

Effect of Non-Renewal of Registration of a Contract of Mortgage under the Ethiopian Civil Code: A Case Comment

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I. Introduction

In almost all jurisdictions, there are important security devices which are meant to secure the due performance of an obligation in general and contractual obligation in particular.⁵⁶⁹ Mortgage is one of such security devices which is widely practiced in the world. According to Black's Law Dictionary, 'mortgage is a conveyance of title to property that is given as a security for the payment of a debt or the performance of a duty and that will become void [extinguished] upon payment or performance according to the stipulated terms'.⁵⁷⁰ However, as we can easily observe, this definition cannot as such enable us to distinguish mortgage from other security devices particularly from that of pledge⁵⁷¹ as the definition does not tell us about properties which are brought under the ambit of mortgage.

Mortgage is established where a specific immovable property is made for the payment of money or the performance of an obligation.⁵⁷² Thus, mortgage, as a security device, pertains to an immovable property. The Ethiopian Civil Code (hereinafter Code) does not define mortgage although it has made it clear that a mortgage may charge an immovable only.⁵⁷³

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⁵⁶⁹ The term security devices encompass devices such as pledge, surety, lien, financial guarantee bond and the like, see for instance, Arkun Kimer Sen and Jitendra Kumar Mitra, *Commercial Law Including Company Law*, 21st ed., the World Press Private Limited, Calcutta, 1998 at 402-409. See also M. Planiol, *Treatise on the Civil Law*, Translated by the Louisiana State Institute, 11th ed., Vol. 2, No. 2, 1939. In Ethiopia, too, surety has been dealt with Art. 1920-1951, and pledge has been regulated by Arts. 2825-2873 of the 1960 Civil Code of the Empire of Ethiopia while lien is essentially created by virtue of the law and found scattered in the Civil Code.

⁵⁷⁰ Bryan A. Garner, (Editor-in-Chief), *Black's Law Dictionary*, 8th ed., 2004, at 1031.

⁵⁷¹ There are essential differences between mortgage and pledge with regard to formation, and the respective rights and duties of the parties involved, the consequences that each security device produce.

⁵⁷² Arkumen Sen and Jitendra Kumar Mitra, *Supra* note, 1, at 402. Besides, mortgage is defined as "dead pledge". See *Corpus Juris Secundum: A Complete Restatement of the Entire American Law*, Vol. 58, at 23.

⁵⁷³ Civil Code of the Empire of Ethiopia (Civil Code), proclamation No. 165, 1960, Art. 3047.

However, the Code has also provided that a mortgage may charge certain kinds of movables where it is clearly provided by law.⁵⁷⁴

As far as the establishment of mortgage is concerned, the Code has incorporated three ways. These are: 1) Legal mortgage; 2) Judicial mortgage; and 3) Contractual mortgage.⁵⁷⁵ Concerning the first, Article 3042 of the Code states that whosoever sells an immovable shall have a legal mortgage on such immovable as a security for the payment of the agreed price and for the performance of any other obligation laid down in the contract of sale. From this provision, it is possible to gather that the mortgage created by virtue of the law is an accessory obligation whose creation and existence hinges upon the creation and existence of the principal obligation - the contract of sale. In addition to this, a legal mortgage is created in favor of a co-partitioner of an immovable property.⁵⁷⁶ In this case, too, for a legal mortgage to come into being, there must be a contract of partition of an immovable property. The second type of mortgage is judicial mortgage where a court or an arbitration tribunal may secure execution of its judgments, orders or awards by granting one party a mortgage on one or more immovables the property of the other party. This also indicates that mortgage is an accessory obligation for it is created by the court or an arbitral tribunal which entertains a case involving a principal obligation.

The other point worth considering in this introductory part, is the requirements that need to be satisfied for the establishment of a valid mortgage. In this regard, Article 3045 of the Code stipulates that the contract or other agreement creating mortgage shall be of no effect unless it is made in writing. Sub-article 2 of the same article adds that it shall be of no effect unless it specifies in Ethiopian currency the amount of the claim secured by mortgage.

