Provisional Attachment Order *vs.* Judicial Mortgage in Ethiopia: Comments on Decisions of the Cassation Bench of the Federal Supreme Court

Aschalew Ashagre Byness[*]

1. Introduction

It is a fact of life that persons, both legal persons and physical persons, become debtors of other persons by virtue of legal, contractual or extra-contractual relationships. The creditors of the debtors may be ordinary or secured creditors as the case may be. However, when circumstances allow, creditors always want to be secured creditors as opposed to rank-and-file ones because the former are better off than the latter if there are many competing creditors over one asset of a debtor which cannot satisfy the claims of all creditors. One of the security devices, recognized in many jurisdictions in general and in Ethiopia in particular, is mortgage. In Ethiopia, the 1960 Civil Code (Civil Code) has clearly provided that a mortgagee-mortgager relationship can be created by virtue of the law (legal mortgage), by virtue of agreement (contractual mortgage) and by virtue of a verdict of a court of law or an arbitral tribunal (judicial mortgage).[1] However, irrespective of the source of the mortgage, a mortgage should be registered by a competent government agency[2] so that it can be valid and binding on the mortgager and can give the creditor priority right over other secured creditors who come next to the first secured creditor and other ordinary creditors.

Despite the clear message of the Civil Code, as shall be discussed below, the Cassation Division of the Federal Supreme Court decided in one case that provisional attachment order made by a court of law can create a mortgagee-mortgager relationship even in the absence of registration. In another decision, however, the Cassation Bench has tried to demonstrate that attachment order

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[*] LL.B., LL.M., Assistant Professor of law, School of Law, College of Law and Governance Studies, Addis Ababa University; PhD student; consultant and attorney-at-law at the Federal Courts of Ethiopia. The author can be reached via: gakidan.ashagre335@gmail.com. I am very much indebted to Associate Professor Getachew Asefa (PhD), who invited me to make this contribution. This reflection was presented in a seminar held on the 16th of February 2017 at the School of Law and it has benefited from the opinions of the participants of the seminar. Therefore, I am grateful to the participants. I remain solely responsible for any errors.

[1] The Civil Code of the Empire of Ethiopia, Proclamation No. 165/ 1960, *Neg. Gaz.*, Year, No, Art. 3041.

[2] *Id.*, Art. 3052.

cannot create a judicial mortgage. This unclear stance of the Cassation Bench has become a source of confusion among practicing lawyers and lower courts instead of insuring predictability, uniformity and certainty of decisions. We have to bear in mind that the equivocation created by the Bench has far reaching effects as decisions of the Bench are declared to be binding interpretative precedents by virtue of a Proclamation issued in 2005.[3]

The purpose of this contribution is, therefore, to analyze these decisions of the Cassation Bench in light of the applicable provisions of the Civil Code and the Ethiopian Civil Procedure Code. To this end, four cases have been selected and critically analyzed. Through this analysis, the writer has come to the conclusion that the stance of the Cassation Bench is still a source of confusion since it has not made clear distinction between the legal effects of provisional attachment order and judicial mortgage, though attachment order is quite different from judicial mortgage both in terms of its essence, its operation and its legal effect.

In this case analysis, the writer argues that attachment order does not give rise to priority right and hence it cannot be equated with judicial mortgage. Therefore, the writer recommends that the Cassation Bench has to reconsider its position in future cases and has to clearly decide that attachment order cannot be taken as a judicial mortgage since the former lacks the elements of the latter as provided by the Civil Code.

This comment is organized as follows. The second part discusses fundamentals of mortgage very briefly. Under the third section the selected cases are summarized, analyzed and commented. Finally, brief concluding remarks are presented.

2. Fundamentals of Mortgage

2.1. What is Mortgage?

Before we delve into the discussion of other matters which are germane to the title of this work, it is better to give some definitions of mortgage which help us have a clear picture of the concept. According to Black's Law Dictionary,[4] 'mortgage is a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void up on

[3] See Federal Courts Amendment Proclamation, Proc. No 454/2005, *Fed. Neg. Gaz.*, Year 11 No. 42.

[4] BLACK'S LAW DICTIONARY 3201 (Bryan A. Garner ed., 8th ed. 2004).

payment or performance according to the stipulated terms.' Though this definition sheds some light on the concept, it does not give us a complete picture of mortgage since some other basic elements of mortgage are missing. In addition, it has not defined what properties are subject to mortgage since all properties are not, as a matter of rule, brought within the ambit of mortgage. In addition, the above definition does not show the sources and effect of mortgage. However, this definition is useful because it tells us that mortgage is an accessory obligation which becomes void upon the extinction of the principal obligation.

According to Investopeida,[5] a mortgage 'is a debt instrument, secured by collateral of specified real estate property that the borrower is obliged to pay back with a predetermined set of payments.' This definition tells us that mortgage is a security device which is meant to secure the payment of borrowed money. Again, this definition cannot be taken as a definition which conveys the complete essence of mortgage. This is because the definition has narrowed down the scope of application of mortgage as it has confined mortgage to obligation arising only from borrowing while mortgage can be a security device for the performance of any obligation emanating from the law or a contract or from an extra-contractual obligation, for that matter.

According to Planiol, mortgage is a real security which, without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosever hands it is found and get it paid from the proceeds by preference to the other creditors.[6] As compared to the previous definitions of mortgage, the definition accorded to the term under consideration by Planiol is better because it has incorporated the most important pillars of mortgage.

In Ethiopia, mortgage has been regulated by the 1960 Civil Code. Though the Code did not define mortgage, it has contained several provisions dealing with the types of mortgage, the requirements for the formation of a valid mortgage, effects of mortgage and extinguishment of mortgage. When one closely reads

[5] See INVESTOPEDIA (December 23, 2016), http://www.investopedia.com/terms/m/mortgage.asp.

[6] See 2/2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 472 (Louisiana State Law Institute trans., 1959) (11th ed. 1939).

these provisions, one can conclude that the elements of mortgage under the Civil Code are similar to the elements of mortgage described by Planiol.[7]

2.2. Creation of mortgage (Types of Mortgage)

When we see various legal systems in the world, we realize that there are various modes of establishment or creation of mortgage. In other words, mortgages are distinguished from one another on the basis of their source.[8] If we take the case of France, mortgage could be:[9]

- a legal mortgage
- Conventional mortgage
- Judicial mortgage

In France, legal mortgage is a mortgage which the creditor obtains by virtue of the law without obtaining an express agreement of the mortgagor. This type of mortgage was called tacit mortgage due to the absence of agreement between the mortgagee and the mortgagor. There are numerous legal mortgages in France. According to Planiol, there are close to fifteen legal mortgages. To mention some of them: [10]

- Mortgages of married women on the property of her husband;
- The mortgage of persons under trusteeship (minors and interdicts) ;
- The mortgage of the state, of the communes and of the public establishments on the property of those accountable for public funds;
- The mortgage of legatees on the property of their debtors in state of bankruptcy;
- The mortgage of the customs office on the property of those indebted to it, and the like.

The second type of mortgage, conventional mortgage, is established by agreement of the parties (by the mortgagee and mortgagor). The contract constituting the mortgage should be passed before a notary as provided under Art. 2127 of the French Civil Code. The mortgage contract in France is one of the rare contracts which should be made solemnly. Therefore, the conventional

[7] See Kibreab Habtemichael, Mortgage: Effects and Practice under the Ethiopian Law 2-3 (1972) (unpublished senior thesis manuscript, on file with Faculty of Law, Addis Ababa University).

[8] Planiol, *Supra* note 6, at 531.

[9] *Id.*

[10] *Id.*

(contractual mortgage) depends not only on the contact but also on the exterior form of the acts.[11]

Judicial mortgage is a general mortgage which the law attaches to every judgment which condemns a castor to execute his obligation as stipulated under Art. 2123 of the French Civil Code. The existence of this type of mortgage is important because it assures the execution of judicial decisions in the most efficacious way possible. In France, judicial mortgage is not a mortgage established by judicial discretion since the courts do not have the power to refuse the creation of judicial mortgage. That is why it is said that judicial mortgage is a legal mortgage taking effect by the operation of the law.[12] Nonetheless, the French Civil Code does not give a complete picture of judicial mortgage. In this regard, Planiol wrote that:[13]

> It is to be observed that the Civil Code is very brief on the judicial mortgage. It can be said that in this matter … it confined itself to vaguely consecrating existence, leaving it to jurisprudence guided by tradition, to provide the necessary rules. Thus, it does not either enumerate the jurisdiction nor the judgments giving rise to this mortgage, nor does it define its conditions; it does not even contain the essential concept that the judgment should contain a condemnation to something.

In Ethiopia, the principle governing the creation of mortgage is laid down under Art. 3041 of the Civil Code. This article provides that mortgage results from the law, or a judgment or may be created by a contact or other private agreement. The first two sources are self explanatory. However, the phrase 'other private agreement' is a vague expression. This is because one cannot stop wondering as to what is meant by a private agreement other than a contract since every contact is a private agreement.[14] In other words, because the bedrock for the formation of a contract is agreement of the contracting parties, every contract is an agreement though every agreement is not a contract. Therefore, if we stick to the English version of the above article, we cannot arrive at the right conclusion regarding the exact meaning of the phrase 'private agreement'.

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[11] Planiol, *Supra* note 6, at 531-532.

[12] *Id.*, at 573.

[13] *Id.*

[14] See the definition of contract under the Civil Code of Ethiopia, *Supra* note 1, Art. 1675. According to this Article, a contract is an agreement whereby two or more persons as between themselves create, vary, or extinguish obligations of proprietary nature.

Nevertheless, a reference to the Amharic version, which is the controlling version, is very much helpful to understand the meaning of the phrase under discussion. This is because the Amharic counterpart of the phrase 'private agreement' is the word '**ኑዛዜ**' (will) which means that the English version of this phrase is not the same as the corresponding Amharic version. Here, what we have to bear in mind is that will is not a result of agreement since it is a juridical act which can be made and broken by the testator until his/her death without any involvement of the legatee.[15] Therefore, on the basis of the above analysis, we can conclude that in Ethiopia, mortgage may be created by virtue of the law, a contract, a judgment or a will. Discussion of each source of mortgage in the Ethiopian context is briefly presented as follows.

As to a legal mortgage, Art. 3042 of the Civil Code has provided that whosever 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. As can be gathered from this article, we can safely conclude that while the principal obligation (contract of sale) is a result of the agreement of the contracting parties, the accessory obligation (mortgage) is established by virtue of the law which is aimed at best protecting the interest of the seller where the buyer fails to discharge his/its/her most important obligation: payment of price.[16]

In addition to the above type of legal mortgage, Art. 3034 of the Civil Code has stated that a co-partitioner has a legal mortgage. Sub-Art. 1 of this Article states that a co- partitioner shall have a legal mortgage on the immovable allotted to his co-partitioners in accordance with the act of partition. As provided under sub-Art. 2 of the same article, the purpose of such legal mortgage is securing the payment of any compensation in cash that may be due to him/her or such other

[15] *Id.*, Arts. 857-941.

[16] In this connection, one question that crosses our mind is as to what other obligations, other than the payment of price, could be conceived that can be a cause for the establishment of a legal mortgage. Needless to say, contracting parties do have the freedom to determine the contents of their contract without contradicting mandatory provisions of the law. In concluding a contract of sale of a building (since land is not a subject of contract of sale in Ethiopia) the parties may agree that the buyer shall pay charges and fees owed by the seller to the government; the buyer may agree that he/she/it shall discharge obligations arising from servitude, lease, usufruct and the like that should have been discharged by the seller had it not been for such agreement. Hence, under those circumstances, the seller becomes a mortgagee by virtue of the law where the buyer fails to discharge such obligations that are stipulated in the contract of sale of the building.

compensation as may be due by the co-partitioners where he/she is dispossessed of any property allotted to him/her.

