CASE COMMENT
ACKNOWLEDGING THE ILLIGITIMATE CHILD

Mesfin Gebre Hiwot

1. Ayelech Wolde Gabriel V. Terunesh Tessema, and
2. Tadesse Gurmu V. Tiruwork Eyassu

(Supreme Court civil appeals No.394/72 and 1111/74 respectively).

The Supreme Court in the Ayelech case[1] held that an entry in a school register made by a school official on the basis of an oral declaration made before him by a person to the effect that the pupil he is having registered is his own child is a valid acknowledgement within the meaning of Art. 748(1).[2] The Court in the Tadesse Gurmu case further held that,pursuant to the same article, a receipt issued by a hospital cashier in the name of the alleged father indictaing payment made for the delivery of the alleged child is, likewise a valid acknowledgement of paternity. It is our intention in this comment to show that in so holding, the Court errs both in its appraisal of the facts and in its interpretion of the law.

The Court maintains that what is envisaged in Article 748)[3] is any « weighty and relaiable evidence made in writing» which may or may not be personally drawn up by the author[4] of the instrument. On the basis of this general premise, the Court deems the following to be adequate to establish the paternity of a child by acknowledgement.

1. Testimony given by the alleged father before a court of law and recorded by the court clerk;
2. any entry made or minutes taken by government officials on the basis of declarations made by the alleged father;
3. any application written to any office by the alleged father, and
4. any private letter written by him to relatives or friends.

The court considers the school secretary in the Ayelech case and the hospital cashier in the Tadesse Gurmu case as neutral government officials, and therefore takes both the school register and the receipt as valid documents of acknowledgement of paternity.

The requirement that an acknowledgement of paternity must be made in writing provided under Article 748(1) is interpreted extremely liberally. More liberally , in fact, than the words «weighty and reliable evidence made in writing» suggests. Before going into the correctness or otherwise of this statment, we

deem it appropriate to go into the sufficiency of the evidence upon which the court's decision is based; regardless of whether such evidence was submitted in the prescribed form or not.

THE COURT'S APPRAISAL OF THE FACTS

The appeal in the Ayelech case is against the decision of the High court which decided for the respondent on the ground that the evidence presented did not show that Ato Wolde Gabriel Tekelemariam was indeed Ayelech's father.[6] The High Court made its decision on the basis of the testimony of witnesses. The Supreme Court on appeal dismissed the High Court's decision because it was unlawful, by virtue of Art. 748(2) of the Civil Code, for the High Court to alow the appellant to prove herself to be an acknowledged child by means of witnesses. The court, then, proceeded to interpret Article 747(1) and as a reault arrived at the decision mentioned earlier.

Now, let us examine in some detail the evidence admitted by the court and its appraisal thereof. The evidence presented as proof to show that an acknowledgement of paternity was made is a letter by the Kelemework school written in response to an inquiry made by the court confirming that Ayelech Wolde Gabriel was a pupil in the same school from 1974-1979 and was registered on a request made by Ato Wolde Gabriel Teklemariam-then an employee of the school-who declared himself to be her father to the school authorities. As it could not take the letter itself as a document of acknowledgement-since it is clearly not a declaration made « in writing » by the alleged father - the Court took it as evidence to prove that such declaration was, in fact, made in the school register. But since it did not have the school register before it,[7] the Court summoned the school secretary, Ato Marcos Yilma, as a witness to testify before it. The Court states its reasons for summoning him in the folowing words.

> We summoned the school official not to have him testify on the question of acknowledgement of paternity *per se*, but so as to explain to us about *what exactly is recorded in the school register; the manner in which the record was made and the procedure of registeration followed by the school.* (Emphasis added.)

In this testimony Ato Marcos declares that the school register contains the name Ayelech Wolde Gabriel, that the record was made upon the request of Ato Wolde Gabriel Teklemariam who declared himself to be the child's father and (if we may so presume), that the appellant in this case *is* indeed the same person whose name appears in the register. The question that needs to be answered at this point is whether one can take the evidence presented as sufficient to prove that Ato Wolde Gabriel had, in fact, declared himself to be Ayelech's father in writing.

From the words of the court and the testimony given by the school secretary we may infer that :

1. the exact information contained in the register is Ayelech W/Gabriel;
2. the record was made by an official of the school who was requested by Ato Wolde Gabriel to register a child by the name of Ayelech Wolde Gabriel who happens to be his own daughter;[8] and
3. registeration is normally based on the oral declaration made by alleged parents or guardians before the registering officer.