Article 3045(1) reaffirmed what Article 1725 of the Code has stated that writing is a validity requirement to establish a contract of mortgage. In

⁵⁷⁴ In Ethiopia, as a matter of exception; mortgage may be established on movable properties where such is specifically provided by law.

⁵⁷⁵ Civil Code, Supra note 5, Art. 3041.

⁵⁷⁶ Id, See Art. 3043 which stipulates that a co-partitioner shall have a legal mortgage on the immovable allotted to his co-particioners 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-partitioner where he is dispossessed of any property allotted to him.

addition to the requirement of writing, the Code has provided another stringent requirement - the contract of mortgage shall be of no effect unless the amount of claim secured by the mortgage is specified in Ethiopian currency. Furthermore, there is also another stiff requirement that needs to be satisfied so that a valid mortgage will be established. This is registration of mortgage. In this regard, Article 3052 of the Code declares that a mortgage, however created,⁵⁷⁷ shall not produce any legal effect except from the day when it is entered in the register of immovable property at the place where the immovable mortgage is situated.⁵⁷⁸

To sum up, no valid mortgage can be established in Ethiopia unless the following elements are cumulatively satisfied. These are:

1. Mortgage must be made in writing;
2. The amount secured by the mortgage should be specified in Ethiopian currency (Birr).
3. The mortgage must be registered.

However, the concern here is on the legal effect of non-renewal of registration of contractual mortgage. This is the central issue in the case under consideration. This case comment is divided in to four parts. In the second part, summary of the facts of the case and holding of the court is

⁵⁷⁷ Bear in mind that the requirement of registration is applicable to all three types of mortgages i.e legal mortgage, contractual mortgage and judicial mortgage. In other words, mortgage produces the required legal effect when it is registered irrespective of the mode of establishment of the mortgage. We know that whether the requirement of registration provided under Art. 1723 of the civil code is a validity requirement or not has remained to be a thorny problem in Ethiopia since the Ethiopian Supreme Court has given different decisions on the same issue. See for instance, *W/o Gorfe G/Hiwot V Aberrash Dubare and Ato Getachew. Nega*, F. Sup. Ct., Cassation, civil file No. 21448, published in *Ethiopian Bar Review*, Volume 2, No. 1. at 181-190. See also another decision of the court, *Nyala Insurance Corporation V Adugna Ejigu*, Cassation, civil file No. 39336, (unpublished) which has gone at logger heads with the previous decision of the same court. See also an excellent article written in Amharic, Mekibid. Tsegaw, የማይንቀሳቀሱ ንብረቶችን የሚመለከቱ ውሎች እና የፎርም ጥያቄ፣ የወቅቱ አሳሳቢ ጉዳይ", *Ethiopian Bar Review*, Vol. 2, No. 1, at 153-180. However, when we come to the Civil Code dealing with mortgage, the law has left no uncertainty as it has made it clear that registration is a validity requirement.

⁵⁷⁸ With regard to registration of immovable property in some selected jurisdictions in general and in Ethiopia in particular, consult Yohannes Heroui, "Registration of Immovables under the Ethiopian Civil Code: An overview in Comparative Perspective", *Ethiopian Bar Review*, Vol. 2, No. 2, 2008, at 31-98.

presented. The third part is devoted to analysis of the decision of the court. Finally, a concluding remark has been made.

II. Summary of the Facts of the Case and Holding of the Courts

On the 11th of Tahisas and on the 17th of Nehasie 1987 E.C., overdraft loan contracts were concluded between the Commercial Bank of Ethiopia (hereinafter the Bank) and Hamid and family Agricultural products Private Limited Company (hereinafter the PLC). The contracts were made in writing and duly signed by the contracting parties. In these contracts, the Bank advanced loans amounting to 2,250,000.00 (Two million, two hundred fifty thousand Birr) to the PLC. In order to secure the payment of the loan advanced to the PLC, a third-party mortgager called Ato Abdurazak Hamid gave his residential house in mortgage to the bank. The contract of mortgage was made in writing and was registered by the then Region 14 Administration, Urban development and Works Bureau.