In relation to the above mentioned article, one relevant question worth raising is as to who are co-partitioners under the Ethiopian legal system. The answer to this question is to be obtained by a close examination of the Civil Code and other laws of the country. One instance which may give rise to co-partitioner is the case of joint ownership as provided under the Civil Code. In this regard, Art. 1257 of the Code has stated that a thing can be jointly owned. Because the term a thing is a very general term, it definitely encompasses immovable properties which can be brought within the ambit of mortgage. Though buildings or land may be jointly owned even perpetually, each joint owner is entitled to apply for the thing jointly owned, if an immovable, to be divided giving rise to the presence of co-partitioners as envisaged by Art. 3043 of the Civil Code. As far as the creation of joint ownership is concerned, it may be created by virtue of the law, a contact or a will.[17]

We can also argue that where the estate of a deceased person is divided among heirs and/ or legatees, each one of such persons can be taken as a co-partitioner. In this regard, Art. 1060(1) of the Civil Code has stated that the succession shall remain in common between the heirs until it is partitioned while Sub-Article (2) of the same Article has stipulated that the rights of co-heirs on the property of inheritance which is in common shall be governed by the provisions of the Civil Code dealing with joint ownership.

A close reading of Art. 3043 of the Code reveals that a legal mortgage is recognized in favor of a co-partitioner which is meant to secure the payment of any compensation due to a co-partitioner and such other compensation arising from dispossession. A question may be asked as to what the source of the harm that gives rise to compensation to the co-partitioner is, since compensation cannot be imagined without damage/harm. Should the harm occasioned be attributable to the fault of the co-partitioner or could it be a strict liability? Though nothing can be inferred from this Article to give adequate answers to these questions, we can argue that the source of the harm could be the other co-partitioner(s). Let us say that one co-partitioner discharged a debt individually which should have been discharged by all the joint owners. However, the other co-partitioners may fail to contribute to the payment of the debt in which case a

[17] MURADU ABDO, ETHIOPIAN PROPERTY LAW: A TEXT BOOK 245 (2012).

co-partitioner that discharged the common debt becomes a mortgagee over the partitioned immovable by virtue of the law. In the case of dispossession, the harm comes from third parties other than the other co-partitioners. In both cases, the co-partitioner who has sustained harm is entitled to be compensated and the immovable is a security to such compensation by virtue of the law.

In Ethiopia, the other type of mortgage is judicial mortgage. However, judicial mortgage is not defined under the Ethiopian legal system. Despite this, the Civil Code has something to say about judicial mortgage. According to Art. 3044(1) of the Civil Code, a court or an arbitration tribunal may secure the execution of its judgments, orders or awards by granting one party (the decree holder) a mortgage on one or more immovables belonging to the judgment debtor. Sub-Art. 2 of the same Article underscores that the judgment or award should specify the amount of the claim secured by mortgage and the immovable or immovables to which such mortgage applies. The absence of detailed legal provisions pointing out the essence of judicial mortgage and the dearth of judicial and scholarly analysis on the issue mean that the exact scope of application and the requirements for the creation of a valid judicial mortgage in Ethiopia remain unclear. For instance, a close reading of Art. 3044 of the Civil Code leads to the following questions: How can a judgment create mortgage? Is such mortgage established upon the application of the decree-holder or can it be established upon the initiation of the court or the arbitral tribunal? Can judicial mortgage be established by provisional orders? How is judicial mortgage different from an attachment order granted by a court or an arbitral tribunal while the case is pending? Should a judicial mortgage be created after the case is finally disposed of through an order, a judgment or an arbitral award?

It is not easy to give direct answers to the above queries though these issues are extremely important. It is true that a court of law can create a judicial mortgage through its judgment. However, arguing that a court of law can create a judicial mortgage on its own motion unless it is requested by a decree holder cannot hold water since no relief should be granted unless expressly pleaded by the party concerned. Should such mortgage be given after the judgment is made or the arbitral tribunal has handed down the award? Still no clear answer is to be found in the Ethiopian law and practice. In the opinion of this writer, it seems good if the decree holder applies before the finalization of the court or arbitral proceeding so that it would be convenient to the court or the arbitral tribunal to create a judicial mortgage along with the judgment or the award. Again, this writer believes that judicial mortgage may be established by a court or an arbitral

tribunal while the case is pending so long as such kind of mortgage meets other stringent requirements for the establishment of a valid mortgage in Ethiopia. We can also argue that judicial mortgage may be created after a case is decided.

Decision of a court or an award of an arbitral tribunal should specify the amount of the claim secured by mortgage. However, we have to bear in mind that since the mortgage is to be established after the amount due to the decree holder is clearly ascertained, what is secured by the mortgage is not a mere claim. In order to understand the clear message of Sub-Article (2) of Art.3044 of the Code, we need to make a reference to the Amharic version of the same Article which clearly states that the judgment or award should specify the amount of the debt.[18]

The other kind of mortgage in Ethiopia is contractual mortgage. When a mortgage is created through the agreement of the mortgagee and the mortgager, such contract should satisfy all the requirements of a valid contract stipulated under the Civil Code.[19] This means that in order to establish a valid contract of mortgage, the contracting parties should be capable, the object should be specifically defined, should be possible, moral and lawful.[20] In addition, the formality requirement should be satisfied as form is a requirement to establish a valid contract of mortgage in Ethiopia.[21]

2.3. Specific Requirements for the Creation of a Valid Mortgage in Ethiopia

In many jurisdictions, there are various specific requirements for the creation of a valid mortgage. For instance, in Bulgaria mortgage can be set up over immovable property and rights in *rem*.[22] In Bulgaria, mortgage can be valid where it clearly identifies the creditor and the debtor, the property over which mortgage is established, the secured claim as well as the amount for which the mortgage has been created.[23] In Bulgaria, contractual mortgage is concluded in the form of a notary deed while statutory mortgage is established upon an application by the mortgager containing the elements of the mortgage agreement. Registration of

[18] See the Amharic version of this Sub-Article.

[19] The Civil Code of Ethiopia, *Supra* note 1, Art.1678.

[20] *Id.* See also Arts. 1714-1716 and Art. 1723(1) of the same Code.

[21] *Id.*, See Arts. 1719- 1730.

[22] See DELLOITTE LEGAL GUIDE TO CROSS-BORDER SECURED TRANSACTIONS (December 15, 2016), available at https://www2.deloitte.com/global/en/pages/legal/articles/deloitte-legal-guide-to-cross-border-secured-transactions.html.

[23] *Id.*

mortgage is mandatory for its validity in Bulgaria.[24] In the Netherlands, mortgage is one of the most important security devices. In that country, rights of mortgage can be created over property subject to registration. Here, properties which are the subject of mortgage are immovable property, registered ships and aircraft. Registration of mortgage is another indispensable requirement to establish a valid mortgage.[25] In France, mortgage can be established over real estate which are immovable properties and movables attached to an immovable property. In order to create a valid mortgage, it must be executed by a notarized deed which must also state the maximum secured amount. In addition, the deed must be drafted in French.[26]

In Russia, mortgage is one of the security devices recognized by law to secure any type of obligation and registration of the mortgage is a validity requirement.[27] In Spain, real estate mortgage and chattel mortgage are recognized by law. In the case of real estate mortgage, all kinds of real estate assets such as surface rights, usufruct rights and administrative concessions are objects of real estate mortgage while chattel mortgage pertains to movable assets such as motor vehicles, airplanes, industrial machinery and intellectual and industrial property.[28] In Spain, all kinds of obligations can be secured by means of mortgage so long as the validity requirements are satisfied.[29] There are general and special requirements for validity of mortgage that need to be cumulatively satisfied. The general requirements include consent of the parties, capacity, clear identification of the main obligation, legitimate cause (the cause of the mortgage must be lawful, moral and in line with the demands of public order).[30] In addition, all types of mortgage securities (real estate and chattel) have to be executed as a public deed before a Spanish notary and, additionally, must be filed for registration with the property register of the place where the property is located. In the Spanish law, if any of those two requirements is missing, no valid mortgage is constituted.[31]

[24] *Id.*

[25] *Id.*, at 91.

[26] *Id.*, at 19.

[27] *Id.*, at 105.

[28] *Id.*, at 118.

[29] *Id.*

[30] *Id.*

[31] *Id.*

In Thailand, mortgage of immovable properties and certain movable properties (such as registered machinery and vessels) is an essential security device serving to secure any sort of obligation.[32] Here, a mortgage agreement should be made in writing and registered with relevant government authorities.[33] In the case of Chile, mortgage over real estate is among the security devices recognized. In Chile, mortgage must be granted by a public deed and it must be registered in the register of mortgages of the real estate register of the commune where the property is located as a condition precedent for its validity.[34]

The Ethiopian Civil Code has embodied some relevant provisions regarding requirements that need to be satisfied in order to establish a valid mortgage. To begin with, the contract or other agreement creating a mortgage cannot produce any legal effect unless it is made in writing. In addition to the writing requirement, the contract of mortgage is of no effect unless it specifies the amount of the claim secured by mortgage in Ethiopian currency.[35] This means that indicating the amount of the claim secured by mortgage in a currency which is not the legal tender of Ethiopia affects the validity of the mortgage.

In Ethiopia, a mortgage can be created to secure any claim whatsoever, whether existing, future, conditional or contingent. In addition, mortgage may be created to secure a claim embodied in a title to order or to bearer.[36] As to the types of property that can be object of mortgage, it is only immovables that are charged with mortgage[37] while the Code has given a room where certain movables may be mortgaged by virtue of special laws of Ethiopia.[38] In line with this exception, the Maritime Code of Ethiopia has provided that ships of two tons, gross tonnage and above may be mortgaged though ship is defined to be a movable property under Art. 3 of the same Code.[39] By the same token, though the Commercial

[32] *Id.*, at 130.

[33] *Id.*

[34] *Id.*, at 129.

[35] Civil Code of Ethiopia, *Supra* note 1, Art. 3045.

[36] *Id.*, Art.3046.

[37] *Id.*, Art. 3047(1).

[38] *Id.*, Art. 3047(2).

[39] Maritime Code of the Empire of Ethiopia, Proclamation No. 164/1960, *Neg. Gaz.* Year 19, No. 1, Art. 30.

