative impact on the efficiency of loan provision service which is the day-to day activity of banks and micro-financing institutions. It is possible to understand from the expression of the lawmaker in the preamble that banks and micro finance institutions did not have any practice of fulfilling authentication or notarization requirement while they conclude contract of mortgage with debtors. This, however, is a lesser evil than what the proclamation states under paragraph two of the preamble which states "*the invalidation of existing contracts of mortgage concluded under the prevailing practices of banks and micro-financing institutions for not being notarized, as provided for by the Civil Code, may leave most of the existing loans unsecured with a serious threat to the existence of the banks and the micro-financing institutions and to the*

[40] It has to be noted that Art. 1723 does not cover all contracts concerning immovable properties. It refers only to sale, mortgage, usufruct and servitude rights on immovable property.

country's overall economy". Therefore, to do away with these dangers, the lawmaker came up with this civil code amendment proclamation that adds Sub-Article (3) to Article 1723. The amendment to Article 1723 states the following:

"3/ Notwithstanding the provisions of sub-article (1) of this Article, a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution may not require to be registered by a court or a notary."

The proclamation under Article 3(1) further states that "*The validity of any contract of mortgage concluded, prior to the effective date of this Proclamation, to provide security to a loan extended by a bank or a micro-financing institution, may not be challenged for not being registered by a court or notary in accordance with Article 1723 of the Civil Code"*. The most arguable and provocative part of this proclamation comes from Sub-Article (2) of Article 3 which states "*any court decision, rendered prior to the effective date of this Proclamation, to invalidate a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution, for not being registered by a court or notary in accordance with Article 1723 of the Civil Code shall have no effect. Any such case pending before any court as of the effective date of this Proclamation shall also be terminated*".

COUNTER ARGUMENTS AGAINST THE RULE OF AUTHENTICATION UNDER ARTICLE 1723

On Cassation File Number 24803 between Mekuannint Worede (applicant) Vs Meskerem Dagnaw and others (Respondents), the bench in majority vote resolved the dispute as per the established precedent (based on the interpretation on file number 21448) regarding the requirement of authentication in contracts for sale of immovable properties. However, one of the judges, his honor Ali Mohammed wrote in detail his dissenting opinion explaining why he does not agree with the interpretation of the majority regarding Article 1723 (1). In his dissenting opinion, his honor judge Ali classifies provisions of contracts in to three categories. The first categories are "permissive provision of the law". These provisions contain words like "may, possible, permissible etc,…". The other categories of contract laws as per the opinion of his honor judge Ali are mandatory rules which contain terms like "shall, ought to be, must etc..". He argues that mandatory provisions in addition to requiring the doing of the thing specified, they also prescribe the result that will follow if they are not done. The third categories of contract laws, which in the opinion of Judge Ali are so far less emphasized by the Ethiopian judiciary, are "directory provisions

of contracts law". Like that of mandatory rules, directory provisions contain words like "shall, must, ought to be etc…" but the observance of such provisions is not necessary to the validity of the proceeding to which they relate and therefore, compliance is of convenience rather than substance. Judge Ali further argues that directory provisions of contracts law only show the desires of the lawmaker in modernizing the contractual transaction by directing contracting parties follow these modern rules. They are different from mandatory provisions as they do not prescribe the consequence of failure to observe them. And therefore, his honor judge Ali argued that the Ethiopian law maker did not have the intention of rendering Article 1723(1) of the Civil Code a mandatory rule for two reasons.