Although the relationship between the bank and the PLC was smooth in the first four years, a dispute arose between them as the borrower declined to repay the loan in accordance with the terms and conditions of the contract. Because of this, the Bank put both the borrower and the third party mortgager in default by notice written on the 24th of Tikmit 1992 E.C. Having done this, the Bank sold the buildings of the principal debtor using its power of foreclosure. However, the Bank did not sell the building (Mortgage) belonging to Ato Abdurazak Hamid (the third party mortgager). Meanwhile, Ato Abdurazak invoked Article 3058⁵⁷⁹ of the Civil Code and instituted a case at the Federal First Instance Court alleging the absence of a mortgage contract between him and the Bank. Ato Abdurasak prayed the Court to order the release of his house from encumbrance and return of the title deed. The Bank argued that because it gave default notice to the principal debtor and the third party mortgager in Tikimit 1992, the requirement of renewal of registration provided in Article 3058 of the Code was interrupted. Hence, the Bank argued that there was a valid mortgage contract. The Federal First Instance Court ruled in favor of the Bank by

⁵⁷⁹ Article 3058 of the Civil Code provides that 'the registration of mortgage shall be effective for ten years from the day when the entry was made. The effect of such registration shall continue, where prior to the expiry of the period of ten years, a new entry is made with a view to renewing the first registration. In such case, the first registration shall be effective for ten years from the day when the new entry was made'.

explaining that absence of renewal of registration of mortgage contract provided under Article 3058 does not extinguish the mortgage contract concluded between the Bank and the third party mortgagor.⁵⁸⁰

Because the plaintiff was dissatisfied by the decision of the Federal First Instance Court, he appealed to the Federal High Court. The Federal High Court accepted the appeal and ordered the Bank to present its side of the story. The Bank raised the same argument that it raised at the First Instance Court. The Federal High Court, having heard the arguments raised by both parties, upheld the decision of the First Instance Court explaining it did not find factual as well as legal error committed by the lower court.⁵⁸¹

Ato Abdurazak subsequently appealed to the Cassation Division of the Federal Supreme Court (hereinafter the Cassation Division) for the reversal of the decision of the lower courts arguing that their decision contained fundamental error of law. The Cassation Division accepted the application and summoned the Bank. The Bank, reiterated the argument it raised in the lower courts. It argued that because it gave a default notice to the principal debtor and the third party mortgager, there was no need to renew the registration of the mortgage despite the fact that ten years lapsed since the registration of the contract of mortgage.

The Cassation Division reasoned that the issued that needed its attention was whether giving default notice to the principal debtor and the third party mortgager was sufficient to maintain the validity and continuity of the mortgage contract despite the fact that the contract registered in 1987 E.C. was not renewed until 1997 (before the expiry of the ten years period stipulated under Article 3058 of the Code). Nonetheless, the Cassation

⁵⁸⁰ See Abdurazak Hamid V. the Commercial Bank of Ethiopia, Civ. File No. 78317/2000, Federal First Instance Court. The crucial part of the decision reads "ሁለተኛውን ነጥብ በተመለከተ በከሳሽና በተከሳሽ መካከል ነሐሴ 11 ቀን 1987 ዓ.ም የመያዣ ውል [የማይንቀሳቀስ ንብረት] ስምምነት የተፈጸመ ሲሆን ተበዳሪው ገንዘቡን ባለመመለሱ ጥቅምት 02 ቀን 1992 ዓ.ም ለተከሳሽ ለተበዳሪው ተከሳሽ ማስጠንቀቂያ ሰጠቷል። ስለዚህ የ10 ዓመቱ ጊዜ ከመጠናቀቅና የመያዣ መብቱን ሳያጣ ተከሳሽ በመያዣው ንብረት ላይ እንቅስቃሴ የጀመረ በመሆኑ በዚህ ረገድ [ከሳሽ] ያቀረበውን ክርክር ፍ/ቤቱ አልተቀበለውም።"

⁵⁸¹ See Abdurazak Hamid (appellant) v the Commercial Bank of Ethiopia, Federal High Court Civil, File No. 64469 (unpublished). Since recent times, Ethiopian courts have stopped giving adequate reasons for their decisions particularly when a case is dismissed or where the decision of a lower court is confirmed. In the case at hand, too, the Federal High Court did not give any reason as to why it confirmed the decision of the Federal First Instance Court except saying that there was no legal as well as factual ground that would justify the reversal of the decision of the lower court.