Code of Ethiopia has considered a business as an incorporeal movable,[40] a business may be mortgaged and the source of such mortgage may be the law or a contract which means that judicial mortgage and mortgage created by will are missing under the Commercial Code of Ethiopia with regard to business mortgage.[41]

As provided under Art. 3048 of the Civil Code, the act creating the mortgage is required to specify the immovable mortgaged. Particularly, such act should specify the commune where the immovable is situated, the nature of the immovable and where appropriate the identification number of the immovable in the cadastral survey plan. The Civil Code provides that a mortgage may be created by a debtor or by any other third party in favor of the debtor.[42] In any case, a person cannot secure his debt by mortgage unless he is entitled to dispose of the immovable for consideration. Therefore, if mortgage is created by a person who is not entitled to dispose of the immovable property, the mortgage is invalid. In addition, such mortgage cannot be valid even if the mortgager acquires the mortgaged immovable subsequent to the establishment of the mortgage. Similarly, mortgage cannot be established on future immovables.[43]

In addition to the above requirements, in Ethiopia a valid mortgage cannot be established in the absence of registration as it is the case in other jurisdictions. The most important question, however, is: is registration a validity requirement for all types of mortgage in Ethiopia - contractual mortgage, legal mortgage, judicial mortgage and mortgage created by will? The relevant article concerning this question is Art. 3052 of the Civil Code. Sub-Art. 1 of this Article has clearly provided that mortgage, *however created*, (emphasis supplied) shall not produce any effect except as from the day when it is entered in the registers of immovable property at the place where the immovable mortgaged is located. Now, the question is: what is the meaning of the phrase "however created?" Does it mean that registration is a mandatory requirement for the creation of a valid mortgage whether mortgage is created by contract, will or judicial decision or an arbitral award? It has been indicated above that the Ethiopian Civil Code has made it clear that mortgage can be created by contract, will, judicial decision, arbitral

[40] Commercial Code of the Empire of Ethiopia, Proclamation No., 166 /1960, *Neg. Gaz.*, Year 19, No.3, Art. 124.

[41] *Id.*, Art. 171.

[42] The Civil Code of Ethiopia, *Supra* note 1, Art. 3049.

[43] *Id.*, Art. 3050.

award and by virtue of the law. Therefore, in the opinion of this writer, when we relate the way mortgage is created with strong message of Art. 3052 of the Code, we can safely conclude that no valid mortgage can be established in the absence of registration.[44]

2.4. Can Provisional Attachment of an Immovable Property be taken as a Judicial Mortgage in Ethiopia?

Before we give any positive or negative answer to this query, we have to first analyze what attachment is, its source and its effects. Under Ethiopian legal system, the word 'attachment' is not defined. Hence, first we have to consult foreign materials to have a fair understanding of the term 'attachment'. Black's Law Dictionary defines attachment as *the seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment*.[45] Attachment order, otherwise known as provisional seizure in civil law countries, is a measure taken by a court of law or an arbitral tribunal, before which civil proceeding is pending upon the application of the plaintiff. This provisional measure is widely practiced in many jurisdictions of the world. For instance, in the USA, attachment order may be made so as to ensure that a judgment will be carried out where it is believed that the defendant may dissipate his assets before judgment is handed down. In the USA, the attachment is made against the property of the defendant which means that the measure is basically *in rem*.[46] The purpose of attachment in America is not to create a preferential right for the beneficiary of the seizure in case the debtor becomes bankrupt.[47]

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[44] The worrisome issue, however, is why is registration a validity requirement in Ethiopia as is the case in other jurisdictions of the world? Because mortgage is the most important one of all security devices, special attention is given to mortgage. To begin with, mortgage, as a matter of rule, encumbers real estate which is a very much valuable asset all over the world. Therefore, to know the exact scope of application of the encumbrance and to assure its authenticity, mortgage should be registered. Most importantly, registration plays irreplaceable roles to clearly understand the exact order of priority right among competing mortgagees. The interests of third parties are also best protected where there is a system of registration of mortgages. Therefore, it is safe to conclude that registration is a validity requirement for all types of mortgage in Ethiopia.

[45] Garner, *Supra* note 4, at 387.

[46] Catherine Kessedjia, *Note on Provisional and Protective Measures in Private International Law and Comparative Law 17* (1998), available at https://assets.hcch.net/docs/b6b726b3-1597-40c0-a9c6-894dd5fc9518.pdf.

[47] *Id.*, at 18-19.

In Germany, there are two kinds of measures to protect assets with a view to insuring that writs of execution can be enforced in a future date. These are arrest and the provisional injunction. However, by arrest here we do not mean arrest of a defendant: rather arrest is a means of blocking of the assets and property of the debtor and is ordered by a court. In Germany, arrest is a decision of a general kind which is valid without specifying which assets are involved. However, such general order must be followed by an enforcement measure which may take a variety of forms such as attachment, sequestration or special entry in the land register.[48] Here, the arrest has a particular effect as it accords a priority right over the attached assets. The priority right is reckoned from the date of the attachment.[49] In Switzerland, too, provisional measures are recognized by law. The term used in place of attachment is sequestration when the measure is to recover a sum of money. Accordingly, a sequestration order is a measure which freezes the debtor's assets so that the creditor may be paid out of these assets if he prevails in the litigation on the merits of the case. However, the creditor does not enjoy any preferential claim over other creditors.[50]

In our own case, provisional measures are recognized under the 1965 Civil Procedure Code. Of these provisional measures, attachment order is one. Under the Civil Procedure Code, attachment order can be granted by the court upon the application of the plaintiff at any stage of the civil proceeding.[51] However, the plaintiff cannot get the property of a defendant attached by the mere fact that suit has been brought against the defendant. Rather, the plaintiff should show to the court entertaining the case that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or part of his property from the local limits of the jurisdictions of the court with a view to obstructing or delaying the execution of the decree that may be passed against him. The applications for attachment order may be supported by affidavit though affidavit is not always a requirement.[52]

According to the Ethiopian Civil Procedure Code, the court cannot grant attachment order without giving the defendant the opportunity to be heard. To

[48] *Id.*, at 25-26.

[49] *Id.*

[50] *Id.*, at 39-46.

[51] The Civil Procedure Code of the Empire of Ethiopia, 1965, Decree No 52/1965, *Neg. Gaz.* Year 25, No., 3, Art. 51.

[52] *Id.*

this end, where an application to an attachment order is made the court summons the defendant to produce security or to show cause why such security should not be produced. If the defendant's argument is not accepted and if he/she fails to produce security as determined by the court, the court grants an attachment order.[53] The Civil Procedure Code also provides that attachment can be granted against any property though there are some assets which are not subject to attachment. In addition, attachment before judgment cannot affect rights of persons not parties to the suit, existing prior to the attachment. Moreover, the presence of attachment order cannot bar any person holding a decree against the defendant from applying for the sale of the property under the attachment in execution of the decree. Under the Ethiopian legal system, attachment order may be given after a decree is passed where the decree holder applied for execution and where attachment of a property of the judgment debtor is necessary.[54]

In Ethiopia, both pre-judgment and post judgment attachment orders do not give rise to priority right to a decree holder in whose favor attachment order is granted. This is so because the Ethiopian Civil Procedure Code has nowhere stated that attachment order gives preferential right to a decree holder in whose favor attachment order is granted. When we see the purpose, establishment and effects of attachment orders, be it pre-judgment or post judgment, we can conclude that attachment order cannot be equated with judicial mortgage and hence cannot give rise to priority right to the person in whose favor such order is granted. In this regard, Robert Allen Sedler wrote:

> The plaintiff who obtained attachment of property prior to the decree should not be in a better position as regards execution than any other plaintiff. The fact that the Code refers to the rights of the parties in an attachment before judgment should not mean that after the judgment, the attachment gives the plaintiff greater [share] than other decree holders.[55]

Moreover, attachment order cannot be taken to be a judicial mortgage because the former cannot meet other requirements of mortgage in addition to the requirement of registration. For instance, attachment order is not required to specify the amount of the claim secured by attachment while this is a strict requirement in judicial mortgage. Secondly, once an attachment order is given,

[53] *Id.*

[54] *Id.*, Art.52.

[55] See ROBERT ALLEN SEDLER, ETHIOPIAN CIVIL CODE 364 (1968).

the property attached cannot be sold by the owner of the property while a mortgagor has the liberty to sell the mortgaged property (irrespective of the mode of creation of the mortgage) since the mortgagee has the right to follow the property mortgaged.[56]

We have to bear in mind that attachment and mortgage are mutually exclusive because a mortgaged property can be attached as we can understand by closely examining the Civil Code.[57] We can mention some conspicuous examples in support of this by citing relevant provisions from the Civil Code. For instance, Art. 3068(1) of the Code states that where the mortgaged immovable is leased, the mortgage shall apply to the rent having run from the day when the immovable was attached. Again, when we read Arts. 3081(1), Art. 3083(1), Art 3079, Art. 3080, 3085, 3090 3093, Art. 3094 and 3095 of the Code, we can realize that attachment comes into the picture regardless of the type of mortgage securing the performance of any lawful civil obligation.

From the foregoing discussions, we can understand that attachment order made by a court of law cannot in any case be equated with judicial mortgage which means that attachment cannot confer priority right on the person in whose favor attachment order is given.[58] What is the stance of the Cassation Bench of the Federal Supreme Court with regard to the issue under discussion? We will examine various positions of the Bench in the following section of this piece.

3. Case Analysis and Comments

Case 1

This case was litigated between the Commercial Bank of Ethiopia (herein after referred to as "the applicant") and Ato Walelign Ayalew and W/ro Lemech

[56] Civil Code of Ethiopia, cited above at note 1, Art. 3085.

[57] In this regard, see Menberetsehay Taddese, *ሞርጌጅ፡- ዋስትና የተነፈገው የዋስትና ሕግ* (1998 E.C) (Unpublished) (Available with the author in hard copy)

[58] This view is supported by some legal professionals with whom I held discussions in the course of writing this paper. For instance Judge Sintayehu Zeleke, a judge in the Federal High Court strongly argues that attachment order is quite different from judicial mortgage. I also heard the same arguments from other fellow lawyers. There are also scholarly works which support the view of this writer. See Beza Dessalegn, *በሰበር መዝገብ ቁጥር 29269 ጥቅምት 15 ቀን 2000 ዓ.ም የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰጠው ፍርድ ላይ የቀረበ ትችት፡* 4/1 MIZAN LAW REVIEW 176, 176-182 (2010).

Lakew[59] (hereafter cited as the respondents). From the decision of the Cassation Bench, we can understand that Ato Walelign lent 80,000.00(eighty thousand) Birr to W/ro Lemech. However, the borrower failed to repay the loan on the due date. Because of this, Ato Walelign brought suit against W/ro Lemech and judgment was rendered in his favor. Following the judgment, the decree holder (Ato Walelgin) filed execution application against the judgment debtor (W/ro Lemech) before the Zonal High Court of West Gojjam, Amhara Regional State. The decree holder applied to the court which was entertaining the execution proceeding to transfer to the decree holder a building belonging to the judgment debtor located in the town of Finote Selam.