The drafter of the Civil Code of the Empire of Ethiopia Rene David discussed Article 1723 but did not mention that the provision refers to authentication. He wrote, "*The importance attached to land by Ethiopians justifies Article 1723 which requires the conclusion in writing of all acts creating or transferring ownership, usufructs, or servitudes on immovable, as well as for contracts of compromise or partition relating to an immovable*".[41] A writer named Workneh Almaw Alula referring to the silence of Rene David regarding the requirement of authentication under Article 1723 argued that "Rene David's omission of authentication[42] as a requirement for the validity of a contract relating to an immovable cannot be an oversight. Therefore, it is possible to argue that the drafter of the Civil Code believed that authentication was not a formal requirement for the validity of a contract relating to an immovable".[43] George Krzeczunowicz, the other famous legal scholar in Ethiopian Laws distinguishes the effect of written formality and authentication as "written form as envisaged under Article 1678 of the Civil Code is a formal requirement (ad validitatem), while the requirement of authentication under Article 1723 is a formal requirement (ad probationem) to prove the existence of the contract".[44] Workineh Alemnew on his part argues that "authentication should not be a deceive factor in rendering a contract relating to an immovable void as long as the contract is made in writing and the performance of both parties is

[41] Rene David *commentary on contracts in Ethiopia*, Haile Selassie University Faculty of Law (1973), P.34

[42] Workineh Almaw in his work used the word "registration" than authentication. The two terminologies should not be considered synonymous, as the cassation bench under file number 21448 has already interpreted Article 1723 to refer to authentication (notarization) than registration. This work will elaborate this distinction in subsequent sections.

[43] Workineh Almaw Alula, *Contracts Form Concerning Immovable, Analysis of the Cassation Decisions of the Supreme Court*, The Cassation Question in Ethiopia AAU Printing Press (2014) P. 150

[44] George Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, Addis Ababa University, Faculty of Law (1983), P. 8-9

based on the terms of the contract and the material circumstances to prove its formation".[45]

Mekbib Tsegaw on his work on "*Contracts relating to an immovable and questions of Form*" argued that while the original French Version as well as its English translation of Article 1723 state that contracts concerning immovable properties should be reduced in to writing and be registered before notaries or court registries, the Amharic version instead stipulates reduction in to writing of the contracts and authenticating it before a notary or court registry.[46] Mekbib Tsegaw further elaborating the issue wrote

"በሰበር ሰሚው ችሎት አስተያየት በቁጥር 1723(1) መሠረት ከጽሑፍ ሌላ የሚጠይቀው ስርዓት ምዝገና (Registration) ሳይሆን ፊርማ ማረጋገጥ (Authentication) የሚመለከት ነው:: ይህን ያህል ግልጽ ባይሆንም የድንጋጌውን የአማርኛ ቅጂ ከተከተልን ሰበር ሰሚው ችሎት የወሰደው አቋም በሚገባ የሚያስኬድ ነው:: የፍርድ ቤቶች መሥሪያ ቋንቋ አማርኛ በመሆኑ መከተል ያለብን በአማርኛው ቅጂ የተደነገገውን ነው ካልተባለ በቀር፤ በአማርኛው የተነደፈው የድንጋጌ ይዘት በትርጉም ስህተት የገባ እንጂ የአርቃቂውንም ሆነ በወቅቱ ህጉን ያፀደቀውን ፓርላማ ሃሳብ (Intent) በትክክል የሚያንፀባርቅ መስሎ አይታይም::"

Translation

"… Even though the Amharic version of the provision itself is not clear enough, if we strictly follow it, the precedent established by the Cassation Bench is acceptable. However, unless we argue that the Amharic version as "Amharic' is the working language of the bench should be a governing version, as it stands now, it is a miss-translation of the original French version and it is not possible to argue that it transpires the intent of the law maker".[47]

WITNESS REQUIREMENT

The requirement of witnesses is also another essential condition for the valid existence of mortgage. As I have tried to explain earlier in this work, Article 3045 of the Civil Code prescribes the fulfillment of written formality to create conventional mortgage. Article 1723 itself requires that contracts concerning immovable properties including mortgage must be reduced in to writing in addition to being signed or made before a notary public or court registrar (authentication). Article 1727(2) of the Civil Code prescribes that two witnesses must attest contracts that require written formalities or the contracts shall be of no effect. The Cassation Bench under file number

[45] Supra note 42 p.151

[46] Mekibib Tsegaw, *Contracts Relating to An Immovable and Questions of Form*, Ethiopian Bar Review, Vol. 2 No 1(2007) P.162, translation is mine.