Division confirmed the decisions of the lower courts. In its decision, the Cassation Division essentially reasoned that because the Bank gave default notice to the applicant on the 24th of Tikimit 1992 E.C., and it commenced to exercise its right as a mortgagee and because the notice was given before the expiry of the ten years period stipulated in Article 3058 of the Code, the contract of mortgage continues to be valid despite the fact that the registration was no renewed.⁵⁸²

This writer believes that the decisions of the lower courts as well as the decision of the Cassation Division are erroneous. The following section provides the reasons.

III. Analysis and Comment

From the outset, this writer would like to point out that the Cassation Division of the Federal Supreme Court not only has the final judicial power in Ethiopia, but also the power to make laws. The latter is clearly provided in Article 2(1) of Proclamation No. 454/2005 which states that '[i]nterpretation of law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional courts at all levels.'⁵⁸³

With this point in mind, let us move to the central theme of analysis i.e. whether the Cassation Division has clearly appreciated the essence and significance of registration of a contract of mortgage and its renewal when it entertained the dispute cropped up between the Bank and Ato Abdurazak. As was pointed out in my previous discussion, the contract of mortgage established between the Bank and Ato Abdurazak was made in writing and was registered by the competent authority as per Article 3052

⁵⁸² See Abdurazak Hamid (applicant) V. Commercial Bank of Ethiopia, Federal Supreme Court (Cassation Bench), civil file No. 448000/2002, unpublished, Tikimit 5, 2002 E.C.) The case has also been produced in this very journal.

⁵⁸³ Federal Courts Proclamation, Re-amendment Proclamation No. 454/2005, Federal Negarit Gazeta, Year 11 No 42, Art. 2(1). As far as the power of the Cassation Division of the Federal Supreme Court is concerned, see Kalkidan Aberra, "Precedent in the Ethiopian Leal system", Ethiopian Journal of Legal Education, Vol. 2, No. 1, January 2009, at 23-42. See also Muradu Abdo, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court", Mizan Law Review, Vol. 1, No. 1, June 2007, at 60-74. Besides consult Yohannes Heroui, "ስለሰበር ሥልጣንና ሥርዓቱ ጥቂት ማስታወሻዎች", Ethiopian Bar Review Vol. 3, No. 1, March 2009, at 131-148.

of the Code. However, the registration was not renewed as required by Article 3058 of the Code.

The query is, therefore, what legal consequence is attached to the non-renewal of registration of a contract of mortgage? In Ethiopia, particularly when the Code was adopted, land was a private property to which great value was attached. Hence the law provided stronger protection to land. Because of this, a contract of mortgage which encumbered land was not allowed to continue for unlimited period of time. Thus, the Code stipulated that contract of mortgage should be made in writing and it should be registered and the registration should be renewed within ten years. Failure to renew the registration would make unsecured after the expiry of the ten years. Although the situation with regard to land has changed since 1974, the requirements of renewal of registration of mortgage contract has not been changed since those requirements are also applicable to mortgage of buildings and other properties as there is no law which has either expressly or impliedly affected the applicability of Article 3058 of the Code.

That a contract of mortgage duly established and registered continue to exist with the existence of the principal obligation is not arguable because Article 3058 has declared that the registration of a mortgage shall be effective for ten years from the day when the entry was made. This means that although a mortgage contract is made in writing by specifying the amount secured in Ethiopian currency and registered by the competent authority, the registration serves only for ten years. After the expiry of the ten years period, the contract of mortgage shall be extinguished by virtue of the law. No step, no activity and no measure, taken by the mortgagee, play a role for the resurrection of the contract of mortgage, which is not renewed. In this case, there shall not be mortgage or mortgagee relationship even if the principal obligation subsists. This means that the former secured creditor has become a rank-and-file creditor.