While the execution proceeding was pending, the Commercial Bank of Ethiopia applied to intervene in the proceeding as per Art. 418 of the Civil Procedure Code alleging that the bank got the above building attached prior to the institution of the execution proceeding by Ato Walelign since W/ro Lemech was also the judgment debtor of the bank. The court accepted the application of the Bank and heard the arguments of both sides. The Bank argued that because it got the building attached by a court of law prior to the institution of the execution proceeding by Ato Walelign, it would enjoy priority right. However, the Zonal High Court decided in favor of Ato Walelign saying that attachment order could not give rise to priority right. Aggrieved by this decision, the Bank appealed to the Regional Supreme Court. Nonetheless, the Supreme Court of the Region confirmed the decision of the lower court. Finally, the Bank appealed to the Federal Supreme Court Cassation Bench which reversed the decision of the regional courts. The Cassation Bench reasoned that attachment orders are judicial mortgages as per Art. 3044(1) of the Civil Code giving rise to a priority right. The main part of the decision of the Cassation Bench reads:

> *አኛም ጉዳዩን መርምረናል። እንደመረመርነውም የአሁን 1ኛ ተጠሪ የብድር ውል መሠረት አድርጐ ክስ ከማቅረቡና ከማስወሰኑ በፊት የአሁን አመልካች በ2ኛዋ ተጠሪ ላይ ባቀረበው ክስ ምክንያት ጥቅምት 28 ቀን 1995 ዓ.ም ይሽው ክርክር ያስነሳው ንብረት በማናቸውም መንገድ ቢሆን ወደ ሦስተኛ ወገን እንዲይተላለፍ ያሳገደው ስመሆኑ በግራ ቀኙ መካከል የተካደ ፍሬነገር አይደለም። ይህ መሆኑ ከተረጋገጠ በአመልካች በኩል የተፈፀመው ተግባር በ2ኛ ተጠሪ ላይ የገንዘብ ክስ አቀርቤያለሁ፤ እንደ ክሱ ባስፈርድ ፍርዱ ውጤት ያገኝ ዘንድ የተከሳሽ ንብረት ወደ ሦስተኛ ወገን እንዲይተላለፍ በማለት ተከብሮ ይቆይልኝ የሚል*

[59] Commercial Bank of Ethiopia v Ato Walelign Ayalew and W/ro Lemech Lakew, Cassation Civil File Number 29269, 7 FEDERAL SUPREME COURT, CASSATION DECISIONS 42-47 (2007 E.C.).

በመሆኑ በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ይህ የማሳገድ ተግባር ክፍርድ የመካጨ የመያዣ መብት መሆኑን ያመለክታል።[60] which is translated into English as:

> We have examined the case. As we have understood from our examination, the fact that the applicant got the property subject to this litigation attached on the 28th of Tikimit 1995 E.C. so that the property would not be transferred to any third party by any means prior to the suit brought by present first respondent against the present second applicant on the basis of contract is a fact that was not disputed by either of the parties. If this fact is established, the request of the applicant, saying that because it instituted suit against the 2nd respondent and got her property attached for the purpose of execution of the decree, indicates that a judicial mortgage has been established by virtue of Art. 3044 of the Civil Code.[61]

Having made the above reasoning, the Cassation Bench finally decided that the Bank had priority right over other creditors since the Bank got the building attached prior to the other party - Ato Walelign Ayalew. However, in the opinion of this writer, the stance of the Bench is absolutely at loggerheads with the spirit of both the Civil Code and Civil Procedure Code. This is because the Civil Code has unequivocally provided that judicial mortgage becomes valid, giving rise to priority right in whose favor it is is established, where one of the most important validity requirements – registration - is satisfied. In Ethiopia, the law has made it clear that the requirement of registration is not declarative in nature. Rather, registration is constitutive since the law has stated that irrespective of the mode of creation of mortgage, mortgage cannot produce any effect whatsoever unless it is registered.

In addition to the Civil Code of Ethiopia, the Civil Procedure Code has nowhere provided that attachment of property gives priority right to a person in whose favor attachment order is granted. Therefore, the Bench made its decision without having any legal basis. Even worse, the Cassation Bench made no clear justification that made it boldly conclude that attachment order is equivalent to judicial mortgage. While a court of law is expected to give adequate analysis and reasoning when it renders a decision, the Bench reached a wrong conclusion without any legal analysis and reasoning. As noted above, the interpretive decisions made by the Cassation Bench are binding precedents that need to be followed by all lower courts of the country - both federal courts and regional courts. Because of this, the decision of the Cassation Bench has to be well reasoned and analyzed so that the *ratio decidendi* of the Bench can be clear.

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[60] *Id.*, at 44-45.

[61] Translation mine.

In the case under consideration, however, the Bench comfortably concluded that attachment order is a judicial mortgage and made the Commercial Bank of Ethiopia to unduly and unlawfully benefit at the expense of the afore-mentioned respondent. The Bench did this without making any analysis as to what is meant by judicial mortgage and as to how judicial mortgage is the same as attachment order. By doing so, the Bench resorted to judicial law making which is beyond its constitutional competence under the current constitutional order of the country. The Bench is only allowed to lay down interpretative precedents as opposed to law making precedents which are known in common law countries. In contradistinction to its true role, the Cassation Bench rendered a decision which was not contemplated by the Ethiopian law maker at the time of writing the Civil Code and the Civil Procedure Code.

Case 2

In this case, too, the applicant was the Commercial Bank of Ethiopia while the respondents were Ato Kinde Afraso and Ato Jibril Immam.[62] In this case, the Bank argued that it was entitled to priority right by the mere fact that it was the first person which got the building attached by a court of law. The Cassation Bench accepted the arguments of the bank and decided that attachment order is equivalent to judicial mortgage entailing priority right to the person who obtained the attachment. In its decision the Bench stated that:

> *……በፍ/ብ/ሕግ ቁጥር 3041 እንደተደነገገው መያዣ ከውል ብቻ ሳይሆን በቀጥታ ከህግ ወይም በፍርድ ሊቋቋም ይችላል። በዚህም ጉዳይ ፍ/ቤቱ በዚህ ቤት ላይ የሰጠው የእግድ ትእዛዝ በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ለአመልካች ከፍርድ የመነጨ መብትን ያጐናጽፋል። ይህ ሰበር ሰሚ ችሎትም በመ. ቁጥር 25863 በሰጠው የህግ ትርጉም በፍ/ቤት በንብረት ላይ የሚሰጥ የእግድ ትእዛዝ ከፍርድ የመነጨ የመያዣ መብት ተቋቁሟል ለማለት እንደሚያበቃ በመጥቀስ ውሳኔ ሰጥቷል።*[63]

The above quotation is translated into English as:

> As stipulated under Art. 3041 of the Civil Code, mortgage can be created not only by contract but it can also be created by law and by judicial decision. In this case, too, an attachment order given by the court conferred upon the applicant a mortgage right as provided under Art. 3044 of the Civil Code. This Cassation

[62] Commercial Bank of Ethiopia v Ato Kinde Afraso and Ato Jibril Immam, Cassation Civil File Number 39170, 8 FEDERAL SUPREME COURT, CASSATION DECISIONS 340-343(2008 E.C.).

[63] *Id.*, at 359.

> Bench decided, under file No. 25863, that an attachment order granted on a property establishes a judicial mortgage right.[64]

Here, too, I strongly believe that the stance of the court is absolutely wrong for mere attachment order given against a certain immovable property cannot establish a judicial mortgage for the reasons I gave under the above case. In addition, another point deserves mentioning here. The Bench under this case was not loyal to its previous decision let alone giving well reasoned and analyzed decision since it wrongly cited file No. 25863 which was decided prior to the case under discussion. Under file No. 25863, the litigants were the Development Bank of Ethiopia (DBE) and the Commercial Bank of Ethiopia (CBE).[65]

Under that case, the DBE alleged that it got registered a certain property belonging to its borrower on the 6th of March 1988 E.C. while the CBE alleged that it got registered the same property on the 23rd of June 1990 E.C. The argument of the latter Bank was that the allegation made by the DBE was false since the seal of the registering organ was not clear. However, because the claim of the CBE was not accepted, the lower courts decided that the DBE was entitled to priority right. Then, the CBE applied to the Cassation Bench which confirmed the decisions of the lower courts saying that priority is to be given on the basis of order of the dates of the registration of the property.

This clearly shows that the Bench wrongly cited a case which does not have anything to do with judicial mortgage and attachment of property. From this, we can conclude that let alone giving carefully analyzed decision regarding the essence of attachment order and judicial mortgage, the Bench did not realize that the case it cited to substantiate its decision (under file number 30170) was absolutely irrelevant. In sum, since the Bench made a wrong legal citation and an erroneous legal analysis, the stance it took under file number 39170 could not serve as precedent. Instead, it has remained (to be) a source of confusion and uncertainty in the country.

Case 3

In this case, the applicants were Ato Tesfaye Battu and W/ro Almaz Tasew while the respondents were W/rt Hilina Feleke, Ato Alemu Shashe and W/ro

[64] Translation mine.

[65] Development Bank of Ethiopia v Commercial Bank of Ethiopia, Cassation Civil File Number 25863, 7 FEDERAL SUPREME COURT, CASSATION DECISION 38-41(2007 E.C.).

Yeshiwork Seyoum.[66] The applicants instituted suit against the 2nd and 3rd respondents before the Federal First Instance Court in Addis Ababa. Then, the applicants applied to the court so that the court would give an order of attachment on a condominium unit belonging to the respondents which is located in Woreda 4, Arada Sub-city, Addis Ababa. The Court accepted their application and gave an attachment order on May 2, 2004 E.C. (May 10, 2012). On the other hand, the first respondent sued the 2nd and 3rd respondents before the Federal First Instance Court and got the above condominium house attached on the 6th of July, 2004 E.C.

Then, the applicants filed an execution application on the 15th of October 2005 E.C. and pleaded for the sale of the hitherto attached condominium unit belonging to the aforementioned judgment debtors. By the same token, the 1st respondent filed an execution application against the same judgment debtors and pleaded for the sale of the same condominium unit so that the decree granted in her favor would be executed. Then, the execution applications of the present applicants and the 1st respondent were entertained by the execution bench separately. Later, the execution bench ordered the Execution Department of the Federal Supreme Court to sell the said condominium house to satisfy the decrees of both decree holders. Because of this, two execution files were opened in the Execution Department. At the execution Department, these two files were consolidated. Then, the condominium was sold by auction and the proceeds of the sale were paid to the Department by the buyer of the building.

Following the sale of the building, the present 1st respondent applied to the court for *pro rata* distribution of the proceeds between the decree holders. The court to which the application was filed ordered the Execution Department to distribute the proceeds of the sale of the building *pro rata* as stipulated under Art. 403 of the Civil Procedure Code. However, the present applicants were dissatisfied by the order of the court since they believed that priority right should have been given to them in preference to the other decree holder. Because of this, they lodged an appeal to the Federal High Court for the reversal of the order of the low court. To their dismay, however, the appellate court confirmed the order of the lower court and dismissed their appeal.

[66] Ato Tesfaye Battu and W/ro Almaz Tasew v W/rt Hilina Feleke, Ato Alemu Shashe and W/ro Yeshiwork Seyoum, Cassation Civil File Number 106494 , Federal Supreme Court Cassation Decision (October 8 , 2015) (unpublished) (File available with author).

Again, aggrieved by the decision of the appellate court, the applicants applied to the Cassation Bench of the Federal Supreme Court for reversal of the decisions of the lower courts, since they believed that the lower courts committed fundamental error of law. The Cassation Bench, having entertained the arguments of both sides, confirmed the decisions of the lower courts which means that the Cassation Bench in effect reversed its previous stances which declared that mere attachment orders are equivalent to judicial mortgage giving rise to priority right. Though the stance the Bench took in this case is basically correct, the decision of the Bench is full of confusions and contradictions. It does not show the *ratio decidendi of the* Bench. In order to make those discussions clearer, further explanations and analysis are in order.