[47] Id at page 162-163, translation is mine

57356 between Meseret Bekele (Applicant) and Elza Somonela (Respondent) also confirmed that, even though a contract concerning immovable properties is concluded before a notary public or court registrar (authenticated), it would not produce any effect as long as two witnesses do not attest it.[48] This decision of the cassation bench therefore affirms that authentication cannot exclude witness requirement, as they are independent requirements for the constitution of contracts concerning immovable properties.

SUBSEQUENT INCONSISTENCIES FROM THE EXISTING PRECEDENTS

So far, I have discussed the established precedents regarding authentication and witnesses requirements as regards contracts concerning immovable properties with particular emphasis on contract of mortgage. In this section, I will make reference to some selected later decisions of the cassation bench which in my opinion are clear departures from the already established interpretations. The first Cassation File is a case between Alganesh Abebe (Applicant) Vs Gebru Eshetu Gebre and Workit Eshetu Hussien (Joint Respondents) (here after Cassation File Number 36887).[49] This case was first initiated at South Wollo High Court. In her application to the state courts, the applicant alleged that the respondents sold to her their house built on a 500 square meters' land found in Kutaber town for 5000 Ethiopian Birr. Even though she paid the agreed price, the respondents failed to hand over the house and transfer title in the name of the applicant. For that reason, the applicant sought a relief of forced performance of the contract and compensation for an income, which would have been earned had the house been handed over at the agreed time and title duly transferred. The respondents admitted that there existed a contract for sale of the mentioned house but they have unilaterally cancelled the contract and notified the applicant that she has to collect back her 5000 Birr. The state high court after looking in to the case held that, both parties to the dispute have admitted the existence of the contract. The respondents did not also raise any reason for not being able to live up to their promises, and thus, they should be forced to execute their obligation and pay a compensation of 1500 Birr for an income which would have accrued to the applicant had the contract been properly performed. The respondents appealed to the state Supreme Court against the decision of the High Court, which reversed the decision of the state High Court on the ground that the contract of sale of the house was not authenticated. Subsequently, the present applicant to the

[48] *Meseret Bekele Vs Elza Somonela*, Federal Supreme Court Cassation Bench Decisions Vol. 12, Cassation File Number 57356 PP. 98-100

[49] *Alganesh Abebe Vs Gebru Eshetu Gebre and Workit Eshetu Hussien*, Federal Supreme Court Cassation Bench Decisions, Vol. 13, Cassation File Number 36887 pp.233-235

cassation bench brought her case to the Federal Supreme Court Cassation Division alleging that the state Supreme Court has made a basic error of law while resolving the legal issue. The Cassation Bench after hearing the written and oral litigation of the parties to the dispute identified that the legal question (issue) which requires answer as follows:

"…can parties to a contract for sale of a house challenge its validity based on Art 1723 while admitting the existence of the contract at the same time?" The Cassation bench while resolving this litigation reasoned that its prior ruling on file number 21448 regarding the interpretation of Article 1723(1) of the Civil Code is not applicable to the situation where parties admit the existence of contracts but challenge its validity for not being authenticated (notarized), as Article 1723 requires. The Cassation Bench further explained that the requirement of authentication under Article 1723(1) of the Civil Code serves the purpose of proof when the litigating parties challenge the existence of the contract. Therefore, if parties admit the existence of the contract, they cannot challenge its validity merely because their undertaking is not authenticated and therefore, the decision of the state Supreme Court in this regard contains a basic error of law.