As shown in the subsequent analysis, the Cassation Division rendered its decision in disregard of what the law clearly stipulates as critically discussed above. The Cassation Division based its decision on other extraneous and irrelevant factors. In fact, in spite of the fact that the initial life span of a mortgage contract is only ten years, such life span can be extended by renewing the registration. In this regard, Article 3058(2) of the Code stipulates that the effect of such registration [the registration made at the time of the creation of the mortgage] shall continue where prior to the expiry of the period of ten years, a new entry is made with a view to

* renewing the first registration. Sub-article 3 of the same article further provides that in such a case, [in the case of renewal of registration] the first registration shall be effective for ten years from the day when the new entry was made. From these provisions of the Code, it is not difficult to gather that a contract of mortgage co-exists with the existence of the principal obligation so long as there are continuous renewals of registration within ten years. Accordingly, it is undoubtedly clear that a contract of mortgage cannot exist perpetually despite the continuity of the principal obligation unless the registration is renewed in accordance with Article 3058 of the Code.*

This is what the law-maker desired to regulate as far as the validity and continuity of mortgage contract in Ethiopia is concerned. However, the Cassation Division did not reflect the intention of the law-maker despite the blunt language of the Code. As mentioned under section two above, the contracts of mortgage established between the Bank and Ato Abdurazak were registered on the 11th of Tahisas and on the 17th of Nehassie 1987 E.C. This demonstrates that, as per Article 3058 of the Code, the mortgage contract registered on the 11th of Tahisas 1987 had undoubtedly expired after the 11th of Tahisas 1997 E.C. while the contract of mortgage registered on the 17th of Nehassie 1987 E.C had expired after the 17th of Nehassie 1997 E.C. as no renewal of registration was made before the extinction of the first registrations. The conclusion to be drawn from this is that the Bank lost its security right over the building owned by Ato Abdurazak. However, the Bank contended that the ten years requirement of renewal was interrupted as the Bank gave notice to the principal debtor and the third party mortgager - Ato Abdurazak. The latter, on the other hand, vehemently argued that absence of renewal of registration extinguished the contract of mortgage. Despite this argument of Ato Abdurazak and despite the clear message of Article 3058 of the Code, the Cassation Division ruled in favor of the Bank.

The lower courts based their decisions on the grounds of interruption of period of limitation. Consequently, they misapplied the law. The Cassation Division also misapplied the law by fully endorsing the wrong decision of the lower courts. This is because although Art. 3058 of the Code requires renewal of registration a contract of mortgage, the Cassation Division reasoned that despite absence of renewal of registration, giving default notice and starting the process of foreclosure would maintain the validity and continuity of the contract of mortgage established between the Bank and Ato Abdurazak. Therefore, it is natural to ask as to how giving default

notice or commencing foreclosure is equated with renewal of registration of a contract of mortgage. The question is: do grounds, which interrupt period of limitation have any thing to do with renewal of registration of a mortgage contract?

The answer is in the negative. However, the Cassation Division seems to have based its decision on Article 1851 of the Code which regulates the conditions which interrupt the running of period of limitation as far as the principal obligation is concerned. As a matter of fact, the Cassation Division did not cite the article expressly. However, the decision seems to have been influenced by this article as the court has reasoned:

... በሌላ በኩል ግን ባለገንዘቡ የመያዣ ውሉ ከተመዘገበበት ቀን ጀምሮ 10 ዓመት ከማለፍ በፊት በመብቱ መገልገል ጀምሯል ሊባል የሚችለው መቼ ነው? የሚለው ሊታይ ይገባል። በአዋጅ ቁጥር 97/90 መሠረት ለሰጠው ብድር መያዣ ባንክ ብድር ካልተከፈለው የ30 ቀናት ማስጠንቀቂያ በመስጠት ንብረቱን ለመሸጥ... እንደሚችል ተመልክቷል።... ተጠሪ ለአመልካች ጥቅምት 24 ቀን 1992 ዓ.ም ማስጠንቀቂያ በመስጠት በመብቱ መገልገል ጀምሯል። ... የቤቱ ሽያጭ ሳይጠናቀቅ 10 ዓመት ማለፍ መያዣውን ቀሪ አያደርገውም።

The decision of the Cassation Division is wrong because starting to exercise the right of foreclosure as provided by Proclamation No. 97/1998 does not replace the requirement of renewal of registration. This proclamation is meant to avoid the effect of Article 2851 and Article 3060 of the Code. It has not affected the existence and continuity of Article 3058 of the Code. Therefore, the proclamation does not have any relevance to the issue at hand. In addition to this proclamation, the decision of the Cassation Division was impliedly supported by Article 1851 of the Code. In fact, this article was cited by the Bank consistently as the major base of its argument. Therefore, it is logical to assume that the Court accepted the arguments of the Bank although the decision has no where cited Article 1851 of the Code.