To this end, citing the crux of the decision is important here. The main part of the decision of the Bench in part reads:

> *አመልካቾች እና 1ኛ ተጠሪ በሥር ፍ/ቤት ተከሳሾች የነበሩትን የ2ኛ እና የ3ኛ ተጠሪዎችን ንብረት በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 154(ለ) መሠረት በፍ/ቤት በተሰጠ ጊዜያዊ የእግድ ትእዛዝ ማሳገዳቸው በፍ/ብ/ሕ/ቁጥር 3044 እንደተመለከተው ከፍርድ የመነጨ የመያዣ መብት ማቋቋማቸውን ያመለክታል። አመልካቾችና 1ኛ ተጠሪ በዚህ ረገድ ያላቸው የመያዣ መብት የጊዜ ቅደም ተከተል ልዩነት ከመኖሩ በቀር ተመሳሳይ ነው። በፍ/ብ/ሥ/ሥ/ሕግ ቁጥር 154(ለ) መሠረት ጊዜያዊ የእግድ ትዕዛዝ የሚሰጥበት ምክንያት ከሳሽ የሆነው ወገን በክርክሩ ቢረታ ውሳኔውን ማስፈፀሚያ እንዲሆን ነው። አመልካቾችና 1ኛ ተጠሪ ንብረቱን በማሳገድ ሁለቱም እኩል ከፍርድ የመነጨ የመያዣ መብት አቋቁመዋል።*[67]

Translated into English, the quotation reads:

> The attachment of the property of the 2nd and the 3rd respondents upon the application of the applicants and the first respondent indicates that they established judicial mortgage as provided under Art. 3044 of the Civil Code. The right of the applicants and the 1st respondent, in this regard, is the same except the time difference. The purpose of giving provisional attachment order, as per Art. 154(b) of the Civil Procedure Code, is to secure execution of the decree in case where the plaintiff wins the case. The applicants and the 1st respondents have equally established a mortgage right emanating from a court judgment.[68]

The decision of the Cassation Bench clearly shows that the Bench consistently confused the quintessence and application of provisional attachment order with judicial mortgage. In addition, the stance of the Bench is against the very purpose of attachment order and judicial mortgage. Therefore, as noted earlier in relation

[67] *Id.*, at 4.

[68] Translation mine.

to case No. 1, the reasoning of the court is wrong and arbitrary since it is not supported by any legal provision.

In contradistinction to the conclusion quoted above, the Cassation Bench (on the same file) concluded that "አመልካቾች ንብረቱን ከ1ኛ ተጠሪ አስቀድመው በፍ/ብ/ሥ/ሥ/ሕ ቁጥር 154(ለ) መሠረት በተሰጠው የእግድ ትእዛዝ መሠረት ማሳገዳቸው የቀደምትነት መብት የሚያሰጣቸው አይደለም።"[69] which in English means "*the fact that the applicants got the property attached prior to the 2nd respondent does not give them priority right*".[70]

In addition to this, the mere fact that a decree holder got a property attached prior to other decree holders does not give rise to priority right over the attached property as decided by the same Bench on the 28th of July 2008 E.C. under file number 97206.[71] Again, the conclusion of the Bench is fallacious and absolutely erroneous. This is because on the one hand, the Bench concluded that attachment order is equivalent to judicial mortgage; on the other hand, the same Bench concluded that attachment order could not give rise to priority right to a decree holder who got the asset attached prior to any other creditors. This clearly demonstrates that the Bench contradicts itself in one and the same decision. Secondly, the Bench tried to support its decision by citing file No. 97206 which was decided on the 28th of July 2008 E.C. This citation, however, is completely irrelevant because file no. 97206 has nothing to do with the case at hand. To be specific, under file No. 97206, what was attached by the order of the court upon the application of a decree holder was money owed to the judgment debtor by the Construction and Road Transport Bureau of Tigray Region. As a matter of fact, in that file the Cassation Bench decided that attachment order given on a sum of money could not give rise to priority right to a decree holder who got attached money prior to other decree holders.

On account of this, the decision of the Cassation Bench rendered on July 28, 2008 E.C. could not be cited to support the decision rendered under file No. 106494 since the properties attached are different. Under file No. 97206, the asset attached was money while under file No. 106494 (the subject of this analysis) the asset attached was an immovable property. Hence, the attempt of the Cassation Bench to relate two unrelated things was a very futile exercise. In

[69] *Id.*

[70] Translation mine.

[71] See Ato Amare Melkamu v Ato Kaleb Hiluf, Cassation Civil File Number 97206**,** 16 FEDERAL SUPREME COURT, CASSATION DECISIONS 337-341 (2014).

other words, the Bench failed to understand the contents of its own decisions rendered at different times.

Though the arguments and explanations of the Cassation Bench are wrong, the final judgment is correct since the Bench decided that the proceeds of the sale of the building attached upon the application of the present applicant and the first respondent be distributed *pro rata* as per Art. 403 of the Civil Procedure Code. Nonetheless, the decision of the Bench cannot serve as a dependable precedent since the Bench has not clearly underscored that attachment order is not a judicial mortgage. Besides, the Bench did not expressly or impliedly state that the stances it took under its previous decisions are reversed by the new decision. Because of this, we have now two contradictory stances of the Bench which have left us in a state of confusion.

It is known that the Cassation Bench was empowered by law to render binding decisions (precedents) since it was believed that such binding decisions would enhance predictability, uniformity and certainty of decisions of Ethiopian courts. To enhance predictability and uniformity of decisions, the Federal Supreme Court is duty bound to publish the decisions of the Cassation Bench. Because of this, the Supreme Court has been publishing and distributing its decisions so far. Nonetheless, though the decision of the Bench under discussion was decided by five judges and it is binding on all courts of Ethiopia, this decision has not been published. The effect of the omission of this decision is extremely far reaching as it affects uniform application of the law.

Case 4

In this case, the applicant was Ato Amerra Seifu while the respondent was Ato Adane Negede.[72] A certain women called Kedija Mohammed borrowed money from Adane Negede amounting to more than 400,000.00 Birr. Again, this same lady borrowed more than 500,000.00 Birr from Amerra Seifu. When the repayment date under each contract was due, the borrower failed to return the money to each lender. Therefore, each lender sued the borrower at different times before different benches of the Federal First Instance Court. The benches where the suits were instituted decided in favor of the lenders.

[72] Amerra Seifu v Adane Negede, Cassation Civil File Number 102161, Federal Supreme Court, Cassation Decision (January 4, 2017) (Unpublished,) (File available with author).

After decision was made in his favor, Adane Negede found a condominium, belonging to Kedija and got it attached prior to Ato Amerra Seifu. Amerra also got the same building attached. Then, each decree-holder filed execution application to different execution benches. Their applications were accepted by the respective execution benches and the execution process was transferred to the Execution Directorate of the FSC so that the attached building would be sold to satisfy the decrees of the decree-holders - Adane Negede and Amerra Seifu.

The Execution Department consolidated the two files before the house was sold by auction. Then, auction was announced and both Adane and Amerra participated in the auction as bidders having obtained the permission of the court. In the auction, Adane won in an auction price of 485,000.00 Birr and claimed that he should not give anything to Amerra since he (the former) was the one who first got the building attached. Amerra, on the other hand, prayed for *pro rata* distribution of the proceedings of the sale since first attachment order would not give priority right to Adane. Because of this stalemate, the Execution Department referred the case to the execution bench which was entertaining Adane's execution application. The bench ruled that Adane was entitled to take the whole proceedings of the sale since he had priority right by virtue of first attachment order rendered in his favor. Because of this, Amerra lodged an appeal to the Federal High Court (FHC) praying for the reversal of the ruling of the lower court. However, the appellate court confirmed the ruling of the lower court by citing the decisions of the Cassation Bench which we cited under Case 1and Case 2 above.

Again, Amerra filed an application to the Cassation Bench of the FSC arguing that the stance of the lower courts is wrong. Amerra boldly argued that the stances of the lower courts as well as the previous stances of the Cassation Bench (cited under Case 1and Case 2 above) were wrong. Adane, on the other hand vehemently argued that the decision of the lower courts as well as the previous stances of the Cassation Bench were correct and prayed for the confirmation of the decisions of the lower courts. The Bench, having entertained the arguments of both sides, decided in favor of Amerra underscoring that attachment order is not judicial mortgage and could not give rise to priority right. In its decree, the Cassation Bench ordered for *pro rata* distribution of the proceeds of the sale of the aforementioned building belonging to Kedija.

As a rule, the stance of the court is to be appreciated since it has made it clear that attachment order does not result in priority right since it is not the same as a

judicial mortgage. In its reasoning part, the Cassation Bench underscored that attachment order is a provisional measure which is not equivalent to judicial mortgage. Nevertheless, the decision of the Cassation Bench is incomplete since it has not analyzed the requirement of registration irrespective of the type of mortgage. Even worse, the Bench has wrongly cross referred to its previous decisions which are irrelevant to the case under discussion. Nor did it expressly declare that the previous stances were wrong and replaced by this decision.

4. Concluding Remarks

In Ethiopia, any type of mortgage cannot produce any legal effect unless it satisfies all the requirements of a valid mortgage. Owing to this, a provisional attachment order cannot be taken as a judicial mortgage since it cannot satisfy all the requirements of a valid mortgage. Therefore, the stance taken by the Cassation Bench under cases discussed in Cases No. 1 and 2 above is absolutely wrong. However, the stances the Bench took in the cases discussed under Cases No. 3 and 4 above are correct in principle. But, under Case No. 3, the reasoning is confusing. Even under Case No. 4, the analysis and reasoning of the Bench is not satisfactory. Hence, in future similar cases, the Cassation Bench has to expressly and deeply declare that a provisional attachment order is not equivalent to judicial mortgage since the former cannot satisfy the legal requirements for the establishment of judicial mortgage. In addition, the decisions of the Bench should be deep and well reasoned containing a clear *ratio decidendi* so that lower courts would follow without much trouble.

ANNEXURE†

የሰበር መ/ቁ 106494
ቀን 28/01/2008 ዓ.ም

ዳኞች፡- ተሻገር ገ/ስላሴ
ብርሃኑ አመነው
ተፈሪ ገብሩ
ሸምሱ ሲር.ጋ.ጋ
አብርሃ መሰለ

አመልካች፡- 1ኛ. አቶ ተስፋዬ ባቱ - ቀረቡ
2ኛ. ወ/ሮ አልማዝ ጣሰው - አልቀረቡም

ተጠሪዎች፡-1ኛ. ወ/ሪት ሕሊና ፈቀለ - አልቀረቡም
2ኛ. አቶ አለሙ ሻሼ - አልቀረቡም
3ኛ. የሺወርቅ ስዩም - ቀረቡ

መዝገቡን መርምረን ተከታዩን ፍርድ ሰጥተናል፡፡

ፍርድ

ጉዳዩ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት የሚሰጥን የዕግድ ትዕዛዝ የሚመለከት ሲሆን ክርክሩ የጀመረው በፌ/መጀ/ደ/ወረዳ ፍ/ቤት ነው፡፡ አመልካቾች በ2ኛ እና 3ኛ ተጠሪዎች ላይ ክስ መስርተው ግንቦት 2/2004 ዓ.ም በዋለው ችሎት ከፍ/ቤቱ በተሰጠ ትዕዛዝ በአራዳ ክ/ከተማ ወረዳ 4 የቤ/ቁ E-B2-3/10 የሆነ ኮንደሚኒየም ቤት በተከሳሾች /በአሁኑ 2ኛ እና 3ኛ ተጠሪዎች/ ስም የተመዘገበ መሆኑ ተጣርቶ ታግዶ እንዲቆይ በሰጠው ትዕዛዝ መሰረት ተጣርቶ ታግዷል፡፡ ሐምሌ 27 ቀን 2004 ዓ.ም በዋለው ችሎት ለከሳሾች /ለአሁኑ አመልካቾች/ ተወስኖላቸው አፈጻጸም ፋይል አስከፍተው ጥቅምት 15 ቀን 2005 ዓ.ም ቀደም ሲል ያሳገዱት የተከሳሾች ንብረት የሆነው ኮንደሚኒየም ቤት በፌ/ፍርድ አፈጻጸም ዳይሬክቶሬት አማካኝነት በሐራጅ ተሸጦ ገንዘቡ እንዲከፈላቸው የአፈጻጸሙን ጉዳይ በያዘው ችሎት ትዕዛዝ ተሰጥቶ መጋቢት 23 ቀን 2006 ዓ.ም ቤቱ በሐራጅ ተሸጧል፡፡

1ኛ ተጠሪ ደግሞ በ2ኛ እና 3ኛ ተጠሪዎች ላይ በፌ/መ/ደ/ፍ/ቤት በሌላ መዝገብ ሐምሌ 5 ቀን 2004 ዓ.ም ክስ መስርተው ሐምሌ 6/2004 ዓ.ም በተሰጠ ዕግድ ትዕዛዝ ከዚህ በላይ

† EDITOR'S NOTE: The cases which are the bases for the Case Comment presented in the preceding pages were decided by the Cassation Bench of the Federal Supreme Court of Ethiopia. The decisions were rendered under Cassation Civil File Numbers 29269; 39170; 102161; and 106494. The decisions under the first two file numbers have been published in Volume 7 and Volume 8, respectively, of the Federal Supreme Court's publication of cassation decisions and the reader is referred to those volumes for a firsthand reading of the decisions. The decisions of the Cassation Bench under the last two file numbers have not been published and for the benefit of the reader they have been reproduced and attached here as part of the case comment. These decisions of the Cassation Bench, copies of which are available with the author, are reproduced verbatim, except changes in formatting made to fit them into the style of the Journal.