The above interpretation, however, was not followed in a later decision of the Cassation Bench between Shiferaw Dejene and Tsehay Tesfaye (Cassation applicants) Vs Sisay Abebu (Respondents).[50] Similar to the previously discussed Cassation case, this one also concerns contract of sale of a house. The disputable issue in the case was the negotiated price of the house. The applicant argued that they have concluded the contract for the sale of the house for 40,000 Ethiopian Birr, which the respondent disregards and claimed that the sale price was 20,000 Ethiopian Birr. The state Zonal High Court, which first seized the case, proved from the written contract that the agreed price of the house was 20,000 Ethiopian Birr. Thus based on Article 2005 of the civil code, the State Zonal High Court ruled that the written contract should be conclusive evidence regarding the price of the house. Aggrieved by this decision, the applicants appealed to the State Supreme Court regular and cassation benches, but both benches affirmed the decision of the lower state court. It was against this decision that the case was brought to the Federal Supreme Court Cassation Bench. The Federal Cassation Bench reversing the decision of the lower courts explained that written evidence as to the existence of a contract shall be exclusive evidence if the written contract follows the legal formalities stipulated in the law. One of such legal formalities is authentication of the contract as enshrined under Article 1723 of the Civil Code. This requirement of authentication is meant

[50] *Shiferaw Dejene and Tsehay Tesfaye Vs Sisay Abebu*, Federal Supreme Court Cassation Decisions, Vol. 14 File Number 78398 pp. 51-53.

to resolve disputes such as whether there is a contract or not, if so with how much price, which property is the subject of the contract etc… Thus, had the contract been made before a notary or court registry, disagreements like this one would have been avoided and since this contract did not follow the mandatory formalities required by the law, it will not sustain in the eyes of the law.

As one can easily comprehend from file number 78398 and 36887, the two cases share the same set of facts. In both cases, the parties have admitted the existence of the contract. The difference is, in the former file number, the argument raised by the cassation respondent relates to non-fulfillment of authentication while in the second file number, the disagreement relates to the price of the house. It is obvious from the two cases that parties did not authenticate their contracts but the cassation bench while rendering its decision stated in the first case that, even if it did not fulfill the requirement of authentication, since parties have admitted its existence, their admission suffices to conclude that there exists a valid contract. However, in case of the latter, even though parties have admitted the existence of the contract, the court ruled that the contract should have been authenticated to resolve disputes regarding the price of the house.

After the rendition of these inconsistent decisions, the bench is encountering cases in which the litigants cite these inconsistent precedents in their oral and written arguments. One illustrative instance is Cassation file number 56794.[51] The case concerns contract of sale of a house. The Cassation applicant argues that the contract he concluded is not legal since it is not authenticated as prescribed by Article 1723 and affirmed by the Cassation Bench decision under file number 21448. The Cassation respondents on their part based their argument on file number 36887 and alleged that, the interpretation of the Cassation Bench on file number 21448 is not applicable in the instances when the parties admitted the existences of the contract and challenged its validity for not being authenticated. The lower court resolved the dispute as per the decision of the Supreme Court Cassation Bench on file number 36887 and ruled that the applicant should be forced to discharge his obligations. The Cassation Bench, while not clearly disregarding the decision of the lower court concerning the validity of the contract of sale of the house, reversed the decision on the ground that a party who received an advance payment may cancel the contract by conceding a double of the advance payment as Article 1885(1) of the Civil Code prescribes.

[51] See *Sahilu Mulgeta Vs Solomon Efrem and others*, Federal Supreme Court Cassation Decisions, Vol. 12 File Number 56794 pp. 71-74.

Regarding witness requirement, I have mentioned in earlier sections that two witnesses must attest contract of mortgage.[52] The Cassation Bench under file number 57356 also confirmed the same. However, this decision was not followed in a latest decision of the Cassation Bench on file number 79907.[53] The Case concerns a Suretyship Contract in which the two respondents stood surety for a third respondent who did not appear in the Cassation litigation. The case was first litigated at the Federal First Instance Court where the respondents argued that even though they stood surety for one of the respondents who did not appear in the Cassation litigation, their contract is not valid because two witnesses did not attest it as the law requires. The court after hearing the written and oral litigation of the parties and available evidences proved that the contract as alleged by the respondents was not attested by witnesses as per Article 1727(2) of the Civil Code and thus, liability shall only be borne by the respondent who did not appear. The ruling of the lower court was also confirmed by the Federal High court up on appeal. The case was finally brought to the Federal Cassation Bench for basic error of law. In making its ruling on the case, the Cassation Bench wrote its analysis as follows:

...“ተጠሪዎች በተናጠል የገቡት የዋስትና ውል በሁለት ምስክሮች ፊት ያልተረጋገጠ ነው ቢባል እንኳን ተጠሪዎቹ በፍ/ሕ/ቁ 1727 የተመለከተውን የፎርማሊቲ መስፈርት ጠቅሰው የሚከራከሩት ውሉ በሁለት ምስክሮቱ ፊት አልተረጋገጠም በማለት እንጂ አልፈረምንበትም በማለት አይደለም፡፡ በመሰረቱ ሕጉ የውሉን በሁለት ምስክሮች ፊት የመረጋገጥ አስፈላጊነት የደነገገው በውሉ መደረግ ወይም ይዘት ወይም መሰል ሁኔታዎች ላይ በተዋዋዮች መካከል ሊነሳ የሚችለውን አለመግባባት ወይም ክርክር ውሉ ሲደረግ በነበሩ ግለሰቦች አገዛ ጭምር ለመፍታት እንዲያስችልም በማሰብ እንደሆነ ይታመናል፡፡ በተያዘው ጉዳይ ተጠሪዎቹ ውሉን ስለለመፈረማቸው ወይም ስለውሉ ቃል ያቀረቡት ማናቸውም ዓይነት ክርክር አለመኖሩን መዝገቡ ያስረዳል፡፡ ስለራሳቸው ፊርማ እና ስለ ውሉ ቃል በተጠሪዎቹ የተካደ ነገር ከሌለ ደግሞ እነዚህ ነጥቡት ቢካዱ ኖሮ በአስረጅነት ሊቀርቡ ይቸሉ ነበር የሚባሉት ምስክሮች በውሉ ላይ ሳይፈርሙ መቅረታቸው የተጠሪዎቹን የውል ግዴታ ተፈፃሚነት ሊያስቀር የሚችል አይደለም፡፡”

Translation

The litigating parties have admitted that they signed on the contract of suretyship but they are challenging its validity because two witnesses as prescribed by Article 1727(2) did not attest the contract. The law prescribed this requirement to avoid controversies regarding the existence, content and other aspects of the contract with the help of witnesses who were present at the time of conclusion of the contract. Nevertheless, in the case at hand, the respondents did not produce any argument against the fact that they have

[52] See Art. 1727(2) cumulative Art. 3045 of the Civil Code

[53] *Liyu Yegenzeb Igeza Tequam Vs Yeweynhareg Tizazu and Tsegaye Gashu*, Federal Supreme Court Cassation Decisions, Vol. 14 File Number 79907 pp. 76-78.

signed on the contract. Had they denied these facts, the witness requirement would have been raised as an issue.

PERSONAL REFLECTION

After file number 21448 was rendered, authentication as a validity requirement for contracts concerning immovable properties including mortgage was firmly established. As I have tried to explain in previous topics of this work, this precedent led to the promulgation of Proclamation 639/2009 which established that banks and microfinance institutions may conclude a valid contract of mortgage without the need to authenticate(notarize) it. The implication of this proclamation is that, mortgage contracts concluded by creditors other than banks and micro finance institutions need to be authenticated. It is true that this particular proclamation might have avoided some undesirable consequences to banking and micro financing business because as explained in the preamble of the proclamation, rendering mortgage contracts in which banks and microfinance institutions are involved invalid for not being notarized would be a serious blow to the security interest of these financial organizations. Loss of security interest of banks and micro finance institutions ultimately may produce negative repercussions on the economy of the country. However, the proclamation can also be criticized for contraventions to basic legal principles. First and foremost, it is against the constitutional principle of separation of power when the proclamation renders ineffective any court decision regarding contract of mortgage (either pending or finalized) by banks and micro finance institutions for not being authenticated(notarized). The lawmaker in doing so acts ultra-virus because it has passed the boundary of making laws and acted like a judiciary. Regarding proclamation number, 639/2009 a writer named Abrham Yohannis wrote:

> "…there *is no such thing as judicial review of legislation in Ethiopia. What about legislative review of judicial decisions? I guess most of you will strongly object to this odd 'concept.' Yes it is odd, but there is proof that parliament has repealed or invalidated existing court decisions after they were pronounced. If you have doubt over the validity of this fact, just read Article 3 sub 2 of Civil Code As Amended Proclamation No. 639/2009.*[54]

Abrham Yohannis further commented,

[54] Abrham Yohannes, *Repeal of a court decision by law (Legislative review of Court Decisions*, available at http://chilot.me/2012/09/17/some-unusual-facts-about-repeal-in-ethiopia/ last visited Feb. 2016

> "*Actually, it was a problem created by the banks, (as they have failed to comply with the requirement of authentication) not by the courts. Any ways parliament thought it necessary to act immediately, to reverse the situation. Then it issued Proclamation No. 639/2009. The title of the proclamation seems to suggest that it is amendment to article 1723 of the Civil Code. However, its content clearly goes beyond amendment*".[55]

The other problem with the English Version of the proclamation is, like that of the English version of Civil Code on Article 1723, the provisions of the proclamation did not use the term authentication (Notarization) except its preamble. File number 21448 makes it clear that the apparent contradiction, which seems to exist between the English version of Article 1723 and Article 2878 of the Civil Code results from the fact that Article 1723, employed the word "registration" while it should have stated "authentication (notarization)" like the Amharic version did. Therefore, I suggest that the proclamation as a Civil Code Amendment Proclamation should have used the term authentication instead of "registration" since the two concepts connote completely different idea. If we insist on sticking to the term "registration" than "authentication", Article 1723 does not only contradict with Article 2878 of the civil code but also Article 3052 (on registration of mortgage) and many of the provisions in Title X of the Civil Code. Base on the aforementioned analysis, I therefore argue that, the lawmakers' intent is in the spirit of the Amharic version of Article 1723.

A closer study of works done by many writers on the same subject matter seem to transpire that the concept of authentication is not only intended under Article 1723 by the lawmaker, but is an alien concept in the Ethiopian legal system. Nevertheless, Article 1728 for instance stipulates that signature or thumb mark of a blind or illiterate person shall not bind him unless a notary, registrar or judge authenticates it. Taking in to consideration the value Ethiopians attach to immovable properties (land and buildings) it is not surprising if contracts concerning immovable properties are required to pass through strict formality requirements such as authentication. Ethiopian legal history also teaches us that contracts concerning immovable properties particularly land was highly regulated by government legislations. Citing Balambaras Mahitemesilassie W/Meskel, Mekibib Tsegaw wrote the following regarding the mode of transfer of title on land during the era of Emperor Minilek:

[55] Ibid

ሰው ለሰው መሬት ሲሸጥ የመሬቱ ወረቀት በመንግስት ምስለኔ ላይ ይደረግና በሁለት የታወቁ እማኞች ፊት እነዚህ እማኞች ወረቀቱን ያትማሉ፡፡

Translation
When one sells his land for another, it has to be made before a government agent and attested by two witnesses.[56] Mekbib Tsegaw citing the 1931 Constitution of the Empire of Ethiopia further wrote the following regarding the effect of failure to follow legal formalities in transfer of title to land.

የርስት ባለቤትነት የሚተላለፍበት ሥርዓት ጥብቅ መሆኑን ለማስረገጥ በ1923 በታወጀው የመጀመሪያው ሕገ መንግሥት እንኳን ሳይቀር ልዩ ክለሳና ጥበቃ ተሰጥቶት ይገኛል፡፡ በሕግ የታዘዘውን ሥርዓት ሳያሟላ የርስት የባለቤትነት መብትን የሚያስተላልፍ የሺያጭ ውል በፍትሐብሔር ሕግ ውጤት አለማግኘቱ ብቻ ሳይሆን፣ እንደ ወንጀል ተቆጥሮ ከፍተኛ የገንዘብ መቀጮም ያስከትል እንደነበረ በ1923 በታወጀው ሕገ መንግሥት የሚከተለው ተደንግጉ ይገኛል፡፡

Translation
The formality to transfer title on land is also given due attention in the 1931 constitution of Ethiopia. Failure to follow the legal formalities in transferring title on land entails criminal liability in addition to civil liability.[57]

The aforementioned discussion may not be directly related to the issue of authentication of mortgage contract, but it shows the importance Ethiopians attach to rights on immovable properties and the strict government regulation regarding their transfer. Analogically, since by mortgage contract rights on immovable properties are encumbered, I assume that the lawmaker under Article 1723 did intend to include authentication as a mandatory validity requirement.

The requirement of authentication as a validity requirement regarding contracts of mortgage is not only peculiar to Ethiopian law. Article 3272 of the Civil Code of Louisiana states, "*A conventional mortgage can only be contracted by an act passed in the presence of a notary and two witnesses*". Likewise, the French Civil Code under Article 2127 reads, "*A conventional mortgage may only be granted by an instrument drawn up in authentic act*". The recent decisions of the Cassation Bench on the issue of authentication have treated it as a requirement for proof of a contract to some contracts concerning immovable properties including mortgage than an essential

[56] Translation mine, see supra note 46 p. 158
[57] Translation mine, id at p. 159

condition for its validity albeit Article 1723 is not found among the provisions of the Civil Code on proof of contracts.

Regarding the requirement of witnesses, the stand of the cassation bench on file number 79907 is not in the spirit of the law. Article 1727(2) clearly mentions that a written contract if not attested by two witnesses shall have no effect. On the contrary, the Cassation Bench, in-spite of the clear message of the provision ruled that parties' admission of the existence of the contract suffices even though the contract is not attested by two witnesses for its validity.

Fikadu Petros in his work on the effect of formalities on enforcement of insurance contracts classifies the function of formalities in to evidentiary, cautionary, channelling and other functions.[58] I assume that evidentiary purpose is the most obvious function of formalities which is clear enough and need no explanation. In the Words of Fikadu Petros, cautionary function refers to a requirement which deters persons from their thoughtless actions. In other words, it requires a party 'to give a pause; to oblige him to stop and think more seriously about the nature of the transaction into which he is entering or by which he is engaging himself in some burdensome or potentially burdensome way.[59] Following the above assertion of Fikadu Petros, the requirement of Authentication obviously serves both evidentiary as well as cautionary functions. Accordingly, Fikadu concludes, "formalities intended to give channelling and cautionary services, however, seem to be likely to have been designed to serve as validity requirements in all cases. The idea is that both the cautionary and channelling functions are related to the quality of consent, particularly with the existence of a free and full consent. Consequently, formalities with evidentiary function may be provided with a validity purpose so that their non-observance may give rise to invalidity or nullity of the contract in question".[60]

CONCLUSION

Mortgage as a juridical act has its peculiar validity requirements based on its sources. Among the validity requirements to it, this work has dealt with the requirement of authentication and witnesses. Authentication as a validity requirement to mortgage was first established in Ethiopia by federal Supreme Courts' Cassation Bench decision on file number 21448. As per this decision, a contract concerning immovable properties including contract of mortgage has to be made before a notary or court registrar. Following this decision, Proclamation 639/2009 was promulgated to amend the Civil Code

[58] Fikadu Petros, *The Effect of Formalities on Enforcement of Insurance Contracts in Ethiopia*, Ethiopian journal of Legal Education, Vol.1 No 1(2008) Page 5-6
[59] Ibid
[60] Ibid

Article 1723. Under this proclamation, it was prescribed that the requirement of authentication does not work for banks and microfinance institutions. Regarding the requirement of witnesses, Article 1727 (2) prescribes that a contracts which have to be made in writing including contract of mortgage have to be attested by witnesses. The same was confirmed in a Cassation File number 57356.

However, subsequent decisions of the Cassation Bench defeat the laws as well as the previous precedents of the same bench. Even though proclamation number 454/2005 prescribes that a decision rendered by the Cassation Bench can be reviewed by the bench itself in another file, a rampant inconsistency which is being witnessed particularly regarding authentication and witnesses does not only make transactions unpredictable but also is against the very principle of equality before the law.