However, Article 1851 of the Code is also irrelevant to the case at hand. This is because Article 1851 of the Code is meant to regulate the situation which interrupt period of limitation with regard to the principal obligation. A close reading of Article 1851 of the Code shows that the provision does not have any nexus, whatsoever, with the requirement of renewal of a mortgage contract under Article 3058 of the Code. Article 1851 of the Code states that 'the period of limitation shall be interrupted where the debtor admits the claim in particular by paying interest or installments or producing a pledge or guarantee in the creditor brings an action for the

debtor to discharge obligations.’ The issue here is whether this article is applicable to the principal claim or the accessory obligation. This article is applicable to the principal claim-the claim that the bank had against Hamid and Family PLC. When we closely scrutinize the elements incorporated in this article, we can understand that these are not meant to renew the registration of mortgage.

At this juncture it is worth reiterating that the general provisions of Book IV, Title XII of the Civil Code are applicable to any contractual relations as clearly stipulated in Article 1676(1) of the Code, we must not forget that the general provisions of should not have primacy over provisions of the Code applicable to certain special obligations by reason of their origin and nature. This is clearly stipulated under Article 1676(2) and Article 1677(2) of the Code. One special contract having its own special feature is a contract of mortgage governed by the special provisions of the Code. The formation, the respective rights and duties of the parties and the continuity or otherwise of the contract of mortgage is governed by Articles 3047 and 3116 of the Code. Hence, it is wrong to resort to the general provisions of the Code while special provisions specifically and clearly regulate a certain situation.

The crucial issue presented to the Cassation Division of was whether a contract of mortgage whose registration was not renewed could give rise to any legal effect. The Cassation Division ruled contrary to Article 3058 of the Code as it has concluded that the commencement of exercising the right of foreclosure was tantamount to renewal of registration and the right of the Bank over the mortgaged property remained intact. The decision of the court did not take into consideration the clear meaning of Article 3058 of the Code. Instead, the court tried to interpret the article while the article does not invite interpretation. By doing so, the court arrived at a wrong conclusion and gave a decision which is extremely detrimental to the interest of Ato Abdurazak.

Courts in Ethiopia, and elsewhere in the world, are prevented from creating rights and obligations which are not contemplated by the law-maker and the contracting parties. In this regard, Article 1713(2) of the Code states that the court may not make a contract under the guise of interpretation. The word “interpretation” employed here may pertain to interpretation of laws or contracts. Hence, where the law is clear, courts do not depart from the clear message of the law and give decision which vitiates the intention of

...the judicator is to discover and to act upon the true intention of the legislature—the *mens* or *sententia legis*. The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nonetheless, in all ordinary cases, the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said. Judges are not at liberty to add or to take from or modify the letter of the law, simply because they have reason to believe that the *sententia legis* is not completely or correctly expressed by it.

IV. Conclusion

The Cassation Division of the Federal Supreme Court has been conferred with the power to revise court decisions that contain basic error of law. Moreover, interpretation of a law by the Cassation Division made by not less than five judges is binding on Federal as well as Regional courts of all levels. Thus, it is clear that well reasoned decisions of the Cassation Division contribute immensely towards the uniform of application of laws in the country. It is also true that wrong decisions by the Cassation Division will have serious repercussions. One instance of a wrong decision by the Cassation Division is the case at hand. Because the Cassation Division misapplied Article 3058 of the Code, its decision will be detrimental to other parties who may bring cases involving the same issue in the future. Therefore, it is the opinion of this writer that the Cassation Division should revise its decision in the case at hand and render the correct interpretation of Article 3058 of the Code as explained in the section above.

⁵⁸⁴ P.J. Fitzgerald, *Salmond on Jurisprudence*, Sweet and Maxwell, Universal Law Publishing Co. Pvt. Ltd, 12th ed, 2009.