የተመለከተውን የተከሳሾች ንብረት የሆነውን ኮንደሚኒየም ቤት በፍ/ብ/ስ/ስ/ቁ 154/ለ/ መሰረት አሳግደዋል፡፡ ሐምሌ 30 ቀን 2004 ዓ.ም በዋለ ችሎት ለከሳሽ /ለአሁኗ 1ኛ ተጠሪ/ ተወስኖላቸው ጥር 1 ቀን 2005 ዓ.ም በዋለ ችሎት በተሰጠ የአፈጻጸም ትዕዛዝ ቤቱ በሐራጅ ተሸጦ ገንዘባቸው እንዲከፈላቸው ተብሏል የተከሳሾች /የአሁኗ 2ኛ እና 3ኛ ተጠሪዎች/ ንብረት የሆነው ኮንደሚኒየም ቤት በፌ/ፍ/አፈ/ዳይሬክቶሬት በኩል በሐራጅ ሲሸጥ የአሁኑ አመልካቾች እና 1ኛ ተጠሪ ያስከፈቱዋቸው የአፈጻጸም መዝገቦች ተጣምረው በሐራጅ ቃለ ጉባኤ ላይም ተመዝግቦ ሽያጩ ተደርጓል፡፡

1ኛ ተጠሪ በኮ/መ/ቁ 196945 በቀን 8/8/2005 ዓ.ም ባቀረቡት አቤቱታ ከኮንደሚኒየም ቤቱ ሽያጭ ገንዘብ ላይ በፕሮራታ ይከፈለን ብለው አመልክተው የአፈጻጸም ችሎቱ በፍ/ብ/ሥ/ሥ/ቁ 403 መሰረት ከቤቱ ሽያጭ ገንዘብ ለፍ/ባለመብቶች /የአሁኑ አመልካቾች እና 1ኛ ተጠሪ/ በፕሮራታ ይከፈላቸው ብሎ ለፌ/ፍ/አፈ/ዳይሬክቶሬት ትዕዛዝ ተጥቷል፡፡

የአሁኑ አመልካቶች ይህን ትዕዛዝ በመቃወም በዚህ የአፈጻጸም መዝገብ ላይ የተሸጠውን ቤት በፍ/ቤት ትዕዛዝ አሳግደን የመያዝ መብት ያቋቋምንበት በመሆኑ የሽያጭ ገንዘቡ የሚገባው ለእኛ ብቻ ነው በቀን 8/08/06 ዓ.ም በዋለ ችሎት የተሰጠው ትዕዛዝ ይነሳልን ብለው አመልክተው ፍ/ቤቱ በሰጠው ብይን ፍ/ቤቱ እራሱ በሚሰጠው የዕግድ ትዕዛዝ የተለያዩ ባለገንዘቦች በቅደም ተከተል ገንዘብ እንዲያገኝ ሲሆን ሁሉም ባለገንዘቦች ፍትሐዊ በሆነ ሁኔታ የተለየ መያዣውን ውል ከሌለ በቀር እንዲሰራ ለማድረግ ነው፡፡ ጊዜያዊ የዕግድ ትዕዛዝ የቀዳሚነት መብት የሚሰጠው በፍርድ ቤቱ በአንድ ባለዕዳ ላይ አስፈርደው አፈጻጸም ለጠየቁ ብዙ ባለገንዘቦች ሳይሆን ከፍርድ ባለመብቶች ውጭ የሆኑትን ሌላ ዕዳ ጠያቂዎች ለመከላከል ነው በማለት አቤቱታውን አልተቀበለውም፡፡

አመልካቾች በዚህ ትዕዛዝ ላይ ያላቸውን ቅሬታ በይግባኝ ለማሳረም ለፌ/ከፍ/ፍ/ቤት ይግባኝ አቅርበው ፍ/ቤቱ የስር ፍ/ቤት ትዕዛዝ የሚነቀፍበት ነጥብ የለም በማለት ይግባኙን ሰርዞታል፡፡

አመልካቾች በስር ፍ/ቤቶች ትዕዛዝ ላይ ተፈጸመ ያሉትን መሰረታዊ የሕግ ስህተት በመጥቀስ በዚህ ሰበር ሰሚ ችሎት ለማሳረም አቤቱታ አቅርበዋል፡፡

የአቤቱታው ይዘት በፍ/ቤት አስቀድመን በማሳገድ ከፍርድ የመነጨ የመያዣ መብት አግኝተናል፡፡ የቀደምትነት መብት አለን ይህን የሚደግፍ በሰ/መ/ቁ 25863፣ 39170 እና 40945 ተወስ'ል የሚል ሲሆን፡-

አቤቱታው ለዚህ ሰበር ችሎት ይቅረብ የተባለው አከራካሪውን በሐራጅ የተሸጠ ንብረት አሳማኝ ስለነበር ከሽያጭ ክፍያው የቀደምትነት መብት አለኝ በማለት ያቀረበው ክርክር በስር ፍ/ቤቶች ውድቅ የመደረጉን አግባብነት ከሰበር መ/ቁ 39170፣ 25863 እና 40945 አንጻር ለመመርመር ነው፡፡

1ኛ ተጠሪ የሰጡት መልስ አመልካች የጠቀሱት የሰበር ውሳኔ ለተያዘው ጉዳይ አግባብነት የለውም፡፡ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሠረት አንድ ንብረት ማሳገድ የቀደምትነት መብት አይሰጥም፡፡ በፍ/ብ/ሥ/ሥ/ቁ 403 ከፍ/ባለዕዳው የተገኘው ገንዘብ ለፍ/ባለመብቶች አልበቃ ሲል ያለው ገንዘብ እንዴት እንደሚከፋፈል የሚደነግግ ነው፡፡ በሰ/መ/ቁ 97206 ትርጉም ተሰጥቷል የስር ፍ/ቤቶች ትዕዛዝ በአግባቡ ነው የሚል ሲሆን 2ኛ ተጠሪ ለክርክሩ ምን እንደሆነ አልተረዳሁም በእስር ላይ ነኝ መልስ ለመስጠት አልችልም ብለዋል 3ኛ ተጠሪ ደግሞ 1ኛ ተጠሪን ከዚህ በፊት አላቃትም ግንኙነት የለንም፡፡ አመልካቾች ትክክል ናቸው የሚል መልስ ሰጥተዋል አመልካቾችም አቤቱታቸውን መሰረት በማድረግ የመልስ መልስ አቅርበዋል፡፡

በግራ ቀኙ መካከል የተደረገው ክርክር ከዚህ በላይ አጠር ተደርጎ የተመዘገበው ሲሆን እኛም ክርክራቸውን ለሰበር አቤቱታ መነሻ ከሆነው የስር ፍ/ቤቶች ትዕዛዝ፣ የአመልካች አቤቱታ ለዚህ

ሰበር ችሎት ይቅረብ ተብሎ ከተያዘው ነጥብ እና አግባብነት ካለው የሕግ ድንጋጌ ጋር እንደሚከተለው መርምረናል፡፡

እንደመረመርነውም አመልካቾች እና 1ኛ ተጠሪ በስር ፍ/ቤት ቀደም ሲል በ2ኛ እና 3ኛ ተጠሪዎች ላይ በመሰረቱት ክስ ቢወሰንላቸው ለማስፈጸሚያ እንዲሆናቸው የተከሳሾችን /የ2ኛ እና 3ኛ ተጠሪዎች/ ንብረት የሆነውን በአራዳ ክ/ከተማ ወረዳ 4 የቤ/ቁ E-B2-3/10 በሚል የተመዘገበውን ኮንደሚኒየም ቤት አመልካቾች ግንቦት 2 ቀን 2004 ዓ.ም 1ኛ ተጠሪ ደግሞ ሐምሌ 6 ቀን 2004 ዓ.ም ከፍ/ቤት በተሰጠ ትዕዛዝ ይህን ንብረት በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት አሳግደዋል፡፡ የአፈጻጸም ችሎት በሰጠው ትዕዛዝ መሰረት የፌ/ፍ/አፈ/ዳይሬክቶሬት በአመልካቾች እና በ1ኛ ተጠሪ የተከፈተውን የአፈጻጸም ፋይል አንድ ላይ በማድረግ ንብረቱ ወይም ኮንደሚኒየም ቤቱ በሐራጅ እንዲሸጥ አድርጓል፡፡

አመልካቾች እና 1ኛ ተጠሪ በስር ፍ/ቤት ተከሳሾች የነበሩትን የ2ኛ እና 3ኛ ተጠሪዎችን ንብረት በፍ/ብ/ስ/ስ/ቁ 154/ለ/ መሰረት በፍ/ቤት በተሰጠ ግዜያዊ የዕግድ ትዕዛዝ ማድረጋቸው በፍ/ብ/ሀ/ቁ 3044 እንደተመለከተው ከፍርድ የመነጨ የመያዣ መብት ማቋቋማቸውን ያመለክታል፡፡ የአመልካቾች እና የ1ኛ ተጠሪ በዚህ እረገድ ያላቸው የመያዣ መብት የጊዜ ቅደም ተከተል ልዩነት ከመኖሩ በቀር ተመሳሳይ ነው፡፡ በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት ጊዜያዊ የዕግድ ትዕዛዝ የሚሰጥበት ምክንያት ከሳሽ የሆነው ወገን በክርክሩ ቢረታ ውሳኔውን ማስፈጸሚያ እንዲሆን ነው፡፡ አመልካቾች እና 1ኛ ተጠሪ ንብረቱን በማሳገድ ሁለቱም እኩል ከፍርድ የመነጨ የመያዣ መብት አቋቁመዋል፡፡