It is clear from the foregoing that the Court's knowldege' of both the existence and the contents of the register does not emmanate from the «writing» alone , which it says is the sole basis of its decision, but from a letter written by the school and a testimony given by a school official. It does *not know from the same «writing» that the name Ayelech Wolde Gabriel belongs, for sure, to the appellant and not to a namesake ; that the alleged father did declare himself to be Ayelech's father and that the record was made on the basis of his declartions*. In other words, everything that connects Ayelech and the alleged father is derived *from the testimony of a witness* and even the existence of the «writing» deemed to be the instrument of « acknowledgement of paternity» is proved not by producing it in court but by a letter that declares its existence, and its contents are «confirmed» by the testimony of the same witness. Under the circumstance, therefore, it is not possible to take the Court's words at its face value when it says that its decision is made on the basis of the record for it clearly does not know for sure that it exists and if it existed would prove nothing for the simple reason that it merely confines itself to stating the name: Ayelech Wolde Gebriel- a common enough name. It is not possible to take its words seriously either when it says: « we summoned the school official not to have him testify on the question of acknowledgment *per se*...» when everything that connects the child and the alleged father, in fact, depends on his testimony.

Let us now briefly consider the proof aduced in the Tadesse Gurmu case. The information contained in the record from the Ghandi Hospital reads: « Name of patient : Turuwork Eyassu ; payment made by Tadesse Gurmu ; Tel. 152025.» The date 15/5/62 E.C. and the signature of the cashier does also appear on the receipt. It is pertinent to note the following in connection with the information contained in the said receipt. The name of the child, Solomon, who is alleged to be the appellant's son does not appear on it . It is not even mentioned that the patient was hospitalized for delivery.[9] And if the case was indeed a case of delivery the receipt does not tell us that the delivery is that of the baby, Solomon, and that the supposed mother, Tiruwork Eyassu, is indeed the respondent in this case. In other words, all this does not follow from the «writing» considered to be the basis of the decision. All this, if at all, the court obtains from the testimony of the witnesses which it says should not have been

heard in the first place. There is, on the face of it nothing in the writing which connects the child, Solomon , with the alleged father, Tadesse Gurmu. *It is submitted, therefore, that even if we were to accept the Court's interpretation of the law and maintain that any «writing» is admissible, both the receipt and the register are insufficient simply because they do not at all prove what they are purported to prove.*

The decision in the Tadesse Gurmu case is based on the interpretation of the law given in the Ayelech case and there is no reason to assume that future cases would not be based on it. It is, therefore, essential that we discuss and evaluate the position taken by the Court with regard to questions of law.

THE COURT'S INTERPRETATION OF THE LAW

In analysing the legal position taken by the Court regarding proof in writing within the meaning of Article 748(1), we think that it is only appropriate that we must discuss the jurisprudential meaning of the term « written proof» or « proof in writing».

Declarations made by persons in writing may take two forms: private and public or authentic acts. The former are those acts drawn up by parties in their own name and the latter by public servants in the discharge of their *official* functions. [10] Authentic acts are those « received by a public officer having the power to draw up public acts in the place where executed and with the requisite formalities." [11] Authentic acts are not therefore declarations received by any and all officials but by those who have been specifically designated by law to receive them. Acts of civil status are, for instance, drawn up only by officers of civil status and, under certain conditions, by notaries. [12]

As a general rule[13] no formalities are required for the drawing up of private acts except for the requirment that they *must be signed* by their authors.[14]

The probative value of authentic acts and acts under private signature [15] differ in that more credence is given to the former than to the latter. The credence given to authentic acts is in a large measure due to the fact that those officials empowered to draw them up are accountable for the accuracy of the contents of the acts they draw up.[16]

Private and authentic acts are the only forms of written proof that are known as « pre-constituted proof». This does not mean, however, that under exceptional circumstance that private letters, domestic papers etc. cannot be introduced as proof. The probative value of such proof is left to the discretion of the judge and they usually serve as a mere commencement of proof. Such writings are not in the catagory of the acts described above. They are not, *therefore considered valid where the law requires proof in writing.*[17]

To recapitulate: where the law requires written proof it means pre- constituted proof; that is, a writing drawn up with the intention of being used as proof in the event a dispute arises in the future. If it is required that it must be made

in the form of an authentic act, such an act must be drawn up by a public official specifically empowered to receive such declarations and not by any adminstrative or other public official. Where private acts are required, such acts even if the body is prepared by a third person, must be signed by the author of the act.[18] Any writing which is not made in either of these two ways cannot thus be considered valid as proof in writing under the law. The inevitable conclusion that we must draw from this is that the Court errs when it accepts entries made or minutes taken by any and all public officials on the basis of declarations made or applications submitted by the alleged father to any office and where it admits private letters and other writings made by the same as valid proof of acknowledgement of paternity.

The Court's interpretation which is so broad that it even admits a hospital receipt is based on the wording of article 747 (2) which reads: «such declaration need not have been made with a view to producing the effects of an acknowledgement of parternity.» The court gives what it considers to be the meaning of the said Article in the following words in the Ayelech case.

> « If it is provided that a declaration need not have been made with a view to producing the effects of an acklnowledegment of paternity, such a document could then be drawn up for a purpose other than an acknowledgement of paternity, it cannot thus be said that it needs to be attested by witnesses. A private letter could serve us here as a clear illustration.»

After drawing the proper conclusion that « such a document could . . . be drawn up for a purpose other than an acknowldgement of paternity», the court jumps to the conclusion that a « private letter could serve . . . as a clear illustration» of a document that can be accepted as a valid acknowledgement of paternity. *The Court, in so concluding, is confusing the form of proof required wth the formalities that one may have to fulfill in draawing up the instrument in the prescribed form* In other words, it fails to distnguish the concept of *formality* from the concept of *form.* This is evidenced by the use the court makes of the following words of the drafter in the Ayelech case.

> These acceptances are not subject to any special *form,* although the acknowledgement itself must be made *according to a certain formality.* (Emphasis added -).[19]

The translator of this work of R.David's says at footnote 103 that: In this article, the preliminary draft required that declaration of paternity be made in the presence of four witnesses. Arts. 747 and 748 which were amended by the Commission have not preserved this requirement.[20]

The «acceptances» refer to the acceptance made by the mother and, in her default, the ascendants provided in article 751. The acceptance need not be in any special form, it may even be made tacitly, i.e,, by not protesting « against

such acknowledgement within one month after he has come to know of it.[21] And this is different from the requirement of Article 748(1) which *insists* that « an acknowledgement of paternity *shall be of no effect unless it is made in* writing. » (Emphasis added.) The acceptance by the mother may thus be made in any form and can, therefore, be proved by any means, say, a private letter.[22] The Court is not precluded from admiting any evidence, whatever the form, be it oral or written.

When David refers to the acknowledgement of paternity, he does not refer to the form (as it must be in writing) but to «a certain formality» which , as the annotation made by the translator indicates, refers to the requirment of attestation by four witnesses which was later deleted by the Codification Commission. If the form required is written proof, say, a private act, it may or may not , therefore, be subjected to the formaility of being attested by witnesses. Contracts for instance, need to be attested by witnesses where they are required to be made in writing. The same holds with wills; but not with acknowledgement since such a requirment has clearly been rejected, as indicated earlier, by the Commission. The Court by confusing the requirements of *form* with what is provided as to formalities has, therefore, put the acknowledgement of paternity on a par with the acceptance by the mother- a situation which is contrary to both commonsense and the letter and spirit of the law.

The one argument that can be made validly is, in fact, the contention that only authentic acts should be accepted as acknowledgements of paternity in view of the fact that article 748(2) implies that acknowledgements were to be made by officers of civil status and, in their default, by notaries. Moreover, records of Civil Status do not need to be attested by witnesses.[23] It is true that acknolewdgement of paternity may be made before an officer of civil status or notary, but this need not preculde private acts in view of the fact that the drafter had suggested a private act made according to « a certain formality»; i.e. attestation by four witnesses and the fact that the modern trend is to liberalise the proof of acknowledgement of paternity so to as improve the status of illigitmate children under the law. The fact that the said formality was deleted by the Condification Commission must thus be interpreted to mean that an act under private signature would suffice without requiring additional formalities.

The fallacy of the above statement can also be seen by comparing it with the French law of acknowledgement of paternity. French law requires that acknowledgement of paternity must be made in the form of an authentic act and that a declaration made in the form of a private act is a radical nullity. [24] In the words of Planiol,[25]

> The law imposes no sacramental formula. It is not even necessary that the notorial act containing the acknowledgement have been especially dra fted to receive it. It may be there incidentally and even implicitly contai ned in it...The acknowledgement may thus flow from mere communications contained in the act, without being the subject matter of the enacting part of the act.

It is clear from the foregoing that the same rule provided in article 747(2) is also provided in French law although it requires that acknowledgement of paternity must be in the form of an authentic act. It may therefore flow from a will made in notarial form or any other authenticated act even if the subject matter of the act happens to have been drawn up with a view other than « to produce the effects of an acknowledgement of paternity ». Article 747(2) should not, hence be interpreted to allow any and all sorts of declarations put on paper by the alleged father but that no formalities would be required as to the manner in which such declarations are made provided that the instrument itself is made in the form of a preconstituted proof, i.e., either in the form of an authentic act or an act under private signature.

CONCLUSION

Starting from the worthy concern that children born outside of marriage should not be left without a father, the court has, we believe, taken an extreme position in allowing school registers, hospital receipts and private letters as valid acknowledgements. To take such a position is however to defeat the very purpose of article 748 (2) which is to provide beforehand an indubitable proof much more reliable than the testimony of witnesses which is based on a notoriously unreliable instrument - human memory. But then, can one really dare consider the testimony of witnesses under oath less reliable than the receipt admitted as valid in the Tadesse Gurmu case. We think not. We think that the court should have confined itself to admitting- «proconstituted proof» drawn up either as public or private acts.

Even if we were to take the Court:s interpreptation of the law as valid, it is clear that the Court did not stick to its own interpretation in these two cases and admit only the writting (writing as understood in common parlance) as proof but did, in fact, rely more on the testimony of witnesses. It has as a matter of fact, admitted what amounts to proof in any form and did not restrict itself to proof in writing. We think that the position taken by the court is a radical departure from both the letter and spirit of the law and that this, *in practice*, and in spite of the concern shown by the court itself, is tantamount to a return to the conditions that prevailed before the code.

FOOT NOTES

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1. The two cases under consideration are here in after referred to as "the Ayelech case" and "the Tadesse Gurmu case.
2. All articiles cited in this Comment are from the Ethiopian Civil Code of 1960.
3. Art. 748/1/ reads: "an acknowledgement of peternity shall be of no effect unless it is made in writing."
4. The word 'author' refers to the maker of an instrument.
5. It is not clear whether the word office is restricted to government office or whetherit may include private offices and those of mass organizations.
6. It appears from the reading of the Courts decision that the dispute arose, as is usually in Ethiopia, when appellant through her mother and guardien requested that she be given a "certificate of heir" as an heir to the deceased, Ato Wolde Gabriel, witin the meaning of art. 996.
7. It is not clear why the Court did not order that the register be brought before it for examination rether than going a round about way to prove its point.
8. It is not clear from the case whether Ato Marcos was the person who received the alleged declarations of Ato Wolde Gabriel.
9. The fact that the receipt is from the Ghandi; Hospital is immaterial as said hospital doe not handle delivery cases only but all sorts of gynaecological diseases.
10. Planiol, *Treite Elementoire de Droit ivil*, Vol. 1 part 1, (1939) pp. 236-6.
11. Planiol Id., Vol. 2 part 1, p. 53. Planiol further notes on the same page that „ acts passed is accordance with administretive formalities are assimilated to authentic acts. " and again hn states: "Administretive agents drew up many authentic acts. They however give authenticity only to those drefted within the limits of their attributions." Pleniol, cited at note 10, - p. 806.
12. *Cf.fArts.* 48 *and* 146. *For the purpose of acknoledgement of paternity of maternity French law attributes testimony given under oath before a court of law and recorded by the court's clerk with the status of an authentic act. planiol, Vol.* 1 *part* 1, *cited above at note* 5, *pp.* 806-7.
13. *Cf. Arts.* 831 *and* 1727 *Which are private acts requiring the formality of being attested by witnesses*
14. " *The signature gives the act its probative force: an act without signature is of no value even in civil martters, as a commencement of proof by writing." planiol, cited above at note* 11, *p.* 53. *The Court needlessly bolabours the point thatthe writing need not be personally drawn up by the author ofthe instrument." They(the authorsofprivate acts-MGH.)canhave the bodyof the actdrawn up by a third person, and confine themselves to signing." Id., p.* 43. *see also arts.* 881/1, 1728 1728 *and* 1720 *regarding wills, contracts and the effects of the provisions as toform, resmpectively*
15. *Thefterms" acts under private signature " are usually used synonymousluy with" private acts"signifying the indeppens ability of the signatures of their authors.*
16. *see fArt.* 143:
17. *Planiol.fvol.2 part* 1, *tited above at note* 11, *pp.*556-66.
18. *The nature of the signature whether made in writing or is merely a thumb mark or takes any other form is irrelevant in as much as it is the author's usual signature and is reliably verifiable. see also note* 14 *above.*
19. *David, R.; "Family Law in the Ethiopian Civil Code" in O'Donvan, K, Cases and Materials on Ethiopian Family Law* (1972, *trans., Hailu Cherinet unpublished*) P.97.
20. *David, cited above at note* 320 *p.* 27.
21. *Art.* 753.
22. *Even in France where mateermity of an illigitimate child can only be established, unlike in Ethiiipia where prooveing the fact of birth suffices, by acknowledgement, acceptance by the mother may be accepted by means of a private letter, if an acknowledgement of paternitey has first been publicly licly made.*
23. *See Chap.* 3 *of Book* 1 *of the Cibivil Code.*
24. *Planiol, vol.* 1 *part* 1, *cited above at note* 10, p. 808
25. *Id., pp.* 807-808.