አመልካቾች ንብረቱን ከ1ኛ ተጠሪ አስቀድመው በፍ/ቤት በፍ/ብ/ሥ/ሥ/ቁ 154/ለ/ መሰረት በተሰጠ የዕግድ ትዕዛዝ ማሳገዳቸው የቀደምትነት መብት የሚያሰጣቸው አይደለም፡፡ አንድ የፍርድ ባለገንዘብ ከሌሎች የፍ/ባለገንዘቦች አስቀድሞ የባለዕዳውን ንብረት ማስከበሩ ብቻ የቀደምትነት መብት እንደሚያሰጠው በዚሁ ችሎት በሰ/መ/ቁ 97206 ሐምሌ 28/2006 ዓ.ም ተወስ'ል፡፡ አመልካቾች ካቀረቡት የሰበር አቤቱታ ጋር በተመሳሳይ ተወስ'ል ብለው የጠቀሷቸው የሰበር መዝገቦች 39170፣ 25863፣ እና 540945 ላይ የተመለከተው ግራ ቀኙ ተከራካሪዎች እኩል የመያዣ መብት ያገኙበትን ሁኔታ መሰረት የማያደርግ በመሆኑ ከተያዘው ጉዳይ ጋር ተመሳሳይ ባለመሆኑ ለተያዘው ጉዳይ እነዚህ የሰበር ውሳኔዎች ተፈጻሚነት የላቸውም፡፡

አመልካቾች እና 1ኛ ተጠሪ በፍ/ቤት ትዕዛዝ በታገደው ንብረት ላይ ያላቸው መብት እኩል በመሆኑ በፍ/ብ/ሥ/ሥ/ቁ 403 መሰረት እንደተራ የፍ/ባለገንዘቦች ተወስደው በፕሮራታ እንዲከፋፈሉ የስር ፍ/ቤቶች የሰጡት ትዕዛዝ በአግባቡ በመሆኑ መሰረታዊ የሕግ ስህተት የተፈጸመበት ነው የሚባል አይደለም ብለናል፡፡

ውሳኔ

1. የፌ/መጀ/ደ/ፍ/ቤት በኮ/መ/ቁ 196945 ነሐሴ 23 ቀን 2006 ዓ.ም በዋለ ችሎት እና የፌ/ከፍ/ፍ/ቤት በኮ/መ/ቁ 156913 ጥቅምት 14 ቀን 2007 ዓ.ም በዋለ ችሎት የሰጡት ትዕዛዝ በፍ/ብ/ሥ/ሥ/ቁ 348/1/ መሰረት ጸንቷል፡፡
2. ግራ ቀኙ በዚህ ሰበር ችሎት ላደረጉት ክርክር ያወጡትን ወጪ እና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡
3. በቀን 5/03/2007 ዓ.ም በዋለ ችሎት የተሰጠው የዕግድ ትዕዛዝ የተነሳ መሆኑ ተገልጾ ለሚመለከተው ይጻፍ፡፡

መዝገቡ ዕልባት ያገኘ በመሆኑ ተዘግቷል ወደ መ/ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ/መ/ቁ. 102161
ታኅሳስ 26 ቀን 2009 ዓ/ም

ዳኞች፡- 1. ዓሊ መሐመድ
2. ተኽሊት ይመሰል
3. ቀነዓ ቂጣታ
4. ሰናይት አድነው
5. ጳውሎስ ኦርሺሶ

አመልካች፡- አቶ አመራ ሰይፉ - አልቀረበም

ተጠሪ፡- አቶ አዳነ ነገደ - ጠበቃ አዜብ ገ/ወልድ ቀርባለብ

መዝገቡ ተመርምሮ ቀጥሎ ያለው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

የዚህ የሰበር አቤቱታ ምክንያት የሆነው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ልደታ ምድብ ችሎት በአፈጻጸም መዝገብ ቁጥር 1608025 በቀን 14/9/2005 ዓ/ም የሰጠው ትዕዛዝ እና የአሁን አመልካች በትዕዛዙ ቅር ተሰኝቶ ያቀረበውን ይግባኝ የፌዴራል ከፍተኛ ፍርድ ቤት መርምሮ የከ/መ/ቁ፡- 137290 በቀን 2/10/2006 ዓ/ም የሰጠው ውሳኔ ነው፡፡

የአሁን አመልካች የሥር ፍርድ መቃወሚያ አመልካች ሲሆን ተጠሪ ደግሞ የፍርድ ባለመብት ነበር፡፡ የክርክሩ ምክንያት በአሁን ተጠሪ እና በፍርድ ባለዕዳ ከድጃ መሀመድ መካከል ባለው የፍርድ አፈጻጸም ክርክር የስር የፍርድ ባለመብት የአሁኑ ተጠሪ የባለዕዳን በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ የኮንዶሚኒየም ቤት አስቀድሞ በ25/01/2003 ዓ/ም በማሳገድ ፍርዱን ለማስፈጸም የሀራጅ ሽያጭ ታዞ፣ ተጠሪም በሀራጅ ሽያጩ ላይ በገዥነት በመሳተፍ ጨረታውን ማሸነፉና የአሁን አመልካች በሌላ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ቂርቆስ ምድብ ችሎት በፍርድ ባለዕዳ ላይ የፍርድ ባለመብት በመሆን ድርሻ እንዲካፈል ትዕዛዝ ይዞ ወደ ፍርድ አፈጻጸም መምሪያ መምጣቱን በመግለጽ ክፍፍሉ በምን መልክ መሆን እንዳለበት የፍርድ አፈጻጸም መምሪያው የተጠሪን ጉዳይ ለሚያየው የመጀመሪያ ደረጃ ፍርድ ቤት 13ኛ ፍትሓብሔር ችሎት በቀን 5/9/2005 ዓ/ም መመሪያ ጠይቆ ባለበት ላይ ፍርድ ቤቱ በ14/9/2005 ዓ/ም በሰጠው ተዕዛዝ አመልካች በቤቱ በሀራጅ ሽያጭ የተገኘውን ገንዘብ ድርሻ ሊካፈል አይገባም ሲል ትዕዛዝ ሰጥቷል፡፡

የአሁኑ አመልካች በትዕዛዙ ቅር በመሰኘት ይግባኝ ለፌዴራል ከፍተኛ ፍርድ ቤት አቅርቧል፡፡ የከፍተኛ ፍርድ ቤቱ የግራ ቀኙን ክርክር ከሰማ በኃላ በፍርዱ ሀተታው ላይ ሰፋ ያሉ ዝርዝር ነገሮችን ያነሳ ሲሆን፣ በፍርዱ ማጠቃለያ የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ተጠሪ በጨረታው በመሳተፍ አሸናፊ ስለሆነ አመልካች ድርሻ ሊካፈል አይገባም ሲል የደረሰው ድምዳሜ ስህተት መሆኑን ገልጾ፣ ነገር ግን ተጠሪ ንብረቱን አስቀድሞ ያሳገደ በመሆኑ ከንግድ ባንክ ቀጥሎ ከአመልካች የቀዳሚነት መብት ያለው ነው፡፡ ይህም መያዝ መብቱ የስር ፍርድ ቤት በመ/ቁጥር 168025 በቀን 20/01/2003 ዓ/ም በሰጠው ትዕዛዝ መሰረት በፍትሓብሔር ህግ ቁጥር 3041 መሰረት ተጠሪ መያዣ መብት አግኝቶ ሳለ ሁለቱም ተራ ገንዘብ ጠያቂ ናቸው ተብሎ የተደረሰበት ድምዳሜ በፍርዱ ዝርዝር ላይ የተጠቀሰውን ድንጋጌና የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁጥር 39190 የሰጠውን ውሳኔ ያላገናዘበ ትዕዛዝ ሆኖ አግኝተነዋል፡፡ የሥር ፍርድ ቤት ተገቢ ያልሆነ ምክንያ በመስጠት የአመልካችን አቤቱታ ያለመቀበሉ ተገቢ ባይሆንም በውጤት ደረጃ ግን ተጠሪ የመያዣ መብት በፍርድ ያገኘ በመሆኑ በአመልካች ላይ ይህ ፍርድ ለውጥ የሚያመጣና መብት የሚሰጠው አይደለም በማለት የስር ፍርድ ቤትን ትዕዛዝ አጽንቷል፡፡

ይህ የሰበር አቤቱታ የቀረበውም በየደረጃው ያሉ ፍርድ ቤቶች የሰጡትን ትዕዛዝና ውሳኔ ለማስለወጥ ነው፡፡ የሰበር አቤቱታ ይዘትም በአጭሩ፡- አመልካችና ተጠሪ ከፍርድ ባለዕዳ ላይ እኩል መብት ያላቸው መሆኑን፡- የግራ ቀኙ ተራ ገንዘብ ጠያቂዎች መሆናቸውን፣ ይህም በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሠረት ታይቶ ከፍርድ ባለዕዳ ቤት ሽያጭ ላይ እኩል ድርሻ ልኖራቸው ሲገባ ለተጠሪ ብቻ መወሰኑ ያለአግባብ መሆኑን፣ ይግባኝ ሰሚ ችሎትም ቤቱን ተጠሪ በፍርድ ቤት በቅድሚያ በማሳገዱ ምክያት የመያዣ መብት ይሰጠዋል በማለት ተርጉሞ መወሰኑ መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ እንዲታረም የሚል ነው፡፡

የሰበር አቤቱታ ተመርምሮ ተጠሪ የጨረታው ተካፋይ ሆኖ ተጠሪ አሸናፊ ከመሆኑ ጋር በማያያዝና እንዳይሸጥ እንዳይለወጥ ተጠሪው አሳግዷል በሚል የመያዝ መብት ያሰጠዋል ተብሎ ተጠሪ ቅድሚያ መብት ያገኛል የመባሉን አግባብነት ከፍትሓብሔር ህግ ቁጥር 3044 እና ከፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 ጋር በማገናዘብ ለመመርመር ሲባል ጉዳዩ ለሰበር ችሎት እንዲቀርብ ተደርጓል፡፡

የአመልካች አቤቱታ ለተጠሪ ደርሶት መስከረም 13 ቀን 2007 ዓ/ም የተጻፈ መልስ የሰጠ ሲሆን አመልካችም ጥቅምት 3 ቀን 2007 ዓ/ም የተጻፈ የመልስ መልስ ሰጥቷል፡፡

የጉዳዩ አመጣጥ አጠር ባለ መልኩ ከላይ እንደተገለጸው ሲሆን ጉዳዩን ከሥር ፍርድ ቤቶች ትዕዛዝና ውሳኔ፣ በዚህ ችሎት ከተደረገው ክርክር እንዲሁም አጣሪው ያስቀርባል ሲል ከያዘው ጭብጥ አንጻር መርምረናል፡፡ ጉዳዩን እንደመረመርነውም የግራ ቀኙ ከወ/ሮ ከድጃ መሐመድ ላይ የፍርድ ባለመብቶች መሆናቸው፣ የወ/ሮ ከድጃ መሐመድ ንብረት የሆነው የግራ ቀኙ ለእዳው ተሸጦ እንድከፈል የሚከራከሩበት በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ የኮንዶሚኒየም ቤት መሆኑ፣ ይህ ቤት ቀደም ሲል የኢትዮጵያ ንግድ ባንክ በመያዣ የያዘ መሆኑ፣ የአሁን ተጠሪ ቤቱን በሀራጅ እንዲገዛ የመጀመሪያ ደረጃ ፍርድ ቤት ፈቅዶለት በብር 485.000.00 (አራት መቶ ሰማንያ አምስት ሽህ) ብር መግዛቱ፣ ከዚህ ገንዘብ ውስጥ የባንኩን እዳ ብር 95.333.24.00 (ዘጠና አምስት ሽህ ሶስት መቶ ሰላሳ ሶስት ብር ከሃያ አራት ሳንቲም) ተጠሪ መክፈሉ፣ ተጠሪ ቤቱን እንዲረከብ የተደረገ መሆኑ በሥር ፍርድ ቤት የተረጋገጡ ፍሬ ነገሮች ናቸው፡፡ በዚህ ጉዳዩ አከራካሪ ሆኖ የሚታየው ተጠሪ ከአመልካች በቅድሚያ የፍርድ ባለዕዳን ንብረት እንዳይሸጥ እንዳይለወጥ እና ለሶስተኛ ወገን ተላልፎ እንዳይሰጥ የአግድ ትዕዛዝ ከፍርድ ቤት በመውሰድ ማሳገዱ የመያዣ መብት ይሰጠዋል ወይ? የመያዣ መብትንስ ለማቋቋም የሚያስችሉ ህጋዊ መሰረቶች ምንድናቸው? የሚለው ነው፡፡

የግራ ቀኙን ክርክር ስንመለከት ተጠሪ ከፍርድ ባለዕዳ ጋር ክርክር እንደጀመረ ወዲያውኑ ክርክር የተነሳበትን ቤት በፍርድ ቤት ትዕዛዝ እንዳሳገደና ይህም የመያዣ መብትን እንዳቋቋመለት ሲከራከር አመልካች በበኩሉ ደግሞ እርሱም በበኩሉ በሌላ ችሎት ከፍርድ ባለዕዳ ጋር በነበረው ክርክር አሁን እያከራከረ ያለውን ቤት በፍርድ ቤት ትዕዛዝ እንዳሳገደ ገልጾ፣ የአመልካችም ሆነ የተጠሪ የፍርድ ቤት የአግድ ትዕዛዞች የመያዣ መብትን ለማቋቋም የሚያስችል ህጋዊ መሰረት ስለሌላቸው የግራ ቀኙ በቤቱ ላይ ሊኖር የሚችለው መብት ሊታይ የሚገባው በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ነው በማለት ተከራክሯል፡፡

ለዚህ ክርክር ተገቢ ምላሽ ለመስጠት የፍትሓብሔር ህጉ በአንድ በማይንቀሳቀስ ንብረት ላይ የመያዣ መብት እንዴት ሊቋቋም እንደሚችል የደነገጋቸውን ድንጋጌች መመልከት ያስፈልጋል፡፡ የማይንቀሳቀስ ንብረት መያዣ በቀጥታ በህግ ወይም በፍርድ ወይም በውል ወይም ደግሞ በኑዛዜ ሊቋቋም እንደሚችል የፍትሓብሔር ሕግ ቁጥር 3041 ይደነግጋል፡፡ በህግ የሚገኝ መያዣ መብትን በተመለከተ ደግሞ የፍትሓብሔር ህግ ቁጥር 3043 ሲደነግግ፣ በፍርድ የሚገኘውን የመያዣ መብትን በተመለከተ ደግሞ የፍትሓብሔር ህግ ቁጥር 3044 የሚደነግግ ሲሆን ይህም መብት በፍርድ ቤት እንዲቋቋም ከተፈለገ የፍርድ ውሳኔ ሊኖር እንደሚገባ

በግልጽ ተደንግጓል፡፡ በተያዘው ጉዳይ ተጠሪ የመያዣ መብት የተቋቋመው ፍርድ ቤቱ በሰጠው የእግድ ትዕዛዝ መሰረት እንደሆነ ተከራክሯል፡፡ ፍርድ ቤት በፍትሓብሔር ሥነ ሥርዓት ሕግ ቁጥር 154 መሰረት የሚሰጠው እግድ የመያዣ መብትን ለማቋቋም አይችልም፡፡ የፍ/ሥ/ሥ/ሕ/ቁ.154 ዓላማ አንድ ንብረት እንዳይሸጥ፣ እንዳይለወጥ፣ እንዳይበላሽ፣ እንዳይጠፋ፣ በማንኛውም ሁኔታ ለሶስተኛ ወገን ተላልፎ እንዳይሰጥና ፍርድ እስከሚሰጥ ተከብሮ እንዲቆይ ለማድረግ ነው እንጂ የመያዣ መብትን ለማቋቋም ተብሎ አይደለም፡፡ የሚሰጠውም ትዕዛዝ ጊዜያዊ እንደሆነ የዚህ አንቀጽ ድንጋጌ በግልጽ ያስረዳል፡፡ አንድ የፍርድ ባለገንዘብ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 154(ለ) መሰረት የንብረት እግድ ቢያሰጥ የቀደምትነት መብት የሚያቋቁም ስለመሆኑና አለመሆኑ ከአሁን በፊት የሰበር ሰሚ ችሎት በሰ/መ/ቁ.27808፣ 29269 እና 97206 አስገዳጅ ውሳኔዎችን ሰጥቷል፡፡ በመሆኑም ተጠሪ በዚህ ረገድ አንስቶ የሚከራከረው ክርክር ህጋዊ ድጋፍ ያለው ሆኖ አልተገኘም፡፡ የፌዴራል ከፍተኛ ፍርድ ቤት ተጠሪ ክርክር የተነሳበትን ቤት በፍርድ ቤት በቅድሚያ በማሳገዱ የመያዣ መብት ይኖረዋል ሲል የደረሰው ድምዳሜ ከላይ የተገለጹትን የህግ ድንጋጌዎችን እና የሰበር ሰሚ ችሎት በተለያየ ጊዜ የሰጣቸውን አስገዳጅ ውሳኔዎችን በአግባቡ ሳያጤን የሰጠው ውሳኔ የሚነቀፍ ሆኖ ተገኝቷል፡፡

መያዣውን በተመለከተ ተጠሪ ቅድሚያ ማሳገዱ ህጋዊ መብት የሚያሰጥ እንዳልሆነ ከላይ እንደተመለከተው ሲሆን የፍርድ ባለዕዳ ቤት ተሸጦ ከተገኘው ገንዘብ የኢትዮጵያ ንግድ ባንክ እዳ በቅድሚያ ተከፍሎ በሚቀረው ገንዘብ ላይ አመልካችና ተጠሪ የሚኖራቸው መብት ከህግ አንጻር እንዴት ይታያል? የሚለው ምላሽ ሊሰጠው የሚገባ ነው፡፡ በተያዘው ጉዳይ አመልካችም ሆነ ተጠሪ ተራ ገንዘብ ጠያቂዎች ናቸው፡፡ የዚህ ዓይነት ገንዘብ ጠያቂዎች በሚኖሩበት ጊዜ የክፍያ ሥርዓቱ ሊመራ የሚገባው በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ነው፡፡ ይህ አንቀጽ በግልጽ የሚደነግገው በፍርድ ቤት ትዕዛዝ ተከብሮ የተያዘ ሀብት በፍርድ ባለመብቶች መካከል እንደየድርሻቸው እንደሚከፋፈል ነው፡፡ የፍትሓብሔር ሥነ ሥርዓት ሕግ ቁጥር 403‘ን’ በጥልቀት ስንመለከተው ሁለት ተራ ገንዘብ ጠያቂያዎች /ordinary creditors/ በሚኖሩበት ጊዜ የፍርድ ባለእዳውን ንብረት ቀድሞ ያሳገደው ገንዘብ ጠያቂ የቅድሚያ መብት ሊኖረው እንደማይችል ነው፡፡

በእጃችን ባለው ጉዳይ የፍርድ ባለእዳዋን የወ/ሮ ከድኛ መሐመድን የኮንዶሚኒየም ቤት ተጠሪው ቀድሞ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ልደታ ምድብ ችሎት ቢያሳግደውም አመልካችም በበኩሉ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የቂርቆስ ምድብ ችሎት እንዳሳገደ ከስር ፍርድ ቤቶች ውሳኔ ለመመልከት ተችሏል፡፡ ሁለቱም ምድብ ችሎቶች የሰጡት ትዕዛዝ የወ/ሮ ከድኛ ቤት ሳይሸጥ ሳይለወጥ ታግዶ እንዲቆይ የሚል በመሆኑ ለተጠሪ የተሰጠው የቅድሚያ የእግድ ትዕዛዝ ቅድሚያ መብትን ሊያጎናጽፍ የሚችልበት ህጋዊ ምክንያት ሊኖርው አይችልም፡፡ ስለሆነም ከላይ እንደተመለከተው ተጠሪው ተራ ገንዘብ ጠያቂ ሆኖ እያለ የፍርድ ባለዕዳን ንብረት ቀደሞ ስላሳገደ ብቻ ከቤቱ ሽያጭ ላይ የተገኘውን ገንዘብ ለብቻው ሊወስድ ይገባል ተብሎ የተሰጠው ትዕዛዝም ሆነ ውሳኔ መሰረታዊ የህግ ስህተት የተፈጸመበት ሆኖ ተገኝቷል፡፡ በመሆኑም የሚከተለው ውሳኔ ተሰጥቷል፡፡

ው ሳ ኔ

1. የፌዴራል የመጀመሪያ ደረጃ ፍርደ ቤት ልደታ ምድብ ችሎት የከ/መ/ቁ.168025 በቀን 14/09/2005 ዓ/ም የሰጠው ትዕዛዝ እንዲሁም የፌዴራል ከፍተኛ ፍርድ ቤት የከ/መ/ቁ.137290 በቀን 2/10/06 ዓ/ም የሰጠው ውሳኔ በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 348/1/ መሰረት ተሻሽሏል፡፡
2. የፍርድ ባለዕዳ ንብረት የነበረው በቦሌ ክፍለ ከተማ ወረዳ 10 በአያት ሳይት ቁጥር 1 የህንጻ ቁጥር 94 የቤት ቁጥር 27 የሆነ ኮንዶሚኒየም ቤት ተጠሪ አስቀድሞ በማሳገዱ ምክንያት የመያዣ መብት በፍትሓብሔር ህግ ቁጥር 3041 እና 3044 መሰረት በፍርድ የመያዣ መብት የሚያቋቁም አይደለም ብለናል፡፡

3. የፍርድ ባለዕዳ ንብረት የነበረው በቦሌ ክፍለ ከተማ በወረዳ 10 በአያት ሳይት ቁጥር 1 የህንፃ ቁጥሩ 94 የቤት ቁጥር 27 የሆነ ኮንዶሚኒየም ቤት በጨረታ ከተሸጠው ገንዘብ የኢትዮጵያ ንግድ ባንክ ከፍርድ ባለዕዳ የሚፈልገው የእዳ ብር 95333.24.00 (ዘጠና አምስት ሽህ ሶስት መቶ ሰላሳ ሶስት ብር ከሃያ አራት ሳንቲም) አስቀድሞ ተከፍሎ ከሆነ የተከፈለው ተቀንሶ የቤቱን ሽያጭ ቀሪ ብር አመልካችና ተጠሪ ድርሻቸውን /ንሮራታ/ ሊካፈሉ ይገባል ብለን በፍትሓብሔር ሥነ ሥርዓት ህግ ቁጥር 403 መሰረት ወስነናል፡፡
4. የዚህን ችሎት ወጪና ኪሳራ የየራሳቸውን ይቻሉ፡፡
5. ነሐሴ 14 ቀን 2006 ዓ/ም በዚህ ችሎት የተሰጠው እግድ ተነስቷል፡፡ ለሚመለከተው አካል ይጻፍ፡፡

መዝገቡ ውሳኔ ስላገኘ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት