የኢትዮጵያ ጠበቆች የሕግ መጽሔት
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የኢትዮጵያ ጠበቆች የሕግ መጽሔት

ETHIOPIAN BAR REVIEW

በኢትዮጵያ ጠበቆች ማኅበር በዓመት ሁለት ጊዜ የሚታተም
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ስለማንኛውም አስፈላጊ ጉዳይ፣ ለዋናው አዘጋጅ፣ የኢትዮጵያ ጠበቆች የሕግ መጽሔት፣ መ.ሣ.ቁ. 700 አዲስ አበባ፣ ኢትዮጵያ e-mail: eba@ethionet.et ብላችሁ ጻፉልን።

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NOTE FROM THE EDITOR

The Ethiopian Bar Review is a bi-annual publication of the Ethiopian Bar Association. The Editorial Board welcomes Articles written in English, whether with or without an Amharic translation. All communications and inquiries are to be addressed to:

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በዚህ መጽሔት ውስጥ የሚቀርቡ ጽሑፎች የፀሐፊዎቹን የግል አስተያየት እንጂ የማኅበሩን አቋም አያንፀባርቁም::

የምጎጻረ ቃላት ዝርዝር

LIST OF ABBREVIATIONS

የፍ.ብ.ሕ.ቁ.	የፍትሐ ብሔር ሕግ ቁጥር
የፍ.ብ.ሥ.ሥ.ሕ.ቁ.	የፍትሐ ብሔር ሥነ ሥርዓት ሕግ ቁጥር
የን.ሕ.ቁ.	የንግድ ሕግ ቁጥር
የፍ.ብ.መ.ቁ	የፍትሐ ብሔር መዝገብ ቁጥር
የፍ.ብ.ይ.መ.ቁ	የፍትሐ ብሔር ይግባኝ መዝገብ ቁጥር
የሰ.መ.ቁ.	የሰበር መዝገብ ቁጥር
የኮ.መ.ቁ.	የኮምፑዩተር መዝገብ ቁጥር
አ.	አንቀጽ
አ.ቁ.	አዋጅ ቁጥር
Art.	Article (of Codes and other Laws)
C.C.	Civil Code
Com.C.	Commercial Code
P. C.	Penal Code
Civ. Proc. C.	Civil Procedure Code
Proc.	Proclamation
Neg. Gaz.	Negarit Gazetta
Fed. Neg. Gaz.	Federal Negarit Gazetta

በሚተላለፉ ሠነዶች «ባለዕዳ» የሆኑ ሰዎች በኢትዮጵያ ሕግ መሠረት ስላላቸው የመከላከያ ወይም መቃወሚያ ነጥቦች*

በዘካርያስ ቀነዓ**

በንግድ ሕግ ቁጥር 715 መሠረት «የሚተላለፍ የገንዘብ ሰነድ» ማለት መብቱ ከሰነዱ ተለይቶ ሊሠራበት ወይም ሊተላለፍ የማይችል ያገልግሎት መብት ያለበት ሰነድ ሁሉ ነው። በተለይም ሕግ እንደሚተላለፍ የገንዘብ ሰነድ የሚቆጥራቸው የንግድ ወረቀቶችን የሚተላለፉ የግዴታ የምሥክር ወረቀቶችን እና የሸቀጥ ባለቤትነት ሰነዶችን ነው።[1] የንግድ ወረቀቶች የሚባሉት ደግሞ አንድ የተወሰነ ገንዘብ እንዲከፈል በላያቸው ላይ በመግለጽ መብት የሚሰጡ የሚተላለፉ የገንዘብ ሰነዶች ናቸው። ከንግድ ወረቀቶች መካከል በአገራችን የሚታወቁት ዋናዎቹ የሐዋላ ወረቀት፣ የተስፋ ሰነድ እና ቼክ ናቸው። አንድ የሚተላለፍ የገንዘብ ሰነድ የያዘም ሰው ይህንኑ ሰነድ ለዕዳ ከፋዩ በማቅረብ በሰነዱ ውስጥ ያለውን ጥቅም የማግኘት መብት እንዳለው በንግድ ሕግ ቁጥር 716 ላይ ተደንግጓል። ዕዳ ከፋዩ በሰነዱ ላይገደድ የሚችለው በንግድ ሕግ ቁጥር 717 ሥር ከተደነገጉት ሁኔታዎች መካከል አንዱ ተሟልቶ ሲገኝ ነው። በዚህ ጽሑፍ ላይ የምናተኩረውም እነዚህ ዕዳ ከፋዩ ሊያቀርባቸው የሚቻለው መከላከያዎች ወይም መቃወሚያዎች በምን ዓይነት ነጥቦች ላይ የተመሠረቱ ሊሆን ይገባል በሚለው ጥያቄ ላይ ነው። ስለእነዚህ መከላከያዎች የሚያወሳው ቁጥር 717 እንደሚከተለው ይደነገጋል፦

«ቁ. 717። መቃወሚያ።

(1) ዕዳ ከፋዩ ሰነዱን በያዘው ሰው፤ በሁለቱ የግል ግንኙነቶች ላይ በተመሠረቱት፤ በሰነዱ አጻጻፍ ፎርምና እንዲሁም በሰነዱ ላይ በተጻፉት ቃሎች ካልሆነ ሌላ መቃወሚያ ሊያቀርብበት አይችልም።

(2) እንዲሁም ፊርማን በማስመሰል የተሠራ፤ ችሎታ ወይም ሰነዱ ሲወጣ የውክልና ሥልጣን ባለመኖሩ ወይም ክስ ለማቅረብ አስፈላጊ የሆኑት ሁኔታዎች ባለመመላታቸው የተነሡትን መቃወሚያዎች ለማቅረብ ይችላል።

(3) አምጪው ይህን ሰነድ ባገኘበት ጊዜ ዕዳ ከፋዩን ለመጉዳት እያወቀ ያደረገው ካልሆነ በቀር ከዚህ በፊት ሰነዱን ይዘው ከነበሩት ሰዎች ጋር በግል ግንኙነቶች ላይ በተመሠረቱ ክርክሮች ዕዳ ከፋዩ ሰነዱ የያዘውን ሰው ሊቃወመው አይችልም።»

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* በኢትዮጵያ የሕግ ባለሙያዎች ማኅበር ሰኔ 26 ቀን 1996 ዓ.ም. በተዘጋጀው ዐውደ ጥናት ላይ የቀረበ።

** በአዲስ አበባ ዩኒቨርሲቲ ሕግ ፋክልቲ፣ ረዳት ፕሮፌሰር።

[1] በእንግሊዝኛ፣ በቅደም ተከተል፣ "commercial instruments", transferable securities", "documents of title to goods" የሚባሉት ናቸው።

ከዚህ በማያያዝ እያንዳንዱን ንዑስ አንቀጽ በክፍል በክፍል ባጭሩ ለማየት እንሞክራለን::

I

በንዑስ ቁ. (1) መሠረት ዕዳ ከፋዩ በሦስት ነጥቦች ላይ የተመሠረቱ መቃወሚያዎች በአምጪው ላይ ማቅረብ ሲችል እነርሱም፣ (1) በሁለቱ የግል ግንኙነቶች ላይ፣ (2) በሰነዱ አጻጻፍ ፎርም ላይ፣ እና (3) ሰነዱ ላይ በተጻፉት ቃላት ላይ፣ የተመሠረቱት ናቸው:: እነዚህን አንድ በአንድ እንመለከታለን::

1. በሁለቱ የግል ግንኙነቶች ላይ የተመሠረቱ መከላከያዎች

በዚህ የመቃወሚያ፣ የመከላከያ ወይም የመከራከሪያ ነጥብ መሠረት አንድ ባለዕዳ ማለትም ያንድ ሰነድ አውጪ በርሱ በራሱና በሠነዱ መሠረት ይከፈለኝ በማለት ሠነዱን ይዞ ቀርቦ ግን ሳይከፈለው በቀረው አምጪ መካከል ያለውን የግል ግንኙነት ጠቅሶ አምጪውን ሊከራከር ይችላል:: ከዚህ የመቃወሚያ ወይም የመከላከያ ነጥብ ጋር በተያያዘ ዋናውና መልስ ሊያገኝ የሚገባው ወሳኝ ጥያቄ «የግል ግንኙነት» ወይም በእንግሊዝኛው «personal relations» ምንድነው? ምን ምንን ያካትታል? የሚለው ነው::

በተራ የዕለት ተዕለት ግንኙነት ውስጥ የግል ግንኙነት ማለት ሌላን ሰው ወይም ሕዝብን የማይጨምር በሁለት ሰዎች መካከል ብቻ የተወሰነ፣ በሌላ ሰው አማካይነት ወይም ጣልቃ ገብነት ሳይሆን በቀጥታ በሁለት ሰዎች መካከል የሚፈጠረውን ግንኙነት የሚመለከት ነው:: የግል ግንኙነት በተራ የዕለት ተዕለት ሕይወት ውስጥ ከላይ የተመለከተውን ትርጉም የሚይዝ ከሆነ በሕግ ምን ትርጉም ይሰጠዋል? ወይም በሌላ አነጋገር በንግድ ሕግ ቁ. 717(1) ሥር «በሁለቱ የግል ግንኙነት» ላይ የተመሠረተ መቃወሚያ ወይም መከላከያ ሲል "የግል ግንኙነት" የሚለው ሐረግ ምን ምንን እንዲያካትት ታስቦ የገባ ነው? ለሚለው ጥያቄ መልስ ለመስጠት መሞከር አስፈላጊ ይሆናል::

ከሕግ አኳያ «የግል ግንኙነቶች» የሚለው ሐረግ ምን ምንን ያካትታል? ለሚለው ጥያቄ መልስ ማግኘት አስፈላጊነቱ እንደተጠበቀ ሆኖ በመሠረቱ በን.ሕ.ቁ. 717(1) ውስጥ «በሁለቱ የግል ግንኙነቶች» ላይ የተመሠረተ የሚለው ሐረግ ትርጉም ቀደም ሲል የገለጽነውን በተራ የዕለት ተዕለት ሕይወት ውስጥ ለሐረጉ የሚሰጠውን ትርጉም እንደሚይዝ መገንዘቡ ጥሩ ነው:: ይህም ማለት በን.ሕ.ቁ. 717(1) ሥር «በሁለቱ የግል ግንኙነቶች» ላይ የሚለው ሐረግ በን.ሕ.ቁ. 790(1) እና 825(1)(ሐ) እና 872 ሥር የተጻፉት እንደተጠበቁ ሆነው ሌላ ማንንም ሳይጨምር በዕዳ ከፋዩ እና በሠነዱ አምጪ መካከል ብቻ ያለውን ግንኙነት የሚመለከት መሆኑን ነው:: በዕለት ተዕለት ግንኙነቶች ውስጥ ሐረጉ የሚኖረውን ትርጉም ካየን በሕግ ረገድ የሚኖረውን ወይም የሚያካትተውን ደግሞ ከዚህ በታች ባጭሩ እንመለከታለን::

ከሕግ አኳያ በተለይም ከሚተላለፉ ሠነዶች ሕግ አኳያ "በሁለቱ የግል ግንኙነቶች" ላይ የተመሠረቱ መቃወሚያዎች ማለት <u>ሠነዱን በቅን ልቡና በያዘው ሰው ላይ ሊቀርቡ የማይችሉ መከራከሪያዎች ሲሆኑ</u> መከራከሪያውን ወይም መቃወሚያውን በሚያቀርበው ሰው ማለትም በባለዕዳውና በአምጪው መካከል ባለው እና በሁለቱም በሚታወቀው ሁኔታ፣ ግንኙነት ወይም ዕውነታ የተነሳ ግን ዕዳ ከፋዩ ስለሁኔታው፣ ስለግንኙነቱ ወይም ስለእውነታው በሚያውቀው አምጪ ላይ የሚያነሳው መቃወሚያ ነው። ለምሣሌ በዕዳ ከፋዩና በአምጪው መካከል የውል ግንኙነት ኖሮ ሠነዱ ለአምጪው የተሰጠው በውል ግንኙነቱ ላይ ተመሥርቶ ከሆነ ዕዳ ከፋዩ በመካከላቸው ያለውን የውል ግንኙነት ጠቅሶ አምጪውን ሊከራከረው ወይም ሊቃወመው ይችላል። የውል ግንኙነት ሲባል በዕዳ ከፋይና በአምጪው መካከል ተመሥርቶ ኖሮ ለሠነዱ መውጣት ምክንያት ወይም መሠረት የሆነውን ውል በተመለከተ ከውሉ ምሥረታ ጋር የተያያዘውን፣ ከውሉ አፈጻጸም ጋር የተያያዘውን ማንኛውንም ነጥብ ማንሳት እና አምጪውን መቃወም ወይም መከራከር እንደሚቻል ነው።

የሸጥኩልህን ዕቃ በዚህ ቀን አስረክባለሁ ብሎ ሻጩ ግዴታ ስለገባ ገዢው ዕቃውን ትረክባለህ ከተባለበት ቀን ቀጥሎ ያለውን ቀን ጽፎበት ቼክ ለሻጭ ሰጥቶ ሻጭ አስረክባለሁ ባለበት ቀን ባለማስረከቡ ገዥ ማለትም የቼኩ አውጪ ቼኩን እንዳይከፈል በን.ሕ.ቁ. 857 መሠረት ቢያስቆምና ሻጩ በቼኩ ላይ ተንተርሶ በገዥ ላይ ክስ ቢመሠርት ገዥ የበስተጀርባ ውለታቸውንና የሻጭን ዕቃውን አስረክባለሁ ባለበት ቀን ግዴታውን ያለመወጣት (ያለማስረከብ) ጠቅሶ ሊከራከር ይህ ክርክር በዕዳ ከፋይ በገዥ እና በአምጪው በሻጭ መካከል ባለው የግል ግንኙነት ላይ የተመሠረተ ይሆናል። ገዢው የቼክ አውጪ የቼኩን ክፍያ ማስቆሙ በውል ላይ የተመሠረተውን የግል ግንኙነት ጠቅሶ መሆኑን መከራከር ካልቻለ ውል ሳይፈጸምለት ገንዘቡ ግን ወጪ በተደረገበት ነበር።

በን.ሕ.ቁ. 744 እና 841 መሠረት አንድ አውጪ ፊርማውን ብቻ ያስቀመጠበትን የሐዋላ ወረቀት ወይም ቼክ ሌላ ሌላውን ነገር በመካከላቸው በተደረሰው ስምምነት መሠረት እርሱ ሞልቶ ሠነዱን የተሟላ እንዲያደርገው የተሰጠው ሰው ወይም አምጪ ሠነዱን ሲሞላ ከስምምነታቸው ውጪ ቢሞላው የሠነዱ አውጪ ይህንኑ ጠቅሶ ሠነዱን የሞላውን ያዥ ወይም አምጪ ቢከራከረው መቃወሚያው በሁለቱ የግል ግንኙነቶች ላይ የተመሠረተ መከላከያ ወይም መቃወሚያ ይሆናል። ሠነዱን ከስምምነት ውጪ የሞላው ሰው ቶሎ ብሎ ሠነዱን ወደ ሌላ ሰው ቢያስተላልፍ ኖሮ ግን ሶስተኛው ሰው ሠነዱን የሞላው ሰው በርሱና በአውጪው መካከል ከተደረገው ስምምነት ውጪ መመላቱን እያወቀ መቀበሉ ካልተረጋገጠ ወይም ሲቀበል ጥፋት ካልፈፀመ በስተቀር አውጪው በርሱና ሠነዱን በሞላው ሰው መካከል ያለውን የግል ግንኙነት ጠቅሶ ሶስተኛውን ሰው (አምጪ) ሊከራከረው አይችልም።

ባሁኑ ጊዜ በኢትዮጵያ ውስጥ በን.ሕ.ቁ. 717 ሥር ከተጠቀሱት መከላከያዎች እጅግ አወዛጋቢና አጨቃጫቂ የሆነው ይኸው "በግል ግንኙነቶች" ላይ የተመሠረተው መከላከያ ነው ቢባል ማጋነን አይመስለኝም፡፡ በተከራካሪ ወገኖች እና በፍ/ቤቶች አካባቢም ይህን የመከላከያ ነጥብ አስመልክቶ ሰፊ ክፍተትና ያለመቀራረብ መኖሩ ይስተዋላል፡፡

የንግድ ሕጉ «የግል ግንኙነቶች» የሚለውን ሐረግ መጠቀሙ ግልጽ ሆኖ እያለ ለፍ/ቤቶች ከሚቀርቡት ክርክሮች መገንዘብ እንደሚቻለው «በግል ግንኙነቶች» ላይ የተመሠረተው መከራከሪያ ከንግድ ግንኙነት በሚመነጭ የሚተላለፍ ሠነድ ገዳይ ላይ ሊቀርብ አይችልም እየተባለ ነው፡፡ አንዳንድ ተከራካሪዎችም «የግል ግንኙነት» የሚለውን ሐረግ የሚከተለውን ትርጉም ሰጥተውት ይታያል፡፡

> ሚስጢራዊ የሆነ፣ ጥብቅ በሆነ መከባበር ላይ የተመሠረተ ፍጹም ግላዊ የሆነ (personal and confidential relationship) ግንኙነትን የሚመለከት ፡፡ . . . . ለምሣሌም በአባትና በልጅ፣ በባልና በሚስት፣ በሐኪምና በታካሚ፣ በጠበቃና በደንበኛ በመሳሰሉት መካከል የጠበቀ እና ግላዊ የሆነ መተማመንን የሚፈጥር ግንኙነት ነው ሲሉ፣ ገበያ ላይ የገበያ ሥርዓትን ተከትለው በሚገበያዩ ነጋዴዎች መካከል የሚፈጠር ግንኙነት የሸጭና የገዥ ግንኙነት እንጂ በማናቸውም መመዘኛ የግል ግንኙነት ሊሆን አይችልም፡፡

ፍ/ቤቶችም፣ የሚተላለፉ ሠነዶችን አስመልክቶ በባለዕዳነት የሚከሰሱ ሰዎች፣ በተለይም በቼኮች ባለዕዳነት የሚከሰሱ ሰዎች በግል ግንኙነት ላይ የተመሠረተ መከላከያ አለን በማለት ሲያመለክቱ ለመከላከል ይፈቅዱላቸውና ባለዕዳዎቹ በግል ግንኙነት ላይ የተመሠረተ መከራከሪያችን ይህ ወይም ያ ነው የሚለውን ሲያቀርቡ መከላከያቸውን ጠለቅ ብለው ለማየት ፈቃደኞች አለመሆናቸው ይስተዋላል፡፡ ፍ/ቤቶች ተከሣሽ ባለዕዳዎች እንዲከላከሉ ከፈቀዱ በኋላ ባለዕዳዎች አለን የሚሉትን በግል ግንኙነቶች ላይ የተመሠረተ ነው የሚሏቸውን ነጥቦች ሲያነሱ በደፈናው፣ «እንዲህ ዓይነት መከላከያዎች ቀርበው ተቀባይነት እንዲያገኙ ከተፈቀደ የቼኮች አገልግሎት አደጋ ላይ ይወድቃል»፣ ወይም "ቼኩን በያዘው ከሣሽ እና ቼኩን ጽፎ በሰጠው ተከሣሽ ባለዕዳ መካከል ያለው የውል ግንኙነት እንደመከላከያ እንዲቀርብ ከተፈቀደ የቼኮችን ያለምንም ቅድመ ሁኔታ ወይም ሐተታ መከፈልን የሚነካ ስለሆነ መከላከያው ተቀባይነት የለውም» እያሉ ነው፡፡

ከዚህም ሌላ የንግድ ሕጉ በአምጪዎች መካከል ልዩነት እንደሚያደርግ እየታወቀ፣ ለቅን ልቡና ያዥዎች ወይም ለቅን ልቡና አምጪዎች (holders in due course) ብቻ ተፈጻሚ መሆን የሚገባቸው ድንጋጌዎች ስመ ከበስተፊት በኩል በተጻፈው አምጪ ላይ ተፈጻሚ እንዲሆኑ ተደርገው እየተተረጐመ ነው፡፡ ለምሣሌ በን.ሕ.ቁ. 841 ሥር የተጻፈውና፡-

«በሚወጣበት ጊዜ ጉድለት ያለው ቼክ ለተደረጉት ስምምነቶች ተቃራኒ በመሆን የተሞላ እንደሆነ በክፉ ልቡና ቼኩን ካላገኘ ወይም ሲያገኝ ከባድ ጥፋት ካላደረገ የነዚሁ ስምምነቶች አለመፈፀም በአመጪው ላይ መቃወሚያ ሊሆን አይችልም::»

የሚለው ድንጋጌ የተፈጻሚነት ወሰኑ በሚገባ ሳይታወቅ ለሁሉም አመጪዎች ተፈጻሚ እንደሆነ አድርጐ መቁጠር ኢፍትሐዊ ወደሆነ ውሳኔ እንደሚያደርስ ሊታወቅ ይገባል:: በነገራችን ላይ የንግድ ሕግ ቁጥር 841 ተፈጻሚነት በቅን ልቡና ያዢዎች ወይም ለቅን ልቡና አመጪዎች ወይም በእንግሊዝኛ holders in due course ለሚባሉት እንጂ ስማቸው ከበስተፊት በተጻፉት በመጀመሪያ ተከፋይ አመጪዎች ላይ ተፈጻሚ ሊሆን አይችልም:: ይህ ድንጋጌ ሠነዱን ስለማግኘት (በእንግሊዝኛ acquire ስለማድረግ) የሚናገር ስለሆነ ተራ አመጪን ከመመልከት ይልቅ የቅን ልቡና ያዥዎችን ይመለከታል ማለቱ የተሻለ ይሆናል::

የንግድ ሕጉ በቁጥር 717 (1) እና 717 (3) መካከል ልዩነትን አድርጐ የደነገገውም በአመጪዎች መካከል ልዩነት ማድረግ እንደሚገባ በማጤን ነው:: የንግድ ሕግ ቁጥር 717(1) በግል ግንኙቶች ላይ የተመሠረተውን መከላከያ የፈቀደው ቼኩን ጽፎ በሰጠው ባለዕዳ እና ቼኩን ከባለዕዳው (ከአውጪው) በተቀበለው እና ስሙ በቼኩ በስተፊት በተጻፈው ሰው መካከል ባለው፣ በሁለቱ መካከል ብቻ ሌላ ሳይጨምር፣ በማለት ሲሆን በዚሁ በቁጥር 717(3) ደግሞ ሠነዱን ከአውጪው ከተቀበለው እና ስሙ በስተፊት ከተጻፈው ሰው ውጪ ሌላ 3ኛ 4ኛ ወይም 5ኛ ሰው መኖሩን ለማመልከት ነው:: እናም ሠነዱን ከዕዳ ከፋዩ አውጪ የተቀበለው እና ስሙ ከበስተፊት የተጻፈው አመጪ ወይም ተከፋይ ሠነዱን በጀርባ ፈርሞ ለሌላ 3ኛ ሰው ቢያስተላልፍ ይህ 3ኛ ሰው በመሠረቱ እንደ ቅን ልቡና አመጪ ወይም ቅን ልቡና ያዥ ወይም holder in due course ስለሚወሰድ በመርህ ደረጃ ዕዳ ከፋዩ በራሱና ከርሱ ሠነዱን በተቀበለው ስሙ በስተፊት በተጻፈው መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረቱትን መከራከሪያዎች ጠቅሶ ይህን ስለነዚህ ግንኙነቶች ሳያውቅ በቅን ልቡና ሠነዱን ያገኘውን ሰው መከራከር አይችልም::

ዕዳ ከፋዩ ይህን 3ኛ ሰው በርሱ እና በስተፊት በኩል ስሙ በተጻፈው ሰው መካከል በግል ግንኙነቶች ላይ የተመሠረተ መከላከያ ላይ ተመሥርቶ መከራከር የሚችለው በዚሁ በቁጥር 717(3) ሥር በልዩነት የተጠቀሱት ነጥቦች ሲሟሉ ብቻ ነው:: እነርሱም 3ኛው ሰው ሠነዱን ባገኘበት ጊዜ ዕዳ ከፋዩን ለመጉዳት ሲል በሁለቱ፣ ማለትም በዕዳ ከፋዩ እና በመጀመሪያው ተከፋይ መካከል ያለውን የግል ግንኙነት እያወቀ፣ እንዲያውም 3ኛው ሰው ከመጀመሪያው ተከፋይ ጋር እየተነጋገረ እየተመሳጠረ ተባብረን እንሠራለታለን እያለ፣ ዕዳ ከፋዩን ለመጉዳት ሠነዱን የተቀበለ ሲሆን ይህ 3ኛ ሰው ቅን ልቡና የሌለው ሰው እንዲያውም በክፉ ልቡና የሚንቀሳቀስ ሰው ስለሆነ ሕግ በልዩነት

(exception) በዚህ 3ኛ ሰው ላይ ዕዳ ከፋዩ በርሱና በመጀመሪያው ተከፋይ መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረቱትን መከላከያዎች እንዲያቀርብ ፈቀደለት::

በንግድ ሕግ ቁጥር 850 ላይ የተጻፈውም እንደዚሁ በጥንቃቄ ሊታይ የሚገባ ነው:: የቁጥር 850 ድንጋጌ ለሐዋላ ወረቀት ከተጻፈው ከቁጥር 752 ድንጋጌ የተለየ አይደለም:: ልዩነታቸው የፊተኛው ለቼክ የኋለኛው ለሐዋላ ወረቀት መጻፉ ብቻ ነው:: እነኚህ ቁጥሮች ባብዛኛው የሚመለከቱት ከአውጪው ውጪ የሆኑትን ሌሎች ባለዕዳዎች ለምሣሌ በጆርባ ፊራሚዎችን፣ በሐዋላ ወረቀት እሺ ባዮችን እና በቼክ በዋስትና እሺ ባዮችን ነው:: ለማንኛውም እነኚህ ባለዕዳዎች በእነርሱ እና በአውጪው መካከል ወይም በእርስ በርሳቸው መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረተውን መከራከሪያ ጠቅሰው የቅን ልቡና ያዥ የሆነውን ወገን መከራከር በመርሕ ደረጃ አልተፈቀደም:: ከላይ ለማመልከት እንደተሞከረው የቅን ልቡና ያዥ ወይም አምጪ በሆነው ሰው ላይ በግል ግንኙነቶች ላይ የተመሠረቱ መቃወሚያዎች ጠቅሶ መከራከር የሚቻለው ያ የቅን ልቡና ያዥ ወይም አምጪ ሠነዱን የወሰደው ባለዕዳዎቹን ወይም ከእነርሱ አንዱን ለመጉዳት ሆነ ብሎ አውቆ ያደረገው ከሆነ ብቻ ነው:: <u>እናም በግል ግንኙነቶች ላይ የተመሠረቱት መከላከያዎች በመርህ ደረጃ በቅን ልቡና ያዥ በሆኑት አምጪዎች ላይ ተፈጻሚዎች አይሆኑም:: ተፈጻሚ የሚሆኑት በልዩነት (exception) ነው::</u>

ግንዛቤ ሊወሰድበት የሚገባው ትልቁ ነገር መከላከያ ሲባል የያዥውን አቋም የሚከተል መሆኑን ነው:: በተለይም ደግሞ በግል ግንኙነቶች ላይ የተመሠረቱት መከላከያዎች የሚቀርቡት የቅን ልቡና ያዥ ባልሆኑት በተራ አምጪዎች ላይ ስለመሆኑ ግንዛቤ ሊወሰድ ይገባል::

በሌላም በኩል የቅን ልቡና ያዥ ወይም አምጪዎች ወይም በእንግሊዝኛ holders in due course በተባሉት አምጪዎች ላይ «በግል ግንኙነቶች ላይ የተመሠረቱት» የሚለው ብቻ ሲቀር በን.ሕ.ቁ. 717(1) እና (2) ሥር የተመለከቱትን ሌሎቹን ማቅረብ እንደሚቻል ሕጉ ይደነግጋል:: ለምሣሌ የፎርም፣ የፊርማ ማስመሰል፣ የችሎታ ወይም የውክልናን ጉዳይ ጠቅሶ በቅን ልቡና ያዥዎች ላይ በመከላከያነት ማቅረብ ይቻላል::

እንግዲህ ሕግ ፈቅዶ እያለ በግል ግንኙነቶች ላይ የተመሠረቱትን መከላከያዎች አለመቀበል ተገቢ አይመስለንም:: ይልቅስ በግል ግንኙነቶች ላይ የተመሠረተው መከላከያ የቀረበበት አምጪ ተራ አምጪ ነው? ወይንስ የቅን ልቡና አምጪ ነው ብሎ ማጣራት አስፈላጊ ነው:: አምጪው ተራ አምጪ፣ ለምሣሌ ስሙ በቼኩ ፊት ላይ የተጻፈው የመጀመሪያው ተከፋይ፣ ከሆነ ይህ ሰው ተራ አምጪ ነው እንጂ የቅን ልቡና አምጪ ሊባል አይችልም:: እንደዚሁም ደግሞ በን.ሕ.ቁ. 730 መሠረት በጆርባ ተፈርሞ መተላለፍ የሚገባውን ሠነድ

ያለጀርባ ፊርማ ያገኘ አምጪ ከሆነ ይህ አምጪ እንደተራ አምጪ ስለሚወሰድ ባለዕዳው በግል ግንኙነቶች ላይ የተመሠረተውንና ስሙ በስተፊት በኩል በተጻፈው ሰው ላይ ማቅረብ የሚችለውን በግል ግንኙነቶች ላይ የተመሠረተውን መከራከሪያ ሠነዱ በጀርባ ተፈርሞ ሊሰጠው ሲገባው ሳይፈርም ተሰጥቶት በያዘው ሰው ላይ ማቅረብ ይችላል::

ከዚህም በተጨማሪ በን.ሕ.ቁ. 746(2) እና 842(2) ሥር የተጻፈው ሁኔታ ሲያጋጥምም ባለዕዳው ሰነዱን ያያዘውን ሰው በርሱና በመጀመሪያው ተከፋይ መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረተውን መከላከያ ሊያቀርብበት ይችላል::

እንደዚሁም አንድ ቼክ ለባንክ ቀርቦ ሳይከፈል እንደተመለሰ የባንክ ማስረጃ ከተሰጠ በኋላ ቼኩ በጀርባ ተፈርሞ ሲሰጠው ይህንን እያወቀ በተቀበለው አምጪ ላይ ባለዕዳው በርሱና በመጀመሪያው ተከፋይ መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረተውን መከራከሪያ ሊያቀርብበት ይችላል:: [የን.ሕ.ቁ. 852(1) በተመሳሳይም የን.ሕ.ቁ. 755(1) ይመልከቱ] ከዚህም ሌላ በዚሁ በን.ሕ.ቁ. 852(1) መሠረት ቼኩን ለክፍያ ለማቅረብ በቁጥር 855 ላይ የተደነገገው ጊዜ ካለፈ በኋላ በጀርባ ተፈርሞ በተላለፈለት ሰው ላይ ዕዳ ከፋዩ በርሱና በመጀመሪያው ተከፋይ መካከል ባለው የግል ግንኙነቶች ላይ የተመሠረተ መከላከያ ሊያቀርብበት ይችላል::

እንግዲህ በግል ግንኙነቶች ላይ የተመሠረተ መከላከያ በቼትኞቹ አምጪዎች ላይ ሊቀርብ እንደሚችል ግንዛቤ ካገኘን የግል ግንኙነት ምንድነው? ከምን የሚመነጭ ነው የሚለው ጥያቄ ግልጽ መልስ አላገኘም ካልተባለ በስተቀር መከላከያውን መቀበል ችግር የሚያስከትል አይመስለኝም::

ቀደም ሲል ለማመልከት እንደተሞከረው የግል ግንኙነት ማለት በሁለት ወገኖች መካከል ብቻ ያለ ግንኙነት ማለት ሲሆን ግንኙነቱም ባብዛኛው የሚመነጨው ከንግድ፣ ከአገልግሎት፣ ከውል ነው:: እየተነጋገርን ያለነው ስለንግድ ወረቀቶች እንደመሆኑ መጠን ግንኙነቶቹም ባብዛኛው የሚመነጩት ከንግድና ከውል፣ ከአገልግሎት፣ ከሽያጭ ወዘተ. ነው:: ስለዚህም የግል ግንኙነቶች ከንግድ ግንኙነቶች ውጪ እንደሆኑ አድርገው ማሰብ ፈጽሞ ስሕተት ነው:: በመጨረሻም አንደርሰን ፎክስ እና ትዎሚ የተባሉት ፀሐፍት የግል ግንኙነቶች ይመነጩባቸዋል በማለት ያስቀመጡትን ጠቅለል ባለ መልኩ በመዘርዘር በግል ግንኙነቶች ላይ ተመሥርተው ስለሚቀርቡት መከላከያዎች ያለንን አስተያየት እናጠቃልላለን:-

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1. ማንኛውም በውል ላይ የተመሠረተ መከላከያ፣
2. ዕዳ ከፋዩ የሕግ ችሎታ እንደሌለው፣
3. ዕዳ ከፋዩ ሠነዱን የሰጠው ተታሎ መሆኑን፣

4. ለቼኩ መሰጠት ምክንያት የሆነው ዕዳ አስቀድሞ የተከፈለ መሆኑን ቼኩን ከሰጠ በኋላ መገንዘቡን፣
5. ለቼኩ መሰጠት ምክንያት የሆነው ውል መሠረዙን፣
6. ቼኩ ለአንድ ለተለየ ወይም ለታወቀ ዓላማ መሰጠቱን፣
7. ባለዕዳው ቼኩን ፈርሞ የሰጠው ተገዶ ወይም በተቀባዩ የኃይል ተግባር ምክንያት መሆኑን::[2]

2. በሠነዱ አጻጻፍ ፎርም የተመሠረተ መከላከያ

በሠነዱ አጻጻፍ ፎርም ላይ የተመሠረተ መከላከያ ማለት ሕግ ለሠነዱ አጻጻፍ የደነገገው ፎርም አለመሟላቱን የሚያመለክት መከላከያ ነው:: ሕግ ለሚተላለፉ ሠነዶች አስፈላጊ ያለውን ፎርም ዘርዝሮ አስቀምጧል:: በተለይም በን.ሕ.ቁ. 715(2) ሥር ዕውቅና ከተሰጣቸው ሶስት ዓይነት የሚተላለፉ ሠነዶች መጀመሪያ ላይ ለተጠቀሱት ማለትም በንግድ ወረቀትነት ለሚታወቁት ሠነዶች ሕግ አስፈላጊ ናቸው ያላቸውን ፎርሞች ደንግጓላቸዋል:: በዚሁ መሠረት አንድ የሚተላለፍ ሠነድ "የሐዋላ ወረቀት" (Bill of exchange) ነው ተብሎ ይወሰድ ዘንድ የግድ በንግድ ሕግ ቁጥር 735 ሥር የተጻፉትን አሟልቶ ይዞ መገኘት አለበት:: ይህ ካልተሟላ ወይም መፍትሔ ሰጭና ክፍተት ደፋኝ በሆነው የን.ሕ.ቁ. 736 መሠረት መፍትሔ ካልተገኘለት በስተቀር በሕግ እንደ ሐዋላ ወረቀት ተደርጐ ሊወሰድ አይችልም::

እንደዚሁ አንድ የሚተላለፍ ሠነድ እንደ ተስፋ ሠነድ (promissory note) ይወሰድ ዘንድ የግድ በን.ሕ.ቁ. 823 ሥር የተጻፉትን አሟልቶ ይዞ መገኘት አለበት:: ይህን ካላሟላ ክፍተቱ በን.ሕ.ቁ. 824 መሠረት መፍትሔ ካገኘ አገኘ ካላገኘ ግን ሠነዱ በሕግ እንደ ተስፋ ሠነድ አይቆጠርም::

በጎበረተሰባችን ውስጥ ከሌሎቹ የንግድ ወረቀቶች በተሻለ የሚታወቀውን ቼክንም ብንወስድ አንድ ሠነድ በሕግ በኩል ቼክ ነው ተብሎ ሊወሰድ የሚችለው በን.ሕ.ቁ. 827 እና 828 ሥር ተደንግገው ያሉትን፣ ማለትም:-

(ሀ) የተወሰነ ገንዘብ ለመክፈል ቅድመ ሁኔታ (ሐተታ) ያልተደረገበት ትዕዛዝ፣
(ለ) የሠነዱን ገንዘብ መክፈል ያለበትን (የሚገባውን) ከፋይ ስም፣
(ሐ) የሠነዱ ገንዘብ የሚከፈልበትን ቦታ፣
(መ) ሠነዱ የወጣበትን ቦታና ጊዜ፣
(ሠ) ሠነዱን ያወጣው ሰው ፊርማ፣

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[2] Ronald A. Anderson, Evan F. Fox, David P. P. Twomey, *Business Law: Principles, Cases, Environment*, Eight Edition, Flash UCC, South Western Publishing Co., Cincinnati, Ohio (1983). ከነዚህ በተጨማሪ፣ በን.ሕ.ቁ. 841 መሠረት ተከፋይ ቼኩን ሞልቶ የተሟላ ሰነድ እንዲያደርገው በሰጪው እና በተቀባይ መካከል ስምምነት ኖሮ ተቀባይ ቼኩን የሞላው ከስምምነታቸው ውጭ መሆኑን፣ እንዲሁም ቼኩ የተሰረቀ መሆኑን፣ መከላከያ አድርጐ ማቅረብ ይቻላል::

ይዞ (አሚልቶ) መገኘት አለበት። ካልተገኘም መፍትሔ ሰጭ በሆነውና ክፍተቶችን በሚሞላው በን.ሕ.ቁ. 828 (ሀ) እና (ለ) ሥር በተጻፈው መሠረት መሥፈርቶችን እንደሚያሟላ ካልተቆጠረ በስተቀር ሠነዱ እንደ ቼክ ሊቆጠር እንደማይችል በን.ሕ.ቁ. 828 መጀመሪያ ላይ ተደንግጐአል። ከዚህም የተነሳ በአንድ ቼክ ላይ በን.ሕ.ቁ. 827(ለ) መሠረት የከፋዩ ባንክ ስም ካልተጻፈበት ሠነዱ በሕግ እንደቼክ የማይቆጠር ስለሚሆን ዕዳ ከፋዩ እንደቼክ ተደርጐ የቀረበው ሠነድ በሕግ ለቼክ የተደነገገውን ፎርማሊቲ (ፎርም) ስለማያሟላ በሠነዱ ላይ የተመለከተውን ግዴታ ለመክፈል አልገደድም፣ ወይም ያልከፈልኩት በዚሁ ምክንያት ነው በማለት ሊከራከር ይችላል። በሌላም በኩል ባሁኑ ጊዜ በሀገራችን ውስጥ ካሉት ባንኮች ትልቁና ከአንድ መቶ ሰባ በላይ ቅርንጫፎች ያሉትን የኢትዮጵያ ንግድ ባንክን ብንወስድ ከፋዩን ለማመልከት በቼኩ ላይ "የኢትዮጵያ ንግድ ባንክ" የሚል ብቻ ተጽፎበት ቼኩ ለክፍያ መቅረብ ያለበት በየትኛው የኢትዮጵያ ንግድ ባንክ ቅርንጫፍ መሆኑ በን.ሕ.ቁ. 827 (ሐ) መሠረት ካልተገለፀ መፍትሔ ሰጭና ክፍተት ደፋኝ በሆነው በን.ሕ.ቁ. 828 (ለ) መሠረት እንደ ቼኩ መክፈያ ቦታ የሚቆጠረው የኢትዮጵያ ንግድ ባንክ ዋና መ/ቤት ይሆናል።

ያንድ ቼክ ከፋይ ባንክ ቅርንጫፎች ያሉት ከሆነ የባለቼኩ (የአውጪው) ሂሳብ ያለበት ቅርንጫፍ ስም በከፋዩ ስም አጠገብ ይጻፋል። ይህንኑ ተከትሎ መፍትሔ ሰጭና ክፍተት ደፋኝ የሆነው የን.ሕ.ቁ. 828(ሀ) ለአንድ ቼክ ልዩ የመክፈያ ቦታ ማመልከት እንደሚቻል (ለምሣሌ በን.ሕ.ቁ. 836 መሠረት) ይጠቁምና በከፋዩ ስም አጠገብ ይህ ልዩ የመክፈያ ቦታ ካልተጻፈ ግን በከፋዩ ስም አጠገብ የተጻፈው ቦታ፣ ለምሣሌ ከፋዩ አዋሽ ኢንተርናሽናል ባንክ ተብሎ ተጽፎ ባጠገቡ «ስታዲየም ቅርንጫፍ» ተብሎ ቢጻፍ የቼኩ መክፈያ ቦታ አዋሽ ኢንተርናሽናል ባንክ ስታዲየም ቅርንጫፍ ሆኖ እንደሚቆጠር፣ የን.ሕ.ቁ. 828(ሀ) ይደነግጋል። በሌላም በኩል ከፋዩ አዋሽ ኢንተርናሽናል ባንክ መሆኑ በቼኩ ላይ ተጽፎ በዚሁ ስም አጠገብ ኮልፌ፣ መርካቶ ቂርቆስ ወዘተ. ተብሎ የበርካታ ቦታዎች ስም ተዘርዝሮ ከሆነ የቼኩ መክፈያ ቦታ ተደርጐ የሚወሰደው በከፋዩ ስም አጠገብ በመጀመሪያ የተጻፈው ቦታ፣ ማለትም «ኮልፌ»፣ እንደ ቼኩ መክፈያ ቦታ ተደርጐ እንደሚወሰድ በዚሁ በን.ሕ.ቁ. 828(ሀ) ሥር በሁለተኛው ዓረፍተ ነገር ላይ ተጽፎ ይነበባል። እንግዲህ በን.ሕ.ቁ. 828 በ(ሀ) እና በ(ለ) ሥር በመፍትሔነት ከተደነገገው በስተቀር አንድ ቼክ በቅድመ ሁኔታ መፈጸም ላይ የተመሠረተ የገንዘብ ክፈል ትዕዛዝ ቢጻፍበት፣ ለምሣሌ «የበልግ ዝናብ የዘነበ እንደሆነ ክፈል ለአቶ 'ሀ' ወይም ላዘዘለት» ቢባል ይህ የተጻፈበት ሠነድ ሕግ ለቼክ የደነገገውን ፎርም ስለማያሟላ እንደ ቼክ አይቆጠርም ብሎ አውጪው በመቃወሚያነት ሊያቀርበው ይችላል። አውጪው ይህን በመቃወሚያነት የሚያነሳው አንድን ሠነድ ቼክ ለማሰኘት አስፈላጊ የፎርም መስፈርቶች ናቸው በማለት ሕግ በን.ሕ.ቁ. 827 ካስቀመጣቸው ነጥቦች መካከል አንዱ በዚሁ በቁ.827(ሀ) ሥር «የተወሰነ ገንዘብ ለመክፈል ሐተታ (ቅድመ ሁኔታ) የሌለበት ትዕዛዝ» መያዙ ነውና።

በን.ሕ.ቁ.ለ 827 ሥር የሠፈሩትን ሌሎቹን ትተን በ(ሠ) ላይ የተጻፈውንም ብንመለከት አንድን ሠነድ ቼክ ከሚያሰጉት አስፈላጊ ፎርማሊቲዎች «የአውጪው ፊርማ» በሠነዱ ላይ መታየቱ እንደመሆኑ መጠን ይህ ከሌለበት አንድ ሠነድ ከፎርም አኳያ እንደ ቼክ አይቆጠርምና ዕዳ ከፋዩ ይህንን የአውጪው ፊርማ አለመኖሩን ሕግ ለሠነዱ ፎርም የደነገገውን እንዳለማሟላት ጠቅሶ ለክራከርበት ይችላል። ነዘሁ ስሜት ለሐዋላ ወረቀቶች በን.ሕ.ቁ. 735 እና 736 ለተስፋ ሰነዶች ደግሞ በን.ሕ.ቁ. 823 የደነገገው አልተሟላም በማለት ሊከራከር ይችላል።

3. በሠነዱ ላይ በተጻፉት ቃላት (text) ላይ የተመሠረተ መቃወሚያ

ቀደም ሲል በን.ሕ.ቁ. 735 እና 736፣ 823 እና 824፣ እንዲሁም 827 እና 828 መሠረት በሐዋላ ወረቀቶች፣ በተስፋ ሠነዶችና በቼኮች ላይ ተጽፈው መታየት የሚገባቸው ነገሮች እንዳሉ አይተናል። እንደ ሠነዱ ዓይነትና መለያ ሕግ የሚጠይቃቸው ሁሉ ተሟልተው ካልተጻፉ ወይም ባይሟሉም ሕግ እንደተሟሉ ካልቆጠረ ሠነዶች እንደ ሐዋላ ወረቀት ወይም እንደ ቼክ ወይም እንደ ተስፋ ሠነድ እንደማይቆጠሩም ተመልክተናል።

በሠነዱ ላይ በተጻፉት ቃላት ላይ የሚመሠረቱት መከላከያዎች የቁ. 735፣ 823 እና 827 ድንጋጌዎች በሚያዘው መሠረት መጻፍ ያለባቸውን ቃላትና አገላለጾችን የሚመለከቱ ናቸው። ለምሣሌ ያህል በቁ. 735፣ 823 እና 827 በሶስቱም ሥር ሠነዱ የወጣበትን ቀን መጻፍ አስፈላጊ እንደመሆኑ መጠን አውጪው በሠነዱ ላይ የጻፈውን ቀን ከርሱ ሠነዱን የተቀበለው ሰው ወይም ሌላ ሰው በመቀየር ወይም ያለፈ ቀን ወይም የወደፊት ቀን በጽፍበት ዕዳ ከፋዩ ይህንኑ ጠቅሶ አምጪውን ሊከራከርበት ይችላል፣ ሠነዱ የወጣበት ቀን መቀየሩ ብዙ ነገሮችን ሊነካ ስለሚችል አውጪው ይህንኑ እንደ ትልቅ የመከራከሪያ ነጥብ ሊያነሳ ይችላል። (የን.ሕ.ቁ. 816፣ 879 እና 880 ይመልከቱ)

አውጪው በሠነዱ ላይ በን.ሕ.ቁ. 769(1) (ለ) መሠረት «ከቀረበ ከ3 ወራት በኋላ ክፈል ለአቶ 'ሀ' ወይም ላዘዘለት» ብሎ የጻፈውን አቶ 'ሀ' ወይም ሠነዱን ከአቶ 'ሀ' የተቀበለው ሰው በቁ. 769(1) (ሀ) ሥር በተጻፈው ማለትም «<u>እንደቀረበ</u> ክፈል ለአቶ 'ሀ' ወይም ላዘዘለት» ተብሎ እንዲነበብ ቢያደርግ ይህም ሁኔታ አውጪው በሠነዱ ላይ በተጻፉት ቃሎች ላይ የተመሠረተ መቃወሚያ ወይም መከላከያ እንዲያቀርብ ዕድል ይሰጠዋል።

በሠነዱ ላይ የተጻፈውን የገንዘብ መጠን በተመለከተም እንደዚሁ አውጪው ሳያውቀውና ምናልባትም ሳይፈቅድ ከፍና ዝቅ ሊደረግ ስለሚችል ተደርጉ ሲገኝ አውጪው ይህንን በሠነዱ ላይ በተጻፉት ቃሎች መከላከያነት ሊያነሳው ይችላል። ሆኖም የሐዋላ ወረቀቶችንና ቼኮችን በሚመለከት ከእነዚህ ሰነዶች ላይ የሚጻፈውን የገንዘብ መጠን

አገላለጽ አስመልክቶ የንግድ ሕጉ በቁጥር 740 እና 837 ላይ መፍትሔ ስለሰጠ ዕዳ ከፋዩ ይህንን ጠቅሶ እንዲከራከር ሊፈቀድለት አይገባም።

II

ከላይ የተገለጸው በንግድ ሕግ ቁ. 717 ንዑስ ቁ. (1) ላይ የተጻፈውን ድንጋጌ በሚመለከት ነው። ከዚህ ቀጥለን ደግሞ በንዑስ ቁ. (2) ላይ ስለሠፈረው ድንጋጌ በአጭሩ ለማብራራት እንሞክራለን። በዚህ ንዑስ ቁጥር ሥር ለዕዳ ከፋዩ መከላከያነት የተጻፉት ነጥቦች አራት ራሳቸውን የቻሉ ነጥቦች ሲሆኑ እነርሱም፡-

(1) ፊርማን በማስመሰል የተሠራ፣
(2) ችሎታ፣
(3) ሠነዱ ሲወጣ የወከልና ሥልጣን ያለመኖሩ፣ እና
(4) ክስ ለማቅረብ አስፈላጊ የሆኑት ሁኔታዎች ያለመሟላታቸው፣ የሚሉት ናቸው።

እነኚህን አንድ በአንድ እንመለከታቸዋለን።

1. ፊርማን በማስመሰል የተሠራ

በሚተላለፉ ሠነዶች ላይ ፊርማ ትልቅ ሚናን ይጫወታል። የሚተላለፉ ሠነዶች የተጻፉ ሠነዶች ስለሆኑ ተዋዋዮቹ በተለይም ደግሞ ተስፋ ወይም ትዕዛዝ በመስጠት ግዴታ ውስጥ የገባው ወገን ፊርማውን በሠነዱ ላይ ማስቀመጡ አስፈላጊ ነው። ቀደም ሲል ከሠነዶች አጻጻፍ ፎርም አኳያ በን.ሕ.ቁ. 735፣ 823፣ እና 827 ሥር የተመለከቱትን ስናይ በሠነዱ ላይ የአውጪው ፊርማ ከሌለ ሠነዱ በሕግ የሐዋላ ወረቀት፣ የተስፋ ሠነድ፣ ወይም ቼክ ተብሎ ሊወሰድ እንደማይችል ተመልክተናል። ከዚህም ሌላ የንግድ ወረቀቶችን አስመልክቶ በን.ሕ.ቁ. 734 ሥር «በንግድ ወረቀት ላይ የተደረጉ ማስታወቂያዎች (ዲክላራሲዮን)» እነዚሁኑ ማስታወቂያዎች የሰጠው ሰው የእጅ ጽሑፍ ፊርማ ሊኖራቸው እንደሚገባ ተደንግጎአል። በንግድ ሕግ ቁጥር 741 እና 742 እንዲሁም 838 እና 839 ሥር የተጻፉትንም ስንመለከት ሰዎችን በንግድ ወረቀቶች ተገዳጅ የሚያደርጋቸው ፊርማቸው በሠነዱ በስተፊት ወይም እንደሁኔታው በጀርባ ላይ መታየቱ ሲሆን ከነኚሁ ቁጥሮች እንደምንረዳው ፊርማው በሠነዱ ፊት ወይም ጀርባ የሚታየው ሁሉ በፊርማው ላይገደድ እንደሚችል ነው። ታዲያ በፊርማቸው ላይገደዱ ከሚችሉት ሰዎች መካከል በሠነዱ ላይ የሚታየው ፊርማ የኔን ፊርማ በማስመሰል የተቀመጠ እንጂ እውነተኛ የኔ ፊርማ አይደለም በማለት መከራከር ሊኖር እንደሚችል በእነኝህ ቁጥሮች ላይ ተደንግጎ ይስተዋላል። በሠነዱ ዋና ባለዕዳ የሆነው አውጪ ደግሞ እንደ አውጪ ፊርማ የተቀመጠው የኔ ፊርማ አይደለም በማለት መከራከር መቻሉን የን.ሕ.ቁ. 717(2) በግልጽ ያስቀምጣል። ፊርማው

የባለዕዳው ሳይሆን ሲቀር ባለዕዳው ለሠነዱ መውጣት እና በሠነዱ ውስጥ ለተነገረው ግዴታ ፈቃዱን እንደሰጠ አይቆጠርም። ይህም በመሆኑ የፊርማን መካድ መከላከያ እንደጠንካራ መከላከያ ይወሰዳል።

2. ችሎታ

በን.ሕ.ቁ. 717(2) ሥር ዕዳ ከፋዩ በመከላከያነት ሊያነሳ እንደሚችል የተመለከተው ሌላው ነጥብ የችሎታን ነጥብ ነው። በዚህ በቁ. 717(2) ሥር የተጻፈው የችሎታ ነጥብ ውል የመዋዋል ችሎታን የሚመለከት ነጥብ ነው። ይህንኑ ተከትለን በን.ሕ.ቁ. 733 ሥር ስለንግድ ወረቀቶች የተጻፈውን ብንመለከት ማንኛውም በውል ለመገደድ ችሎታ ያለው ሰው በንግድ ወረቀትም መገደድ እንደሚችል ተደንግጐ እናገኛለን። በፍትሐ ብሔር ሕግ መሠረት አንድ ሰው በአንድ ውል የማይገደደው ከዕድሜው የተነሣ፣ ከአእምሮው ጤና ማጣት የተነሣ ወይም ከቅጣት የተነሣ ሲሆን ምናልባት የልዩ ችሎታ ጉዳይ ከሆነ ደግሞ ከዜግነቱ ወይም ከሚሠራው ተግባር የተነሣ መሆኑን እንገነዘባለን።[3] እናም በቁ.717/2/ መሠረት አንድ ዕዳ ከፋይ በሠነዱ ላይ የሚታየው ፊርማ የኔ ቢሆንም አካለ መጠን ባለመድረሴ ምክንያት በሠነዱ ውስጥ በተመለከተው እና በኔ በተፈረመው ግዴታ አልገደድም ማለት ይችላል።[4] በሌላም በኩል የሠነዱ አውጪ የአእምሮ ሕመምተኛ መሆኑንና የፍርድ ክልከላ እንደተደረገበት እና ከዚህም የተነሣ በሠነዱ ላይ የሚታየው ፊርማ ችሎታ በሌለው ሰው የተፈረመ ስለሆነ እንደማይገደድበት ጠቅሶ ሊከራከር ይችላል።[5] እንዲሁም፣ በን.ሕ.ቁ. 741 እና 742 አልፎም 838 እና 839 ሥር ተደንግጐ በሚነበበውም መሠረት በችሎታ ማጣት ምክንያት ሰዎች በሠነዶች ላይ በሚታዩት ፊርማዎቻቸው ላይገደዱ እንደሚችሉ ተጽፎአል።

3. ሠነዱ ሲወጣ የውክልና ሥልጣን ባለመኖሩ

ሌላው በን.ሕ.ቁ. 717(2) ሥር ለዕዳ ከፋዩ መከላከያነት የተቀመጠው ሌላው ነጥብ ሠነዱ ሲወጣ የውክልና ሥልጣን ያለመኖሩን ጠቅሶ የመከራከሩ ነው። በዚህ ነጥብ መሠረት ዕዳ ከፋዩ የሚያነሳው መከላከያ እንደ እኔ ሆኖ፣ እኔን ወክሎ በሠነዱ ላይ የፈረመው ሰው ይህን ሲያደርግ የውክልና ሥልጣን አልነበረውም፣ ሠነዱ ተፈርሞ ከወጣ በኋላም ቢሆን የፈራሚውን ያለውክልና ሥልጣን መሥራት ተቀባዩ አላፀደቅሁትም፣ በመሆኑም የውክልና ሥልጣን ሳልሰጥ እንደሺሚ ተደርጌ የቀረብኩት እኔ እዳ ከፋይ አልገደድም በማለት ሊከራከር እንደሚችል የሚያስገነዝብ ነጥብ ነው። በን.ሕ.ቁ. 742 እና 839 ሥር የተዛፈውን ስንመለከት እንደሺሚ ተደርጐ የቀረበው ባለዕዳ በንግድ ሕግ ቁ. 717(2) መሠረት ተከላክሎ ከመገደድ ነፃ ቢወጣ የውክልና ሥልጣን ሳይኖረው ወኪል ነኝ በማለት በሐዋላ ወረቀት

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[3] የፍትሐ ብሔር ሕግ ቁ. 193 እና 194 ይመልከቱ።
[4] የፍ.ብ.ሕ.ቁ. 198 እና 313 ይመልከቱ።
[5] የፍ.ብ.ሕ.ቁ. 351 እና 380 ይመልከቱ።

ወይም በቼክ ላይ የፈረመው ሰው እርሱ እራሱ ተገዳጅ መሆኑን እንገነዘባለን። እንዲሁም አንድ ወኪል ከተሰጠው ሥልጣን በላይ ሄዶ በሐዋላ ወረቀት ወይም በቼክ ላይ ቢፈርም ሿሚው ድርጊቱን ካልተቀበለለት በስተቀር ከሥልጣኑ አልፎ የፈረመው ወኪል በፊርማው እንደሚገደድም ይነግሩናል።

4. ክስ ለማቅረብ አስፈላጊ ቅድመ ሁኔታዎች አለመሟላታቸው

በን.ሕ.ቁ. 717/2/ ሥር ከተነሱት መቃወሚያ ነጥቦች የመጨረሻው ክስ ለማቅረብ አስፈላጊ ቅድመ ሁኔታዎች ያለመሟላታቸውን የሚመለከተው ሲሆን በዚህ የመቃወሚያ ነጥብ ላይ ተመሥርቶ ዕዳ ከፋዩ ሊያነሳው የሚችለው በዋናነት የእምቢታ ማስታወቂያ ማሠራት አስፈላጊ ሆኖ እያለ የአመልቺው የእምቢታ ማስታወቂያውን ያለማሠራቱን ይሆናል። በን.ሕ.ቁ. 780 እና ተከታታዮቹ ላይ በተመለከተው መሠረት የአንድ የሚተላለፍ ሠነድ አመልቺ የሠነዱ የመክፈያ ጊዜ ደርሶ ሳይከፈለው ቢቀር ወይም የሠነዱ የመክፈያ ጊዜ ባይደርስም ሠነዱን ለአሸታ አቅርቦ እሺታ በከለከል እንደሁኔታው የመክፈል ወይም የእሺታ እምቢታ ማስታወቂያ (protest) ማሠራት ይኖርበታል።

በን.ሕ.ቁ. 789 ሥር እንደተግፈው በሠነዱ ላይ ያለእምቢታ ማስታወቂያ ክስ የሚቀርብበት ካልሆነ በስተቀር ክስ ለማቅረብ የእምቢታ ማስታወቂያን ማሠራት እንደአስፈላጊ ቅድመ ሁኔታ ይወሰዳል። በመሆኑም አመልቺው የእምቢታ ማስታወቂያውን ሳያሠራ ክስ ቢመሠርት ዕዳ ከፋዩ ይህንኑ ጠቅሶ ሊከራከር እንደሚችል የን.ሕ.ቁ. 717(2) መብት ይሰጠዋል።

III

በመጨረሻም፣ በንግድ ሕግ ቁ. 717 ንዑስ ቁ. (3) ሥራ የተጻፈውን ባጭሩ ለማየት እንሞክራለን። ምናልባት ነገሮችን ግልጽ እንዲያደርጋቸው ይህን በንዑስ ቁ. (3) ሥር የተጻፈውን እራሱን አስፈላጊውን ለውጥ በማድረግ መጻፍ ጠቃሚ ነው ብዬ አምናለሁ። አስፈላጊው ለውጥ ሲደረግበትም እንደሚከተለው ሊጻፍ ይችላል።

> «አመልቺው ሠነዱን ባገኘበት ጊዜ ዕዳ ከፋዩን ለመጣዳት እያወቀ ያደረገው (ሠነዱን የተቀበለ) ካልሆነ በስተቀር ዕዳ ከፋዩ በራሱ እውቅና ካሁኑ አመልቺ በፊት ሠነዱን ይዘው በነበሩት ሰዎች መካከል ያሉትን በግል ግንኙነቶች ላይ የተመሠረቱትን መከራከሪያዎች ጠቅሶ ያሁኑን አመልቺ መከራከር አይችልም።»

ቀደም ሲል ስለ ን.ሕ.ቁጥር 717(1) ድንጋጌ በምናወሳበት ጊዜ፣ ዕዳ ከፋዩ በርሱና ባመልቺው መካከል ባሉት የግል ግንኙነቶች ላይ ተመሥርቶ ሊከራከር እንደሚችል ተገንዝበናል። እንዲያውም የን.ሕ.ቁ.

717(3) ድንጋጌ ባምጪዎች መካከል ልዩነት እንዳለ ለመገንዘብ እንደሚረዳም ተመልክተናል። ለማንኛውም የን.ሕ.ቁ. 717(3) ድንጋጌ ሊያስተላልፈው የፈለገው መልዕክት በመሠረቱ በዕዳ ከፋዩና ከአሁኑ አምጪ በፊት ሠነዱን ይዘው በነበሩት ሰዎች መካከል የግል ግንኙነት ሊኖር ቢችልም በአውጪው እና ከአሁኑ አምጪ በፊት ሠነዱን ይዘው ከነበሩት ሰዎች መካከል ከአንደኛው ጋር ያለውን የግል ግንኙነት ጠቅሶ የአሁኑን አምጪ መከራከር እንደማይችል ነው። በሌላ አነጋገር ዕዳ ከፋዩ በመሠረቱ ከሌላ ጋር ያለውን የግል ግንኙነት ስለዚያ ግንኙነት ሳያውቅ ሠነዱን በተቀበለው በአሁኑ አምጪ ላይ እንዳያነሳ የሚከለክል ድንጋጌ ነው፣ የቁጥር 717(3) ድንጋጌ።

ቀደም ሲል እንዳየነው፣ በ ቁ. 713(3) ድንጋጌ መሠረት ባለዕዳው በአሁኑ 3ኛ፣ 4ኛ ወይም 5ኛ ሰው አምጪ ላይ ከቀደሙት ሰዎች ጋር ያለውን በግል ግንኙነቶች ላይ የተመሠረተውን መከላከያ ጠቅሶ እንዲከራከር በልዩነት ተፈቅዶለታል። ይህም የሚሆነው የአሁኑ አምጪ ሠነዱን ከሰጠው ሰው ሲቀበል መመሳጠር ካለ ነው። በሌላ አነጋገር ሠነዱን ለመጨረሻው አምጪ የሰጠው ሰው ለዕዳ ከፋዩ መወጣት ያለበትን የውል ግዴታ አለመወጣቱን፣ ከዚህም የተነሳ ሠነዱን ለአሁኑ አምጪ ያስተላለፈለት ዕዳ ከፋዩ ገንዘቡን ለ3ኛው ሰው ሲከፍል የሚገኘውን ገንዘብ ለመካፈል ወይም ኮሚሽን ለማግኘት ወይም እንዲሁ ዕዳ ከፋዩን ለመጉዳት በማሰብ ከሆነ ዕዳ ከፋዩ በርስና ሠነዱን ለመጨረሻው (ለአሁኑ) አምጪ በሰጠው ሰው መካከል ያለውን በግል ግንኙነቶች ላይ የተመሠረተውን በመከላከያነት በአሁኑ አምጪ ላይ ሊያነሳው ይችላል። ቀደም ሲል ለማመልከት እንደተሞከረው፣ የቁጥር 717(3) ድንጋጌ በመከላከያነት የሚያገለግለው ቅን ልቡና በጐደለው መልኩ ሆን ብለው ዕዳ ከፋዩን ለመጉዳት ተመሳጥረው ነገር ግን የዋህ ሠነድ አምጪ መስለው የሚመጡትን ለመቃወም እና የቅን ልቡና አምጪዎችን ለመደገፍ ነው።

ፌደራል ጠቅላይ ፍርድ ቤት
የፍትሐ ብሔር ችሎት

<u>ይግባኝ ባይ</u>፡- ክፍሉ ወ/ሚካኤል

<u>መልስ ሰጭ</u>፡- ኮሸመ ገብሩ

<u>የፍ.ብ.ይ.መ.ቁ. 2249/88</u>

ስለሚተላለፉ የገንዘብ ሰነዶች - የቼክ ባለዕዳ የሆነ ወገን ሊያቀርባቸው ስለሚቻለው መከላከያዎች - የን.ሕ.ቁ.716 እና 827፡፡

ይግባኙ የቀረበው ይግባኝ ባይ የ6,100 ብር ቼክ ከሰጠኝ በኋላ ክፍያው እንዳይፈፀም ትዕዛዝ ስላስተላለፈ ይህንኑ ገንዘብ ሊከፍለኝ ይገባል በማለት መልስ ሰጭ ላቀረበበት ክስ ይህንኑ ቼክ ፈርሜ ለመልስ ሰጭ የሰጠሁት ረጅም ጊዜ የቆየ የንግድ ግንኙነት ስለነበረን መሆኑን ላስረዳ በማለት መልስ ሰጭ ያቀረበውን መከላከያ የሥር ፍ/ቤት ቼክ ያለምንም ቅድመ ሁኔታ የታዘዘው ገንዘብ እንዲከፈል መብት የሚሰጥ ተላላፊ የገንዘብ ሰነድ እንደመሆኑ ያልተከፈለው በዚህ ምክንያት ነው የሚለው ክርክር ተቀባይነት የለውም በማለት ውድቅ አድርጐ ክስ የቀረበበትን ገንዘብ እንዲከፍል የሰጠውን ውሣኔ በመቃወም ነው፡፡

<u>ው ሣ ኔ</u>፡- የሥር ፍ/ቤት የሰጠው ውሣኔ ተሽሮአል፡፡

ው ሣ ኔ

<u>ዳኞች</u>፡- አሰግድ ጋሻው፣ ሆሣዕና ነጋሽ፣ ጌታቸው ምህረቱ፡፡

ይግባኝ ቅሬታው በ4/11/1987 ዓ.ም. በተጻፈ ማመልከቻ የቀረበው የክልሉ 14 ዞን ፍ/ቤት በ10/9/1987 ዓ.ም. በፍ/መ/ቁ/877/87 ላይ የሰጠውን ውሣኔ በመቃወም ለማስገልበጥ በመጠየቅ ነው፡፡ በዚያ ፍ/ቤት መልስ ሰጭ ከሣሽ ይግባኝ ባይ ተከሣሽ ነበሩ፡፡ በ22/3/1987 ዓ.ም. ቀርቦ የነበረው ክስ ተከሣሽ ቁጥሩ ቢ.ኤ.049872 በሆነ ቼክ ላይ ብር 10,000.00 (አሥር ሺህ ብር) ተመንዝሮ ለተከሣሽ እንዲሰጥ ለኢትዮጵያ ንግድ ባንክ ትዕዛዝ ከሰጠ በኋላ ክፍያው እንዳይፈፀም ትዕዛዝ በማስተላለፉ ገንዘቡ ሳይከፈል ቀርቷል፡፡

ስለዚህ ተከሳሽ ብር 10,000.00 (አሥር ሺህ ብር) ዋጋ ያለው ቼክ ጽፎና ፈርሞ ከሰጠ በኋላ ሊከፍል ባለመቻሉ ገንዘቡን ከወለድ ከወጪና ኪሣራ ጋር ጨምሮ እንዲከፍል የሚጠይቅ ነው።

ተከሣሽ ክሱን ለመከላከል እንዲፈቀድለት በ12/5/1987 ዓ.ም. ባቀረበው ማመልከቻ ለሚካሄደው የልኳንዳ ዕርድ የሚሆኑ ከብቶችን ከሣሽ ለረጅም ጊዜ የሚያቀርብልኝ በመሆኑ በሥራው ላይ የተመሠረተ ግንኙነት አለን፣ በቼኩ ላይ ከተገለጸው ገንዘብ ብር 6,100.00 (ስድስት ሺህ አንድ መቶ ብር) ለከሣሽ የተሰጠው የዕርድ ከብቶች እንዲያቀርብበት ነው። ቀሪውንም በተከሣሹ ዋስትና ከሣሽ ለሌላ ሰው ለሰጠው ለከብቶች ዋጋ እንዲውል ነው በማለት የጽሑፎች ማስረጃ በማቅረብና ምሥክር በመጥቀስም ለማስረዳት እንደሚችል አመልክቷል።

የዘኑ ፍ/ቤትም ቼክ ተላላፊ የገንዘብ ሰነድ እንደመሆኑ መጠን ያለምንም ቅድመ ሁኔታ ወይም ሐተታ በቼኩ ላይ የተገለጸው ገንዘብ እንዲከፍል መታዘዙ የቼክ ዓይነተኛ ባሕሪ በመሆኑ በማናቸውም ሁኔታ ክፍያው ባይፈፀም ክስን መመሥረት የሚቻል ሲሆን ገንዘቡ ያልተከፈለው በዚህ ምክንያት ነው የሚለው ክርክር ተቀባይነት የለውም በማለት ተከሣሽ ለመከላከል አይፈቀድለትም በማለት ክስ የቀረበበትን ገንዘብ ከወለድና እንዲሁም ወጪና ኪሣራ ጋር እንዲከፍል ፈርዶበታል።

የይግባኝ ቅሬታውም የቀረበው ይህንኑ ፍርድ ለማስለወጥ ነው። መልስ ሰጭም የቀድሞ ክርክሩን በማጠናከር ፍርዱ ሊፀና እንደሚገባው በ24/1/1989 ዓ.ም. መልስ አቅርቧል። በመልሱም ላይ ይግባኝ ባይ በንግድ ሕግ ቁጥር 827 መሠረት የቼኩን ሰነድ ለመቃወም አልቻሉም። በሰውና በሰነድ ማስረጃ ለማስረዳት ያቀረበውም ክርክር አግባብነት የሌለው ነው በሚል ተከራክሯል። ይግባኝ ባይ በዘኩለ በ2/3/1989 ዓ.ም. በሰጠው የመልስ መልስ በይግባኝ ባይና በመልስ ሰጭ መካከል ያለው የንግድ ግንኙነት አለመካዱን፣ ቼክ የተሰጠበት ሰዓና ምክንያትም እንዳልተካደና ይግባኝ ባይ ለማስረዳት በማስረጃነት ያቀረበው ሰነድና ምሥክሮች በሕግ ያልተከለከሉ ስለመሆናቸው በማስረዳት ውሣኔው መሻር የሚገባው ስለመሆኑ ተከራክሯል።

እኛም ክርክሩን መርምረናል። ከሕግ ጋር አገናዝበን አይተናል። ይግባኝ ባይ ለክሱ የመከላከያ ማስፈቀጃ ማመልከቻ ላይ ክሱን በንግድ ሕግ ቁጥር 716 መሠረት ለመከላከል የሚያስችለውን ከመልስ ሰጪው ጋር በልኳንዳ ንግድ ሥራ ምክንያት የቆዩ የሥራ ግንኙነት ያለው መሆኑን በመግለጽ ይህንም የሚያስረዳለት በ25/10/1986 ዓ.ም. የተደረገ ውል ፎቶ ኮፒ አቅርቦ አስረድቷል። በውሉም ላይ ይግባኝ ባይና መልስ ሰጭ በየገዟው ከብቶች እየተገበያዩ የቆዩ ለመሆኑ ተገልጿል። ይህም የከብት ገበያ ከልኳንዳ ሥራ ጋር የተገናኘና የመልስ ሰጭም ሥራ የልኳንዳ ሥራ ስለመሆኑ ገልጾ ያስረዳ ሲሆን በመልስ ሰጭ አባባሉ አልተካደም። መልስ

ሰጭ በንግድ ሕግ ቁጥር 827 መሠረት ብቻ መቃወሚያውን ማቅረብ እንደማይቻል ቢገልጽም የዚህ ሕግ የቼክ ሰነዱን ዋጋ ወይም ሕጋዊነት የሚመለከት በመሆኑና ይልቁንም በንግድ ሕ.ቁ. 716 ላይ በተሰራጣሪ ወገኖች የግል ግንኙነት ካለ ክስን ለመከላከል እንደሚፈቀድ ስለተመለከተ የመልስ ሰጭ ክርክር አግባብነት የሌለው ነው። ፍ/ቤቱም ይህን ተቀብሎ መወሰኑ የሚገባ ሆኖ አልተገኘም። ስለሆነም ይግባኝ ባይ ክሱን ለመከላከል መብት ያለው ስለሆነ ሊፈቀድለት የሚገባ ሆኖ ተገኝቷል። መከላከል የሚገባው ግን ያላመነውንና ለመከላከል ፈቃድ እንዲሰጠው የጠየቀበትን የብር 6,100.00 (ስድስት ሺህ አንድ መቶ ብር) ብቻ በተመለከተ ነው። የብር 3,900.00 (ሦስት ሺህ ዘጠኝ መቶ ብር) በሚመለከት ግን ይግባኝ ባይ ለመልስ ሰጭው ለመስጠት ፈቃደኛ መሆኑን፣ ይግባኝ ባይ ሊቀበለው እንዳልቻለ የገለጸ በመሆኑ ምክንያት ዕዳውን ያመነ ስለሆነ ይህን ገንዘብ ለመልስ ሰጭው በፍ.ሥ.ሥ.ሕ.ቁ. 286 መሠረት ይከፍላል።

በአጭሩ ይግባኝ ባይ ብር 3,900.00 (ሦስት ሺህ ዘጠኝ መቶ ብር) ለመልስ ሰጭ ይክፈል፣ የብር 6,100.00 (ስድስት ሺህ አንድ መቶ ብር) ክርክሩን በተመለከተ በዞን ፍ/ቤት የቀረበበትን ክስ ይከላከል በማለት የዞኑን ፍ/ቤት ውሣኔ በፍ.ሥ.ሥ.ሕ.ቁ. 348(1) መሠረት አሻሽለን ፈርደናል። የዞኑን ፍ/ቤት የተካው የፌ/መ/ደ/ፍ/ቤት·ም ጉዳዩ ሲቀርብለት በተፈረደው መሠረት አከራክሮ መወሰን እንዲችል የውሣኔው ግልባጭ ይተላለፍ ወጪና ኪሣራ ይቻቻሉ።

መዝገቡ ተዘግቷል። ወደ መዝገብ ቤት ይመለስ። ጎዳር 22 ቀን 1993 ዓ.ም.

ጠቅላይ ፍርድ ቤት
ሰበር ሰሚ ችሎት

<u>አመልካች</u>፡- አቶ መርሐጽዮን ነጋ

<u>መልስ ሰጭ</u>፡- አቶ ነጋ በላይ

<u>የሰ.ሰ.ች.ፍ.መ.ቁ. 262/83</u>

በቼኮች ላይ ስለሚቀርቡ መቃወሚያዎች፡- መቃወሚያን ስለማስተባበል፡- የንሕ.ቁ.717

በሁለት ቼኮች ብር 600,000 ፊርሞ ስለሰጠኝ ዕዳውን ሊከፍለኝ ይገባል በማለት መልስ ሰጭ ያቀረቡትን ክስ ከፍተኛው ፍርድ ቤት ክርክር ባስከተለው ጋራዥ ምክንያት ካላቸው ግንኙነት ውጭ አመልካችን በቼክ ባለዕዳ የሚያደርግ ማስረጃ አላቀረቡም በማለት ውድቅ ሲያደርግባቸው ጠቅላይ ፍ/ቤት ግን ያቀረቡትን ይግባኝ ተቀብሎ አመልካቹ በቼኮች ፎርም ላይ ያቀረበው መከራከሪያ ባለመኖሩ የማይከፍልበት ምክንያት የለም በማለት ስለሻረው መሠረታዊ የሕግ ስህተት ተፈጽሟል በማለት በአመልካች የቀረበ አቤቱታ ነው፡፡

<u>ውሳኔ</u>፡- የጠቅላይ ፍርድ ቤት ውሳኔ ተሽሯል፡፡

<u>ዳኞች</u>፡- አሰፋ ሊበን፣ ዓለማየሁ ኃይሌ፣ ጌታቸው አፍራሣ፣ ጥላሁን ተሾመ፣ ተስፋዬ ኃይለ ማርያም፡፡

አመልካች ግንቦት 13 ቀን 1983 ዓ.ም. በተጻፈ ማመልከቻ ጠቅላይ ፍርድ ቤት በፍ.ይ.መ.ቁ. 1092/81፣ በፍ.ይ.መ.ቁ. 1093/81 እና በፍ.ይ.መ.ቁ. 1258/81 ሦስት ይግባኞች በማጣመር ሚያዝያ 29 ቀን 1983 ዓ.ም. በሰጣቸው ውሳኔዎች ላይ የሰበር አቤቱታ አቅርቦ ከእነዚህ ውስጥ በሰበር ችሎት እንዲታይ የተፈቀደለት በአንዱ ይግባኝ በተሰጠው ውሳኔ ላይ በመሆኑ፣ ችሎቱ በዚህ ላይ የቀረበውን ክርክር ተመልክቶ ቀጥሎ ያለውን ውሳኔ ሰጥቷል፡፡

ው ሣ ኔ

በዚህ ጉዳይ በሁለቱ መካከል ክርክር የተነሳው በአንድ ጋራዥ ባለቤትነት ነው። አመልካቹ የመልስ ሰጭው የወንድማቸው ልጅ ሲሆን አሳቱ አባት ሆነው ያሳደጉትና በስማቸውም የሚጠራ ነው። ጋራዡን መልስ ሰጭ በገንዘባቸው ያቋቋሙት ሲሆን የተመዘገበው በአመልካቹ ስም ነው።

ሁለቱ ወገኖች በጎዳር 1976 ዓ.ም. መተማመኛ ሰነድ ተብሎ በተፈራረሙት ስምምነት አመልካቹ ለመልስ ሰጭው ጋራዥ የተቋቋመበትን ገንዘብ ብር 232,000 ከድካማቸው ዋጋ ብር እስከከፈላቸው ድረስ መልስ ሰጭው ይዘው እንዲጠቀሙበት፣ አስፈላጊም ከሆነ ሸጠው ሀብታቸውን ማግኘት እንደሚችሉ ተስማምተዋል።

ተከራካሪዎቹ በቀረበ ተደራራቢ ዝምድና የተሳሰሩ እንደመሆናቸው በመተማመን ሲሰሩ ቆይተው አመልካቹ ለመልስ ሰጭው ውክልና በመስጠት ጭምር ለተወሰኑ ዓመታት ሁለቱም አብረው ሲሰሩ ቆይተው በመካከላቸው በተፈጠረው አለመግባባት መልስ ሰጭው በአመልካች ላይ፣ 1ኛ/ ለጋራዥ ማቋቋሚያ በወጣው ብር 232,000 ገንዘብ፣ በድካም ዋጋና በጋራዥ በተገኘ ገቢና ንብረት፣ 2ኛ/ በሁለት ቼኮች ደግሞ በብር 600,000 ክስ ሲያቀርቡ፣ አመልካች በበኩሉ ከጋራዡ በተገኘ ገቢ የእንተሳሰብ ክስ በመልስ ሰጭው ላይ አቅርቦ ነበር።

ክፍተኛው ፍርድ ቤት መልስ ሰጭ ጋራዡ በተቋቋመበት ገንዘብና በአንዳንድ የጋራዡ ሃላቦችና ንብረቶች ያቀረቡትን ክስ በመቀበል ለለድካም ዋጋ የቀረበውን መጠን በማሻሻል ፍርድ ሲሰጥላቸው በቼክ የቀረበውን ክስ ግን አመልካቹ በሁለቱ መካከል የነበረውን የጠበቀ ግንኙነት በማስረዳቱና በጋራዡ ካላቸው ግንኙነት ውጪ መልስ ሰጭው አመልካችን በቼክ ባለዕዳ የሚያደርግ ማስረጃ ባለማቅረባቸው ውድቅ ሲያደርግ አመልካች በእንተሳሰብ ያቀረበውንም ክስ ሰርዞታል። መልስ ሰጭው በሁለት ቼኮች ባቀረቡት ክስ አመልካቹ በቼኮቹ ፎርም ያቀረበው መከራከሪያ ባለመኖሩ የማይከፍልበት ምክንያት የለም በማለት ጠቅላይ ፍርድ ቤት ለመልስ ሰጭ መስኖ የከፍተኛውን ፍርድ ቤት ውሳኔ የሻረው ሲሆን በቀሩት ሁለት ይግባኞች የከፍተኛውን ፍርድ ቤት ውሳኔ አጽንቷል። የሰበር አቤቱታ የቀረበውም በነዚህ ሦስት ውሳኔዎች ላይ ነበር። ነገር ግን ከእነዚህ ውስጥ ለሰበር ችሎት የተመራው በሁለት ቼኮች በብር 600,000 ክስ ቀርቦ ውሳኔ በተሰጠበት ላይ ስለሆነ በዚሁ ላይ የተካሄደውን ክርክር እንመለከታለን።

አመልካች በነዚህ ቼኮች ላይ በተነሳው ክርክር የጠቅላይ ፍርድ ቤት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት አለበት በማለት ለሰበር ያቀረበው አቤቱታ ከዚህ በታች ያለው ነው።

አመልካች፣ መርሐጽዮን ነጋ ጋራዥ ተብሎ በስሙ ለሚጠራው ድርጅት ባለስምና ባለቤት በመሆኑ ለዚህ ጋራዥ ብር 232,000 ላበደሩት ለአባቱ ለአቶ ነጋ በላይ (መልስ ሰጭ) ጋራዡን እንዲያስተዳድሩና ገንዘባቸው ተመልሶላቸው እስካለቀ ድረስ ጋራዡን በመያዣ እንዲይዙ አመልካች መተማመኛ ሰነድ የሰጠ ከመሆኑም በላይ ሙሉ ውክልና ሰጥቶ ስለነበር የቼክ ደብተር ሳይቀር በባዶ ቼክ ላይ ፊርማ ይሰጣቸው ነበር። በሰጣቸው ባዶ ቼክም ላይ መልስ ሰጭ በራሳቸው ጽሑፍ የተከፋይ ስም፣ የገንዘብ መጠን፣ የመክፈያ ቀን እየጻፉ ቼክ ያወጡ ነበር። አመልካች በመልስ ሰጭ አንዳንድ አሠራር ቅር በመሰኘት በብድር ገንዘብ በስመ የተቋቋመውን ጋራዥ ሊወስዱበት በማሰብ ያልተጠበቁ ድርጊቶችን በመፈጸማቸውና በብዙ መንገዶች አመልካችን በማወካቸው ውክልናቸውን ሊሽርና በስምምነታቸው መሠረት ተፈጽሞ ግንኙነታቸው እንዲቋረጥ ለማድረግ ሂሣብ እንዲያደርጉ ክስ እንዲያቀርብ ተገድዷል። በዚህ መካከል በራሳቸው ጽሑፍ እየሞሉ ገንዘብ ከማያገዘቡበት ቼኮች ውስጥ አመልካች አምኖ የሰጣቸውን ሁለት ቼኮች በአንዱ ብር 200,000፣ በሌላው ብር 400,000 በሌላ ሰው ጽሑፍ በማስሞላት በፍትሐብሔር ለዚህ አቤቱታ መነሻ የሆነውን ክስ አቀረቡ። በወንጀልም አቤቱታ አቅርበው ክስ እንዲመሠረት አስደረጉ። አመልካች ቼኮቹን ባዶውን እየሰጣቸው በራሳቸው ጽሑፍ ሳይቀር እየሞሉ ይሠሩበት እንደነበረ ለማስረዳት ቼክ በማቅረብ በራሳቸው ምስክርነት ጭምር የወንጀሉ ክስ ተሰረዘ። እነዚህ ሁለት ቼኮች ቁጥር PB 1123018 እና PB 1123017 ሲሆኑ ፊርማው በባዶ ቼክ ላይ በአመልካች የሰፈረና ጽሑፉ መልስ ሰጭ ያስጻፉት ሲሆን፣ ከእነኝህ ቼኮች ጋር በአንድ ደብተር ያሉት ቼኮች ደግሞ መልስ ሰጭ በራሳቸው የእጅ ጽሑፍ እየሞሉ ሲያንቀሳቅሱት የነበረ ነው። የፍትሐብሔሩን ክስ በሚመለከት እነኝህ ቼኮች በዚሁ በጋራዥ ምክንያት ባለው ውዝግብ መልስ ሰጭው በሀሰት የሞሏቸው አመልካችን በኮንትራል ባዶ ለማስቀረት የፈጸመት ተግባር መሆኑን በመረዳት የከፍተኛው ፍርድ ቤት ክሱን ውድቅ አድርጐታል። ጠቅላይ ፍርድ ቤት ግን የነዚህን ቼኮች ጉዳይ ከሌሎች የሂሳብ ጥያቄዎች የማይገናኝ አድርጎ ነጥሎ በማየቱ ከፍተኛ የሕግ ስህተት ፈጽሟል። ጠቅላይ ፍርድ ቤት በቼኮቹ ላይ ለቀረበው ክስ ከፍተኛው ፍርድ ቤት የሰጠውን ፍርድ ሲሰርዝ አመልካች ስለቼኩ በፎርሙ ላይ ያቀረበው ክርክር የለውም። ባዶ ቼክ ላይ ለመፈረሙ ሰክላከል ያቀረበው ጥያቄም ከንግድ ሕግ ቁ. 717(1) ጋር የሚቃረን ነው በማለትና ስለማስረጃም የንግድ ሕግ ቁ. 840ን በመጥቀስ ነው። ጠቅላይ ፍርድ ቤት አመልካች በፎርሙ ላይ ያቀረበው ክርክር የለውም ስላለው በፎርሙ ላይ ክርክር አለመቅረቡ በሌላው ነጥብ ላይ የቀረበውን ክርክር ውድቅ አያደርገውም፣ የንግድ ሕግ ቁ. 717(1) በግልጽ የሚናገረውም የሁለቱን ወገኖች የግል ግንኙነት በማስመልከት መቃወሚያ ማቅረብ መቻሉን ነው። የሁለቱን ግንኙነትም ያስረዳን ሲሆን አመልካች እነዚህን ባዶዋቸውን የተፈረሙ በርካታ ቼኮች ለመልስ ሰጭ የሰጣቸው ሂሳብ ለማንቀሳቀስ እንዲችሉ ውክልና ከመሰጠቱ በፊት ነበር። ከዚህ በፊትም

በውክልናቸው መሠረት ባዶዋቸውን በተፈረመ ቼኮች ላይ በራሳቸው ጽሑፍ እየሞሉ ቼክ ያወጡ እንደበረ በማስረጃም ጭምር የተረጋገጠና መልስ ሰጭውም የማይክዱት ከመሆኑም በላይ በሁለቱ ግንኙነት መሠረትም ከላይ የተገለጸውን ድርጅት ለማቋቋም ከሰጡት ብር 232,000 ብድር በስተቀር የብር 600,000 ቼክ የሚያስፈርም ምክንያት ምንም አልነበራቸውም። ጠቅላይ ፍርድ ቤት ግን በንግድ ሕግ ቁ. 717(1) መሠረት መቃወሚያ ያቀረብነው በሕጉ መሠረት መሆኑን ባለማየት አመልካች ባዶ ቼክ ለመፈረሙም ያቀረበው ጥያቄ ከንግድ ሕግ ቁ. 717(1) ጋር የሚቃረን ነው ያለው ከፍተኛ የሕግ ስህተት አለው። በመጨረሻ አመልካች መልስ ሰጭን በጋራዡ ምክንያት ሂሳብ የጠየቃቸውና ከውክልና ሥልጣናቸው የሻራቸው መሆኑም ከግምት ውስጥ ገብቶ የአመልካች መቃወሚያ የንግድ ሕግ ቁ. 717(1)ን የሚቃረን ነው ተብሎ በጠቅላይ ፍርድ ቤት ውድቅ የሆነው ስህተት ስለሆነ ውሳኔው ተሽሮ ክሱ እንዲሰረዝልን የሚል ነው።

የአመልካች አቤቱታ ለመልስ ሰጭ እንዲደርሳቸው ተደርጎ ጥር 12 ቀን 1984 በተጻፈ የበኩላቸውን መልስ ያቀረቡ ሲሆን ዝርዝሩም ባጭሩ፡-

- አመልካች ቼኮችን ለተጠሪው የሰጡአቸው በሕጉ መሠረት ሊጻፍ የሚገባው ሁሉ መጻፉን አረጋግጠውና ፈርመው ነው። አመልካች ቼኮችን የፈረምኳቸው የገንዘቡን መጠን ሳልሞላ ነው ብለው በቃል ስለገለጹ ብቻ የርሳቸው ቃል እንደ እውነት የመልስ ሰጭ ቃል ደግሞ እንደውሸት መታየት የለበትም። በንግድ ሕጉ በቁ. 841 ላይ እንደተገለጸው የአንድ ቼክ አውጪ ፊርማውን ብቻ በማሳረፍ ያልተሟላ ማለትም ጉድለት ያለበት ቼክ ቢሰጥና ቼክ የተሰጠው ግለሰብም ያልተሟላውን ማናቸውንም ቅድመ ሁኔታ ሁሉ አሟልቶ የታዘዘለት ገንዘብ እንዳከፈለው ቢጠይቅ ቼኩን ያገኘው በክፉ ልቦና መሆኑን ወይም ከባድ ጥፋት መፈጸሙን በማስረዳት ካልሆነ በቀር ቼኩ የተሞላው ከተደረሰው ስምምነት ውጪ ቢሆንም እንኳ ቼኩን ዋጋ እንደማያሳጣው፣
- በወንጀሉ ረገድ የቀረበውን ክስ መልስ ሰጭ ራሳቸው ቀርበው በሰጡት ምስክርነት አመልካች ባዶ ቼክ ላይ ፈርሞ ሰጥቷቸው ራሳቸው በእጅ ጽሑፋቸው የገንዘቡን መጠን ያስገቡበት ቼክ መኖሩን በማረጋገጣቸው ጭምር ክሱ ተሰረዘ የተባለውም ሀሰት መሆኑን፣
- ቼክ የሚተላለፍ የገንዘብ ሰነድ እንደመሆኑ በሚተላለፍ የገንዘብ ሰነድ የገባበትን ዕዳ እንዲከፍል የሚጠየቅ ሰውም መክፈል የለብኝም ብሎ ለመከላከልና ከዕዳው ነጻ ለመሆን የሚችለው በእርሱና ሰነዱን በያዘው ተከፋይ መካከል ባለው የግል ግንኙነት በተመሠረተ ምክንያት፣ በሰነዱ አጻጻፍ

ፎርም፣ በሰነዱ ላይ በተጻፉት ቃሎች፣ ፊርማን በመካድ፣ የሰነዱ አውጪ ችሎታ ወይም ሥልጣን ማጣትን በማስረዳት ብቻ እንደሆነ በንግድ ሕግ ቁ. 717(1) እና 717(3) የተደነገገ በመሆኑ፣

- በንግድ ሕጉ የተመለከተው የግል ግንኙነት የንግድ ግንኙነት የሚመለከት እንጂ የዝምድና ግንኙነትን ስላልሆነ አመልካች ከመልስ ሰጭ ጋር ያላቸው ዝምድና እንደግል ግንኙነት ተቆጥሮ ዕዳውን አልከፍልም ብለው ቢከራከሩ በሕግ ተቀባይነት እንደሌላቸው፣
- አመልካች ለመልስ ሰጭ ውክልና የሰጧቸው መተማመኛ ሰነዱን ከመፈረማቸው በፊት በመሆኑ ቼኩን በባዶነቱ ፊርማ ለመልስ ሰጭ የሰጠኋቸው ውክልናውን ከመስጠቴ በፊት በስሜ ተከፍቶ ከነበረው ሂሣብ ገንዘብ ማውጣት እንዲችሉ ነው በማለት ያቀረቡት ክርክር ትክክል እንዳልሆነ፣
- መልስ ሰጭ ቼኩ በአመልካች ከተፈረመላቸው በኋላ የገንዘቡን መጠን ሞልተውት ቢሆንም ይህን ያደረጉት በክፉ ልቦና ወይም ከባድ ጥፋት በመፈጸም መሆኑን ካላስረዱ ከኃላፊነት እንደማይድኑ፣
- ነጋዴዎች ሁሉ ለሌሎች ግለሰቦች ቼክ የሚሰጣጠብት ምክንያት ምን እንደሆነ ያውቃሉ ተብሎ ስለማገመት አመልካች ቼኩን ለመለስ ሰጭ የሰጡበትን ምክንያት መጠየቅ እንደሌለበት፣

በመግለጽ የጠቅላይ ፍርድ ቤት በጉዳዩ ላይ የሰጠው ውሳኔ ስህተት ስለሌለበት የአመልካች አቤቱታ ወድቅ እንዲሆን የሚል ነው።

አመልካችም በአቤቱታቸው ያቀረቡትን ክርክር በማጠናከር የመልስ መልስ አቅርበዋል።

የግራ ቀኙ ክርክር ከዚህ በላይ የተመለከተው ሲሆን በዚህ ጉዳይ ሊወሰኑ የሚገባቸው ዋና ዋና ጭብጦችም፦

1ኛ/ ጠቅላይ ፍርድ ቤት አመልካች በቼኮቹ ላይ የፎርም ጉድለት አለ ስላልተባለ መቃወሚያው ተቀባይነት የለውም በማለት የሰጠው ውሳኔ ሕጋዊ ነውን?

2ኛ/ አመልካች ከመልስ ሰጭ ጋር ባለው ግንኙነት በቼኮቹ ላይ ያቀረበውን መቃወሚያ መልስ ሰጭው የማስተባበል ግዴታ የለባቸውም?ነ? አለባቸው ከተባለስ ይህንን መቃወሚያ በበቂ ሁኔታ አስተባብለዋልን?

የሚሉ ሲሆኑ እነርሱንም በቅደም ተከተል እንመረምራለን።

አመልካች በነዚህ ቼኮች እንዲከፍል የተጠየቀውን ገንዘብ መክፈል አይገባኝም በማለት የሚከራከረው በቼክ ላይ መኖር የሚገባቸው አስፈላጊ መግለጫዎች በነዚህ ቼኮች ላይ ተጓድለዋል በማለት አይደለም። እርሱ የሚለው በቼኮቹ ላይ ያለው ፊርማ የራሱ ቢሆንም በውስጣቸው ያለውን ገንዘብ የሞሉት መልስ ሰጭ ናቸው፣ ይህም የሆነው እኔ ለመልስ ሰጭ የምከፍላቸው ዕዳ ኖሮ ሳይሆን በሁለታችን መካከል ባለው ዝምድናና በነበረን የውክልና ግንኙነት በባዶ ቼኮች ላይ ፊርማዬን አኑሬ ሰጥቻቸው ስለነበረ በመካከላችን አለመግባባት በመፈጠሩ እኔን ለመጉዳት ብለው የጻፉት ገንዘብ ነው። ባዶ ቼኮች ላይ ፊርማዬን አኑሬ መልስ ሰጭ ደግሞ በራሳቸው ጽሑፍ እየሞሉ ቼክ ያወጡ እንደነበረ በግንኙነታችን ወቅት የተፈረመ ሌሎች ቼኮች በማስረጃነት አሉኝ። ስለዚህ በሁለታችን መካከል የነበረውን ግንኙነት በማስረዳት እነዚህን ቼኮች ለመቃወም በንግድ ሕግ ቁ. 717(1) የሚፈቀድልኝ ሆኖ ሳለ ተከለከልኩ ነው።

ጠቅላይ ፍርድ ቤት አመልካች በቼኮቹ ላይ መቃወሚያ ለማቅረብ አይችልም ያለው በንግድ ሕግ ቁ. 717(1) መሠረት መቃወሚያ ማቅረብ የሚፈቀደው በቼኮች ላይ የፎርም ጉድለት አለ የሚባል ከሆነ ብቻ ነው በማለት እንደሆነ ከላይ ተመልክተናል። ሆኖም በንግድ ሕግ ቁጥር 717(1) መቃወሚያ ተብለው ከተዘረዘሩት ምክንያቶች ውስጥ በሰነድ አጻጻፍ ፎርም እንዲሁም በሰነዱ ላይ ከተጻፉት ቃሎች ከሚቀርቡት መቃወሚያዎች ሌላ በዕዳ ከፋዩና ሰነዱን በያዘው ሰው መካከል ያሉትን የግል ግንኙነቶች በማስረዳት መቃወሚያ ማቅረብ እንደሚቻል ተገልጾ ስለሚገኝ በጠቅላይ ፍርድ ቤት ውሳኔ ላይ እንደተገለጸው አመልካች በቼኮች ላይ ያለውን ቅሬታና ማስረጃ ቆጥሮ ለማሰማት ወይም መቃወሚያ አድርጎ ለመጠቀም ያቀረበው ጥያቄ በንግድ ሕግ ቁ. 717(1) ከተጻፈው ድንጋጌ ጋር የሚቃረን ነው በማለት የሰጠውን አስተያየት ባለመቀበል አመልካች የሁለቱን ወገኖች የግል ግንኙነት በማስረዳት መቃወሚያ ለማቅረብ ይችላል ብለናል።

ከላይ እንደተገለጸው አመልካች የሁለቱን ወገኖች የግል ግንኙነት በማስረዳት መቃወሚያ ለማቅረብ እንደሚችል ከተወሰነ በሌላው ወገን በኩል ደግሞ የሚቀርበውን መቃወሚያ የማስተባበል ግዴታ ያስከትልበታል ማለት ነው። በዚህም መሠረት መልስ ሰጭ ነጋዴዎች ሁሉ ቼክ የሚሰጣጡበትን ምክንያት ያውቃሉ ተብሎ ስለሚገመት አመልካች ቼኮቹን ለተጠሪ የሰጡበት ምክንያት መጠየቅ የለበትም የተባለውን ክርክር አልተቀበልነውም።

ሌላው በዚህ ጉዳይ መወሰን የሚገባው ደግሞ አመልካች ከመልስ ሰጭ ጋር ባለው ግንኙነት በቼኮቹ ላይ ያቀረበውን መቃወሚያ መልስ ሰጭው በበቂ ሁኔታ አስተባብለዋልን የሚለው ነው።

ከላይ በስፋት እንዳየነው የአመልካች ክርክር በቼኮች ላይ ያለው ፊርማ የራሴ ነው። ሆኖም እነዚህ የተፈረመ ቼኮች በመልስ ሰጭ እጅ

የገቡት ለእዳ መክፈያነት ገንዘብ ተሞልቶባቸው ሳይሆን ለመልስ ሰጭ የጋራገቹን ውክልና ከመስጠቴ በፊት በነበረን ግንኙነትና መተማመን የድርጅቱን ሂሳብ እንዲያንቀሳቅሱ ነው። አመልካች በተመሳሳይ ሁኔታ በበርካታ ባዶ ቼኮች ላይ እየፈረምኩ ለመልስ ሰጭ እየሰጠኋቸው አርሳቸውም የገንዘቡን መጠን እየጻፉ መሥራታቸው የተረጋገጠ ሲሆን የወንጀሉ ክስ ለሰረዝልኝ የቻለውም መልስ ሰጭ ራሳቸው በዚህ ዓይነት በመተማመን ስንሠራ መቆየታችንን በከፍተኛው ፍርድ ቤት በሚሰረዳታቸውና በዚህ ዓይነት አሠራራችን የተሠሩ ማስረጃዎችን በማቅረቤ ነው። አሁን አከራካሪ የሆኑት ሁለት ቼኮችም ቀደም ሲል ለመልስ ሰጭ ባዶዋቸውን እየፈረምኩ ከሰጠኋቸው ቼኮች መካከል ጥቂቶቹ ናቸው። መልስ ሰጭ ለድርጅቱ ማቋቋሚያ በብድር ከሰጡኝ ብር 232,000 ሌላ የሚያገናኘን የገንዘብ ግንኙነትም ስለሌለ ብር 600,000 የሚያወጡ ቼኮች ፈርሜ ለመስጠት የሚያበቃ ምክንያት አልነበረኝም። በነዚህ ቼኮች ላይ ያለውን ገንዘብ የሞሉት መልስ ሰጭ ራሳቸው ሲሆኑ ይህንንም ያደረጉት በጋራገቹ ምክንያት በመካከላችን በተፈጠረው አለመግባባት የተነሳ አመልካችን ለመጉዳት በማሰብ እንጂ የሚፈለግብኝ ዕዳ ኖሮ ባለመሆኑ በቼኮቹ ልጠየቅ አይገባኝም የሚል ነው።

በመልስ ሰጭ በኩል ለቀረበው መቃወሚያ የተሰጠው መልስ የአመልካች መቃወሚያ በቼኩ ላይ የፎርም ጉድለት ተገኝቷል የሚል ባለመሆኑ መቃወሚያው በሕግ የተደገፈ ስላልሆነ በቼኩ የገባውን ግዴታ ሊከፍል ይገባዋል፣ በባዶ ቼክ ላይ ፈርሜ ሰጠኋቸው የሚለውም ሀሰት ነው፣ አመልካችም ነጋዴ እንደመሆኑ መጠን ቼክ ለሌላ ሰው ስለሚሰጥበት ምክንያት ያውቃል ተብሎ ስለሚገመት ክፍያ መጠየቂ ሕጋዊ ነው፣ መቃወሚያ ሊቀርብበት አይገባም፣ ቼኩ በአመልካች ከተፈረመ በኋላ የገንዘቡን መጠን ራሴ እንኳ ሞልቼበት ቢሆን ይህ የተደረገው በክፉ ልቦና ወይም ከባድ ጥፋት በመፈጸም ለመሆኑ በመልስ ሰጭ በኩል ማስረጃ ስላልቀረበ አመልካች በቼኩ የተጠየቀውን መክፈል ይገባዋል የሚል ነው።

ከዚህ በላይ በቀረቡት ክርክሮች እንደታየው አመልካችና መልስ ሰጭ አባትና ልጅ ከመሆናቸው በላይ መርሐጽዮን ነጋ ጋራዥ ተብሎ በአመልካች ስም የሚጠራውን ድርጅት ብር 232,000 ወጪ አድርገው ያቋቋሙት መልስ ሰጭ ናቸው። በ1976 በሁለቱ ወገኖች የተፈረመው መተማመኛ ሰነድ እንደሚያስረዳውም መልስ ሰጭ ለድርጅቱ ማቋቋሚያ ያወጡትን ወጪ አመልካች እስኪተካላቸው ድረስ ድርጅቱን እያስተዳደሩና በገቢውም እንዲጠቀሙ መብት ተሰጥቷቸዋል። በዚህ መሠረት መልስ ሰጪ በገቢው በመጠቀም እየሠሩ እያለ አመልካች በመተማመኛ ሰነዳቸው ከተገለጸው ስምምነት መንፈስ በመውጣት የድርጅቱን ሂሳብ እንተሳሰብ የሚል ጥያቄ በማቅረቡ በተፈጠረው አለመግባባት ሁለቱም ወገኖች የየበኩላቸውን ክስ በመመሥረት ሲከራከሩ ቆይተው አሁንም እየተከራከሩ ይገኛሉ። በአመልካችና በመልስ ሰጭ መካከል ከዚህ ከሚከራከሩበት ድርጅት ውጪ

የሚያገናኛቸው ሌላ የንግድ ግንኙነት ለመኖሩ በሁለቱም ወገኖች የተጠቀሰ ነገር የለም። አሁን ስለሚከራከሩባቸው ሁለት ቼኮችም አመልካች በንግድ ሕግ ቁ. 717(1) መሠረት በራሱና በመልስ ሰጭው መካከል ስላለው ግንኙነትና ቼኮቹ በመልስ ሰጭ እጅ ስለገቡበት ሁኔታ አስረድቷል። መልስ ሰጭ ግን አመልካች እነዚህን ቼኮች ፈርሞ ሰጥቶኛል ከሚሉ በቀር በቼኮቹ ላይ የተሞላው የገንዘብ መጠን እንኳ በአመልካች ለመጻፉ ለዚህ ፍርድ ቤት ማረጋገጫ አልሰጡም፣ ብር 600,000 ቼክ ሊያስፈርም የሚችል በዚህ ድርጅትም ሆነ ሌላ የንግድ ግንኙነት እንዳላቸው ለማስረዳትና አመልካች ያቀረባቸውን መቃወሚያዎች ለማስተባበልም አልቻሉም። ይህ ፍርድ ቤትም በሁለቱ ወገኖች መካከል ይህን ያህል ከፍተኛ ገንዘብ ሊያስከፍል የሚችል ግንኙነት ለመኖሩ የሚያሳምን ሁኔታ አላገኘም። ይህም በመሆኑ ቼኮቹ ላይ የተጠየቀው ገንዘብ በመካከላቸው በተፈጠረው አለመግባባት የተነሳ የተደረገ ነው የሚለው የአመልካች መቃወሚያና ክርክር አሳማኝ ሆኖ ተገኝቷል።

ስለዚህ የን.ሕ.ቁ 717(1) በሚፈቅደው መሠረት አመልካች ከመልስ ሰጭ ጋር ክርክር ባስነሳው ጋራዥና የጠበቀ የዝምድና ግንኙነት አስረድቶ ሳለ፣ መልስ ሰጭው ግን ቼኮቹ ለርሳቸው የተሰጡት ከአመልካች ከተሰጣቸው የውክልና ግንኙነት ውጪ በሆኑ ሌሎች ግንኙነቶች ላይ የተመሠረተ ስለመሆኑ አጥጋቢ ማስረጃ ሳያቀርቡ ጠቅላይ ፍርድ ቤት ጥያቄ ባልተነሳበት ነጥብ ቼኮቹ የፎርም ጉድለት የላቸውም የሚል ምክንያት በመስጠት የሰጠውን ውሳኔ በፍትሐ ብሔር ሥነ ሥርዓት ሕግ ቁ. 348(1) መሠረት ሽረን መልስ ሰጭ ቼኮቹን የተቀበሉት ውክልና ከተቀበሉት ጋራዥ ጋር ባላቸው ግንኙነት ምክንያት እንደሆነ በማመን አመልካች በቼክ ቁ. PB 1123018 እና PB 1123017 የተጠየቀውን በድምሩ ብር 600,000 ለመልስ ሰጭ ሊከፍል አይገባም በማለት ወስነናል።

ሁለቱ ወገኖች በሰበር ችሎት ባካሄዱት ክርክር የደረሰባቸን ወጪና ኪሣራ የየራሳቸውን ይቻሉ። ውሳኔው ለከፍተኛው ፍርድ ቤት ይተላለፍ። ይህ ፍርድ ዛሬ መጋቢት 30 ቀን 1984 ዓ.ም. አዲስ አበባ ተሰጠ።

ፌደራል ጠቅላይ ፍርድ ቤት
የፍትሐ ብሔር ችሎት

<u>ይግባኝ ባይ</u>፡- ዘለቀ አዳ

<u>መልስ ሰጭ</u>፡- አበራ ኃ/ጊዮርጊስ

<u>የፍ.ብ.ይ.መ.ቁ. 1392/88</u>

ስለሚተላለፉ የገንዘብ ሰነዶች - የተስፋ ሰነድ - ሰነዱ በማስገደድ የተፈረመ መሆኑ ስለሚያስከትለው ውጤት - በወንጀል ክስ ጥፋተኛ ሆኖ መገኘት በፍትሐ ብሔር አላፊነትን ላይ ስለሚኖረው ውጤት፡፡

ይግባኙ የቀረበው የሥር ፍ/ቤት በይግባኝ ባይም ሆነ በመልስ ሰጭ የተቆጠሩትን ምሥክሮች ሳይሰማ ይግባኝ ባይ በወንጀል ተከሶ ጥፋተኛነቱ ተረጋግጦ እንዲቀጣ የተሰጠውን ፍርድ ብቻ መሠረት በማድረግ መልስ ሰጭ ክስ ያቀረበበትን የቃል ኪዳን ሰነድ (የተስፋ ሰነድ) የፈረመው በራሱ ውዴታ ላይሆን ተገድዶ ስለሆነ ፈራሽ ነው በማለት የሰጠውን ፍርድ በመቃወም ነው፡፡

<u>ው ሣ ኔ</u>፡- የሥር ፍ/ቤት ውሣኔ ተሽሮአል፡፡

ው ሣ ኔ

<u>ዳኞች</u>፡- ሐጐስ ወልዱ፣ ዳኜ መላኩ፣ ጌታቸው ምህረቱ፡፡

ለአሁኑ ይግባኝ መቅረብ መነሻ የሆነው ቀደም ሲል በሥራ ላይ የነበረው የክልል 14 መስተዳድር ዞን ፍ/ቤት ቁጥሩ 161/84 በሆነው የፍትሐ ብሔር ክስ መዝገብ ሰኔ 29 ቀን 1983 ዓ.ም. ተጽፎ በተፈረመው የተስፋ ሰነድ ላይ የሰፈረውን ብር 200,000 (ሁለት መቶ ሺህ ብር) ከሣሹ የአሁኑ መልስ ሰጪ ለተከሣሹ ለአቶ ዘለቀ አዳ እከፍላለሁ ያለው በኃይል የማስገደድ ተግባር ተፈጽሞበት ነው ወይንስ አይደለም በሚለው ዙሪያ

ሲያከራክር ከቆየ በኋላ ሚያዝያ 2 ቀን 1987 ዓ.ም. በዋለው ችሎት መርምሮ የተሰፋውን ሰነድ የፈረመው ተገዶ ነው በማለት ፈራሽ ነው ሲል የሰጠው ውሣኔ ነው::

ዞን ፍ/ቤት የቃል ኪዳን ሰነዱን የሠረዘው ተከሣሹ አቶ ዘለቀ አዳ በዚሁ በቃል ኪዳኑ ሰነድ ጉዳይ በወንጀል ተከሶ በኃይል በማስፈራራት ያስፈረመው መሆኑ ተረጋግጦ እንዲቀጣ መወሰኑን እንደዋና ማስረጃ አድርጎ በመጠቀም ነው::

የአሁኑ ይግባኝ ባይ በፍትሐ ብሔሩ ለቀረበው ክስ መልስ ሰጪ የቃል ኪዳን ሰነዱን የፈረመው በራሱ ውዴታ ማንም ሳያስገድደው መሆኑን፣ የቃል ኪዳን ሰነዱን የፈረመው ከመሬት ተነስቶ ያለምክንያት ሳይሆን ለይግባኝ ባይ መክፈል የሚገባው ገንዘብ ያለበት መሆኑን ስለሚያውቅ እንደሆነ፣ ይግባኝ ባይም መልስ ሰጪን ለማስገደድ አቅመ-ም ሆነ ችሎታ እንደሌለው ገልጾ መልስ በመስጠት የቃል ኪዳን ሰነዱ እንዲሠረዝ የቀረበውን ክስ አጥብቆ በመቃወም ተከራክሯል::

ዞን ፍ/ቤትም ይግባኝ ባይ በወንጀል ተከሶ ጥፋተኛነቱ ተረጋግጦ እንዲቀጣ የተደረገበትን ብቻ እንደ በቂ ማረጋገጫ አድርጎ ከመውሰዱ በቀር በመዝገቡ በመልስ ሰጪ በኩል የተቆጠሩትን ምሥክሮችም ሆነ ይግባኝ ባይ ጥቅምት 24 ቀን 1984 ዓ.ም. በቀረበው የመከላከያ ማስረጃ ዝርዝር መሣለጫ ላይ በመከላከያነት የቆጠራቸውን ምሥክሮች አስቀርቦ የምሥክርነት ቃላቸውን አልተቀበለም:: መልስ ሰጪ ሰነዱን የፈረመት በመገደድ ስለመሆኑ ያስረዱልኛል ብሎ የቆጠራቸው አምስት ምሥክሮች ቢሆኑም አልተሰሙም:: ይግባኝ ባይ በዚሁ በሰነዱ ጉዳይ በወንጀል ተከሶ ጥፋተኛነቱ ተረጋግጦ እንዲቀጣ የተወሰነበት ስለመሆኑ ተገልጾ ይኼው በአስረጂነት እንዲቀርብ በክሱ ማስረጃ ዝርዝር ላይ አልተጠየቀም:: በወንጀሉ ጉዳይ የተፈረደበት መሆኑ የታወቀው በኋላ ነው:: የይግባኝ ባይ አንዱ ተቃውሞ ይህንኑ የሚመለከት ነው:: ዞን ፍ/ቤት በይግባኝ ባይ በኩል የተቆጠሩትን ምሥክሮች ሳይሰማ ማለፉ አንዱ የፈፀመው ስህተት መሆኑን በመግለጽ ነው ይግባኝ ባይ የሚከራከረው::

መልስ ሰጪም ለይግባኙ ቅሬታ የካቲት 7 ቀን 1988 ዓ.ም. ተጽፎ እንዲቀርብ ባደረገው መልስ ላይ የይግባኝ ባይ ክርክር ተቀባይነት የለውም የሚልባቸውን የክርክር ምክንያቶች በመዘርዘር አቅርቧል:: በይግባኝ ባይ በኩልም መጋቢት 27 ቀን 1988 ዓ.ም. የተፃፈ 9 ገጽ የመልስ መልስ እንዲቀርብ ተደርጎ ከመዝገቡ ጋር ተያይዟል::

በእኛም በኩል በቀረበው ይግባኝ የተመለከትነው አንዱ ነጥብ ይግባኝ ባይ ሰኔ 29 ቀን 1983 ዓ.ም. በተፃፈው የቃል ኪዳን ሰነድ ጉዳይ በወንጀል ተከሶ ጥፋተኛ መሆኑ ተረጋግጦ እንዲቀጣ ተፈርዶበታል የተባለውን መሠረት በማድረግ ብቻ ፍ/ቤቱም በአንድ በኩል በአሁኑ መልስ ሰጪ

የተቆጠሩትን ምሥክሮች በሌላም በሁል የአሁኑ ይግባኝ ባይ በመከላከያ ማስረጃነት የቆጠራቸውን ምሥክሮች ላይሰማ፣ በአጠቃላይ ፍ/ቤቱ ከክርክሩ ጋር በተያያዘ በግራ ቀኙ የተቆጠሩትን ምሥክሮች የምሥክርነት ቃል ሳይሰማና የሚያረጋግጡትን ነገር ሳያውቅ፣ አልፎ በወንጀሉ ውሣኔ ላይ የተነገረውን በቂ ነው ብሎ በመቀበል መልስ ሰጪ በቃል ኪዳን ሰነድ ለይግባኝ ባይ በመፈረም የሰጠው ይግባኝ ባይ በሃይል በማስፈራራት አድርሶበት ነው በማለት ብር 200,000 (ሁለት መቶ ሺህ ብር) እከፍላለሁ ብሎ ግዴታ የገባው ፈራሽ ይሆናል ሲል የወሰነው በሕገ አግባብ ነው ወይንስ አይደለም የሚለውን ነው::

መልስ ሰጪ የቃል ኪዳኑን ሰነድ ጽፈና ፈርሜ ለይግባኝ ባይ የሰጠሁት ተገድጄ ነው ሲል ለገለፀው ይግባኝ ባይ ተክክል ያለመሆኑንና የፈረመውም በራሱ ውዴታ ለይግባኝ ባይ መክፈል የሚገባው ገንዘብ ያለበት መሆኑን ስለሚያምን እንደሆነ በመግለጽ ተከራክሯል:: መልስ ሰጪ ሰነዱን የፈረመው በመኪና ታፍኖ ተወስዶና በጦር መሣሪያ ትገደላለህ ተብሎ ብርቱ ዛቻና ማስፈራሪያ ደርሶበት መሆኑን በክሱ ማመልከቻ ላይ በገለፀው መሠረት ምሥክሮቹን አቅርቦ በማሰማት አላረጋገጠም:: የእርሱም ቢታለፍ ይግባኝ ባይ የመልስ ሰጪው አባባል ከእውነት የራቀና ሰነዱን ፈርሞ የሰጠው ማንም ሳያስገድደው ወዶና ፈቅዶ ስለመሆኑ አስረዳለሁ በማለት ምሥክሮች ቆጥሯል:: ይግባኝ ባይ በቃል ኪዳን ሰነዱ ጉዳይ በወንጀል ተከሶ ጥፋተኛ መሆኑ ተረጋግጦ እንዲቀጣ ተወስኖበታል ቢባል እንኳን በፍትሐ ብሔሩ ክስ ሙሉ የመከላከል መብት ስላለው በወንጀል ጉዳይ በቀረበበት ክስ ጥፋተኛ መባሉ ይህንን የመከላከል መብት ሊያስቀርበት አይችልም:: በሥነ ሥርዓት ሕጉም ተከሣሽ አለኝ የሚለው የክስ መቃወሚያ የሕግና ፍሬ ነገር ክርክር ከተደመጠና የቆጠረው መከላከያ ማስረጃ አንድ በአንድ ተሰምቶና ተሰባስቦለት እንዲቀርብ ተደርጎ ጭብጡ ተይዞ የግራ ቀኙ ማስረጃዎች በአግባቡ ተመዝነው ጉዳዩ በማስረጃ ከነጠረ በኋላ በሕጉ የሚደገፈው ክርክር ተቀባይነት ተሰጥቶት የሚወሰን እንጂ በዚህ ጉዳይ እንደታየው ፍ/ቤት ማስረጃውን ሳያስጨርስ አልፎ የሚሰጠው ውሣኔ የተሟላ ሊሆን አይችልም:: ፍ/ቤቱ በተለይ የአሁኑ ይግባኝ ባይ በመከላከያነት የቆጠራቸው ምሥክሮች ሊሰሙ አይገባም ብሎ ብይን በመስጠት ሳይቀበለው የቀረበ የሕግ ምክንያት ምን እንደሆነ ሳይታወቅ ዝም ብሎ ማለፍ ትክክለኛውን የዳኝነት አሠራር ሥርዓት የተከተለ ሊሆን አይችልም:: ይግባኝ ባይ በወንጀል ተከሶበት ተፈርዶበታል መባሉ ፍ/ቤቱ በፍትሐ ብሔሩ በቀረበለት ክስ የራሱን ማስረጃ ሰምቶ ከማረጋገጥ የሚያግደው አይደለም::

በመሆኑም ዘን ፍ/ቤት በመዝገቡ በቀረበው ክስ የአሁኑ መልስ ሰጪም ሆነ ይግባኝ ባይ የቆጠራቸውን ምሥክሮች ሳይሰማና የግራ ቀኙን ማስረጃዎች ሳያስጨርስ አልፎ በችኮላ የሰጠው ውሣኔ ሕጋዊ ሊሆን ስለማይችል በተጠቀሰው መዝገብ ሚያዚያ 2 ቀን 1987 ዓ.ም. የሰጠውን ውሣኔ በፍ.ሥ.ሥ.ሕ.ቁ. 348(1) መሠረት ሽረን በቅድሚያ በሥር ከሣሽ

በአሁኑ መልስ ሰጪ በኩል የተቆጠሩትን ምሥክሮች ቀጥሎም በተከሣሹ በአሁኑ ይግባኝ ባይ በኩል የተቆጠሩትን መከላከያ ምሥክሮች በመስማት በአጠቃላይ የግራ ቀኙን ማስረጃዎች አጠናቆ ክስና ክርክሩን መርምሮ ተገቢ ነው የሚለውን ውሣኔ አሁን ያለው የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት እንዲሰጥበት በፍ.ሥ.ሥ.ሕ.ቁ. 343(1) መሠረት ጉዳዩን መልሰን ልከናል።

ይግባኝ ባይ ባቀረበው ይግባኝ ረቂቅ ስለሆነ በክርክሩ ምክንያት አውጥቻለሁ የሚለው ወጪ ካለ ዝርዝሩን የማቅረብ መብቱን ጠብቀንለታል።

የዚህ ውሣኔ ትክክለኛ ግልባጭ ለፌዴራል መጀመሪያ ደረጃ ፍ/ቤት እንዲተላለፍ ብለን መዝገቡን ዘግተን ወደ መዝገብ ቤት መልሰናል። ግንቦት 3 ቀን 1993 ዓ.ም.

Registration of Immovables under the Ethiopian Civil Code: An Overview in Comparative Perspective

Yohannes Heroui

1. Introduction

The decision of the Cassation Bench of the Federal Supreme Court in *Gorfe Gebe Hiwot v. Aberash Dubarge* and *Getachew Negga* has given rise to a controversy extending well beyond the ranks of the legal profession.[1] In this case, the Court held that a contract of sale of an immovable can only be valid if the two requirements as to form are satisfied; these formal requirements being, that it be made in writing, and, that it be registered with a court or notary.[2] The reason for the unusual interest and controversy partly lies in the fact that the Cassation Bench has, in so ruling, chosen to depart from settled practices and, in the process, lent life to provisions of the Civil Code long considered still born.[3] It also, no doubt, partly arises out of the fear that, given the sky rocketing prices currently being witnessed in the housing market, the ruling of the Court may embolden unscrupulous sellers to renege on contracts already sealed and even disown transactions long considered closed. *Ato* Mekbib, a renowned former Justice of the Supreme Court has, in an earlier issue of this Journal, added a further dimension to the controversy.[4] It may, in his opinion, be maintained that the 1975 laws of nationalization of all rural and urban lands, as also endorsed by the new 1995 Federal Constitution of the country, has drastically undermined the notion of "ownership" itself and thus robbed the rules of the Civil Code on the subject of their very *raison d' etre*.[5] And as the maxim holds: "when the reason for the rule goes, the rule also lapses". *Cessante ratione, cessa ipsa lex.*

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[1] See, the Sunday, Ginbot 12, 1999 Issue of the Amharic bi-weekly newspaper, *The Reporter*.

[2] For a full text of the Judgment, see, Ethiopian Bar Review, Vol. 2 No. 1, pp. 182-190.

[3] See, pp. 61-62, *infra*.

[4] Mekbib Tsegaw, *Contracts Relating to an Immovable and Questions of Form* (Amharic), Ethiopian Bar Review, Vol. 2, No. 2, pp. 157-161.

[5] See, pp. 72-73, *infra*.

The facts of the case may be summarized as follows. The present appellant, *Woizero* Gorfe brought an action against the present first respondent, *Woizero* Aberash, before the Federal First Instance Court seeking her deceased father's share of the common property held by the first respondent who was wife of the deceased at the time of his death. The Court ruled in her favor and held that, as an heir, she is entitled to her father's half of the property held in common. Thereafter, the present second respondent, *Ato* Negga, appeared in opposition claiming that the proceeds of the judgment included a 400 sq. meter plot of land and a house on it which was transferred to him under a contract of sale entered into between him and the deceased father of the present appellant on Hidar 23, 1985.[6] In reply, the present appellant contended, among others, that the contract of sale is not valid as the property in question did not have a title certificate and that, upon examination of the records relating to the house by the engineer of the Judgment Execution Office in 1992, no document indicating that Ato Negga owned the premises was found. On the other hand, the present first respondent, *Woizero* Aberash, affirmed that the sale did indeed take place. The Court upheld the validity of the contract of sale and accordingly revised its earlier decision. An appeal was lodged by the present appellant and the Federal High Court dismissed the appeal thereby affirming the decision of the court below. Thereafter, the present appellant filed a protest before the Cassation Bench of the Federal Supreme Court asking for a review of the decision of the lower courts contending that the lower courts committed a fundamental error in holding that the contract of sale was valid. The question of registration with a court or notary was not raised as an issue in the court of first instance, but, in view of the controversy surrounding the question[7], it seems that the Cassation Bench wanted to set a precedent and,

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[6] The Ethiopian calendar is seven years and eight months behind the Gregorian one. The year 1985 mentioned as the year of the contract would hence be 1993 under the Gregorian calendar. This date is of some importance, as we shall see later.

[7] See, Mekbib Tsegaw, op. cit., pp. 161-167. In an earlier case, *Habte Zurga et. al. v. Mulushewa Terefe* et. al., held that registration is not a requirement as to form and that a contract of sale of an immovable is, despite the provisions of Art. 1723, valid as between the parties so long as it is made in writing as this is the only formal requirement imposed by Art. 2877 which deals specially with contracts of sale of an immovable. Registration, on the other hand, is imposed for the protection of the rights of third parties, as is clearly stated in Art. 2878. On appeal, the ordinary Bench of the Federal Supreme Court reversed the decision reasoning in much the same way as the Cassation Bench did in the *Gorfe* case. See the full text of both judgments in the Ethiopian Bar Review, op. cit., pp. 171-179.

as we saw overturned the decision of the lower courts ruling that the two requirements as to form must be complied with.[8] In the opinion of the court, public policy demands that special protection be given to contracts relating to immovable properties.[9]

In this Paper, we shall attempt to present a survey of the rules of the Civil Code relating to registration of immovables and of the inter-relationships and differences between the various types of registrations found in them with a view to further elucidating the issues raised in the *Gorfe* case as well as provoking further interest on and study of a subject which was given a prominent place within the scheme of our Civil Code at the time of its enactment but has since been largely neglected. We have chosen the comparative method of approach not only because of its obvious advantages in the study of laws largely based on foreign sources but also because the institutions designed for the implementation of the laws under survey lack local counterparts which could serve as an autochthonous source for the study of the subject. We shall begin with a comparative survey of the laws on registration, their historical origins and the principles which gave rise to their introduction. We shall then examine the Ethiopian rules more in particular in light of these comparative sources.

2. Registration in Comparative Perspective

2.1. Historical origins

Formalities have played an important role in the law since the earliest of times.[10] One of the earliest examples of a contract enforceable at common law was the contract under seal, known as a *deed*. A *deed* was an instrument which was not merely in writing, but which was sealed by the party bound thereby and delivered by him to or for the benefit of the person to whom the

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[8] Under Art. 2 (1) of the Federal Courts Establishment (Amendment) Proclamation No. 454/2005, decisions given by the Cassation Bench of the Federal Supreme Court constituted by no less than five judges are binding on both Federal and State Courts of whatever level.

[9] Judgment., pp. 188-189.

[10] See, for example, S.M.Waddams, *The Law of Contracts*, Second Edition, p. 161, Canada Law Book Inc., Toronto (1984).

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liability was incurred.[11] At common law, 'the importance of the promise given under seal was that it was enforceable even if there was no consideration—the price for which the promise of the other is bought, which is an essential element of contract under the law.[12] In other words, a deed was enforceable because of its *form*; it was the presence of the seal alone that made the promise under seal enforceable.[13] The elaborate rituals of the hot wax, the red ribbon (wafer) usually affixed, and the longhand employed indicated care and deliberateness by the parties obviating the need for consideration.[14] Although the traditional ritual of the seal as a formal requirement of a deed was abolished in 1989, deeds still play an important role in English law, as we shall see later.[15]

Formalities played an important role in Roman law too. Of particular importance was the special form required for the voluntary alienation of property. Under Roman law, contracts alone could not transfer property. They only served to create obligations, i.e., "mere rights to be paid".[16] In other words, the purchaser did not become owner in virtue of the contract; he was merely the vendor's creditor. For ownership of the thing to be transferred, a formal act of transfer was necessary. This was known as *manicipio*, for things *res manicipi*, or those which constituted the principal subjects of ownership, such as land, houses, slaves, and "beasts tamed by neck or back", and *in jure sessio* for both *res manicipi* and other things (*res nec manicipi)* as well.[17] The essence of both is their publicity.

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[11] *Chitty On Contracts*, Twenty-Eighth Edition, Vol. 1, p. 16 and 24-27, London, Sweet & Maxwell (1999).

[12] See, John Swan, Barry J. Reiter, Nicholas Bala, *Contracts: Cases, Notes & Materials*, 5th Edition, pp. 210-211; also, S.M. Waddams, op. cit., p. 129.

[13] Seals were originally impressions made in hot wax by the parties' signet rings or personal seals affixed by being embossed on the document evidencing the promise. See, J. Swan et al., op. cit., p. 210-211.

[14] Ibid., p. 210.

[15] Section 1 (1)(b) of the Law of Property (Miscellaneous Provisions) Act 1989. The law now requires that for an instrument made by an individual (as opposed to companies) to be a deed, it must make "clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)."

[16] See, Planiol, *Treatise on the Civil Law*, Vol. 1, Part 2, p. 529, Louisiana State Law Institute.

[17] See, W.W.Buckland and Arnold D. McNair, *Roman Law & Common Law: A Comparison in Outline*, pp. 86-88; Henry John Roby, *Roman Private Law in the times of Cicero and Antonines*, Vol. I, pp. 423-24, The Lawbook Exchange, Ltd., Union, New Jersey (2000); Fritz Schulz, *Classical Roman Law*, pp. 344-348, Oxford, Clarendon Press (1954).

In *manicipio*, the parties meet in the presence of at least five witnesses and an additional witness called *libripens* (balance holder) who holds a bronze balance as if for the purpose of weighing the bronze metal about to be produced. The acquirer or purchaser by *manicipatio* holds a piece of bronze or coin as a symbol of the price and seizing the thing to be acquired says "This thing I assert to be mine by the law of the Quirites, and it shall be bought for me with this bronze and bronze balance." He then strikes the balance with the bronze or coin and hands it to the other party (the vendor) as a symbolic act.[18] *In jure sessio* was slightly different. The parties appeared before a magistrate of the Roman people, usually the praetor, and, in the provinces, before the governor, and after the acquirer formally claims the thing, in much the same language as in *manicipio*, the praetor asks the other party whether or not he wished to make objections and if he remained silent, the praetor assigns (*addicit*) the thing to the claimant.[19] Thus, in both cases, a formal act of investiture was necessary for the transfer of ownership in the property.

It is this formal act of delivery initiated by Roman law that later gave rise to the modern notion of registration as a necessary formality for the transfer of ownership rights in real property in some continental laws. Planiol tells us that when the Civil Code of France was compiled, its compilers, after thoroughly considering it, abandoned this old Roman law principle that made delivery necessary for transfer of ownership.[20] Under the principle adopted by the new Code, a contract does not merely create an obligation as in Roman law; it may also be translative of ownership. These two things have, under the Code, been blended into one.[21] Article 1138 states: "The obligation of delivering a thing is perfected by the consent alone of the contracting parties." Relating to sales, Article 1582, in much the same language, states: "A sale is an agreement whereby the one obligates himself to deliver a thing and the other to pay for it." And Article 1583 adds: "It is perfected between the parties and the ownership is acquired by law by the buyer with regard to the seller as soon as they have agreed on the thing and the price, although the thing has not yet been delivered nor the price paid."[22]

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[18] J. Roby, Ibid., pp. 423-24; also, F. Schulz, Ibid., p. 348.
[19] H.J.Roby, Ibid., p. 425 and F. Schulz, Ibid., p.349.
[20] Planiol, op. cit., p. 529.
[21] Id..
[22] See, John H. Crabb, The *French Civil Code, Revised Edition*, Fred B. Rothman & Co. (1995).

Among the Continental Codes, as Planiol states, it is only the Prussian system that "occupies an intermediary place between the French system of transfer by mere agreement and the Roman system of transfer by special procedure".[23] The purchaser of an immovable does not become owner of it except by an entry made in the land registry books, made following an act of investiture.[24] Sub-section (2) of Section 873 of the German Civil Code states: "The parties are bound by the agreement before the registration only if the declarations have been notarially authenticated or given before the Land Registry Office or filed with the same, or unless the person entitled has handed over to the other party an authorization for registration in accordance with the provisions of the Land Registration Law."

It stands to reason that grave dangers are latent in such systems as that adopted by the French Code.[25] He who bought an immovable was never certain to become its owner. He had always to fear the existence of a previous sale, unknown to him because it may have been carried out without real delivery. And for the same reason, he, who without buying an immovable, desired to acquire upon it some immovable right, servitude, mortgage, etc., is never certain of dealing with the true owner. The seller who offered this guarantee to the purchaser may have already sold his property, or other rights on it, in secret. As one lawyer more forcefully expressed it: "He who lends on a mortgage is never sure to be paid; he who buys is never sure to become owner and he who pays is never sure that he pays the true owner."[26]

Article 1583 of the French Code itself recognizes this latent danger. As we saw, it deliberately uses the phrase "...it is perfected *between the parties*..." leaving the question of the protection of the rights of third parties open, to be taken care of, presumably, either by statute or court decisions. We thus

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[23] Ibid., p. 538.

[24] Id. Sub-section (1) reads: "The conveyance of the ownership in a piece of land, the encumbrance of a piece of land with a right, as well as the transfer or encumbrance of such a right requires, to the extent that the law does not otherwise provide, the agreement of the person entitled and of the other party with regard to the occurrence of the change of title and the registration of the change of title in the Land Register." Simon L. Goren, *The German Civil Code*, Revised Edition, as amended to January 1, 1992, Fred B. Rothman & Co. (1994).

[25] Planiol, op. cit., p. 541.

[26] As quoted in Planiol, op. cit., p. 546.

witness here the articulation of two contending views on the concept of registration: one viewing it as affecting the agreement between the parties itself, and the other viewing it essentially as a means of publicity designed to protect third party interests without any consequence on the agreement between the parties *inter se*.

The Ethiopian Civil Code, in my opinion, definitely follows its French source. As between the parties, the sale of an immovable is perfected by the agreement to convey. The sanction imposed for failure to register is that, the purchaser who fails to register the sale is defeated by any rival who registers it first. Further, the acquirer of an immovable is not compelled to suffer the effect of a mortgage, or of a servitude or of other encumbrances placed upon it if it has not been registered. The only difference is that, under Ethiopian law, the contract of sale has to be in the form of a certified instrument whereas, under the French Code, such form is optional. These general remarks would become more and more clear as we proceed in this paper.

2.2. The System of Registration and its Development

A word or two need initially be said about the relationship between land law and the laws on registration of rights in land. Land law is "a subject steeped in history".[27] On the other hand, the laws pertaining to registration of rights in land are of relatively recent origin, mainly dictated by the fundamental social and economic transformations which the beginning of the 20th century brought with it.[28] At the heart of land law is the idea that "land" includes not only tangible, physical property like tracts of land or houses, but also intangible rights in the land. This latter category includes real rights in individual things less than ownership of which mortgages, usufructs or life interests, and servitudes or easements are examples. Real rights less than ownership are sometimes better described in French law treatises as "fragmentations of ownership" (*demembrements de la propriete*).[29] The creation and transfer of a right of ownership and these other *fragmentations of ownership rights* including which rights are subject to registration

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[27] Martin Dixon, *Principles of Land Law*, Third Edition, p. 1, Cavendish Publishing Limited (1999).

[28] Ibid., p. 13; See also, R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, Third Edition, p. 1027, Stevens & Sons Limited, London (1966).

[29] *Amos and Walton's Introduction to French Law*, Second Edition, p. 87fn., Clarendon Press, Oxford (1963); see also, Planiol, op. cit., p. 623.

because of the demands of public policy is governed by the substantive rules of land law. Laws on registration do not affect nor are designed to affect these substantive rules; they rather attempt to impose a structure on them with a view to facilitating and expediting sales and other land transactions as well as lending security to such transactions.[30] Hence the *raison d' etre* of registration systems. One thus notices a similarity, or even a tendency towards unity, in the system of registration adopted by various countries, as all legal systems share these above objectives in common.

A study of the development of the laws of registration of the various legal systems reveals that there are three types of public registration in relation to rights and interests in land: (i) Registration of incumbrances, (ii) Registration of deeds, and (iii) Registration of title.[31] We shall briefly sketch the general features of each.

(i) *Registration of incumbrances*. The word "incumbrance" (encumbrance) is specially used to indicate a burden on property. Black's Law Dictionary defines it as "a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." Under this system of registration, various registers are provided in which any person claiming to be entitled to certain encumbrances on any land should register his claim. The registrar does not question the validity of an interest when the owner of it applies to register. There is thus no investigation or guarantee of the claim by the registrar. All that the applicant need do is to fill in a form containing the necessary particulars and file it in the appropriate registry. The object of the system is to enable a purchaser of land, when investigating the title, to discover easily whether certain encumbrances exist, and to protect the owners of such encumbrances against defeat by a purchaser of the land who has no notice of them.[32]

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[30] R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, Third Edition, p. 1027, Stevens & Sons Limited, London (1966), also, M. Dixon, p. 23.

[31] See, Megarry & Wade, op. cit., pp. 1026-27, Dixon, op. cit., pp., 13-18; S.H. Goo, *Source Book On Land Law*, pp. 209-262, Cavendish Publishing Limited (1994); Patric J. Dalton, *Land Law*, Fourth Edition, Pitman Publishing (1996), pp. 398-403; Planiol, op. cit. pp.; Amos & Walton, op. cit. pp. 104-109.

[32] In England, five registers are maintained for this purpose at the Land Charges Registry. The Registers are: Register of pending actions, register of annuities, Register of writs and orders affecting the land, Register of deeds of arrangement, and Register of land changes (divided into six classes and governing matters such as mortgages, contracts of transfer, easements, restrictive

(ii) *Registration of deeds*. This is the oldest kind of registration. It is similar to registration of encumbrances in that the registrar neither investigates nor guarantees the document registered. It differs from the former in that a full copy of the deed must be filed with the original; the latter is then duly returned endorsed with a statement that it has been registered. (See Annex I for specimen).[33] The object of such registration is to assist a purchaser in verifying the title and to prevent the alteration or suppression of documents.[34] A purchaser of land will normally demand some proof from the vendor that he does own what he is selling. As a deed (a written instrument) is needed each time the property is transferred, a collection of deeds would have accumulated. This bundle of deeds is called collectively the title deeds to the property and is passed on to successive owners.[35] A vendor will demonstrate his ownership of the property being sold by giving the purchaser details of the more recent of the deeds and other documents and events affecting the property. The purchaser will then be able to trace a chain of ownership from the chosen starting point through to the vendor. But this provides no guarantee to the purchaser that the vendor does own what he is selling, "for there may be some defect prior to the point at which the vendor chooses to commence the chain of title".[36]

(iii) *Registration of title*.[37] This is a new system designed to supersede the above two essentially traditional systems. Its prime object is to substitute a title guaranteed by the State for a title which must be separately investigated on every purchase, as in the deed registration system. The Registrar not only investigates the title himself but also, when satisfied, guarantees it. This guarantee is supported by a system of statutory indemnity (that is, monetary compensation) for any person who suffers loss by reason of the application

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covenants). See, for example, P.J. Dalton, op. cit., pp. 398-403. Compare with Art. 1568-1574 of our Civil Code.

[33] The "Specimen" is taken from P. J. Dalton's work earlier cited.

[34] See, Megarry & Wade, op. cit., p. 1027. As to how ownership is acquired, see, for example, Art. 1151, 1161 and 1168 of the Ethiopian Civil Code.

[35] See, I.R. Storey, *Conveyancing*, p. 4, London Butterworths (1983) and Megarry & Wade, Id.

[36] I.R. Storey, Id.

[37] This system is also sometimes known as the "Torrens System" after the Australian statesman Sir Robert Torrens.

of the registration system.[38] On registration, the registered proprietor is entitled to a *Land Certificate* which effectively summarizes the entry in the Register and constitutes evidence of title. (See Annex II for specimen).[39] Hence, title to land depends on a person being registered as the owner and on no other proof of ownership. Registration of title thus differs fundamentally from both the previous types.

It also differs from the others in the following main respects. Firstly, in the first two types, registration essentially means "transcription" or "recordation". It is the copying of an act relating to the disposition of a right on real property upon the special registers kept in each district (arrondissement) by an official usually known as the Registrar or the Conservator of Registers. When an act (deed) is presented to him for registration, the conservator makes a summary of the deed and records it in the special register. Neither the deeds nor the registers themselves provide any guarantee of title or even of the validity of the transactions they record. Secondly, in both the above types, the system is essentially a registration of owners rather than a registration of land. The registers are kept according to the names of persons and it is the list of the names of owners that forms the index of the Registers. Prospective purchasers who desire to be informed of their contents have the right to ask the Conservator for an extract from his registers by giving the name of the person whom they know to be or to have been the owner of the immovable about which they desire information. They can then ascertain whether an act of alienation has been registered in his name by which he disposed of his ownership or other proprietary interests. It thus follows that in order to be exactly informed of the present position of an immovable, one must know the names of the successive owners without exception, and submit all of them to the conservator. If there be a single name omitted or badly given, the entire system falls down.[40]

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[38] See, M. Dixon, op. cit., p. 28 and P.J. Dalton, op. cit., pp. 436-443. The Indemnity Fund for this purpose is usually established from the fees raised through registration. Our Civil Code too seems to envisage the creation of such a Fund. See Art. 3051(3).

[39] The "Specimen" is taken from P. J. Dalton's and S. H. Goo's works eaelier cited. For "98 WITHERED HEATH ROAD" appearing in Entry No. 1 of the "Property Register" please read "13 AUGISTINE WAY, KERWICK" indicated on the Plan. This is because the two specimens were taken from two different title certificates chosen because they illustrate the subject better.

[40] See, Planiol, op. cit., p. 561.

In contrast, registration of title is a registration of land. In essence, each plot would be assigned a "title number" and described by reference to an accurate plan based upon the ordnance survey map (cadastre) revised up to date and, in addition to information about the title itself, other rights and interests affecting the title may be entered on the Register against the title number.[41] It thus seeks to overcome the above difficulties by providing a once and for all registration of title to a particular piece of land upon first registration. Thereafter, all that a prospective purchaser has to do is merely inspect the Register to see that the vendor is certified to be the owner. It thus revolutionizes the methods of carrying out sales, mortgages and other land transactions. As one authority on the subject puts it, although "the complexity of rights in land is such as to render it impossible to make the transfer of registered land as simple as the transfer of shares registered in the books of a company, ...the present system of registration of title attempts to follow that analogy so far as is practicable." [42]

As mentioned earlier, Registration of Title is quite a revolutionary system designed to supersede the traditional systems of conveyancing, to borrow an essentially English concept.[43] The difficulties of introducing such a system at one go or at a go are apparent. In England, beginning from 1925, it took nearly 70 years to progressively make it applicable throughout the country. Its implementation was effected by degrees; at first in certain geographical areas and then incrementally to cover the whole country. All land in England and Wales became subject to compulsory first registration as of December 1, 1990. By this time, there were already 13 million titles registered and it was then estimated that, by the year 2000, over 90% of all qualifying titles will be registered.[44]

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[41] See, Theodore B. Ruoff, *Concise Land Registration Practice*, Second Edition, pp. 23-24, London, Sweet & Maxwell Limited (1967). See also, Annex III.

[42] Megarry & Wade, op. cit., p. 1046.

[43] "Conveyancing" is a special art. It is "about how to transfer ownership in land, about the rights of the parties at different stages in real property transactions, and about their respective positions if things should go awry in the course of the transaction." See, P.H. Kenny and C.M. Bevan, *Conveyancing Law*, p. 1, MacDonald & Evans Ltd. (1980). In England, it is one of the principal, if not the exclusive, function of solicitors as opposed to barristers, the two branches of the legal profession.

[44] M.Dixon, op. cit., p. 23 and 24.

In France, registration of alienations had a somewhat chequered history. First introduced by the Law of Brumaire II, Year, XII (November 1, 1798) during the revolutionary days, it was abandoned by the Civil Code (except for registration of mortgages) but was reinstated by a law of 1855. The central idea of the system laid down by this law, as well as the laws amending it, and the goal envisaged, it is said, is the same as that of England but the result has not yet been attained. The major difficulty being that such a system requires the "entire remaking of the cadastre which today does not give even an approximately correct plan of present real estate holdings."[45] It also requires a special regime for the towns because of the division of buildings into flats.[46] Planiol, writing around 1930, says "the remaking of the cadastre is such a stupendous undertaking that up to the present no government has dared to attempt it."[47]

To conclude, in as much as encumbrances too are created by deeds, we can say that registration systems fall into two general types— registration of title and registration of deeds.[48] Registration of title signifies, in substance, a system under which there is recorded in a public register, against every unit of property, the name of the owner or the person having registrable interests. "The correspondence of titles with the register is guaranteed by the defining authority of the law—he and he alone has title, *adversus omnes*, whose name is on the register." Registration of deeds is the system under which the register records only conveyances, and "makes no pretence of guaranteeing the title of the grantor".[49] The former is the system which now prevails in England and the latter is at present the system of French law.[50]

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[45] Planiol, op. cit., p. 562.

[46] See, Amos and Walton, op. cit., p. 109.

[47] Planiol, Ibid., p. 562.

[48] Under the English system, a registered mortgagee to is issued with a "charge certificate", which is very similar to a land certificate save only that the mortgage document is attached. A rent owner too is given a "rentcharge certificate". See, P.J. Dalton, op. cit., p.31 and T.B. Ruoff, op. cit., p. 16.

[49] Amos & Walton, op. cit., p. 106.

We are now in a better position to appreciate the system of registration designed by our Code.

3. The System of Registration under the Ethiopian Civil Code

3.1. Registration under Title X

Registration of immovable property is governed by "Title X", Articles 1553 to 1646, of the Ethiopian Civil Code and the entire "Title" is devoted to it. The system is strikingly similar to what we have observed in the preceding pages. We may briefly summarize its salient features as follows.

3.1.1. Type of Registers to be Maintained

Registration under this Title may conveniently be classified into two main categories: *Registration of Acts* and *Registration of Land*. Article 1567 provides for the registration of "all acts, public or private, made *inter vivos* or *mortis causa* purporting to recognize, transfer, modify or extinguish the right of ownership of one or more persons over an immovable..." The Registers in which these acts are registered are of two kinds and are referred to as (1) *Register of Property* and *Register of Mortgages* (Art. 1556), and (2) *Register of Immovable*. The first are also referred as "principal registers". The list of acts which have to be registered in the register of property is quite wide, the idea being that the registers should reflect the full character of the property so that an intending purchaser knows what he is

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[50] Id. The introduction of a compulsory title registration system in England is not without its consequences. It is said that it brings English law closer to German law. See, for example, *The New Encyclopedia Britannica* (1992), Vol. 26, p. 201. Under present English law, non-registration of title within two months renders the conveyance of the legal estate void. After this period, if the purchaser does not ask for an extension of the period and is granted one, the legal estate in the land will be revested in the vendor who "holds it as a bare trustee for the purchaser". The remedy for failure to register within two months is, however, "simple, effective and cheap". The Land Registrar and the court may extend the period if "satisfied that [it] cannot be made within the said period, or can only be made within that period by incurring unreasonable expense, or that the applicant has not been able to do so within the said period by reason of some accident or other sufficient cause. See, S.H. Goo, op. cit., pp.276-277.

buying and the person with an interest in the property knows that it will be protected. These are enumerated in Articles 1568 to 1573 inclusive. It is to be noted that mortgages, like in French law, have, under our Code too, their own registers reflecting their importance as well as precedence in the history of registration of liabilities affecting land.[51]

Registers of property and mortgages are to be kept in each place of conservation according to the districts into which the land is divided. The geographic area constituting a district for such purposes is to be determined by the Ministry of Agriculture.[52] The Ministry may also, by a general directive, or by a directive specially applicable to one or more places of conservation, prescribe the keeping of additional registers.[53] In urban areas, for example, as is done in many countries, such registers may be devoted to registration of restrictions or servitudes imposed by the municipality "not to build, rights of way or servitudes relating to municipal sewers and pipes".[54]

The Registers of property and mortgages shall consist of files made up of printed forms, made available to private individuals "who shall cancel any useless indications and fill in any blanks therein".[55] The registers are, therefore, transcriptions of the act giving rise to the registrable right rather than a registration of the act itself. The transcription is also done by the concerned party himself and not the officiating registrar. It is forbidden to include indications other than those set down in the forms.[56] Again, it is the above same Ministry that is given the power to draw up the forms and determine their format.[57]

The registers of property and mortgages are, in essence, registers of names, in the sense that the registrations are effected against the name of the landowner or other person whose interest on the land is intended to be

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[51] "The remedy of registration was adopted, piecemeal, to deal with particular liabilities affecting land, as the hardship on purchasers came to be felt, by a series of enactments." *Halsbury's Laws of England*, Vol. XIX, Second Edition, p. 338, Butterworths & Co., London (1935); See also Planiol, op. cit., p. 540.

[52] Art. 1555 of the Civil Code.

[53] Art. 1559.

[54] Art. 1538 (2).

[55] Art. 1587.

[56] Art. 1597.

[57] Art. 1588.

affected thereby. In recognition of this, Article 1558 states "where the state of the cadastre does not allow the drawing up of a register of immovables, a register of owners shall be kept in each district instead of such registers." Registers of owners are to contain, classed in alphabetical order, leaves relating to each one of the persons who, in an act registered in one of the principal registers, are indicated to be owners of an immovable situate in the district. This Register corresponds to the "Index of Owners" which in other countries, as we saw, is intended as an aid to the searcher of the register of deeds, and good indexes are indeed needed "to extract from such a system all the protections it purports to afford".[58] In our Code, it is made compulsory as a complementary register.

In contrast to this, our Code provides for another type of Register which we earlier mentioned as "Register of Land" and the Code refers to as "Register of Immovables". Under this type, it is a plot of land which is registered and once so registered all acts subject to registration (titles and encumbrances) which concern the immovable are entered against it. This type of registration resembles, and is indeed an embryo of, the more modern registration of title system. Its adoption and implementation too depends, and is under the Code made to depend, on the realization of the ordnance survey map or cadastre preparation scheme.[59] The registration and the description of each immovable in the register must be made according to the measurements and indications of the cadastral survey plan. The Register must also be kept "in permanent and absolute conformity with such plan".[60] Article 1575 states, and it is worth quoting in full, that:

> (1) Every immovable existing within the district shall be registered in the register of immovables under its number in the cadastre, and a leaf be assigned to it.
> (2) The register shall contain, on each of its leaves, a summary description of the immovable made with the object of its individualisation.[61]

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[58] Amos and Walton, op. cit., p. 109. See also, p. 40 *supra*.
[59] Art. 1557.
[60] Art. 1576.
[61] "Individualisation" of the plot is very important.. As T. B. Ruoff notes, "one of the distinguishing features of registered conveyancing is that the land is described by reference to an accurate plan based upon upon the ordnance survey map, revised up to date". On the other hand, in a "recording" system, the identification of the immovable is usually given by referring to the names of neighboring owners and, consequencly, "when the neighbors have changed one no longer knows to

(3) All acts subject to registration which concern the immovable shall be mentioned on the leaf with an indication of their reference number in other registers and of their date.

3.1.2. Procedure

A request for registration may be made by any interested person.[62] The keeper of the registers is forbidden to effect any registration on his own motion.[63] The person making the request may attach thereto the act itself or any other supporting document which he thinks fit. The keepers of registers may not refuse to accept a request on the grounds that the necessary documents have not been attached to such request. They may only call the attention of the person making the request to the necessity of such documents and to the consequences which the absence thereof may entail.[64] The keeper shall assign to each request, when presented to him, a serial number in the register to which such request corresponds and shall hand back to the person making the request one of the forms duly signed by him with the seal of the place of conservation affixed thereon. The other form shall be incorporated in one of the two principal registers to which it appertains in the order in which the requests are made.[65] A person who has registered a right in the registers must, within eight days, serve on the owner of the immovable to which such right relates a copy, certified by the keeper of the registers, of the form which has been entered in the registers. Failure to do so would entail liability for the prejudice that may be caused to the owner of the immovable or to third parties as a result such failure to comply with the formality.[66]

The registers of immovable property are public. Keepers of registers are required, on request, to deliver a certified true copy of the leaf concerning a particular immovable which is to be found in the register of immovables. They are also required, on request, to deliver a certified true copy of the leaf or leaves concerning a particular owner which are to be found in the register

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what property the description applies". See, Ruoff, p. 23 and Planiol, p. 562 fn. respectively. As an example of identification by neighbors, see Annex IV.

62 Art. 1594.

63 Art. 1593.

64 Art. 1613.

65 Arts. 1598 to 1600.

66 Art. 1646 C.C.

of owners. They must also, on request, deliver certified true copies of the acts registered in the registers of property or of mortgages as well as of the supporting documents kept by them. Where necessary, they are, in addition, required to deliver a certificate showing that the leaf of an immovable does not contain any registration or that no leaf concerning a particular owner exists in the register.[67]

3.1.3. Effect of Entry into the Registers

The registration of an act in the registers of immovable property does not constitute a decision as to its validity. Under Article 1637, keepers of registers are not authorized to decide on the validity of acts presented to them for registration. They must register such acts "without delay" when the formalities required by the law have been performed by the interested persons. The State does not hence guarantee title or the validity of the act registered. No land (title) certificate or charge certificate is issued and, as we saw, only a copy of the form bearing the act registered is issued to the person who requested the registration or to others upon request. It should thus be noted that the provisions of Article 1198 of the Civil Code on "Liability of the State" do not apply until a title registration system guaranteed by the State is put in place, as envisaged by the Code.[68]

The purpose of registration is thus not to guarantee the validity of the act registered but rather to give notice to third parties who want to enter into transactions affecting a certain property. Under Article 1640, no person may take advantage of the fact that he did not know of a registration entered in the registers of immovable property even when such ignorance is due to a fault in the functioning of the registry office. As between two persons who have acquired a right subject to registration from the same person, the one whose right has been registered first shall be preferred (Art. 1641). The bad faith of the person who has requested the registration or required the right to which the registration relates shall not affect the validity of the registration

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[67] Arts. 1561 to 1563.

[68] The application of the provision, it seems to me, should have been suspended together with the provisions of Title X. It was not so done either due to oversight or, more probably, because it was then assumed that the "Order" mentioned in Art. 3359 would soon be forthcoming. However, it makes little difference, as it is obvious that the State cannot be liable when it is clearly disclaimed that registration is no guarantee of the validity of an act.

(Art. 1644). Hence, the fact that a purchaser or a mortgagee has notice of the existence of an earlier unregistered conveyance does not impair his claim based on prior registration. In general, therefore, the failure of a purchaser or a mortgagee to register the transaction can only be set up against him by a rival whose interest is registered. The transaction is perfectly good as between the original parties to it even if unregistered.

3.1.4. Concluding Remarks

We may thus conclude that the system of registration adopted by the Ethiopian Civil Code is similar to that found in French law; it is a registration of acts or deeds rather than a registration of title, as in English law. It simply means "transcription" or recordation of the act or deed submitted for registration. In title registration, documents or deeds are merely vehicles for obtaining registered title and, when once registered, all defects therein, so far as subsequent purchasers are concerned are cured.[69] In the recording system, on the other hand, the recording of such deeds does not cure inherent defects therein.[70] There is hence no guarantee of title by the state, nor even of the validity of the act submitted for registration. The overall system is also patterned along French law as well as the English law of the pre-1990 period in that the ultimate goal is to replace the prevailing system of registration of deeds with the more modern system of registration of title. The provisions on registers of property, mortgages, and owners establish an intermediate, but temporary system of registration. They, as it were, prepare the ground and from this beginning, as work on the preparation of cadastral survey plans advances so will the implementation of the system of title registration, until it emerges as the sole system and the others can thus be abandoned completely.

As is well known, the application of the entire provisions of Title X has been suspended "until a date to be fixed by Order published in the *Negarit*

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[69] The investigation is done by the legal staff of the Land Registry and is extensive and thorough but as Mr. Rudoff, himself once a Registrar, adds: "Statute law has given the Chief Land Registrar a Nelson's eye which enables him to overlook errors and omissions that no prudent solicitor would dare to ignore." Theodore B. Ruoff, op. cit., p. 2.

[70] See, L. Voumard, *The Law Relating to The Sale of Land in Victoria*, Second Edition, pp. 398-99, The Law Book Co. of Australia (1965).

Gazeta".[71] This reminds one of the method employed in England to effect the registration of title system. It was made compulsory in each district by "Order in Council" to be issued as and when the situation in such district allowed the introduction of the system. It would not be a mere conjecture to surmise that the same strategy was envisaged here too. Unfortunately, however, nothing has been heard of the promised "Order" after the promulgation of the Code that one wonders whether it was at all seriously intended to introduce the system of registration itself in the first place.

3.2. The Practice in Addis Ababa

Under the "transitory provisions" of the Code, pending the publication of the Order earlier mentioned, the *customary rules* relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable property may be set up against third parties shall apply in lieu of the provisions of Title X. The same is true of the formalities relating to easements, promises of sale, rights of pre-emption or provisions preventing attachment or assignment.

This can as well be taken as an obvious reference to the "Rule of Ownership of Land in Addis Ababa of October 20, 1900" as it cannot be said that the legislator was unaware of this major piece of legislation when it proclaimed the Code. The Code has chosen to relegate it to the position of a customary practice possibly because the Rule was then, despite its age, still in its infancy and was not from the start supported by subsidiary legislation necessary for its effective implementation. Nonetheless, the system of registration of land and issuing of title deeds currently in force in Addis Ababa owes its origin to it and, to date, there is no other law on the subject.[72] Because of its historical significance (this year marks its

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[71] Art. 3359. An "Order" is a form of law issued by the Emperor in the exercise of his constitutional powers to determine the organization, powers and duties of all ministries, executive departments and the administrations of the Government under Art. 27 of the Revised Constitution of 1955. *Negarit Gazeta* (*Neg. Gaz.*) is the official gazette in which all laws are published.

[72] Before Addis Ababa was granted a Charter in 1954, it was, like other towns in the country, administered under the Ministry of Interior. As a result, one can say that the same system of registration was extended to the other towns as well. *General Notice No. 172 of 1954, Neg. Gaz., 13th Year No. 10.*

centenary) as well, the full text of the Rule has been annexed to this paper. We shall here present its gist.[73]

The Rule was proclaimed by Emperor Menelik, the founder of Addis Ababa, soon after the foundation of the city. It contains 32 Articles, colloquial in style but at the same time brief and to the point. It begins with a declaration that the right to buy land within the city of Addis Ababa is hereby granted to "all my fellow countrymen" as well as foreigners upon whom such privilege is conferred by me. Individual owners may freely sell their land in accordance with the procedures laid down in the Rule. The price of government land is to be determined by the government per square meter and may vary from area to area. When a person desires to buy land, such land shall first be measured and its size determined. Thereafter, a plan of it shall be drawn by an engineer and entered in the Land Register. The task of measuring the land, delimiting its boundaries, and drawing its plan shall be done by two engineers one of whom, and preferably both, shall be a government appointed one. The plan so drawn and registered shall be known as the *cadastre* of Addis Ababa.

When government land is sold, a written instrument evidencing the sale shall be issued to the purchaser by the authorities. The purchaser shall not be issued with a title deed until he pays the full price of the land. Thereafter, he may freely dispose of his property. Sale transactions between individuals shall be written upon government paper and bear the seal of the Office. They shall also be attested by two witnesses who shall affix their marks thereon. Title certificates issued by the government shall be entered in a Register which shall contain (1) the number assigned to the entry, (2) name of seller, (3) name of purchaser, (4) size of the land and encumbrances on it, (5) its boundaries, (6) name of owners of neighboring lands by which it is bounded, (7) name of the locality in which it is situated, (8) price of the land, (9) date and year of sale.[74]

The Rule concludes with a proviso that disputes arising out of ownership in land shall be settled in accordance with local customs and, where local customs are lacking, the judge shall consult "the law of Napoleon". The

[73] See Annex III. Taken from, Mahteme Selassie Wolde Meskel, *Zekre Neger*, pp. 166-171, Artistic Printing Press, Addis Ababa (1962). Annex IV, following it, is a specimen of certificates issued to landowners during Emperor Haile Sellassie's reign.

[74] Cf., Art. 1606 of the Civil Code.

obvious reference here is to the French Civil Code, as it was then known as the Code Napoleon, but it is broad enough to include the laws of the Directorate which, as we saw, the Civil Code abandoned but were soon after reinstated. This proviso thus seems to reintroduce, through the back door, the implementation of Title X of the Code since its provisions are mostly based on Napoleonic laws of which the Civil Code of France forms a part. This is a matter which both the redactor and our legislators have probably overlooked but it, without doubt, leaves the door open to us to use French law as well as the provisions of Title X to complement the current practice.

We are now in a better position to tackle the provisions of Article 1723.

3.3. Registration under Article 1723

As the above narration makes clear, Title X deals with what is often called registration at the Land Registry, a governmental department established for the specific purpose discussed above. On the other hand, Article 1723 deals with registration with a court of law and notary, at the option of the party concerned. This much is clear. What is not clear is why the term "registration" is used in two different contexts if it means one and the same thing and, if not, what is the difference between the registration provided by Title X and that envisaged in Article 1723. As we saw, this is the nub of the controversy surrounding the relationship and differences between Articles 1723 and 2878, some courts holding that lack of registration under Article 1723 does not affect the validity of the contract as between the parties as under Article 2878 registration is only designed for the protection of third parties and that as a special law it (Art. 2878) prevails over the general law found in Article 1723.[75] We also saw that the Supreme Court is of a different opinion. Without elaborating it[76], in the *Gorfe* case, it intimates that the two types of "registrations" are different in nature thus concluding that a contract of sale of an immovable has to satisfy the requirements of Article 1723 in addition to those relating to writing and attestation in order to be valid. There was no law on notaries both prior and subsequent to the

[75] See, the decision of the Federal Supreme Court in *Mulushewa Teferra et al. v. Habte Zerga et. al.*, Ethiopian Bar Review, Vol. 2 No. 1, pp. 177-178. See also, Mekbib Tsegaw, op. cit., pp. 161-165.

[76] See, pp. 186-187 of the Judgment in Vol. 2 No. 1 of the *Ethiopian Bar Review*.

enactment of the Civil Code[77] as well as a law enabling the courts to perform the tasks attributed to them by Article 1723 and this has, no doubt, contributed its own share for the difference of opinion on the issue among our courts. We shall following attempt to investigate the type of "registration" envisaged by the Article and why the term was preferred from an examination of the role historically played by the two institutions in connection with the tasks attributed to them under the Article. We shall begin with the notary.

3.3.1. The *Notariat*

Although the notariat is a universal institution and exists in some form in common law countries as well, it is an institution essentially French and, to a lesser extent, a Continental one too.[78] Its historical roots in France could be traced back to the Middle Ages.[79] It was, however, Napoleon Bonaparte who reorganized the profession and formed the basis of the modern notariat by the Law of 25 *Ventose*, Year XI (March 16, 1803).[80] The modern notariat is thus a contemporary of and pre-dates the French Civil Code by a few years, implying the importance attached to the institution by the legislature in the codification system about to be inaugurated.

The Law of 25 *Ventose*, as slightly modified by an Ordnance of 2 November 1945, defines notaries as:

> "public officials instituted for the purpose of receiving all acts and contracts to which the parties are required by law, or desire, to invest with the character of authenticity attaching to the acts of the public authority, of establishing the date thereof, of having the

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[77] See, p. 62, *infra*.

[78] See, Planiol, Vol. 2, Part 1, op. cit., pp. 80-81 and M. Cappelletti, J.H. Merryman and J.M. Perillo, *The Italian Legal System: An Introduction*, pp. 95-102, Stanford University Press (1967). For a good comparative study of the subject, see also, Thomas Gebreab, *The "Notariat" in Ethiopia: Its Present Functions and Status in Comparative Perspective*, Thesis submitted in partial fulfillment of the requirements of the L.L.B. degree, Addis Ababa University, Faculty of Law, 2000 (unpublished).

[79] See, Planiol, op. cit., p. 79.

[80] A compilation of the present laws dealing with the French Notariat is found in the *Nouveau Code De Procédure Civile, Dalloz, 1993, Appendice, 1629-1717*.

custody of the originals, and of furnishing copies both common and executory."[81]

Notaries are thus firstly public officers. Although public officers they are not employees of the State, nor paid by the government. Instead, they are rewarded for their services by fees which they charge their clients usually according to a schedule established by law. The term "public officer" merely connotes that the notary is conferred with authority by the State which authority gives his act the character of executability. The State bears no responsibility for his acts as he is independent from any of its branches. Notaries are appointed for life by the President of the Council of Ministers and an aspirant to the office must hold an LLM degree or its equivalent to be eligible. In addition, he must have served the necessary period of apprenticeship (*stage*) in a notary's office and must have passed the professional examination. Much like the legal profession, they are regulated by their own governing bodies organized at the district (*department*), regional and national levels.

The competence of notaries is territorial. They can only function within the territorial jurisdiction of the district for which they are appointed.[82] Outside of the locality or territorial jurisdiction in which he functions, "the signature of the notary is not considered to be known".[83] Notaries enjoy a monopoly in the performance of their tasks within their own locality; no other public officer can compete with them. In return, they may not refuse their assistance to those who seek it. In France, in 1896, the total number of notaries was 8,910.[84] In 1945, their number was estimated at 7,600.[85]

The most important function of notaries is, as is alluded to in the definition, the drawing up of acts (*actés*) which the parties must or wish to invest with the character of authenticity. The law does not require the notarial or

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[81] As found in, Amos and Walton, op. cit., p.24.

[82] The number of notaries is limited by law so that in towns with over 100,000 inhabitants there shall be at most one notary for every 6,000 people, and in smaller towns and the countryside at least one notary in each canton. The government is authorized to regulate their distribution. See, N. Brown, op. cit., p. 62.

[83] Planion, op. cit., p. 89.

[84] Ibid., p. 81.

[85] See, Thomas Gebreab, op. cit, p.45.

authentic form except for a very small number of acts but, in practice, because of its probatory value as well as the respect and confidence commanded by the institution, individuals prefer to conclude almost all contracts of any significance before notaries.[86] Article 1317 of the French Civil Code defines the term "authentic" acts as "any instrument which has been drawn up, with the proper formalities, by a public officer duly empowered by law to that effect, in the place where he officiates."

Hence, we may say that "authentic acts' are those which are received by a public officer with the requisite solemnities. The signature of the officer who has received the act carries full credit of everything which the act contains and of the signature of the parties who have subscribed it.[87] The act is conclusive evidence, until impeached for falsity, of the acts performed by the notary and the events which are mentioned as having taken in his presence. In other words, it conclusively establishes three things: (1) that the act was in fact so drafted and executed; (2) that the recitals and agreements expressed in the act are accurate reports of the parties' statements and agreements[88]; and (3) that any fact that the act recites to have occurred in the presence of the notary did occur, and any act the instrument recites to have been performed by the notary and attesting witnesses, if any, was in fact performed.[89] The conclusive nature of a notarial act can be impeached only by a special procedure (*inscription de faux*) which may be pursued either in civil law alone or criminally at the same time and is "a very involved and costly procedure".[90] The fraudulent insertion of a false statement in a notarial act is assimilated to forgery and is punishable with penal servitude for 20 years in the case of a party and for life in the case of the notary.[91]

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[86] See, Planiol, op. cit., p. 79 and N. Brown, op. cit., p. 66.

[87] Pothier, *A Treatise on the Law of Obligations, or Contracts*, Vol. I, p. 476, A. Straham, London (1806).

[88] By this is meant that the notarial signature is full proof only of the fact that the parties have made the declarations (recitals) which the act relates, but not that these declarations are themselves true. See, Neville Brown, op. cit., p. 66.

[89] See, M. Cappelleti, J.H. Merryman, and J.M. Perillo, *The Italian Legal System: An Introduction*, p. 100, Stanford University Press (1967).

[90] Neville Brown, op. cit., p. 66.

[91] See, Amos and Walton, op. cit., p. 25.

The notary is the guarantor of the identity of the parties. He should not have parties sign, except those who are known to him, and if he does not know them, he must have their identity certified by special witnesses, called certifying witnesses.[92] "Attestation", in relation to an instrument, means that (1) one or more witnesses have seen the executant sign the instrument; (2) with a view to attesting or to bearing witness to this fact each of them has signed the instrument in the presence of the executant and notary. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or a certifying witness, etc., he is not an attesting witness.[93]

A notarial act is also full proof of its date. It confers an authentic date (*fecha cierta*) upon the instrument, rebuttal of which requires a special procedure. In the words of the definition of the term earlier stated "it establishes the date of [the instrument]".[94] In contrast, an instrument under private writing (*actes sous singe prive*) cannot prove the date on which it was executed unless that date is rendered certain by the death of one of the parties or the instrument has been deposited with an administrative or judicial authority.[95] The date of the deed, as we saw, becomes particularly important in determining the order of priorities in real rights.[96]

The definition provided by the law also refers to another important function of the notary: the function of "having the custody of the originals of the acts which they receive and of furnishing copies both common and executory". Notarial acts are thus drawn in originals and copies. The originals must always remain with the notary, as he is responsible for their preservation. It is only certified copies that are issued to the parties or the persons legally entitled to call for copies. Copies of notarial acts are in turn of two kinds: common copies, or *expéditions*, and executory copies, or *grosses*, both being complete copies of the act. A *grosse* contains in addition the executory formula. The executory formula very much resembles the decree

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[92] See, for example, Id., and Planiol, op. cit., p. 86.
[93] See, *Dr. Sir Hari Gour's Commentary on The Transfer of Property Act*, Vol. 1, 11th Edition 2005, p. 50, Delhi Law House.
[94] Compare with Art. 2015 (a) and (b) of our Civil Code.
[95] Compare with Art. 2015 (c).
[96] See, p. 47, *supra*.

of a court of law. It contains an order addressed to all bailiffs (*huissiers*[97]) and the public force permitting "execution, seizures, and in a manner more general the employment of force to obtain justice".[98] It is, however, the exception as the law gives the notary such powers only in limited cases. It is the common copy which is the general rule. The acts are called "grosses" because they are written in letters of large size (*grossoyes*) as opposed to the common copies which are in ordinary writing or "*minutes*".[99]

It is the practice of drawing up these *Minutes*, developed by notaries through the years especially in relation to sales of immovable properties (*acte de vente*), that has given the function of the notary the characteristics of "registration" proper, so much so that "in reality the general soundness of French titles to land depends on this practice".[100] This is also probably the reason why our Code, under Article 1723, has taken the liberty of using the term "registration" instead of the more appropriate term "authentication". As one common law lawyer describes this practice of French notaries:

> "The provisions of the *acte de vente*, taken together, give the document an all inclusive contractual and conveyancing quality... The first element is a recitation that the parties appeared before the notary at a particular place. The second provision identifies the parties with greater particularity: their names, marital status, addresses, occupations, and dates and places of birth. These preliminaries recited, the major portion of the document declares that the parties purchase and sale the property, which is then physically described. If a dwelling unit is involved, a description is given room by room, detailing the function of each, for example, 'a dwelling known as ...

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[97] The legal profession in France is even more "divided" than that of England. "Huissiers" form another branch of the profession.

[98] Planiol, op. cit., p. 88; See also, Amos & Walton, op. cit., p. 25. A creditor whose right rests upon a notarial act can thus, by virtue of the *grosse*, initiate proceedings for execution upon the property of his debtor without first obtaining a judgment. See, Id.

[99] Planiol, op. cit., p.88.

[100] Amos & Walton, Ibid., p. 109; see also, Planiol, op. cit., p. 562 fn.

with three floors and a cellar below; on the first floor, a dining-room...', etc."[101]

This is not all. A section is also devoted to the *origine de propriete*. It contains a history of the title to the property, extending back in time over 30 years. The section attempts to condense this history but "is as lengthy as completeness necessitates".[102] It thus passes a resume of the title on the land to successive owners, just as title deeds, as we have seen, do under the English system of conveyancing practice. Other provisions of the minutes are a statement of the price, the fact and means of payment, all servitudes known to the vendor, and the results of the notary's inquiries of the local planning office.[103]

The notary, therefore, by reason of his duty to conserve his acts in minutes and the traditions of his practice, is turned into an archivist as well. Hence elaborate rules exist regarding the custody and the transmission of his minutes.[104] A notary is obliged to keep the minutes of himself and his predecessors for 125 years. As and when minutes exceed this age, they are periodically transferred to the national or district archives. Further, as all acts have to be registered at a government office and certain registration duties paid, the notary must keep a *repertoire* or a daily journal of all the acts which he receives.[105] This repertoire must, on penalty of disciplinary action for failure to do so, be periodically presented for various inspections and controls.[106] For convenience, all transactions of the notary are set down in the *repertoires* in chronological order, indicating whether the act was a sale, lease, will, etc., as well as whether it was the original which was delivered or the certified copy, and bound into volumes.

As is readily apparent, a visit at the notary's office where the land is situate would yield, to the prospective purchaser, much the same information as a

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[101] D. Barlow Burke, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, Tulane Law Review, Vol. 50 (1975-76), p. 323.
[102] Ibid., p. 324.
[103] Ibid., p. 323.
[104] N. Brown, op. cit., p. 67 and Amos & Walton, op. cit., p. 25.
[105] N. Brown, Ibid., p. 67.
[106] See, G.L. Certoma, *The Italian Legal System*, p. 58, Butterworths, London (1985); also, Neville Brown, op. cit., p. 67.

visit to the land registry office would. The minutes of the notary are not, however, public records as registers of property are. Copies of minutes are, as we saw, delivered only to the parties or to persons legally entitled to call for them. A notary may not surrender the documents in his custody except by an order of a court. As a general rule, since the tasks entrusted to the notary are similar to those ordinarily performed by lawyers except that his are confined to voluntary as distinct from contentious jurisdiction, the same ethical rules of confidentiality govern both professions. In addition to acting as legal advisers for both parties who appear before them for the drawing up of acts, notaries perform a host of other legal tasks as well. These include marriage settlements, the drawing up of wills, liquidation of successions, administration of estates, company formations and the drawing up of their memorandums, etc.

To conclude this part, to describe the act set forth in Article 1723 as "registration" would, strictly speaking, probably be a misnomer. It is one of "authentication" rather than "registration". The former is primarily designed to bring about certainty in transactions as is also the case with private writings (*sous singe prive*). The latter is primarily an act of publicity designed to bring about security in transactions. It would have thus saved us from the controversy that ensued around the question of reconciling the "inconsistency" between this Article and that on registration proper (Art. 2878) had the more appropriate term been chosen or the functions of a notary amplified by other legislation. What brings this Article closer to registration of immovables proper is, as we saw, the practice of notaries in the drafting of their minutes and the redactor of the *avant projet* of our Code, Professor Rene David, a renowned French jurist, must have this in mind when selecting the term.

From the foregoing, we can hence conclude that, under our Code, as between the parties, the sale of an immovable is perfected by the agreement to convey, but this agreement has to be in the form of an authentic act in order to be valid. Private writings alone would not suffice and herein alone lies the difference between our law and its French counterpart. It should further be noted that it is not only contracts that affect title, or ownership, which have to be "registered" pursuant to the provisions of the Article but also all registrable interests attached to the land or immovable property. These are defined in Articles 1568 to 1574 of the Civil Code as well as in the provisions of Title X, which we saw earlier.

The idea of a notary serving as a drafter of acts and legal advisor in all important matters of daily life in every canton of the countryside and in every district in the towns is, without doubt, a noble idea. In addition to its obvious benefits in the economic sphere, it has the equally important beneficial effect of raising the level of legal awareness of the community thus enhancing respect for the rule of law. But such a system obviously requires a sizable number of trained legal manpower as well as a correspondingly efficient countrywide state administrative machinery for its effective implementation. The Ethiopia of the early 1960s was, by all accounts, far short in both. It is therefore little wonder that the idea was unceremoniously consigned to oblivion, without even a word being offered by way of explanation. It took another 43 years to establish a notariat somehow resembling the one envisaged by the Code. We shall say a few things about this new institution later.

3.3.2. Registration with a Court

The institution of notary was first introduced into the country by the Italians during their brief period of intrusion (1935-1941). An Italian was commissioned as a notary for the city of Addis Ababa around the years 1939 or 1940. After the departure of the Italians, notarial services were discontinued for some time until around 1945 when the Registrar of the High Court commenced providing these services. Initially confined to Addis, the service was soon extended to other localities and, in remote areas, even Registrars of *Awraja* and *Wereda* courts began rendering such services.[107] It is said that this was made possible by a circular issued by the Ministry of Justice which circular, in addition to conferring notarial powers upon registrars, also outlined the nature of the functions to be performed.[108] This circular was soon superseded by the Civil Procedure Code which nowhere assigns to the courts or their officials functions akin to those of a

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[107] See, Thomas Gebreab, op. cit., p. 67, citing Abate Yimer, *The Functions of the Notary Public of Ethiopia*, pp. 19-20, (September 1985, unpublished, Justice and Legal Systems Research Institute).

[108] It needs to be noted that both *The Courts (Fees) Rules of 1943 and of 1952* fix the rates to be charged upon "Registration of an agreement for the payment of blood money in cases of homicide", "Registration of testamentary dispositions and deeds of gift", "Registration of an arbitration", and "Registration of a divorce", indicating that some form of such system was already in place. Legal Notice No. 14 of 1943, *Neg. Gaz.*, 3rd Year No. 2 and Legal Notice No. 177 of 1953, *Neg., Gaz.*, 12th Year No. 15.

notary. Nonetheless, registrars continued performing their previous functions as if nothing affecting their powers has happened.

In 1970, registrars were relieved of their notarial functions and a separate unit, called "Contract Section", established for this purpose within the High Court itself.[109] It was the Head or Deputy Head of this Section who replaced the Registrar in assuming notarial functions.[110] In 1976, this Section was detached from the High Court and became part of the Ministry of Justice under its Civil Affairs Division, thus ending the little known and legally undefined role the courts played as notarial offices. It is this Section within the Ministry of Justice which served as a nucleus for the later establishment of the Addis Ababa City Government Acts and Documents Registration Office and its successor the present Federal Office of the same name, now an autonomous institution under the Ministry of Justice as we shall later see.[111]

The Civil Code too, in a number of Articles[112], contains provisions giving the courts functions of registration somewhat resembling those of notaries. It is worth quoting some of these in full.

> "Art. 630 – Deposit of contract
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> (1) A copy of the contract of marriage shall be deposited in the registry of the court or with a notary.
> (2) It may be freely consulted there by any one of the spouses or by any person authorised for this purpose by the spouses or by the court.
>
> Art. 891 – Deposit of wills
>
> (1) A public or holograph will may be deposited with a third party, in particular a notary or in a court registry.

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[109] See, Thomas Gebreab, Id., citing Girma Wakjira, *The Duties and Responsibilities of the Notary in Ethiopia*, p. 18, (March 1981, unpublished, Ministry of Justice).

[110] See, Thomas Gebreab, Id., citing Bezawork Shimelash, *The Legal Status of Our Notaries in Addis Ababa*, p. 15, (May 1998, unpublished, Justice and Legal Systems Research Institute).

[111] It probably also ought tobe noted that, in the final years of the Peoples Democratic Republic of Ethiopia, a Draft Proclamation on public notaries was finalized and was awaiting promulgation. A copy of the English draft is found in Thomas Gebreab's work earlier cited.

[112] See, for example, Articles 632, 962, 964, 967.

(2) A register, showing in alphabetical order the names of the persons whose wills have been so deposited shall be kept by each notary and in each court registry.
(3) An indication shall be made in the register of the date when the deposit of the will has taken place."

We can thus assume that, at the time of the enactment of the Code, some role was also assigned to the courts to act as depositories of records dealing with non-contentious matters too. This practice of courts acting as depositories of records of non-contentious matters has again its origins in French law. A Decree of 6 January 1960, amending an earlier law, states: "Each year a reproduction of registries closed during the preceding year will be deposited without cost with a clerk of a court [*au greffe*[113]] of grand first instance or of a court of first instance situated in an arrondissement other than the one where the registrar resides."[114] This is no doubt motivated by the desire to give registered acts as much publicity as possible as courts are not only readily accessible but also places which one would naturally approach to obtain information on such matters. It also aims at preventing possible alterations of documents as it is less easy to do so when the same documents are deposited in several places. Hence also the rational of the rule that these documents ought to be deposited in a district other than the one where the registrar resided.

3.3.3. Concluding remarks

By way of concluding remarks, we may say that the decision of the Cassation Bench of the Federal Supreme Court in the *Gorfe* case accords with the principles earlier enunciated. The "registration" provided for in Article 1723 is different in nature from that found in Article 2878. A contract of sale of an immovable has to be in the form of an authentic act in order to be valid. But it has to be further noted that the law in Article 1723 on registration with notaries was until the year 2003 a dead law. The provisions on registration with the courts too were not effective laws, as neither the Civil Procedure Code nor other special laws passed to date enable the Courts to perform such functions. A cardinal rule of

[113] "Greffiers" form yet another branch of the legal profession. Their functions approximate those of our court registrars.

[114] Decree no. 60 – 4, Art. 1. See, Petit Code Dalloz and Art. 2200 of the French Civil Code in John H. Crabb earlier cited.

interpretation is that a court of law may not decline judgment on the ground that there is no law applicable to the case before it. Laws are not made by man alone, or better still, by the legislature alone. There is natural law, equity, customs, etc., and a court has to resort to these in the absence of positive law.[115] It is different with institutions, it seems to me. Institutions are creations of men, of the sovereign power in modern constitutional practice. A court of law cannot create institutions and subject citizens to their jurisdiction, even if the legislature had once entertained the idea of establishing such an institution.

4. Other Related Issues

As noted above, the provisions of the Civil Code relating to notarial acts remained laws confined to the statute books alone because of the absence of the institution of notary essential for their implementation. In the year 2003, however, a law establishing notary offices was enacted thus marking a turning point on the status of the provisions. Hence, together with this change in status, the question of failure to comply with the formalities of the provisions too acquires a place of practical importance. In the following pages, we shall first attempt to examine this question and then address an issue which is often raised in relation to rights of ownership and other interests in land after the 1975 nationalization laws. Firstly, however, a few words on the newly established "notary office" would be in order.

4.1. The Nature and Functions of the new Notary Office

The "Authentication and Registration of Documents Proclamation No. 334/2003 came out on 8 May 2003 and entered into force on the same date. It is this Proclamation which establishes notarial offices. The new notary established by it is far different from the notary envisaged by the Code. It more resembles the "public notary" of the Anglo-American system than the French notariat per se.[116] For one, the notariat established by the new law is a government organ. Under the Proclamation, notary offices perform their functions under the directions of the Ministry of Justice, in the case of the

[115] See, for example, Planiol, Vol. 1, Part 1, op. cit., p. 155, 160.
[116] For a comparative study of the subject, see, Thomas Gebreab, op. cit.

federal offices, and the Justice Bureaus, in the case of Regional States.[117] The Head of the Office is appointed by the Minister of Justice or his counterpart in the Regional States.[118] Employees of the offices too are to be administered in accordance with the relevant civil service laws.[119] Regional States and the Council of Ministers, as the case may be, are authorized to issue regulations for the proper implementation of the laws establishing the offices.[120]

Regarding the territorial competence of the offices, the cities of Addis Ababa and Dire Dawa "shall have notary offices each".[121] Addis Ababa is the seat of the Federal Government and Dire Dawa, a city accountable to the Federal Government. Under Article 19, state members of the federation too are obligated to organize their own notary offices and "may issue details based on the facts of their own area". The purpose of this proviso is, no doubt, to bring about uniformity in the laws of the states and that of the federation, for inclusion of it in a federal legislation would have otherwise been unnecessary. The States may hence establish notarial offices similar in content to the ones found in the Federal Proclamation but whose organizational details may vary depending on local conditions.

The new notary does not have the all-important function of drawing up acts, the distinguishing mark of the continental notary which enables him to act as legal advisor to both of the parties at one and the same time. Apart from ascertaining its legality, the Ethiopian notary is forbidden to "change or cause to be changed the contents of a document submitted for authentication".[122] His main functions are, to use the same language as that found in the Proclamation:

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[117] "Authentication and Registration of Documents (Amendment) Proclamation, No. 467/2005, Art. 1 *cum* Art. 50 (2) and (6) of the Federal Constitution.

[118] Ibid., Art. 2.

[119] Ibid., Art. 3 (2)(a). No specific mention is made in the Proclamation as to which employees of the Office have notarial powers, which is a very important question.

[120] Ibid., Art. 6.

[121] Proc. No. 334/2003, Art. 20 (1).

[122] Ibid., Art. 13 (2). This would mean that the contract, in important matters especially, is to be drawn up by lawyers. There is no justifiable reason, in principle, why a private writing should not be considered as good as a notarial one if drawn up by lawyers, as lawyers too are officers of the court and have stringent ethical rules to abide by.

- to authenticate and register documents;
- to verify copies of documents against their originals and register same;
- to ascertain the capacity, right and authority of persons who are about to sign or who have signed documents submitted for registration;
- to ascertain the legality of documents submitted for authentication.
- to ascertain with respect to contracts made to transfer properties for which title certificates are issued under the law: (a) the right of the transferor to transfer the property; and (b) that the property is not mortgaged or pledged or not attached by a court order.[123]

Under the definition Article of the Proclamation, "to register a document" means "to register an authenticated document by marking it with an identification number, in a register prepared for this purpose and to deposit the same document, or to register and deposit a document which is required by law to be deposited with a notary." The documents so registered are not open to the public. The notary owes a duty of secrecy. Under Article 9, he is duty bound not to give to third parties information which comes into his possession in the course of performing his duties, "unless ordered by a court or by a body empowered by law". He must keep secret anything which he happens to know in the course of performing his duties.

Hence, the meaning attached to the term "registration" in Article 1723 is now made clear. It means "authentication" of an act and the "deposit" of such act by registering it in a book prepared for this purpose. And the "depositing" is essentially for the purpose of conservation rather than giving publicity to the act. This would mean that the provisions of the Civil Code dealing with notaries are activated bearing the attributions conferred on notary offices by the new Authentication and Registration of Documents Proclamation. As a result, as we said earlier, the question of failure to register an act with a notary becomes one of practical importance than was the case earlier. We shall now attempt to address this question.

[123] Ibid., Art. 4.

4.2. Effect of Failure to register

Under Article 1727, it is stated that a contract required to be in writing shall be of *no effect* unless it is attested by two witnesses. A similar provision is found in Article 2877 wherein it is stated that a contract of sale of an immovable shall be of no effect unless it is made in writing. On the other hand, as regards contracts creating or assigning rights in real property, the law employs a slightly different language. It uses the mandatory form "shall" without adding more. It merely states that such contracts "... shall be in writing and registered with a court or notary". This implies that a distinction is drawn, as regards their effect, between the forms relating to writing and those relating to registration. In the first case, we may say that lack of the proper form makes the acts *inexistent*, as it is, as a matter of fact, "of no effect"; in the second, it makes them null or void, in the eyes of the law.

As Planiol tells us, "the theory of nullities is one of the most obscure in the field of the civil law."[124] In theory, where an act is inexistent the law does not have to annul it. It is an act which has not been performed in reality and which exists only in appearance. Judicial intervention would hence be unnecessary as such an act "would not have to be wiped out, for one does not destroy that which does not exist".[125] The absence of the solemn form which the law mandates for certain acts is generally considered to be a cause for their inexistence. As the maxim goes, *Format dat esse rei*. In such cases, the possibility of performing the same act without solemn forms is conceivable. It is the will of the law which reduces them to juridical inexistence.[126] On the other hand, a juridical act is null when by law it has no effect in spite of the fact that it has actually been made. The nullity results from the direct work of the law-maker which nullifies what has been done. There is thus, strictly speaking, no need to resort to the courts to have the act nullified, as the law has taken care of that. Nevertheless, if a dispute arises in regard to the validity of the act, thereby casting doubt as to its nullity, an action at law becomes necessary "because nobody can take the law into his own hands".[127] In contrast to these is the annulable act or

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[124] Vol. 1 Part 1, op. cit., p. 219.
[125] Aubry and Rau, as quoted in Planiol, Ibid., p. 223.
[126] Planiol, Ibid., p.233.
[127] Ibid., p. 227.

contract. In cases of this nature, the nullity does not take effect by operation of the law; it must be declared by judicial authority. This distinction between *inexistent*, *null*, and *annulable* contracts is, however, of little practical importance. In French law, a "resolutory condition" is always "understood" (implied) in synallagmatic contracts.[128] A party cannot take the law into his own hands. Resolution must be sought in legal proceedings,[129]

Under our law, as we saw, the wording of articles 1723 and 1727 seem to make a distinction between the forms on writing and attestation on the one hand and those on registration on the other. However, as Professor Krzeczunowicz observed, the practical consequences of the distinctions between inexistent, null or void, and annulable or voidable contracts "amount to so little under the Ethiopian system".[130] As we shall see later, the distinction between "inexistent" and "null" contracts proves to be of some significance only in relation to the largely procedural question of legal standing. Otherwise, in Prof. Krzeczunowicz's words, the two terms "mean the same".[131] In relation to contracts, all types of nullities are governed by the provisions of Section 1 of Chapter 3 on Obligations. Pursuant to Article 1808 of this Section:

> (1) A contract which is affected by a defect in the consent or by the incapacity of one party may only be invalidated at the request of that party.
> (2) A contract whose object is unlawful or immoral or a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party."

The effect of cancellation or invalidation is governed by Article 1815. Under its terms, where a contract is invalidated or cancelled, the parties

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[128] See, Art. 1184 of the French Civil Code. The term *synallagmatic contract* is essentially the civil law equivalent of the common law's *bilateral contract*. See, Black's Law Dictionary, Eighth Edition, Thomson West (2004).

[129] See, Guenter H. Treitel, *International Encyclopedia of Comparative Law*, Vol. VII, Chapter 16, pp. 112-113.

[130] G. Krzeczunowicz, *Formation and Effects of Contracts under Ethiopian Law*, p. 9, Faculty of Law, Addis Ababa University (1983).

[131] Id.

shall as far as possible be reinstated in the position which would have existed had the contract not been made.[132]

The rules on forms grew out of the serious concern that the enforceability of informal promises would enable fraudulent persons falsely to allege the existence of agreements that have never been made.[133] The very fact that the agreement is in writing, it was thought, is likely to discourage such fraudulent claims from being made. Unfortunately, however, as the history of the Statute of Frauds in England amply demonstrates, formalities themselves could often serve as a protective shield for fraudulent practices.[134] The rogue seller is always a force to contend with. He may use registration as a means to trap innocent third parties. He may sale and resale his property by sheltering behind the rules on registration. Indeed, in the *Gorfe* case, one of the fears expressed by many is that, given the sky rocketing prices currently being witnessed in the housing market, the unqualified ruling of the Cassation Bench may embolden unscrupulous sellers to renege on contracts already made and even disavow transactions long considered closed.

The provisions in Article 1815 requiring the reinstatement of the parties "in the position which would have existed had the contract not been made" could provide a possible remedy in discouraging the rules as to forms from being used as an engine of fraud. "Reinstatement" of the innocent purchaser to his previous position would mean, or could be interpreted to mean, the position of equality vis-à-vis the seller in respect of the value of the property bought and sold. It would be a poor "reinstatement" if by reinstatement is meant the price he paid at the time of the sale, if this does not approximate

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[132] See, G. Krzeczunowicz, *The Ethiopian Law of Extra-Contractual Liability*, p. 127, Faculty of Law, Haile Sclassie I University (1970).

[133] See, for example, Waddams, op. cit., p. 163.

[134] The Statute, for the first time, laid down the rule that certain classes of agreements ought to be made in writing. Enacted in 1677, it was since copied or adopted in almost every common law jurisdiction. One judge wrote, in 1766,: "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing fraud." See, Ibid., p. 162.

the value of the property at the time invalidation was sought.[135] In the *Gorfe* case, the transaction took place some 14 years before the contract was invalidated for lack of registration, and during these years the price of real estate has been registering a dramatic rise. Interpretation of the term *reinstatement* ought to take such factors into consideration. Conveyancing processes are generally performed in four distinct stages and it would do well to follow such practices to avoid possible fraud. These stages are: finding a property; financing its acquisition; proving title to it; closing the transaction. The conveyance is not accomplished in one document but in a number of interim agreements.[136]

4.2.1. Who may require invalidation?

Our Code, this time, makes a distinction between annulment of acts relating to substance and those relating to form. Those affecting *will* (consent and capacity), which is an essential element in a contract, may only be invalidated at the request of the party suffering from lack thereof. In the case of acts affecting form, these may, in addition, be invalidated at the request of "any contracting party or interested third party". In both cases, the right does not belong to everybody; only to a third party with interest. It is also not a matter to be raised by the court *proprio motu*.[137]

In the *Gorfe* case, the original party-plaintiff is not, as we saw, a contracting party but an heir to the seller and the action was initially brought by her for the purpose of claiming her share of the inheritance as a daughter of the deceased, the party to the contract of sale. The question then is, is an heir, under the circumstances, entitled to bring an action for invalidation in his or her own right pursuant to the provisions of the above Article.

It is a general principle of the law that contracts do not have any absolute effect and do not have obligatory force against everybody. They oblige only the parties to them and can neither injure nor confer rights upon a third

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[135] Under Art. 1799, contractual compensation is equal not to the actual damage, but to the normal damage which could reasonably be expected to result from the breach. See, Krzeczunowicz, Ibid., p.121.

[136] For an elaboration of these stages, see, fox example, Ruth Annand and Brian Cain, *Modern Conveyancing*, pp. 1-5, Sweet & Maxwell, London (1984) and P. J. Dalton, op. cit., pp. 26-32.

[137] See, pp. 32-33, *supra*.

party.[138] This general rule has, however, its own exceptions for, as a general rule too, the effects of an agreement extend to the heirs and successors by universal title of the contracting parties, unless the contrary results from a special provision of the law, a clause in the agreement, or from the nature of the contract.[139] Such heirs are deemed to continue the person of the deceased and the rights and obligations resulting from an agreement entered into by the deceased during his lifetime are transferable to them in proportion of their hereditary portions. Thus, before a partition, each coheir is entitled to sue to the extent of his share for the payment of the debts due to the succession and to regain, in the same proportion, the immovable that form part thereof.[140]

In the *Gorfe* case, it could thus be maintained that the right to sue survives to the extent of the present appellant's share of the patrimony forming the estate of the deceased at the time of his death. But even if it could be so maintained, it is of no practical use under the circumstances of the case for, as we shall see below, the right of action was barred by limitation long before the present appellant instituted suit.[141]

4.2.2. Period of Limitation and Matters Similar

Under our Code, nullity is not immediate. The act giving rise to it may be subsequently annulled by the court, but in the meantime it exists and produces its effects.[142] It may also be cured by confirmation. Confirmation removes the vice with which it was tainted. From this moment, "the act becomes as solid as if it had been regular at its inception".[143] In this regard, Article 1814 (1) states: "The party who is entitled to require the invalidation of the contract or to cancel the contract shall, where he is so asked by the

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[138] See, Art. 1165, French Civil Code and Art. 1952, Civil Code of Ethiopia.

[139] See, Art. 1122, French Civil Code and Art. 1986, Civil Code of Ethiopia.

[140] See, Aubry & Rau, *Cours De Droit Civil Francais*, Vol. IV, Sixth Edition, p. 344 and Vol. IX-X, pp. 6-8, 232, English Translation by the Louisiana State Law Institute (1965).

[141] As we can gather from the circumstances of the case and the facts summarized in the judgment of the Cassation Bench, the contract of sale was executed on Hidar 23, 1985. The action for partition was brought by Woizero Gorfe sometime during 1994 or 1995 E.C. but not, in any event, before 1992. The first instance court gave its decision upholding the validity of the contract of sale on Hamle 14, 1996.

[142] See generally, Planiol, op. cit., p. 229. Under Art. 1809 of the Ethiopian Civil Code, one or the other of the parties may refuse to perform it.

[143] Planiol, Ibid., p. 231.

other party, without delay answer whether he intends to confirm or to cancel the contract"[144], thus indicating that the defect can be cured by confirmation. The action of nullity may also be lost by prescription. This prescription is of a very short period in both ours as well as French law.[145] Under our Code, it is limited to two years. But this needs an explanation. Under Article 1810:

> "(1) No contract shall be invalidated unless an action to this effect is brought within two years from the *ground* for invalidation having *disappeared*. (italics ours)
>
> (2) Where a contract is unconscionable and the party injured was of age, the action shall be brought within two years from the making of the contract."

Of the provision, the following can be said by way of comment. The "ground" for registration does not disappear until registration is actually made, in which case there would be no need for the provision. Consent, as a ground, cannot at all disappear unless the claim as to mistake, deceit or duress itself was in the first place fraudulent or the party later discovers that he was laboring under a false apprehension when the contract was entered into, in which case the limitation period provided would again be unnecessary. Only lack of capacity can disappear after a certain lapse of time. This would mean that periods of prescription, under the Article, apply only to nullities relating to the capacity or disability of a contracting party. A literal interpretation suggests this result, however unintended it may prove to be when the provision is read in the context of the Articles found in the Section as a whole.

The Amharic and French versions of the Article are more faithful and stand opposed to the English version.[146] Both, in more or less identical terms, state that: (1) an action for the nullity of a contract must be exercised, at the latest, within two years of the ground for nullity having disappeared, and (2) where the party injured is of age, the action for nullity must be exercised within two years from the date of the making of the contract.[147] Limitation

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[144] It needs to be remembered that, in the Gorfe case, one of the adjudged co-owners of the property sold, wife of the deceased at the time of the transaction, has confirmed the sale.

[145] As to French law, see Planiol, Ibid., p. 231.

[146] The Code was originally drafted in French and later translated into Amharic, the official language, and English.

[147] Compare with "donation" which also has a two year limitation period. Art. 2441.

periods thus apply to all vices affecting the contract and not capacity alone. A contract affected by a vice is hence under a sentence of death for a period of two years; after this period, it becomes unassailable.

4.3. The Question of "draft contracts" under Article 1720 (1)

To say that "where a special form is required by law and not observed there shall be no contract but a mere draft of a contract" sounds illogical and could even be misleading, as we can observe from the cases cited earlier.[148] And that is what Article 1720 (1) says. For one, when we talk of form of contracts, the word "form" is usually used to indicate the "written form" as opposed to informal or oral agreements. The expression used in the Article does not hence always hold true. Besides, a "draft" relates to matters of substance (consent, consideration) and not to form. It signifies that the parties have not yet agreed upon the terms of their contract. Requirement as to form imposed by the law is, on the other hand, something extraneous to the intention of the parties. The parties have reached an agreement. It is the law which intervenes by way of exception to the rule that contracts are laws as between those who created them.

Above all, there is no need to say so unless a different consequence attaches to the fact that the contract is considered as a draft of a contract. Under sub-articles (2) and (3) of the same Article, it is clearly stated that formalities additional to those provided in the Code such as those relating to stamp duties or registration fees and "prescribed measures of publication" found in other laws do not affect the validity of the contract in contrast to those provided in the Code. Hence, for example, in France, a notarial act has to be drawn upon stamped paper issued by the government. In the same token, under our Commercial Code, the sale of a business as well as a contract of lease of a business and its termination must be published in the official commercial gazette and in a newspaper empowered to publish legal notices circulating at the place where the head office of the business is situate.[149] Under sub-articles (2) and (3) of Article 1720 of the Civil Code, the non-observance of such formalities does not affect the validity of the contract.

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[148] See, Judgments of the Fed. High and Supreme Courts in Habte Zurga, on p. 173 and p. 178 respectively.

[149] Art. 164, 195 and 202 of the Commercial Code. Art. 152 further states that the sale of a business "shall be null and void unless evidenced in writing".

There is no stipulation of the kind in sub-article (1) except the mere statement that the contract is to be considered as a mere draft.

Hence, judged by the company it keeps, like sub-articles (2) and (3), sub-article (1) too must be talking of "special forms" other than those of writing, attestation, and registration found in the Code. But even here, it matters little whether a contract is considered as a draft contract or one which does not comply with the requirements as to form provided in the Code. Both are subject to the provisions of Article 1808 discussed in the earlier section. Thus sub-article (1) seems to be unnecessary and could even be misleading unless followed by the question "what if the contract is considered as a 'draft contract'? The search for an answer to this question would steer us to its logical end: the provisions of Article 1808.

4.4. The Effect of Nationalization of Rural and Urban Lands

A question often raised, and quite rightly so, in relation to the provisions of the Civil Code on ownership and other interests in land is the effect of the nationalization laws of 1975 upon laws which were primarily designed to protect the sanctity of private property,[150] as is the case with provisions of the Civil Code. A word or two on the subject, in so far as it relates to registration, would hence be appropriate.

Following the February Revolution of 1974, all rural lands were nationalized by a Proclamation of March 4, 1975.[151] This was soon followed by the nationalization of all urban lands and extra-houses by a Proclamation of July 26 of the same year.[152] The rural lands nationalization Proclamation declares that all rural lands are "the common property of the Ethiopian people" and that, henceforth, no person or business organization or any other organization may hold rural lands in private ownership.[153] It further proclaims that an individual who is willing to *personally* cultivate land shall

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[150] See, Mekbib Tsegaw, *Contracts Relating to an Immovable and Questions of Form*, Ethiopian Bar Review, Vol. 2 No. 1 (2007), pp. 157-160.

[151] "Public Ownership of Rural Lands Proclamation No. 31/1975", *Neg. Gaz., 34th Year No. 26.*

[152] "Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975, *Neg. Gaz,.34th Year No.41.*

[153] Art. 3.

be allotted land sufficient for his maintenance and that of his family provided that such allotment shall at no time exceed ten hectares.[154] A person may not by "sale, exchange, succession, mortgage, antichresis, lease, or otherwise" transfer his holding to another except that, upon the death of the holder, the wife or husband or minor children of the deceased or, where they are not present, any child of the deceased who has attained majority, shall have the right to *use* the land.[155]

The Urban Lands and Extra-Houses nationalization Proclamation too, in the same vein, proclaims that all urban land is the property of the Government and that no person, family, or business organization may thus hold urban land in private ownership.[156] Any person or family may own only a single dwelling house and may in addition own business houses the number and size of which shall be determined by the government taking into account the condition and type of business. An organization may also own houses for the purpose of housing its employees or persons under its responsibility.[157] It further declares that henceforth any person or family may be granted "the possession" of up to 500 square meters of land for the purpose of building a dwelling house. Organizations too may be granted lands for the purpose of building an office or a dwelling house.[158] Any person, family or organization who owns a house, by virtue of these provisions, has the right to transfer such house by "succession, sale or barter".[159]

The Constitution presently in force, the Constitution of the Federal Democratic Republic of Ethiopia of 1995, endorses the principles underpinning the above Proclamations. Article 40 (3) states, in no uncertain terms, that: "The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange." As a result, no significant change has been made in the land holding system ushered in by the earlier Proclamations as regards the modes

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[154] Art. 4.
[155] Art. 5.
[156] Art. 3.
[157] Art. 11.
[158] Art. 5.
[159] Art. 12.

of acquiring as well as the use and transfer of both rural and urban lands.[160] Of particular importance, however, are the laws on "Urban Lands Lease Holding" and "Condominiums", both recent developments of some significance to our study.

The "Re-enactment of Urban Lands Lease Holding Proclamation", No. 272 of 2002, creates another system of land holding, *the leasehold*, and seems to suggest that this will be the exclusive system in times to come.[161] "Lease", is defined as a "leasehold system in which use right of urban land is transferred or held contractually".[162] An urban land shall be permitted to be held by lease "on auction or through negotiation" or "according to the decision of Region or City Government".[163] A leasehold is granted for *a term of years*. Such term may be of up to 99 years for personal dwelling houses and houses to be rented as well as others "depending on the level of urban development and sector of development activity or the type of service", and is renewable by agreement.[164] A leasehold title deed shall be conferred on a person to whom urban land is so permitted. The leasehold possessor may transfer his right of leasehold, mortgage it, and may also use it as a capital contribution to the amount of the lease payment he has made. A leasehold is thus equivalent to *ownership* of the land *for a slice of time*.

Condominiums are legal beings acute housing shortages gave birth to. The Proclamation on Condominiums attempts to create favourable conditions to individuals to build their own houses by pooling their limited resources and those with the means to invest in the sector to ameliorate the existing conditions.[165] A "condominium" is defined as "a building for residential or other purpose with five or more separately owned units and common elements, in a high-rise building or in a row of houses, and includes the land holding the building."[166] A building may be registered as a condominium

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[160] See, the "Federal Rural Land Administration Proclamation No. 89/1997".
[161] See, Art. 3 and 4 as well as the Preamble. The Articles suffer from lack of clarity. The lease system was first introduced by Proclamation No. 80 of 1992 issued soon after the present Government unseated the former regime. The present Proclamation is a "re-enactment" of this Proclamation.
[162] Art. 3 (1).
[163] Art. 4.
[164] Art. 6 and 7.
[165] "Condominium Proclamation,No. 370/2003". See Preamble.
[166] Art. 2 (1).

when the owners or their agents submit a written application declaring their intention that the building be so designated.[167] A certificate of registration shall be issued to the "declarant" (promoter) when the building is so registered.[168] A promoter may raise the necessary capital for the construction of the building by selling a unit (a flat or an apartment) of the condominium. A contract of sale of a unit may hence be concluded before or after registration of the building. The promoter must deliver the necessary documents relating to the formation of the condominium to every person who purchases a unit before or after registration.[169]

A unit owner is entitled to ownership right upon the unit. He can thus sell or transfer his right of ownership to others. A unit of a building registered may also "be subject of any legal transaction".[170] A unit owner may thus create encumbrances on it in the exercise of his right of ownership. An owner who leases or renews the lease on his unit must, however, notify the unit owners association of such lease and provide a copy of the contract. He must also furnish the lessee with a copy of the registration documents as well as the by laws and rules of the condominium.[171]

By way of conclusion of this section, we can, therefore, say that, as the laws on registration aim at promoting security in land transactions primarily for the purpose of acquisition of credit for the development of the land itself or the undertaking of other investment activities, the provisions of the Civil Code on the subject have been rendered useless by the advent of the rural lands nationalization Proclamation. As we saw, this law forbids the transfer of rural lands by sale, exchange, succession, mortgage, antichresis, lease, or otherwise. The situation is different as regards urban lands and houses. In relation to these, the idea that land belongs to the people and is thus *extra commercium* whereas houses could be objects of private ownership and thus *subject to commerce* is at best a legal fiction, and the law knows of such fictions. Land could not be seen in isolation from the things fixed on it and it is, in fact, these things which, especially in urban areas, make land an item of such great value and scarcity. We may, with the Romans, say "what is affixed to the soil belongs to the soil". *Quicquid plantature solo solo*

[167] Art. 4 (1).
[168] Art. 5.
[169] Art. 21.
[170] Art. 8.
[171] Art. 22.

cedet.[172] Hence, so long as houses are freely bought and sold, as is presently the case in the towns, it is actually the land too which is being bought and sold. In relation to urban lands, therefore, the changes introduced by the nationalization laws do not affect the laws on registration in any significant way. In fact, with the introduction of the laws on leasehold and condominiums and, as the free market system gains further inroads, the need to strengthen the laws on registration assumes an importance it never had before. The boom in the construction sector currently being witnessed attests to this.

CONCLUSIONS

By way of conclusion, we may say the following.

The term Registration denotes a formal act of investiture whose origins can be traced back to Roman law and times. In some systems, lack of this formal act affects the validity of the agreement between the parties itself. The sale of an immovable property would be considered void if not registered in the registers provided for this purpose. In other words, a sale is not perfected by a written agreement alone. In other systems, lack of registration does not affect the agreement between the parties itself. Its function is one of publicity and is designed to protect subsisting third parties rights over the property. In both cases, laws on registration aim at promoting security in real estate transactions so as to permit optimum utilization of real property as a basis of credit. They are also designed to ensure that a purchaser of land knows of the rights and interests of other persons over that land thereby ensuring that the price paid reflects the true economic and social value of the land. They have incidental benefits as well. They promote the development of accurate plans and cadastres which can equally be used as a basis for an efficient and fair tax collection system as well as the provision of other municipal services. As a result too, disputes can usually be resolved more easily and expeditiously.

Registration before a notary is different in both its nature and purpose. It has more of a cautionary function. The necessity of writing and attestation will make the rash promisor pause and reflect thus lending certainty to

[172] See, for example, *Sir Hari Gour's Commentary*, op. cit., pp. 76-77.

transactions. And the more formal the document and the more formality there was when it was signed, the more likely it is that there was deliberateness in its making. The drawing up of the act by the notary himself gives further guarantee to its authenticity as both parties are fairly represented prior to committing themselves to an agreement. The record so registered is not a public record as the purpose of such a registration is not essentially one of publicity. It would hence not be proper to refer to such a formality as "Registration", except that the French system and practice of notarization carries with it many of the features inherent in a land registration system. With the coming into effect of the "Authentication and Registration of Documents Proclamation", however, this comparison is no longer tenable.

As we saw, the laws on registration occupied a prominent place in the scheme of our Civil Code upon its enactment but has since been neglected. Several factors could be attributed to this neglect, the principal ones being, in my opinion, lack of the necessary human as well as financial resources to put the system in place and the uncertainty concerning the question of rights in land which followed the nationalization laws. In addition, the beginnings of the system were laid down by the 1908 Rule and this provided an "alternative" to fall back on, thus contributing to the neglect. To day, in my opinion, the first constraint is no longer overwhelming. With the introduction of the free market system, the uncertainty which clouded the question of rights on land has also began to clear. The Proclamations cited earlier attest to this. It is thus hoped that, together with the decision of the Federal Supreme Court in the *Gorfe* case, this Paper will help revive interest upon a field of study which occupies an important place in a world where space and, therefore, housing are increasingly becoming serious challenges.

ANNEX I

A deed of Conveyance

THIS CONVEYANCE is made the 9th day of May 1983 BETWEEN JOHN QUINCE of 20 Athenia Wood Road Arden Warwickshire ('The Vendor') and MARY MOTH of 10 Starveling Lane Lysandford Warwickshire ('the Purchaser').

WHEREAS the Vendor is seised of the property hereby conveyed for an estate in fee simple absolute in possession free from incumbrances and has agreed with the Purchaser for the sale thereof to her for the sum of £30 000.

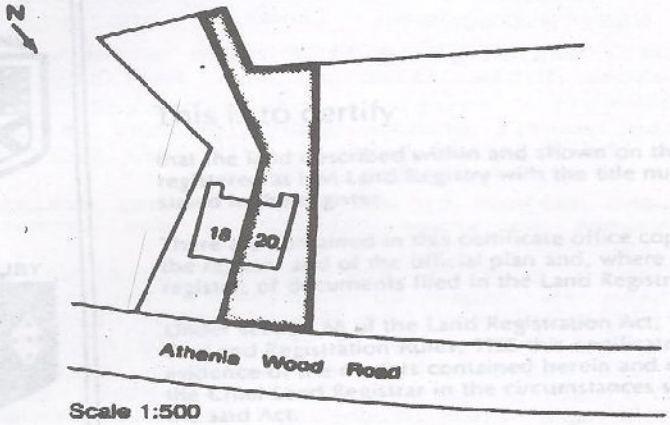
NOW THIS DEED WITNESSETH as follows:

1 In pursuance of the agreement and in consideration of £30 000 now paid by the Purchaser to the Vendor (receipt hereby acknowledged) the Vendor as beneficial owner hereby conveys unto the Purchaser ALL THAT property known as 20 Athenia Wood Road Arden Warwickshire and for the purpose of identification only edged by thick lines on the plan annexed hereto TO HOLD unto the Purchaser in fee simple.

2 The Purchaser hereby covenants with intent that this covenant shall enure to the benefit of the Vendor his successors and assigns and others claiming under him to that property owned by him adjoining the property hereby conveyed and known as 18 Athenia Wood Road Arden aforesaid that the property hereby conveyed shall not be used for the purposes of the trade of carpentry.

3 IT IS HEREBY CERTIFIED THAT the transaction hereby effected does not form part of a larger

transaction or a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £30 000.



Scale 1:500

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first before written.

Signed Sealed and Delivered by JOHN QUINCE

John Quince

in the presence of:– R Bottom
14, Wild Thyme Bank
Arden
Warwickshire

Mary Moth

Signed Sealed and Delivered by MARY MOTH in the presence of:–

C. Mustardseed
2, Willowshop Pool
Lysandford

ANNEX II

BIRKENHEAD

HALDANE

HALSBURY

CAIRNS

SELBORNE

WESTBURY

HM Land Registry

This is to certify

that the land described within and shown on the official plan is registered at HM Land Registry with the title number and class of title stated in the register.

There are contained in this certificate office copies of the entries in the register and of the official plan and, where so indicated in the register, of documents filed in the Land Registry.

Under section 68 of the Land Registration Act, 1925 and rule 264 of the Land Registration Rules, 1925 this certificate shall be admissible as evidence of the matters contained herein and must be produced to the Chief Land Registrar in the circumstances set out in section 64 of the said Act.

HM LAND REGISTRY HM LAND REGISTRY

WARNING

All persons are cautioned against altering, adding to or otherwise tampering with either this certificate or any document annexed to it.

HM LAND REGISTRY

TITLE NUMBER: XYZ123

Edition date: 29 March 1995

Entry No.	A. PROPERTY REGISTER containing the description of the registered land and the estate comprised in the Title
	COUNTY: WEST MIDLANDS — DISTRICT: SOLIHULL
1.	(4 September 1969) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 98 WITHERED HEATH ROAD.
2.	The land has the benefit of the rights granted by but is subject as mentioned in the Transfer dated 1 July 1983 referred to in the Charges Register in the following terms:– "Together with and Subject to the rights of way drainage and other easements equivalent to those granted by and excepted from the Lease dated 28 September 1956." The following is a copy of the rights contained in the Lease referred to which is dated 28 September 1956 made between (1) Arden (Estates) Limited and (2) John Brendan Brown (Lessee) and which Lease is that referred to in the Charges Register:– "TOGETHER with the right to use the existing drains and services running to and from the property hereby demised into the street and the right if and when necessary with workmen and others to enter upon the adjoining property for the purpose of and to open cleanse and repair the said drains and services making good any damage occasioned thereby but subject to a similar right for the owners and occupiers of the adjoining property with regard to so much of the said drains and services as lie under the property hereby demised making good any damage occasioned thereby the Lessee and such owners and occupiers as aforesaid paying their due proportion of the cost of keeping the same in repair."
3.	The Transfer dated 1 July 1983 referred to above contains the following provision:– "IT IS HEREBY AGREED AND DECLARED as follows:– (1) That the Transferee shall not be entitled to any right or access of light and air over the adjoining land to the buildings erected or to be erected on the said land hereby transferred which would restrict or interfere with the use of such other adjoining land by the Transferor or any person deriving title under him for building or any other purpose. (2) That the Transferor shall be under no personal liability for either inserting or not inserting any grant lease or transfer or any part of his land comprised in title number ABC123 any covenant or restrictions similar to those herein contained or for not enforcing or attempting to enforce the performance or observance of any such covenants or restrictions or for releasing any grantee lessee or Purchaser or any part of his said land in the said title number ABC123 from any covenants or restrictions." NOTE: The land in this title with other land was formerly copyhold of the Manor of Knowle and the rights saves to the Lord by the 12th Schedule of the Law of Property Act 1922 are excepted from the registration.

HM LAND REGISTRY

TITLE NUMBER: X4Z123

Entry No	B. PROPRIETORSHIP REGISTER stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposing thereof TITLE ABSOLUTE
1.	(29 March 1995) Proprietor: Margaret Morley of 98 Withered Heath Road, Shirley, Solihull, W Midlands.

Entry No.	C.CHARGES REGISTER containing charges, incumbrances etc. adversely affecting the land and registered dwellings therewith
1.	Lease dated 28 September 1956 to John Brendon Brown for 99 years from 25 March 1956.
2.	A Transfer of the land in this title dated 1 July 1983 made between (1) Constance Helen Lee (Transferor) and (2) Peter Black and others (Transferee) contains covenants details of which are set out in the schedule of restrictive covenants hereto.
3.	(29 March 1995) REGISTERED CHARGE dated 28 February 1995 to secure the moneys including the further advances therein mentioned.
4.	(29 March 1995) Proprietor: PORTMAN BUILDING SOCIETY of Portman House, Richmond Hill, Bournemouth BH2 6EP.

Item No.	SCHEDULE OF RESTRICTIVE COVENANTS
1.	The following are details of the covenants contained in the Transfer dated 1 July 1983 referred to in the Charges Register:— "THE Transferees with the intent so as to bind the land hereby transferred and to benefit the remainder of the land comprised in title number ABC123 hereby jointly and severally for themselves and their successors in title covenant with the Transferor as follows:— a. At all times hereafter to observe and perform the covenants and restrictions and stipulations contained in the Charges Register of the said Title (so far as the same relate to and affect the property hereby transferred) and will indemnify and keep indemnified the Transferor from and against the non-observance and non-performance thereof and from all costs charges claims and demands in respect thereof b. Not to carry on or permit to be carried on upon the said premises any business trade process of manufacture whatsoever or use or permit the said premises to be used for any illegal or immoral purpose or for a Public House Inn Tavern or Beer shop or otherwise for the sale of wine malt liquors or spirituous liquors or do or suffer to be done thereon any act matter or thing

HM LAND REGISTRY

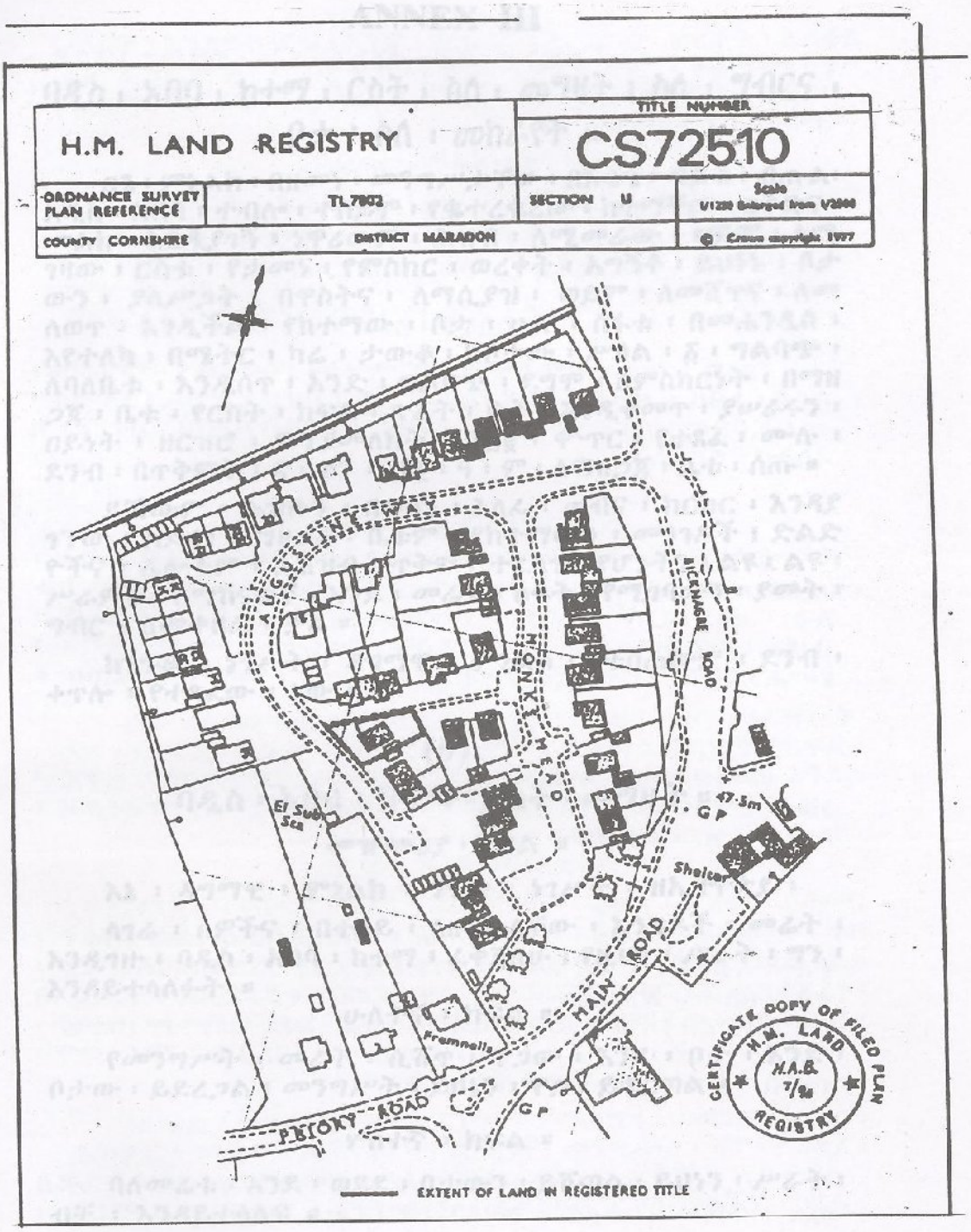
TITLE NUMBER: X4Z2123

Item No.	SCHEDULE OF RESTRICTIVE COVENANTS (continued)
	whatsoever which may be an annoyance or disturbance to the Transferor or her lessees or tenants or any person or persons for the time being owning or occupying any of the land adjacent to or in the neighbourhood of the land hereby transferred and not to use or permit the premises to be used for any other purpose than that of a private dwellinghouse only and (save with the previous consent in writing of the Transferor) for the occupation of the members of one family only c. Not to erect or set up or suffer to be erected or set up on any part of the said premises hereby transferred without the previous licence in writing of the Transferor any messuage or dwellinghouse or buildings other than and except the said messuage or dwellinghouse and except a garage and outbuildings to be occupied and used therewith and not to make any alteration in the plan site or elevation of such messuage or dwellinghouse without such licence as aforesaid d. That in case at any time there shall be occasioned to rebuild the said messuage or dwellinghouse and buildings or any part thereof to erect only a detached or semi-detached messuage or dwellinghouse at least two storeys in height with necessary and proper outbuildings thereto e. At all times hereafter to maintain good and substantial walls of fences on the side of the said premises hereby transferred where indicated by the Letter "T" within the boundary on the plan hereinbefore referred to f. To pay a reasonable proportion of the expense of repairing and maintaining any party walls sewers drains pipes watercourses and other easements used or to be used in common by the occupiers of the said premises hereby transferred and the occupiers of any adjoining or neighbouring premises such proportion in case of dispute to be determined by the Transferor's surveyor for the time being whose decision shall be final and binding upon all parties. NOTE: "T" marks affect the boundary of the land in this title.

***** END OF REGISTER *****

NOTE A: A date at the beginning of an entry is the date on which the entry was made in the Register.

NOTE B: This certificate was officially examined with the register on 29 March 1995.


H.M. LAND REGISTRY
TITLE NUMBER
CS72510
ORDNANCE SURVEY PLAN REFERENCE
TL7803
SECTION U
Scale
COUNTY CORNWALL
DISTRICT MARADON
© Crown copyright 1977
AUGUSTINE WAY
HONEYCOMB LANE
BICKNACRE ROAD
El Sub Sta
17.5m
G P
Shelter
MAIN ROAD
Fremnells
PERRORY ROAD
G P
CERTIFICATE COPY OF FILED PLAN
H.M. LAND REGISTRY
H.A.B.
EXTENT OF LAND IN REGISTERED TITLE

ANNEX III

ባዲስ ፡ አበባ ፡ ከተማ ፡ ርስት ፡ ስለ ፡ መግዛት ፡ ስለ ፡ ግብርና ፡ ቦታ ፡ ስለ ፡ መከራየት ።

ዐዜ ፡ ምኒልክ ፡ በዘመነ ፡ መንግሥታቸው ፡ በእቴጌ ፡ ጣይቱ ፡ ብጡል፡ አዲስ ፡ አበባ ፡ ተብሎ ፡ ተሰይሞ ፡ የቈተረቈረው ፡ ከተማቸው ፡ ዐቅድና ፡ መልክ ፡ እንዲያገኝ ፡ ነዋሪውም ፡ ሕዝብ ፡ ለሚመራው ፡ ወጄም ፡ ለሚገዛው ፡ ርስቱ ፡ የታመነ ፡ የምስክር ፡ ወረቀት ፡ አግኝቶ ፡ ይህነኑ ፡ ቦታውን ፡ ያለሥጋት ፡ በዋስትና ፡ ለማሲያዝ ፡ ወይም ፡ ለመሸጥና ፡ ለመለወጥ ፡ እንዲችል ፡ የከተማው ፡ ቦታ ፡ ሁሉ ፡ ስፋቱ ፡ በመሐንዲስ ፡ እየተለካ ፡ በሜትር ፡ ካሬ ፡ ታውቆ ፡ ከቦታው ፡ ሥዕል ፡ ፩ ፡ ግልባጭ ፡ ለባለቤቱ ፡ እንዲሰጥ ፡ አንድ ፡ ግልባጭ ፡ ደግሞ ፡ ለምስክርነት ፡ በማዘጋጃ ፡ ቤቱ ፡ የርስት ፡ ክፍል ፡ ጽፈት ፡ ቤት ፡ እንዲቀመጥ ፡ ያሠራሩን ፡ ዐይነት ፡ ዘርዝሮ ፡ የሚያመለክት ፡ በ፴፪ ፡ ቊጥር ፡ የተጻፈ ፡ ሙሉ ፡ ደንብ ፡ በጥቅምት ፡ ፳ ፡ ቀን ፡ ፲፱፻፱ ፡ ዓ ፡ ም ፡ ለማዘጋጃ ፡ ቤቱ ፡ ሰጡ ።

ይኸውም ፡ ሕዝቡን ፡ በወሰን ፡ እላፊ ፡ ጠብና ፡ ክርክር ፡ እንዳያገኘው ፡ አደረገ ፤ ማዘጋጃ ፡ ቤቱም ፡ የከተማውን ፡ መንገዶች ፤ ድልድዮችና ፡ ሌሎችም ፡ ለሕዝብ ፡ ጥቅም ፡ ተፈላጊ ፡ የሆኑትን ፡ ልዩ ፤ ልዩ ፡ ሥራዎች ፡ ለማከናወኛ ፡ እንደ ፡ መሬቱ ፡ ስፋት ፡ የሚገባውን ፡ ያመት ፡ ግብር ፡ ለመቀበል ፡ ቻለ ።

ከንጉሠ ፡ ነገሥት ፡ ዳግማዊ ፡ ምኒልክ ፡ የተሰጠውም ፡ ደንብ ፡ ቀጥሎ ፡ የተጻፈው ፡ ነው ።

(ሀ)

ባዲስ ፡ አበባ ፡ ከተማ ፡ ርስት ፡ መግዛት ።

መግቦመሪያ ፡ ክፍል ።

እኔ ፡ ዳግማዊ ፡ ምኒልክ ፡ ንጉሠ ፡ ነገሥት ፡ ዘኢትዮጵያ ፡

ላገሬ ፡ ሰዎችና ፡ በተለይ ፡ ላዘዝኩላቸው ፡ እንግዶች ፡ መሬት ፡ እንዲገዙ ፡ ባዲስ ፡ አበባ ፡ ከተማ ፡ ፈቅጃለሁ ፤ የዚህን ፡ ሥራት ፡ ግን ፡ እንዳይተላለፉት ።

ሁለተኛ ፡ ክፍል ።

የመንግሥት ፡ መሬት ፡ ሲሸጥ ፡ ዋጋው ፡ እንደ ፡ ቦታ ፡ እንደ ፡ ቦታው ፡ ይደረጋል ፤ መንግሥት ፡ ይህንን ፡ ዋጋ ፡ ይቈርጣል ።

ሦስተኛ ፡ ክፍል ።

ባለመሬቱ ፡ እንደ ፡ ወደደ ፡ ቦታውን ፡ ይሸጣል ፤ ይህነን ፡ ሥራት ፡ ብቻ ፡ እንዳይተላለፍ ።

አራተኛ ፡ ክፍል ።

የምድር ፡ ዋጋ ፡ በሜትር ፡ ካሬ ፡ ተለክቶ ፡ ነው ፡ የሚሠራ ፤ አንዱ ፡ ሜትር ፡ ርዝመትና ፡ አንዱ ፡ ሜትር ፡ ወርድ ፡ አንድ ፡ ሜትር ፡ ካሬ ፡ ተበለ ፡ ይቁጠራል ።

አምስተኛ ፡ ክፍል ።

ከመንግሥት ፡ ምስለኔ ፡ መሬት ፡ ለመግዛት ፡ የተስማማ ፡ ሰው ፡ መሬቱን ፡ ለክተው ፡ ስፋቱንም ፡ አስበው ፡ የምድሩ ፡ ዋጋ ፡ ይሰላል ፡ ከዚያ ፡ በኋላ ፡ የመሐንዲስ ፡ ሥዕል ፡ ያስደርጋል ።

ስድስተኛ ፡ ክፍል ።

የዚህን ፡ ሥዕል ፡ ግልባጭ ፡ ለመንግሥት ፡ ያሳልፋል ፤ መንግሥቱ ፡ ባዲስ ፡ አበባ ፡ ሥዕል ፡ እንዲያስጨምረው ፤ በዚህ ፡ ሥዕል ፡ የተሣለ ፡ መሬት ፡ በመንግሥት ፡ መዝገብ ፡ የተጻፈው ፡ ያዲስ ፡ አበባ ፡ ከተማ ፡ ካዳስትር ፡ ይባላል ።

ሰባተኛ ፡ ክፍል ።

ወሰን ፡ ለመወሰን ፡ ዋጋ ፡ ለማስቈረጥ ፡ ስፋት ፡ ለማስለካት ፡ ሥዕል ፡ ለማሣል ፡ የሁለት ፡ መሐንዲሶች ፡ ሥራ ፡ ነው ፤ ከነዚህ ፡ ከሁለቱ ፡ መሐንዲሶች ፡ አንድ ፡ የመንግሥት ፡ መሐንዲስ ፡ ሁለቱም ፡ ቢሆኑ ፡ መልካም ፡ ነው ፤ መሐንዲሶቹ ፡ የሠሩትን ፡ ሥራ ፡ ያትማሉ ፤ የመሐንዲሶቹን ፡ የሥራቸውን ፡ ዋጋ ፡ መንግሥት ፡ ነው ፡ የሚቈርጠው ።

ስምንተኛ ፡ ክፍል ።

የመንግሥት ፡ መሬት ፡ ሲሸጥ ፡ የመሐንዲሱን ፡ ዋጋ ፡ ገዢ ፡ ነው ፡ የሚከፍለው ፤ የሌላ ፡ ሰው ፡ መሬት ፡ ሲሆን ፡ ሽያጭና ፡ ገዢ ፡ ለዚህ ፡ ነገር ፡ ይስማማሉ ።

ዘጠነኛ ፡ ክፍል ።

የምድርን ፡ ዋጋ ፡ ለመንግሥት ፡ ምስለኔ ፡ ይሰጣል ፤ መሬት ፡ ቶሎ ፡ እንዲሸጥ ፡ መንግሥት ፡ ለገዢዎች ፡ ፈቃድ ፡ ይሰጣል ፡ ዋጋ ፡ ቀስ ፡ ብለው ፡ እንዲሰጡ ። ነገር ፡ ግን ፡ ወሰን ፡ ይደረጋል ፤ ዋጋ ፡ እስኪሞላ ፡ ድረስ ፤ ዋጋ ፡ ሳይሞላ ፡ ወሰን ፡ ያለፈ ፡ እንደ ፡ ሆነ ፡ መንግሥት ፡ የወደደ ፡ እንደ ፡ ሆነ ፡ መሬቱን ፡ ይወስድና ፡ ለባለቤቱ ፡ የከፈለውን ፡ ፐንዙብ ፡ ያለወለድ ፡ ይመልስለታል ።

ዐሥረኛ ፡ ክፍል ።

መሬት ፡ ሲገዛ ፡ መንግሥት ፡ ለገዢው ፡ የግዥውን ፡ ወረቀት ፡ ይሰጣል ፤ በገዛው ፡ መሬት ፡ ጕዳዩን ፡ እንዲሠራ ፡ ከዚህ ፡ ከተጻፈው ፡

ሥራት ፡ እንዳይተላለፍ ፡ እንጂ ፡ የርስቱን ፡ የምስክር ፡ ወረቀት ፡ አይቀበልም ፡ የገዛውን ፡ መሬት ፡ ዋጋ ፡ እስከ ፡ ሞላ ፡ ድረስ ፤ የዚህንም ፡ የተጸፈውን ፡ ሥራት ፡ እያደረገ ።

ዐሥራ ፡ አንደኛ ፡ ክፍል ።

መንግሥት ፡ የሚሰጠው ፡ የርስት ፡ ወረቀት ፡ በመዘገብ ፡ ይገለበጣል ፤ የሚጸፍበት ፡ ነገር ፡ ይህ ፡ ነው ። ፩ኛ ፡ ኑሜሮ ፤ ፪ኛ ፡ የሸያጭ ፡ ስም ፤ ፫ኛ ፡ የገዢ ፡ ስም ፤ ፬ኛ ፡ የመሬቱ ፡ ስፋትና ፡ ያለበት ፡ ነገር ፤ ፭ኛ ፡ የመሬቱ ፡ ወሰን ፤ ፮ኛ ፡ የጎረቤቶቹ ፡ ስም ፤ ፯ኛ ፡ የአምባ ፡ ስም ፤ ፰ኛ ፡ የመሬት ፡ ዋጋ ፤ ፱ኛ ፡ የመሸጫ ፡ ቀንና ፡ ዓ ፡ ም ፡

ዐሥራ ፡ ሁለተኛ ፡ ክፍል ።

የርስት ፡ ወረቀት ፡ በመንግሥት ፡ ማኅተም ፡ ይታተማል ። የዚህ ፡ ማኅተም ፡ ዋጋ ፡ ዐሥር ፡ ብር ፡ ነው ፤ ከዚህ ፡ በላይ ፡ እንደ ፡ መሬቱ ፡ ዋጋ ፡ ከመቶ ፡ እንድ ፡ ይከፍላል ።

ዐሥራ ፡ ሦስተኛ ፡ ክፍል ።

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

ዐሥራ ፡ አራተኛ ፡ ክፍል ።

ሰው ፡ ለሰው ፡ መሬት ፡ ሲሸጥ ፡ የመሸጫ ፡ ወረቀት ፡ በመንግሥት ፡ ላይ ፡ ይጸሓልና ፡ በመንግሥት ፡ ማኅተም ፡ ይታተማል ። ባ፲፪ኛ ፡ ክፍል ፡ እንደ ፡ ተባለው ፡ ዐሥር ፡ ብር ፡ ይከፍላል ፤ ከዚያ ፡ በላይ ፡ እንደ ፡ መሬቱ ፡ ዋጋ ፡ ከመቶ ፡ እንድ ፡ ይከፍላል ።

ዐሥራ ፡ አምስተኛ ፡ ክፍል ።

ወንጀል ፡ የተገኘ ፡ እንደ ፡ ሆነ ፡ ማለት ፡ ገዢና ፡ ሸያጭ ፡ በመንግሥት ፡ ፊት ፡ አብለው ፡ ሌላ ፡ ዋጋ ፡ የነገሩ ፡ እንደ ፡ ሆነ ፤ ገዢው ፡ ተበይኖበት ፡ ለመንግሥት ፡ የሚደርሰውን ፡ ግብር ፡ አራት ፡ ዕጥፍ ፡ ይከፍላል ። ሸያጩም ፡ እማኞችም ፡ የገዢው ፡ ዋስ ፡ ይሆናሉ ፤ ወንጀል ፡ ከተደረገ ፡ ሁለት ፡ ዓመት ፡ ካለፈ ፡ በኋላ ፡ ወንጀለኞቹ ፡ ተበይኖባቸው ፡ አይቀጡም ።

ዐሥራ ፡ ስድስተኛ ፡ ክፍል ።

በተለይ ፡ የተፈቀደለትም ፡ እንግዳና ፡ የእንግዳ ፡ ኩባንያ ፡ ካሥር ፡ ሔክታር ፡ በላይ ፡ እንዳይገዛ ፡ ተከልክሏል ፤ መንግሥት ፡ ግን ፡ የወደደ ፡ እንደ ፡ ሆነ ፡ ይፈቅዳል ። ተላላፊዎች ፡ በብርቱ ፡ ቅጣት ፡ ይቀጣሉ ፤ ደግሞ ፡ መንግሥት ፡ የተገዛውን ፡ ይወስዳል ፡ የተገዛበትን ፡ ዋጋ ፡ እየከፈለ ።

ዐሥራ ፡ ሰባተኛ ፡ ክፍል ።

ይህ ፡ ዐዋጅ ፡ ከወጣ ፡ በኋላ ፡ እስከ ፡ ፭፰ ፡ ዓመት ፡ ድረስ ፡ መን ግሥት ፡ የተገዛ ፡ መሬት ፡ በበለጠ ፡ ዋጋ ፡ የተሸጠ ፡ እንደ ፡ ሆነ ፡ ሽያጩ ፡ የትርፉን ፡ ሚሶ ፡ ለመንግሥት ፡ ይሰጣል ፤ ከተባለው ፡ ካሥር ፡ ብር ፡ በቀር ፤ ወንጀለኞቹ ፡ ባሥራ ፡ አምስቱ ፡ ክፍል ፡ እንደ ፡ ተባለው ፡ ይቀጣሉ ።

ዐሥራ ፡ ስምንተኛ ፡ ክፍል ።

ሙሉ ፡ ዋጋ ፡ ለመንግሥት ፡ ሳይከፍል ፡ መሬቱ ፡ የተሸጠ ፡ እንደ ፡ ሆነ ፡ ገዢና ፡ ሽያጭ ፡ ርስ ፡ በርሳቸው ፡ በመንግሥት ፡ ላይ ፡ ይባባላሉ ። የቀረውን ፡ ዋጋ ፡ ገዢ ፡ ለመንግሥት ፡ ቶሎ ፡ እንዲከፍል ፡ ወይም ፡ ገዢው ፡ ከመንግሥት ፡ ጋራ ፡ ተስማምቱው ፡ እንደ ፡ ነበረ ፡ በመሬቱ ፡ ወረቀት ፡ ይህ ፡ ነገር ፡ ይጻፋል ።

ዐሥራ ፡ ዘጠነኛ ፡ ክፍል ።

የመንግሥት ፡ ዕዳ ፡ ስለ ፡ መሬት ፡ ዋጋና ፡ ስለ ፡ መሬት ፡ ግብር ፡ ከሁሉ ፡ በፊት ፡ ይከፈላል ፤ የተረፈው ፡ ለወራሾች ፡ ይሰጣል ።

ካያኛ ፡ ክፍል ።

የመሬት ፡ ሙሉ ፡ ዋጋ ፡ ሲከፈል ፡ ወረቀቱም ፡ እንደ ፡ ሥራት ፡ ሲደረግ ፡ ባለቤቱ ፡ መሬቱን ፡ እንደ ፡ ወደደ ፡ ያደርጋል ። ለወራሾቹ ፡ አሳልፎ ፡ ይሰጣል ፤ ያሳግተዋል ። ገንዘብ ፡ እንዲበድር ፡ ሁሉንም ፡ ወይም ፡ እኩሌታውን ፡ እንደ ፡ ወደደ ፡ ይሸጣል ፤ ነገር ፡ ግን ፡ ስለ ፡ ከተማ ፡ ነዋሪዎች ፡ ጤና ፡ ካራት ፡ መቶ ፡ ሜትር ፡ ካሬ ፡ እንዳያንስ ፤ ማለት ፡ ካያ ፡ ሜትር ፡ ርዝመት ፡ ካያ ፡ ወርድ ፡ ያኽል ፡ ነው ።

ካያ ፡ አንደኛ ፡ ክፍል ።

ዛሬ ፡ ያለው ፡ ርስት ፡ ስፋቱ ፡ እንዳለ ፡ ይታወቃል ። ከዚህ ፡ በኋላ ፡ ግን ፡ እንዳይከፈል ፡ ተከልክሏል ፤ በዚህ ፡ በተጻፈው ፡ ሥራት ፡ ያልሆነ ፡ እንደ ፡ ሆነ ።

ካያ ፡ ሁለተኛ ፡ ክፍል ።

ለመሬት ፡ ሙሉ ፡ ዋጋ ፡ ሳይከፍል ፡ የሞተ ፡ እንደ ፡ ሆነ ፡ የቀረውን ፡ ዋጋ ፡ ወራሾች ፡ ቶሎ ፡ ይከፍላሉ ፤ ወይም ፡ አውራሽ ፡ ከመንግሥት ፡ ጋራ ፡ ተስማምቶ ፡ እንደ ፡ ነበረው ። እንቢ ፡ ያሉ ፡ እንደ ፡ ሆነ ፡ መንግሥት ፡ መሬቱን ፡ ይወስዳል ፤ በፀኛ ፡ ክፍል ፡ እንደ ፡ ተባለው ። በቦታው ፡ ላይ ፡ ቤት ፡ ተሠርቶበት ፡ እንደ ፡ ሆነ ፡ ቤቱንና ፡ መሬቱን ፡ ሸጠው ፡ ያውራሽን ፡ ዕዳ ፡ ከፍለው ፡ የተረፈው ፡ ለወራሾቹ ፡ ይሰጣል ።

ካያ ፡ ሥስተኛ ፡ ክፍል ።

ወራሾች ፡ የግድ ፡ የሆነባቸው ፡ እንደ ፡ ሆነ ፡ ርስታቸውን ፡ ለመ ካፈል ፡ ከመንግሥት ፡ ያስፈቅዳሉ ፤ ርስታቸውን ፡ ካራት ፡ መቶ ፡ ሜትር ፡ ካሬ ፡ እንዲያሳንሱ ።

ካያ ፡ አራተኛ ፡ ክፍል ።

ወራሾች ፡ ከደረሳቸው ፡ ርስት ፡ እንደ ፡ ዋጋው ፡ ከመቶ ፡ ሁለት ፡ ለመንግሥት ፡ ይከፍላሉ ።

ካያ ፡ አምስተኛ ፡ ክፍል ።

ስለ ፡ ከተማ ፡ ደኅንነት ፡ መንግሥት ፡ ከባለመሬቶች ፡ ቦታቸውን ፡ ወይም ፡ እኩሌታውን ፡ መግዛት ፡ የፈቀደ ፡ እንደ ፡ ሆነ ፤ በቦታውም ፡ ውስጥ ፡ ቤት ፡ ቢኖር ፡ ባለቤቱ ፡ ለመንግሥት ፡ በግድ ፡ ይሸጣል ፤ የቤ ትና ፡ የቦታ ፡ ዋጋ ፡ ዐዋቂች ፡ እንደ ፡ ገመቱት ፡ መንግሥት ፡ ይከፍላል ።

ካያ ፡ ስድስተኛ ፡ ክፍል ።

ስለ ፡ ትንሽ ፡ ነገር ፡ የሆነ ፡ እንደ ፡ ሆነ ፡ ከሁለት ፡ ሜትር ፡ ወርድ ፡ የማይበልጥ ፡ ያስፈለገ ፡ እንደ ፡ ሆነ ፤ መንግሥቱ ፡ እንደ ፡ ሸጠ ፡ ቍጥር ፡ ዋጋ ፡ ይከፍላል ፤ ቁመቱ ፡ ምንስ ፡ ረኾም ፡ ቢሆን ። ዐሥር ፡ ዓመት ፡ ያለፈ ፡ እንደ ፡ ሆነ ፤ ከመንግሥት ፡ መሬት ፡ ከተሰጠ ፤ ግን ፡ ለሥራው ፡ የሚያስፈልገውን ፡ መሬት ፡ ዋጋውን ፡ እንደ ፡ ተገመተ ፡ ይከፍላል ።

ካያ ፡ ሰባተኛ ፡ ክፍል ።

ነገር ፡ ግን ፡ ቤት ፡ እንዳለ ፡ መንግሥት ፡ የቤቱን ፡ ዋጋ ፡ ከባለቤት ፡ ጋራ ፡ ተስማምቶ ፡ ይከፍላል ፤ ወይም ፡ ሌላ ፡ የሚያክልን ፡ ነገር ፡ ይሰጣል ።

ካያ ፡ ስምንተኛ ፡ ክፍል ።

እንግዳ ፡ ባለመሬት ፡ የሞተ ፡ እንደ ፡ ሆነ ፡ ባገር ፡ ወራሾች ፡ ሳይ ኖሩት ፡ አንድም ፡ ቆንስል ፡ ሳይኖረው ፡ መንግሥት ፡ ቦታውን ፡ ያከራ ያልና ፡ ክራዩን ፡ ይቀበላል ፤ እውነተኛ ፡ ወራሾች ፡ በመጡ ፡ ቍን ፡ መን ግሥት ፡ የተቀበለውን ፡ የርስታቸውን ፡ ክራይ ፡ ይከፍላቸዋል ፤ ከዚህ ፡ ገንዘብ ፡ ለራሱ ፡ የሚያስቀረው ፡ ይህ ፡ ነው ፤ ፭ኛ ፡ የተወራሽ ፡ ለመንግ ሥት ፡ ያለበትን ፡ ዕዳ ፤ ፪ኛ ፡ ቦታ ፡ ለማስበጀት ፡ የተከፈለውን ፡ ገንዘብ ፤ ፫ኛ ፡ በካያ ፡ ሥስተኛ ፡ ክፍል ፡ እንደ ፡ ተባለው ፡ በመቶ ፡ ሁለት ፡ እንደ ፡ ቦታው ፡ ዋጋ ።

ካያ ፡ ዘጠነኛ ፡ ክፍል ።

ሠላሳ ፡ ዓመት ፡ ያለፈ ፡ እንደ ፡ ሆነ ፡ ርስቱ ፡ ለመንግሥት ፡ ይገባል ።

ሠላሳኛ ፡ ክፍል ።

ያለወራሽ ፡ የሞተ ፡ ሰው ፡ ርስቱ ፡ ወደ ፡ መንግሥት ፡ ይገባል ።

ሠላሳ ፡ አንደኛ ፡ ክፍል ።

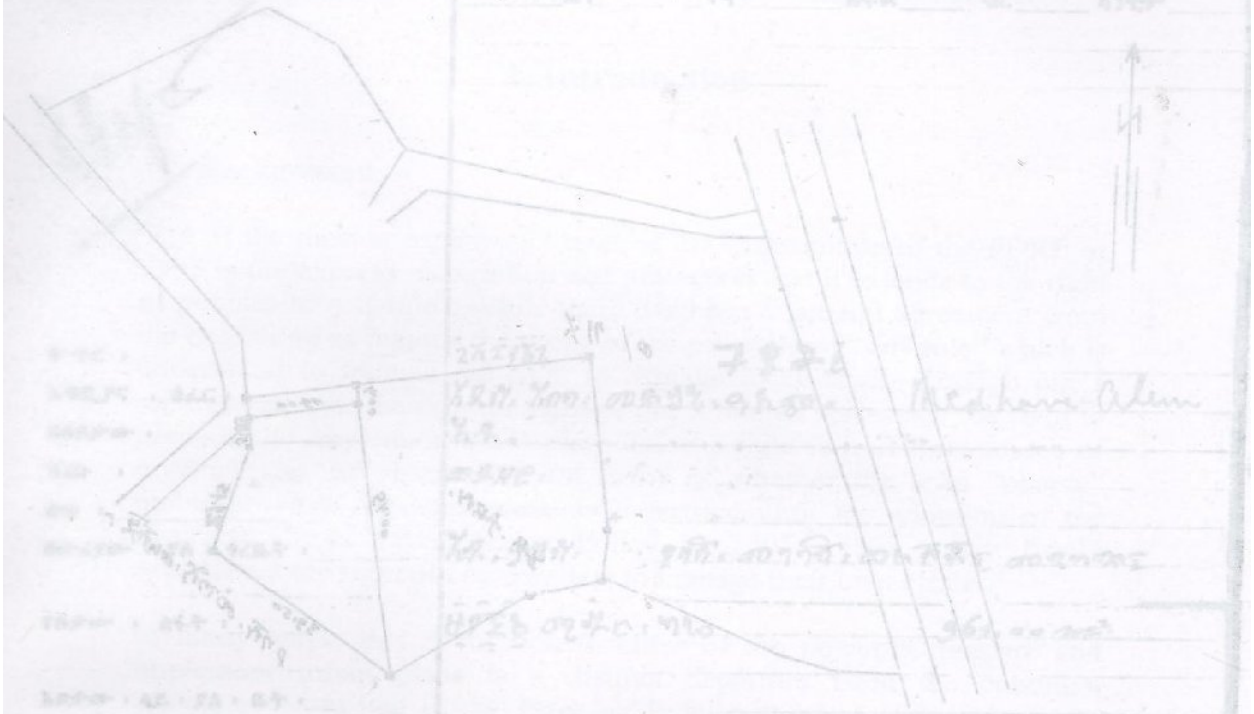
በርስት ፡ ንብር ፡ ክርክር ፡ የተነሣ ፡ እንደ ፡ ሆነ ፡ እንዳገሩ ፡ ሥራት ፡ ይፈረዳል ፤ ሥራት ፡ ያነሰ ፡ እንደ ፡ ሆነ ፡ ዳኛው ፡ የናፖሊዎንን ፡ ሕግ ፡ ይጠይቃል ።

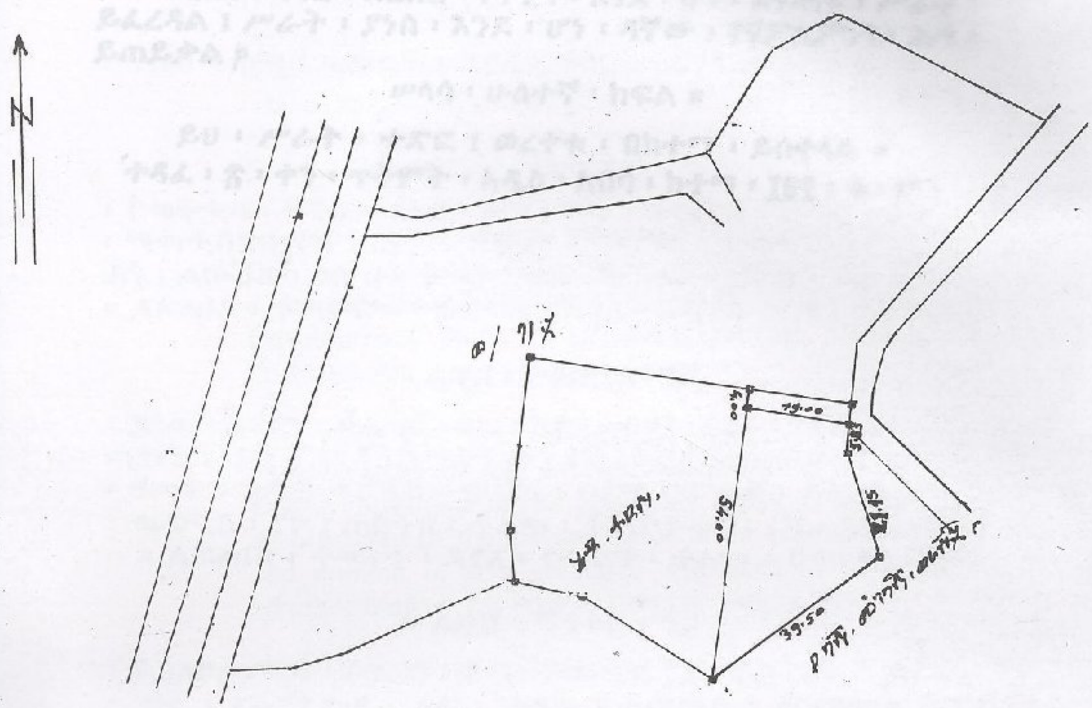
ሠላሳ ፡ ሁለተኛ ፡ ክፍል ።

ይህ ፡ ሥራት ፡ ተጽፎ ፤ መረቀቱ ፡ በከተማ ፡ ይሰቀላል ።

ተዳፈ ፡ ሸ ፡ ቀን ፡ ጥቅምት ፡ አዲስ ፡ አበባ ፡ ከተማ ፡ ፲፱፻ ፡ ዓ ፡ ም ፡

ANNEX IV





ሜትር ፡ ልክ =1:1000

0 10 20 30 40 50 100

ለካት ፡ ያነሣው ፡ መሐንዲስ ፡

ቀያሹ ፡ መሐንዲስ

የርስት ፡ መዝገብ ፡ ሹም ፡

ከዩናይትድ ፡ ምክትል ፡ ዳይሬክተር ፡

Prof. Ing. A. Hedelzonič

ቀ.ር. ፲፱ ፡ 1.6. 1948

ወረቀት ፡፡

Policy and Legal Framework for the Involvement of the Private Sector in Urban Planning: Where Things are and the Way Forward*

By Tamrat Delelegne**

1. Introduction

1.1. Background

One of the most conspicuous marks of the Constitution of the FDRE of 1995 is the express recognition and protection that it extends to the right of peoples to self-rule[1]. While there has been a general agreement from the beginning as regards the scope of the principle of "self-rule" which is understood to include the right to manage [illegible] affairs through one's representatives, the [illegible], the right to prepare and implement [illegible] and the right to [illegible] sources of revenue, the difference on the issue of whether the term "people" includes urban residents remained unsettled until the adoption of the National Urban Development Policy of 2005[2]. This policy firmly established the right of city dwellers to manage their own affairs[3].

In many ways, this devolution to cities of the power to prepare and implement urban plans is a distinct departure from the centralist philosophy enshrined in the Planning Proclamation of 1986 (No. [illegible]). Under this Proclamation, the task of preparing urban plans was the exclusive jurisdiction of the then National Urban Planning Institute (NUPI), now the Federal Urban Planning Institute (FUPI)[4]. Indeed, this *de facto* status of the Institute continued for a long time even after the

* This paper was prepared for and presented at the [illegible] National Conference on Urban Planning and Urban Development Issues, 4-6 June, 2007, Addis Ababa.

** LLB (HSIU), LLM (McGill), Attorney and Legal Consultant

1 See arts. 88/1 cum art. 52/2 and art. 39 of the Federal Constitution

2 The National Urban Development Policy [illegible] March, 2005.

3 It needs to be noted that even prior to the adoption of the National Urban Policy, the Amhara, Tigray, Oromia, and the South Regional States had enacted city proclamations [illegible] others, the right to initiate, prefer, approve, imple[illegible] urban plans.

4 FUPI has lately been reorganized as a Plan Co[illegible]

ከዚሁ ፡ በላይ ፡ የተጠቀሰውን ፡ ግብር ፡ በየጊዜው ፡ ለመክፈል ፡ የሚችል ፡ ነው ።

ይህ ፡ ካርታ ፡ ከሁለት ፡ ላይ ፡ ተጽፎ ፡ አንዱ ፡ በማዘጋጃ ፡ ቤት ፡ ሁለተኛው ፡ በባለይዞታው ፡ እጅ ፡ ይኖራል ።

ተጻፈ ፡ ... ምሕረት ፡ ... ቀን ፡ አዲስ ፡ አበባ ፡ ከተማ ።

የርስትና ፡ የውል ፡

ያዲስ ፡ አበባ ፡ ከንቲባ ።

የግብር ፡ ዋና ፡ ዲሬክተር

Policy and Legal Framework for the Involvement of the Private Sector in Urban Planning: Where Things are and the Way Forward*

By Tamrat Delelegne**

1. Introduction

1.1. Background

One of the most conspicuous marks of the Constitution of the FDRE of 1995 is the express recognition and protection that it extends to the right of peoples to self-rule[1]. While there has been a general agreement from the beginning as regards the scope of the principle of "self-rule" which is understood to include the right to manage local affairs through one's representatives, the right to manage one's human resources, the right to prepare and implement one's plans and the right to a distinct source of revenue, the difference over the issue of whether the term "people" includes urban residents remained unsettled until the adoption of the National Urban Development Policy of 2005.[2] This policy firmly established the right of city dwellers to manage their own affairs.[3]

In many ways, this devolution to cities of the power to prepare and implement urban plans is a distinct departure from the centralist principles enshrined in the Planning Proclamation of 1986 (No. 315). Under this Proclamation, the task of preparing urban plans was an exclusive jurisdiction of the then National Urban Planning Institute (NUPI), now the Federal Urban Planning Institute (FUPI)[4]. Indeed, this *de facto* status of the Institute continued for a long time even after the

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* This paper was prepared for and presented at the 6th National Conference on Urban Planning and Urban Development Issues, 4-6 June, 2007, Addis Ababa.

** LLB (HSIU), LLM (McGill), Attorney and Legal Consultant

[1] See arts. 88/1 cum.art.52/2 and art. 39 of the Federal Constitution.

[2] The National Urban Development Policy as approved by the Council of Ministers, March, 2005.

[3] It needs to be noted that even prior to the adoption of the National Urban Policy, the Amhara, Tigray, Oromia, and the South Regional States had enacted city proclamations which recognized the right of cities to self-rule which included, among others, the right to initiate, prefer, approve, implement and revise urban plans.

[4] FUPI has lately been reorganized as a Plan Coordinating Bureau.

promulgation of the FDRE Constitution which enshrines decentralization as one of its principal postulates. Nonetheless, NUPI's legal status remained in a state of uncertainty until the enactment of the FUPI Establishment Proclamation, No. 450 of 2005. This Proclamation, following the wording and spirit of the Constitution, confirmed that FUPI may get engaged in urban plan preparation only upon the request of either the Region or the concerned urban center. Now cities make decisions. They decide when and how to prepare their plans. They decide who prepares the plan for them. This is clear. But the National and Regional frameworks for the preparation of urban plans have not been issued yet.

The National Urban Planning Law will have yet to be promulgated. But this, however, does not mean that urban planning is a forgotten area. Slow as the progress may have been, both the Federal and Regional Governments are working in unison to enable cities to prepare and implement their plans. The Ministry of Works and Urban Development (MUWD) has through successive conferences and workshops also built a consensus over the Draft National Urban Planning Law. This Draft legislation with the proper amendment or supporting directives would serve as a framework for the preparation of urban plans. There is a general expectation that the Proclamation will be enacted soon.
The question is, where in all this does the private sector fit?

1.2. Objective of this Paper

There is a strong desire on the side of both the Government and the private sector for the latter to involve in the preparation and the implementation of urban plans. And the query is whether or not the existing policy allows this involvement in principle and whether there is a sufficiently detailed legal framework within which this policy could be realized. This question makes the subject of this paper.

2. Where Things Are

2.1. Planning Legislation and the Private Sector

Most of the city proclamations of Regional Governments use broad languages to describe the power of cities to prepare their plans. There are some which expressly mention their power to hire consultants to have their plans prepared. Thus, the City Proclamations of the Amhara State

those of the Southern Nations, Nationalities and Peoples' State (SNNP) incorporate express provisions that empower cities to prepare and implement or cause the preparation of urban plans. Art. 44(1) of the City Proclamation of the SNNP[5] provides as follows:

> *"Every city shall have the authority to initiate the preparation of, have prepared, approve, revise and implement a city plan. In carrying out the planning and implementation process, the City shall observe Regional Government planning principles, guidelines, standards and parameters."*

For a similar stipulation, see art. 60/1 of the Amhara City Proclamation.[6] Obviously enough, the phrase "have prepared" has been inserted in the provision with the purpose of empowering the city to hire public and/or private consultants to prepare urban plans. On the other hand, one needs to note here that in accordance with the above, the consultant may be engaged only in the preparation of urban plans. In other words, no consultant may be engaged in the implementation of plans. Of course, the power to approve plans is to be exercised exclusively by the City Council. This is the broad policy of the Regional Government.

The above is also consistent with the general policy pursued by the Federal Government. A quick look at the pertinent provisions of the Draft Urban Planning Proclamation and FUPI Establishment Proclamation makes this clear. Thus Article 16 of the Draft Planning Proclamation provides as follows:

> "1. Urban administrations at all levels shall have the power and duty to prepare and review their respective urban plans.
> 2. Urban administrations can contract certified private consultants or public institutions to prepare and review their respective urban plans. Particulars shall be determined by legislation."

The above makes it sufficiently clear that it is also the Federal Government's position that the involvement of the private consultant be restricted to the preparation and review of urban plans. This is further

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[5] The City Administration Proclamation of the Southern Nations, Nationalities and Peoples Regional State No. 51/2002.

[6] The Amhara National Region Urban Centers Establishment, Organization and Definition of their Powers and Duties Revised Proclamation No. 91/2003

confirmed by Article 22 of the same Draft Proclamation which stipulates that the responsibility to implement urban plans rests with the urban center. Article 6 of the FUPI Establishment Proclamation too is in line with this broad policy. Thus, sub-art. 4/a (Amharic version) stipulates that upon the request of Regional or City Governments, FUPI may, alone or in partnership with private or government institutions, *prepare* urban plans. This technically restricts the involvement of the private sector to the preparation of urban plans.

Going by the above, the overall policy of both the Federal and Regional Governments appears to be to allow the private sector to take part only in the preparation of urban plans. It is not very clear why their involvement should be restricted to the preparation of plans. One would have thought that the private sector could provide significant help in the implementation of urban plans as well. They would be of particular help in the preparation of detailed land use plans and in parceling out lands. Indeed, practice shows that the private sector has been involved in developing Local Development Plans in Addis Ababa, Mekele and Diredawa. FUPI has also been sub-contracting such works to the private sector. This leads one to ask if oversight could not be taken as a possible explanation for the restrictive wording of the broad policy.

But an even more serious source of concern is the fact that the subsidiary legislation envisaged by Article 16/2 of the Draft Urban Planning Proclamation has not even been drafted yet. As the envisaged subsidiary legislation is intended to define the particulars for the participation of the private sector in the planning process, its absence would make it difficult for urban centers to hire the services of the private sector. For, in the absence of such a law, cities can't know the standards and criteria that must be met in order to hire the services of the private sector. However, one needs to add here that, in spite of the absence of such legislation, the private sector has, in several instances, taken part in developing plans. This is the case with Adama, Benishangul-Gumuz and Diredawa. On the other hand, one needs to note further that the absence of the particulars for the participation of the private sector in the planning process has hampered their effective participation. Indeed, if the private sector is to be involved in the planning process, it would be important to have in place a regulatory framework so as to protect the public against sub-standard planning and its consequences and to ensure that the objectives of the law are fully met.

Having the regulatory framework in place is an urgent task. A quick review of the situation on the ground reveals why the task is urgent.

2.2. Justification for a Quicker Action

Ethiopia has about 925 urban settlements (CSA). And only very few of them have their own urban plans. A senior FUPI official estimates that a maximum of 110 plans may have been prepared by his organization during the past many years. But many of the plans are aged and therefore need to be reviewed. There is therefore a huge backlog of work to be accomplished. However, given the limited capacity of FUPI (a senior FUPI official confirmed that the maximum number of plans that the organization can prepare in a year at present is only 10) and the fact that the private sector has not been involved in the preparation of plans, the task becomes hugely colossal to accomplish.

The situation is aggravated by a somewhat high rate of urbanization in this country (about 4.1% per annum). This is above the population growth rate of 2.4% and above the African average of 3.6%.[7] Existing urban settlements are expanding in a haphazard manner. And new ones are mushrooming without any kind of plan. Urbanization in Ethiopia is often characterized by serious deficiencies in infrastructure and services. Cities have poor roads and inadequate sewerages. Waste disposal is even worse. Similarly, air and water pollution is a common place. And this often results in serious health and sanitation hazards. It is this that calls for a planned development. Add to this situation, FUPI's vision for 2010. FUPI plans to prepare digital maps (basic plans) for 600 small towns before the end of this decade.

It is obvious from the preceding that this titanic mission can be realized only with the active involvement of the private sector and the public sector. This has been fully realized by all stakeholders.
Now, the question is clear: What does it take to bring the private sector aboard?

2.3. Challenges

1. One of the major challenges is the absence of a comprehensive planning law that among other things firmly sets the ground for the involvement of the private sector in urban planning. The

[7] U.N. Population Fund Report on the State of the World Population, 2005 (as quoted by John Metcalfe).

country needs to have one; and the sooner the better. It is a common knowledge that the Draft Proclamation is awaiting the blessing of the Government.

2. A serious source of concern in connection with the above is the absence from the Draft Urban Planning Proclamation of provisions on National and Regional development plans which provide the frameworks within which urban development plans may be prepared. This question had been raised at the National Conference called to discuss the draft urban planning law. However, there is no indication that the final draft will incorporate specific provisions on the said development plans.

3. There is also the challenge of enacting a regulation that provides details regarding the involvement of the private sector in urban planning. The Draft Guideline[8] that is intended to serve this purpose requires a rigorous review. For a closer look at the Guideline refer to section 3.1. below.

4. While having in place a legal framework is absolutely essential, a no less important challenge would be that of readying Regional States and urban centers to take up the challenge of either partnering with the private sector in the preparation of urban plans or in monitoring and supervising their works. Their capacity needs to be strengthened both in terms of organization and the staff ability to carry out specific tasks. Higher learning institutions could be of immense help in this regard. And as always FUPI's role in this regard would be critical.

5. Encouraging and helping the private sector organize themselves and build their capacities could also prove a no easy task. The Regulation, the enactment of which this paper proposes, should incorporate mechanisms to encourage the private sector to embark on building its capacities to play an active part in the planning process.

[8] Ministry of Works and Urban Development, Guideline Prepared to Involve the Private Sector in Urban Planning Services (Second Draft, March, 2007)

6. The absence of a proper organization is also another challenge. There is a need for an organization that would be responsible for the proper implementation of the regulatory legislation to come. The manner of organization of the institution and scope of its powers and responsibilities have been reviewed below.

3. The Way Forward

3.1. What Must be Done

The following needs to be done to enhance the participation of the private sector in the planning process:

1. **Enactment of the new National Urban Planning Law**. As noted above, this is the law in the making that lays down, in clearer and stronger terms, the principle that the private sector may involve in the preparation and implementation of urban plans. Broad as the language of the draft law may be, it provides the basis for the involvement of the private sector in the planning process. This will need to be enacted as soon as possible if the vision of FUPI to prepare 600 digital plans before the end of 2010 is to be realized.

2. **The Need for National and Regional Urban Development Plans.** Art 7 of the Draft Urban Planning Proclamation stipulates as to the hierarchy of plans. It makes it clear that Urban Plans are governed by the Regional Urban Development Plan which in turn is governed by the National Urban Development Scheme. This means that the National and Regional plans will serve as a framework for the preparation of urban plans. Whoever prepares the urban plan, be it a public institution, the private sector or the city itself, will need the framework to guide it throughout the planning process. Whichever institution checks the legality of the plan, as well needs the broader framework as a yardstick to measure the adequacy of the plan. And the City Council approves the plan only if it is in line with the broad framework. Hence the framework is absolutely essential.

   It is not certain, however, that the draft legislation incorporates basic provisions regarding those plans. While the plans may, in view of their size, need to be prepared in separate documents, they need to constitute an integral part of the Urban Planning Proclamation. One hopes that the Proclamation would have general sections on the plans

which could be either annexed or deposited at points of convenience for reference; for the absence of such a framework would act as a serious impediment to the involvement of the private sector in the planning process.

If the task of preparing the National and Regional Development plans proves difficult, the Government could consider the option of issuing directives which lay down the general guidelines and the standards which should be observed in the course of the preparation of urban plans. Some go further to suggest that sector programs such as the Federal Road Sector Program, the National Resettlement Program and other programs developed by the Government could in their respective areas serve as framework in the preparation of urban plans. But the ultimate objective should remain to be to prepare a comprehensive, coherent and focused National and Regional Development Plans as stipulated by the Draft Urban Planning Proclamation.

3. **The Need for New Legislation Detailing the Particulars for the Participation of the Private Sector.** The Ministry of Works and Urban Development has prepared a Draft Guideline to facilitate the involvement of the private sector in the planning process. The status and content of this guideline will need to be reviewed to check whether it meets the requirements of Article 16/2.

a) The Status of the Guideline

As this is a Guideline, it can not have the status of legislation in terms of Article 16/2 of the draft Urban Planning Proclamation. What this means is that it cannot have the force of law. But as the task of enhancing the private sector in the urban planning process involves several issues with legal consequences, it is here suggested that the instrument be enacted as a law instead of a guideline.

b) The Content of the Guideline

i. Statement of Principles

There is no legislation that states the basic principles that should be upheld by planning professionals. Neither does the Guideline under review incorporate a provision on such principles. This is a major omission. While details could be left for professional associations to

work out, the general principles will need to be stated by the Government. The public is entitled to know what is expected of the planning professionals.

What then could be the principles?

Lessons could be drawn from the Planning Profession Bill of South Africa[9] which suggests the following among others:

- The planning profession must pursue and serve the interests of the public to benefit the present and future generations.
- The planning professionals must strive to achieve high standards of quality and integrity in the profession.
- The professionals must promote the profession and pursue improvements in the competence of planners through the development of skills, knowledge and standards within the profession.
- All must strive to promote environmentally responsible planning which will ensure sustainable development.
- The profession must also strive to ensure its legitimacy and effectiveness.
- These principles are so basic that it is unlikely that any one would contest them; but the Association of Ethiopian Urban Planners and other stakeholders might wish to further enrich them whenever necessary.

ii. The Need for an Implementing Organization

- An efficient and effective management of affairs pertaining to planning professionals requires a carefully structured organization. However, the Guideline neither establishes a new organization nor makes an express reference to an existing one. The Guideline simply refers to " a legally authorized entity." Presumably, the entity is to be designated after the Guideline has been issued. But that is going to take a very long time; because it is going to involve two processes: one to get the Guideline

[9] Republic of South Africa Planning Profession Bill 1 (B76B-2001). Similar lessons could also be drawn from the Federal Court Advocates' Code of Conduct Council of Ministers Regulation No.57/1999.

(Regulation is suggested here) approved and another one to get the entity established. If the actions are not combined, execution of the regulation could also be delayed until measures to establish the organization are put in place. This unnecessary procrastination could be avoided by incorporating in the Regulation an express provision on the matter of organizational arrangement.

- The Ministry of Works and Urban Development is, under the Draft law, responsible for establishing the entity. It is important that the organizational arrangement is such as to make space for the representation of the private sector. The Association of Ethiopian Urban Planners may be authorized to designate its representatives. It is here further suggested that other pertinent professions as well as pertinent higher learning institutions should be represented in the entity.
- The section establishing the entity should also define its working procedures. Meeting procedures and decision-making modalities, accounting and reporting duties need to be clearly stipulated. Otherwise, the institution could be paralyzed. The section should also have provisions on funding and budgeting.
- The section should also expressly define the powers and responsibilities of the entity. As could be gathered from the reading of the Draft Guideline and the Planning Profession Bill of South Africa, the power of the entity may include the following:

    - Regulate the profession by ensuring the proper observance of government laws, directives and standards.
    - Manage the registration of professionals. This includes the task of determining whether a professional applying for registration meets the legal requirements. Matters pertaining to professional ethics and questions pertaining to suspension and cancellation of registration should as well be attended to by the entity.
    - Propose to the Minister the size of registration fee and the time for its payment. This includes matters pertaining to registration renewal fees and other incidentals.
    - Help build the capacity of planning professionals. This includes the function of organizing, in cooperation with the Association of Planning Professionals, training programs for registered planners as well as advising the

Minister on the role to be played by Higher Learning Institutions.

- Help, where appropriate, registered professionals get access to credit facilities.
- Advise the Minister on ways of establishing mechanisms to help registered professionals get recognition abroad.

iii. The need for a section on Professional conduct

- As noted earlier, one of the principal functions of the entity is to regulate the profession. And an effective and efficient regulation of the profession requires that there be in place a clear set of provisions dealing with professional conduct. But the draft guideline does not incorporate such provisions. This again is a serious omission. It is here suggested that such provisions be incorporated.
- The entity established earlier shall be responsible for the proper implementation of the Code of Conduct.
- The essential elements of the professional conduct ought to include the following:
  - To abstain from participating as an advisor or decision maker in all matters in which the concerned professional has a personal interest.
  - Not to seek any favors that tend to influence one's objectivity as an advisor or decision maker. Offering favors to influence decisions is an equally serious violation of the code.
  - Not to solicit prospective clients or employment through the use of false or misleading claims, harassment or duress.
  - Not to use the power of any office to get a special advantage that is not in the public interest.
  - Not to further one's interest through the use of any confidential information obtained in the performance of duties. Disclosing such information to others is a no less serious violation of the code.
  - Not to do any wrongful act that may adversely affect the planning profession.
  - To accurately represent one's qualifications to practice the profession.

- The section on professional conduct should also incorporate provisions on the hearing of cases against planning professionals. As well, the procedures for aggrieved parties to lodge appeals need to be expressly provided for.

c) Other related remarks on the Guideline

- One area of concern is the size of the professional fee. The size of the fee has never been an issue when FUPI prepared urban plans. Now that the private sector is being encouraged to take part in the urban planning process, the need to address it cannot be ruled out. As the number of consultant planners is likely to be small and therefore stiff competition unlikely, at least in the short term, there could be the fear that the planners may set exorbitant charges for their services. Especially smaller towns with limited negotiating skills could be at greater disadvantage. This is probably one area where the professional association of planners could play a regulatory role. The Association could assist in refining the parameters and procedures for fixing the service charges. On its part, the Government needs to build the capacity of the Regional Governments and urban centers to negotiate and administer contracts. As part of the whole exercise, the Government needs to develop model contracts and negotiating procedures for use by urban centers.

- Closely allied to the above is the duty to establish and build the capacity of the planning units of Regional Governments and urban centers to prepare and implement urban plans. Such moves should enable urban centers, through time, to partner with the public as well as the private sector in the exercise to prepare and execute urban plans. Capacity so built should enable urban centers to supervise the preparation and implementation of their plans. Higher learning institutions, both public and private, could play a significant role in the effort to build the capacity of Regional States and urban centers. The Federal Government (FUPI) should continue to put up the effort that it has been exerting to date in this regard. Of particular significance are, the support it extended during the exercise to establish planning units in four Regional States, the planning and implementation manuals

that it prepared, the identification of gaps in the Regional States that it conducted, and the capacity building strategies that it designed.

- As part of executing its regulatory authority, the Government could take several measures to encourage the private sector to play an active part in the preparation of urban plans. One obvious measure is to make registration and licensing requirements and procedures simple and clear. Planners and other allied professionals should have easy access to pertinent regulations and directives. In some countries, the Regulations or Guidelines that lay down such requirements and procedures are available on websites. Moreover, both registration and licensing should be effected within a reasonably short time. Furthermore, registration and licensing fees should be reasonable considering all circumstances. In some countries, the Government even offers incentives to attract the private sector join the planning sector. Such incentives include free listing of the private sector on Government databases and websites, assisting them access to financing, training and capacity building programs and on-line renewal of registrations.
- It would also be to the benefit of the public, the Government and the planning profession for the Government to encourage the establishment and development of the professional association of urban planners. Such an association would be of great help in ensuring the maintenance of the quality of services given by its members and in building the capacity of its members. The Association could also prove a useful instrument in ensuring the observance by its members of the professional code of conduct.
- The Government also has another important task. It has the duty to create a suitable environment for the involvement of the private sector in urban planning. As part of this broad responsibility, the Government should have in place a working system that discourages corruption. Accordingly, all contracts should be awarded through fair competition. And any party aggrieved by the decision of the city administration in connection therewith shall have the opportunity to present its appeal.

3.2. Opportunities

This is probably one of the most opportune moments to enhance the participation of the private sector in the urban planning process. First of all the Government is willing and acting to create the environment that it takes to involve the private sector in the planning process. The principal legislation will hopefully be enacted soon and the draft subsidiary legislation, which currently is in the form of a draft guideline, could be readied for action by the Council of Ministers within a short period of time. Secondly, the Association of Urban Planners has shown deep interests to play an active part in the urban planning process. They have been taking an active part in the exercise to build consensus around the newly drafted comprehensive Urban Planning Proclamation. It was also the Association that designed a proposal to the Ministry suggesting ways of enhancing the role of the profession in the planning process. Thirdly, Regions and cities are now in the process of building the capacity of their staff to take up the challenge necessitated by the involvement of the private sector in the planning process. As helping build the capacity of Regions and cities is one of the principal legislative duties of FUPI, this organization has been engaged in organizing training programs for regional and urban staff members. Fourthly, now more and more higher learning institutions are opening urban planning departments. Needless to say, this greatly facilitates the capacity building exercises by Regions and cities. Fifthly, the National Urban Development Policy sets a suitable environment for the development of cities and the involvement of the private sector in the planning process.

4. Summary and Conclusion

The developments that lead to and the circumstances that necessitated the involvement of the private sector in the urban planning process have been reviewed. As demonstrated by the moves that the Government is in the process of undertaking at present, it has a strong desire to see the private sector play a more dominant role in the urban planning process. And for obvious reasons, the private sector is also extremely eager to play an enhanced role in urban planning. But one needs to have the ground rules for the involvement of the private sector. For that, the comprehensive Urban Planning Proclamation will need to be enacted; and that law must incorporate provisions on National and Regional urban development plans. These plans are important because they

provide the framework for the urban plans. The Draft Guideline as well needs to be transformed into a more coherent regulation.

There is a big chance that the comprehensive Draft Urban Planning Proclamation would be enacted into law sooner than later. But there is a deep fear that it might be enacted without the provisions on National and Regional Urban Development plans. In that case, one would have a serious problem of having a reference against which the validity and legitimacy of urban plans could be judged. As introducing an amendment to the Proclamation could take time longer than tasks awaiting urgent attention can afford, the Ministry may need to consider a fall-back position. A possible option would be to draft a directive incorporating national standards and parameters for urban planning in anticipation of the amendment of the Proclamation. The participation of the private sector in the designing of the directive would be an additional guarantee to the adequacy and implementability of the directive.

Building the capacity of Regions and urban centers is a necessary yet formidable task. FUPI is already engaged in this task; but much more needs to be done. The private sector as well needs to organize itself and focus on building its capacities. In this connection, ways will need to be devised to harmonize the efforts of the Ministry with those of higher learning institutions.

References

1. The Constitution of the FDRE, Proc. No 1/1995.
2. The Constitutions of the Regional States of Amhara, Oromia, Harari, the SNNPRS and Benishangul-Gumuz.
3. The City Proclamations of Amhara, Tigray, Oromia and the SNNP.
4. The Diredawa Administration Charter Proclamation No. 416/1004.
5. The Addis Ababa City Government Revised Charter Proclamation No. 361/2003.
6. FUPI Establishment Proclamation No. 450/2005.
7. The National Urban Development Policy, as approved by the Council of Ministers in March, 2005.
8. Urban Planning Proclamation (Draft).

9. MWUD, Guideline Prepared to Involve the Private Sector in Urban Planning Services (Second Draft, March, 2007).
10. Republic of South Africa Planning Profession Bill 1(B76B-2001).
11. Shapira and Hellerman, The Assessment of Future Requirements in Urban Planning Institutional Options and Capacity Building Requirements (2005).
12. Donald Brownell and Amrit Rai, Urban Sector and Municipal Governance (Nepal, 2002).
13. Tilahun Fekade, A Preliminary Assessment On the Potentials and Constraints For the Participation of the Private Sector in the Provision of Urban Planning Services in Ethiopia (May, 2002).

Mining and Development; an Overview of the Ethiopian Experience Within the Context of the Mining Laws*

By Wondemagegnehu G.Selassie**

Abstract

The paper explores the role of mining for economic development and the required policy framework for a vibrant mining industry. For over 60 years Ethiopia has issued various laws to encourage mining investment and spur development. Unfortunately adequate investment in the mining sector and development of the industry has eluded the country and we do not see its realization on the horizon. All attempts so far have not been effective and have not yielded the intended results. The mining law has been revised ten years back but the outcome of the revision did not go further than a couple of years glimmer of hope. On the other hand, some countries are fairing better at securing investment, discovering and developing mines. This poses questions to be answered: what is wrong with our policies and laws? Where did we fail? What can we learn from other countries? What shall we do to change the situation? These are the broad issues treated in this paper.

1. Introduction

Human history shows that life without the use of minerals is unthinkable. Early man had to use various stone tools for his hunting and later for his farming activity. The gradual improvement of these simple tools brought man to the present day of complex tools and machines. While observing these associations, one cannot fail to appreciate that these tools, and therefore the minerals that they are made of, are central to humankind becoming what he is and his cultural progress.

When we examine the more recent developments in human history – the industrial revolution that followed the down of the 19th Century – it is very easy to see the role that minerals played in the dramatic changes in the way

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man lived and in his understanding of his world. One of the prominent economists of the first half of the 20th century, L.C.A. Knowles, in his work of 1921, enumerated six important areas of development that made up the industrial revolution.[1] These were:

1. Engineering
2. Iron Foundries
3. Water and steam driven mechanical devices applied in textile industries
4. Chemical Industries
5. Coal Mining
6. Transport

According to Knowles, of these six, the developments in iron and coal mining were the bases for the developments in the other fields.

This was also true across the Atlantic, in the United States of America. An examination of the economic progress of the United States sheds light on how much dependent the US was on the use of minerals to fuel its advancement in becoming a global power in every sense of the term. The following table is illustrative of this fact.

Mineral Consumption of the USA, 1870 – 1970, at 1967 Prices[2]
(Millions of Dollars)

Year	Total	Fuels	Metals	Others
1870	456	258	64	134
1880	964	510	172	283
1890	1,878	995	349	535
1900	2,635	1,551	584	500
1910	4,936	3,104	1,143	589
1920	6,716	4,533	1,511	673

[1] C.A Knowles, The Industrial and Commercial Revolutions in Great Britain during the Nineteenth Century, London, 1947, pp. 17-22.

[2] Manthy, Robert S. 1978, as quoted in Minerals and Economic Growth, by John G. Myers and Harold J.Barnett, in William A. Vogely (Ed.), *Economics of Mineral Industries*, 4th edition, American Institute of Mining, Metallurgical and Petroleum Engineering Inc. 1985, page 8.

1930	7,860	5,426	1,450	985
1940	9,669	6,627	2,136	906
1950	14,419	9,748	3,021	1,650
1960	18,669	13,181	2,788	2,700
1970	27,326	19,651	3,691	3,984
Annual growth %	+ 4.2	+ 4.4	+ 4.1	+ 3.5

The United States, a country with an economy predominantly based on agriculture in the 1850s and which also employed 48% of its population, was transformed, in less than a century, into an industrialized nation due to its extensive use of minerals. Today only 3% of the US population produces a large volume of agricultural products to satisfy the needs of its population of 260 million and its large export trade.[3]

The development problems and challenges of today are different from those of the 1870s. The most advanced national economies are very much diversified and the service and entertainment industries are now much more dominant than the rest of the economic sectors. Irrespective of the shift, however, the role of minerals in the daily life of the developed countries has still been growing. In the developing parts of the world the significance of minerals is much more important as these countries have yet to build the infrastructure that is essential to making life better and more secure. The wise and sustainable development and use of mineral resources of a nation is hence still an important issue in both developed and developing nations alike.

2. The Development of Mining Legislation during the Industrial Age

At the start of the Industrial Revolution mineral ownership in Europe was based on two legal traditions: the Common Law and the Continental European legal systems.[4] Under the common law principle, minerals belong

[3] Ibid,

[4] The discussion in this section is mainly based on T.A Rickard, *Man and Metals*, Whittlesey House, Magraw–Hill Book Company inc., 1932, p. 621-626, and Nicholas J. Campbell, Jr. *Principles of Mineral Ownership in the Civil Law and Common Law System*, Tulane Law Review, Vol. XXX1, 1957.

to the landowner, with the exception of coal and petroleum, which were brought under Crown ownership in the United Kingdom during the 1930s to early 1940s[5].

In the USA the legal tradition is basically that of the English common law. The surface owner owns the minerals in the subsurface. However, minerals in public lands are owned by the Federal Government based on the original settlement between the 13 States that first formed the United States, and the minerals in such public lands are disposed of by grant or cession.

The situation in the United States during 1849 and the following years was crucial in mineral development and in the evolution of mining legislation in that country. A review of these may shade some light on wise mineral development policy.

In 1848 gold was discovered in California and with the gold rush, the movement of a large number of people to the western United States began.[6] The gold diggers did not have permits to mine gold and in actual fact they were trespassers on someone else's property. At the time there was no law governing exploration and mining. The Federal and state governments could not intervene without legal sanction. They therefore adopted a more pragmatic stance whereby they decided not to interfere in the chaotic activities of the gold diggers in the belief that they themselves would set their own rules. The miners, now left on their own, established their own rules to determine the manner in which their individual interests could be protected and their mining activities regulated[7]. This helped to put an end to the chaotic situation. In the end, in 1866 the Federal Government enacted a mining law, which was essentially based on the rules of the gold diggers of California. The law was, in 1872, replaced by another which still retained the basic elements that were derived from the rules of the California miners.[8] Today, one hundred thirty two years later, that law is still in force, having undergone several amendments and additions to accommodate the needs of changing times.

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[5] Petroleum (Production) Act of 1934 and Coal Industry Nationalization Act of 1946 of the United Kingdom.

[6] Rickard, Id.; see also, *Short History of Man and Gold*, Mining Engineering, January 1998, page 53.

[7] Ibid., page 620-621.

[8] Ibid., page 624-626.

Two lessons are learned from the evolution of the mining law of the United States:

- The enactment of laws that reflect the wishes of the governed adds to the acceptability of the law and the propensity for the governed to advocate for its enforcement: government authority then becomes truly regulatory
- The institutional stability that was promoted by the longevity of the mining law was one of the most important factors that helped the US to attain world leadership in the mining and mineral use technologies: the success of a mining industry is based on very long term views and it benefits from legislative stability over equally long time scales.

In the Civil Law system, minerals are mainly owned by the state according to three basic forms known as accession, *res nullius*, and *regalia*/royalty. Accession is of French origin and is based on the legal fiction that the subsurface of the land is an accessory of the surface and minerals are considered as accessory to the surface hence minerals belong to the owner of the surface. *Res Nullius* assumes that minerals belong to no one until they have either been discovered or taken into possession. In accordance with this principle, title to the surface does not carry proprietary rights with respect to the subsoil or minerals. The first occupant or first discoverer of the minerals obtains ownership.[9] Under the *regalia*/royalty system, ownership of the surface and subsoil is separate and title to minerals is ascribed to the state. The state owns and controls the use of minerals by granting licenses and regulating the activities of exploration and mining.[10]

In general, in all of the systems there is some overlap and it is very difficult to find a system of legislation that is purely attributable to common law or to civil law. Irrespective of the type of mineral ownership, however, there is one thing that is common to all countries. All highly advanced economies of the world relied on the intensive and extensive use of minerals to fuel their development. It is easy to go through the list of developed countries and see that their economies flourished because of their use of minerals, either by producing their own or by acquiring from elsewhere through

[9] Nicholas J. Campbell, Jr., op. cit., pp.304-312.
[10] Id.

resource exploitation via colonialism or trade. Even in the small wealthy countries that attribute their economic successes to developed financial service provisions, mineral consumption in infrastructure building has been very high.

3. The Ethiopian Mining Legislation

3.1 Traditional Mineral Use and Early Policy Measures

Use of Minerals in Ethiopia dates back to times immemorial. *Dinkenesh*, better known as Lucy, would not have devolved to us without stone tools. The numerous sites of early human settlement in several parts of the southern half of Ethiopia have left evidence of pre-historic mineral use in the form of stone tools, grave markings, cave carvings and paintings. The well constructed temples of the Adamites in Yeha and elsewhere, the Axumite obelisks, temples, palaces and precious metal coins are fingerprints of early historic mineral use in Ethiopia. The rock hewn churches of Lalibela show the high level of refinement attained in the use of minerals in situ for construction purposes. The walled city of Harer was wholly built and enclosed by a wall of stone and lime in the tradition of the trading city states of Eastern Africa. The palaces, castles and bridges of the Gondarine period reflected the peace and prosperity of the times where mineral use in construction further developed Emperor Tewodros's achievements in building a road from Debre Tabor to Meqdela and his casting of canon were points of entry to more modern and higher stages of mineral use.[11]

Though mining legislations are relatively recent in Ethiopian legal history some policy decisions by rulers date back in time. One interesting policy on mining was the one issued by Aatse Sertse Dingel (1563 - 1597). During his reign there was a gold mine in Tembien. The Emperor was apprehensive of the temptation that the existence of the mine could create in the minds of the Turks that were then entering the western Red Sea region. Fearing the Turkish aggression that may follow, he ordered the mine to be closed.[12] This

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[11] See, in general, Richard Pankhurst, *An Introduction to the Economic History of Ethiopia from Early Times to 1800*, Lalibela House, 1961; also, Sirgiw Habte Selassie, *Dagmawi Menelik Yeadissu Silitane Mesratch*, 1989 EC, pp. 444-446.

[12] See, R. Pankhurst, Ibid., p. 226.

may be viewed in light of the then current pillage of precious metals from Central and South America by the Spanish conquistadors and as prescient of what was eventually to happen in Africa during the colonial period of the following centuries. Sertse Dingel's ruling was obviously negative as regards mineral development but it clearly shows that mining is always subject to considerations of national welfare and security. One can find more records of similar but less dramatic actions in Professor Richard Pankhurst's well known book cited earlier.

3.2 Mining Legislation in Ethiopia: History and Development

During the long period of Ethiopian history, mining is not known to have been subject to any specific laws until the year 1928. From this period onwards, in the 75 years between 1928 and 2003, 23 pieces of legislation were issued in Ethiopia, known to this writer. The four Constitutions of 1931, 1955, 1987 and 1995 dedicated provisions to minerals and natural resources some of which are too detailed for constitutional provisions. Seventeen of these legislative instruments were proclamations and decrees dealing with ownership, administration, tax and procedural matters. Five deal with the establishment of institutions dedicated to minerals and mining.

The earliest known legislation on minerals was the Imperial Decree of 18th April 1928. It was a ground-breaking legislation. It, in a nutshell, provided that:

- All wealth in the sub-soil was State property and beyond the power of disposal of the landowner.
- The landowner could freely dispose of building materials.
- The Government would grant "permits of exploration" for all minerals.

In contradistinction to common law practice, this legislation separated title to land and right to minerals. Akin to the continental European system of *regalia*, the government was designated as the guardian of the mineral wealth of the nation and manager of the resource by granting permits for those who are interested to be involved in exploration and development activities. This basic definition of mineral ownership continues until now,

with minor changes in expression, while the manner of administering mineral exploration and mining has undergone various restyling during the successive change of regimes in the country.

Article 130 of the Revised Constitution of 1955 was perhaps the most detailed article of all. It dealt with ownership of minerals as well as the development and conservation of the resource:

- The natural resources of and in the sub-soil of the Imperial Government, including those beneath its waters, are state domain;
- The natural resources in the water, forests, land, air, lakes, rivers and parts of the Empire are a sacred trust for the benefit of present and succeeding generations of the Imperial Ethiopian Government and Ethiopian People. The conservation of the said resources is essential for the preservation of the Empire. The Imperial Ethiopian Government shall, accordingly, take all such measures, as may be necessary and proper, in conformity with the Constitution, for the conservation of the said resources.
- None of the said resources shall be exploited by any person, natural or juridical, in violation of the principles of conservation established by Imperial Law.

Following the coming into force of the Revised Constitution, however, sixteen years elapsed until a detailed mining legislation was issued. The first mining law, Proclamation No.282, was issued in 1971[13]. It followed the same principles as defined in the Decree of 1928, the difference being that it was more detailed, well organized and complete. The Proclamation had 54 articles and was sub divided into two parts. The largest part, which was part two, was sub-divided into five chapters and sections. The law addressed the following major points:

- Mining Rights generally
- Prospecting Permits: Non exclusive and non transferable
- Exploration Licenses: Transferable in accordance with the Regulations
- Mining Lease: 30 years, renewable
- Oil and Natural Gas
- Fiscal Regime: Tax: 51%, Royalty: 12.5% for petroleum, up to 15% for minerals.

[13] Mining Proclamation, Negarit Gazeta 30 year No. 12, Proclamation No. 282 of 1971.

The Mining Regulation No. 396 of 1971[14] also came out as a detailed and well-organized Regulation that dealt with the procedural and administrative matters required for the implementations of the Proclamation.

However, the 1971 Proclamation had some shortcomings. It addressed both petroleum and solid minerals, not accommodating the specificity of needs in the two industries. It introduced the concepts of concessions and leases, which may not be acceptable to present day thinking. It also provided for high penalties for infractions. Environmental provisions were not included reflecting the lower level of environmental awareness of the time. Furthermore, the law provided for very high tax and royalty rates. In other respects, most of its provisions could be used even today without much difficulty. This legislation has been instrumental in attracting some new investment in exploration, both local and foreign. The times had been the heyday of global mineral development and booming investment for gold mining with prices rising from US$ 42 in 1973 eventually reaching US$ 627 and $850 in 1980. While it had conditions well set for its entry into the modern mining world Ethiopia was soon to opt out and to miss the good years of mineral development, with that chance not to recur till the present day.

In 1974, Ethiopia underwent a profound change in its political and social structure. A military government took over power and was influenced by left leaning intelligentsia. The Mining Proclamation of 1971 was thus in force for less than four years but found only negative expression in practical application, with declining exploration activity due to the turbulence of the times and the policies of the government. Further, Proclamation No. 26 of 1975[15] on Government Ownership and Control of the Means of Production, was issued to institute restrictions on mining by the private sector and provided that the following activities were excluded from private sector participation.

- Exploration and Exploitation of precious metals, radio active and nuclear minerals
- Large-scale mining of salt
- Petroleum refining

[14] Mining Regulations, Negarit Gazeta 30th Year No. 20, Legal Notice No. 396 of 1971.

[15] Government Ownership and Control of the Means of Production Proclamation, Negarit Gazeta 34th Year, No.22, Proclamation No.26 of 1975.

The following were reserved for Joint Venture between the Government and foreign investors, with 51% participation by the Government:

- Carbons and hydrocarbons such as petroleum and coal
- Mining of ferrous and non-ferrous metals
- Mining of chemical and fertilizer industry raw material minerals such as potash, phosphate, and sulfur.

This was soon followed by another Proclamation, No. 39/1975, on Government Control of Mineral Prospecting, Exploration and Mining Activities.[16] It reconfirmed the above provisions and restricted the private sector to engaging in only small-scale quarrying, salt and clay production.[17]

During 1975 –1993, there were only three other Proclamations that were directly related to minerals and petroleum development. These were the two Proclamations establishing the Ethiopian Mineral Resources Development Corporation (EMRDC) and the Ethiopian Institute of Geological Surveys[18] (EIGS), and the twin Proclamations issued to promote Petroleum Exploration and Development and Petroleum Operations Income Tax.[19]

These four Proclamations were very important for the long term mineral resources development of Ethiopia. Particularly the establishment of the EMRDC and EIGS contributed a great deal to the mineral development sector. These two institutions were responsible for:

- the development of a large and well trained human resource base on which a modern mining industry can be built.
- the aggressive strengthening of modern exploration practices that were introduced earlier but developed at a slow pace.

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[16] Government Control of Mineral Prospecting, Exploration and Mining Activities Proclamation, Negarit Gazeta 34th Year No. 33, Proclamation No. 39 of 1975.

[17] Id., Article 4.

[18] Ethiopian Mineral Resources Development Corporation Establishment Proclamation, Negarit Gazeta 42nd Year, No. 3, Proclamation No. 229 of 1982. Ethiopian Institute of Geological Survey Establishment Proclamation, Negarit Gazeta 42nd Year, No. 3, Proclamation No. 230 of 1982.

[19] Petroleum Operations Proclamation, Negarit Gazeta 45th Year, No. 6, Proclamation No. 295 of 1986 and Petroleum Operations Income Tax Proclamation, Negarit Gazeta 45th Year, No. 7, Proclamation No. 296 of 1986.

- the greater knowledge of the geology of the country and its mineral wealth endowment potentials.
- the identification of numerous mineral resource potential areas for exploration.
- the discovery and development of the *Lege Dembi* gold deposit which heralded Ethiopia's entry into the modern hard-rock mining world;

During this period the mining sector spawned a number of endeavors in technical cooperation with a number of countries from the then western and eastern block countries. The most notable had been the cooperative effort with the former Soviet Union, which resulted in the discovery of Lege Dembi and several other prospects.

Following the promulgation of the twin petroleum proclamations, British Petroleum, Amoco, Maxus Energy Corporation, International Petroleum Limited and Hunt Oil Company started exploration operations in the Ogaden and the Red Sea. The petroleum laws opened the way for private sector participation similarly opening up the mining sector although somewhat belatedly with respect to global mineral industry trends.

These silver linings around the cloud shadowing mining development were to result in the adoption and promulgation of the new mining legislation that had been under research and development during the late 1980s, eventually to end the nineteen years of lost opportunities covering 1974 –1993. The then Ministry of Mines and Energy started working on research and drafting of a new mining law during the late 1980's. By mid-1990 the drafts were ready and after further modifications these were adopted and promulgated in 1993.

4. Mineral Development Legislation since 1993

Article 40 of the Constitution of the Federal Democratic Republic of Ethiopia of 1995[20] declares that "the right to ownership of rural and urban land, as well as of natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is the common property of the

[20] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st Year No.1 Proclamation No. 1 of 1995.

nations, nationalities and peoples of Ethiopia and shall not be subject to sale or other means of exchange". In Article 89 (5), the constitution provides that the Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.

A few years before the adoption of the Federal Constitution, a new mining law as well as a mining income tax law was issued in June 1993.[21] The Mining Regulations enacted for their implementation came into effect in April 1994[22]. The two Proclamations were amended in 1996 and 1998[23] and the Regulations, in 1998 and 2006.[24] The most important features of the two Proclamations may be summarized as follows.

Mining Proclamation No. 52/1993

This law lays the general framework of the rules governing the mining industry in Ethiopia. Accordingly:

- it invites private investment in all kinds of mineral operations,
- it provides for a one-year exclusive prospecting license,
- a three-year exclusive exploration license with two renewals of one year each
- exclusive mining license for twenty years with unlimited renewals
- provides for compliance with adequate health, safety and environmental requirements
- possibility of including minerals, which were not originally specified in the license as they are discovered

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[21] Mining Proclamation, Negarit Gazeta, 52nd Year No.42, Proclamation No. 52 of 1993, and Mining Income Tax Proclamation , Negarit Gazeta, 52nd Year No. 43 , Proclamation No. 53 of 1993.

[22] Mining Operations Council of Ministers Regulations, Negarit Gazeta 53rd Year, No. 84, Regulations No. 182 of 1994.

[23] Mining (Amendment) Proclamation No.22/1996, Fed. Neg. Gaz.,2nd. Year No. 10 and Mining (Amendment) Proclamation No. 118/1998, Fed. Neg. Gaz., 4th Year No. 47.

[24] Mining Operations Council of Ministers (Amendment) Regulations No. 27/1998, Fed. Neg. Gaz., 4th Year No. 14 and Regulations No. 124/2006. The latter Amendment set a royalty of 4% for semi precious minerals.

- insures the licensee's right to sell the minerals locally or by exporting them
- provides exemption from customs duties and taxes on equipment, machinery, vehicles and spare parts necessary for mining operation,
- allows the opening and operation of a foreign currency account in banks in Ethiopia, retention of portion of foreign currency earning and remittances out of Ethiopia of profits, dividends, principal and interest on a foreign loan etc.
- allows dispute settlement through negotiation and international arbitration.

Mining Income Tax Proc. 53/1993

The Proclamation provides:

- generous deductions and calculations of expenditure
- ten years loss carry forward
- allows depreciation of capital expenditure and pre-production costs for four consecutive years
- 35% tax[25]
- 10% dividend tax
- government participation of a maximum of 2% in large scale mining operations.[26]

Mining Regulations No.182/1994

The Regulations in general provide:

- Form and methods of applications
- Procedures in processing, granting and renewal of licenses
- Rights and obligations of licensees
- Areas where mineral exploration and mining can not be conducted
- Royalties of 2-5% and rentals and fees.

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[25]. Originally, the tax rate was 45%, later it was amended by Mining Income Tax Amendment Proclamation No 23 of 1996, Negarit Gazeta 2nd Year No. 11.

[26]. Earlier government participation was set at 10%. It was later amended by Mining Amendment Proclamation, Negarit Gazeta 2nd Year No.10, and Proclamation No. 22 of 1996.

5. Evaluation of the Mining Law of 1993 in Light of Global Trends in Mining Law

According to a study by Koh Naito and James M. Otto, more than 90 countries adopted new mining laws or made major amendments to existing ones during the preceding decade.[27] According to the study, the matters addressed were summarized as follows:

- Removing or reducing barriers to foreign investment in the mining sector
- Reducing fiscal restraints through revised taxation schemes
- Enhancing the transferability of mineral rights between parties
- More careful definition of the linkage between exploration and mining rights
- Closure of some areas to mineral activities
- Imposing obligations to reduce the impact of mining operations on the environment and on local communities.

The mining legislative reform exercise in Ethiopia during this period may thus be viewed as an internally driven expression of the worldwide trend. If the 1993 legislation is viewed against the basic criteria of Naito and Otto it generally fares very well. It addressed almost all the basic issues that modern mining legislation was expected to address. However, since the coming out of the Ethiopian law, many more regions of the world have been opened up for the worlds mining companies and the competition among discovered deposits and countries for investment is much stronger now than before. The world is also not short of supply in the type of minerals that may be discovered and developed in Ethiopia. In view of these factors, the following matters need to be accommodated in the law or the administrative practice, as appropriate:

- In times of hardship, as when mineral prices are low, it may not be possible to raise the required investment in financial markets, in which case, licensees should be allowed to keep their licenses

[27] Koh Naito & James M. Otto, *Legislative Regimes for Exploration and Mining Projects: Formulating Guidelines to Assess Regulatory Requirements*, in SEG Newsletter, No 33 April 1998, Society of Economic Geologists, Littleton Colorado, page 14- 15.

without having to incur much more than care and maintenance costs of their license areas, until such situations improve;

- Work program definition should primarily be the responsibility of the licensee as he is the entity that puts his resources to risk by deciding on the model that should guide his work. Work commitment should also be flexible to allow changes in light of new information made available as exploration progresses.
- As per Article 13.2 of the Proclamation, the Discovery Certificate is valid for one year only. It is advisable that the period be extended to at least three years, so that the discoverer will have sufficient time to arrange for the financing of his next stage of activity.
- The idea of the maximum allowable area for license should be changed to reflect possible geologic and structural controls of ore accumulation, and also, because all areas are not of equal exploration attraction.
- Duty free importation of vehicles should be extended to include lighter vehicles for head office use; this way the privilege will allow flexibility and rational use of high cost vehicles where needed, for example, on field work.
- Repatriation of funds for reasons other than bankruptcy should be allowed, as when exploration is discontinued.
- Mining Licenses are commercial licenses and should not require the approval of any authority higher than the Minister of Mines when issued at the federal level. This will allow greater expeditiousness in licensing and any required follow-up negotiations.
- Fiscal impositions are a convenient way of managing investment flows and therefore a flexible application of Royalty should be adopted taking into consideration the location, the possible quality of the mineral prospect, and the level of development of infrastructure.
- In addition to income tax and a dividend tax of 10%, mining is subject to royalty which is payable on value of mineral production (before cost deduction). This fiscal burden heavily penalizes mining investment in favor of investment in other sectors. This distortion may be corrected to encourage balanced investment by reducing mining income tax to 25% and dividend tax to no more than 5%.

These measures may be strengthened by a forward looking, positively disposed, efficient and effective application of the law and contribute to encouraging mining investment, in turn contributing to the growth of export earnings and the indigenous development of mining related downstream and upstream industries.

The need to address such issues may be viewed in light of the state of investment in mineral exploration in Ethiopia during the period since the promulgation of the presently active law. The 2001 Statistical Abstract (March 2002) shows that private sector investment in mineral exploration was as follows:

Fiscal Year	Exploration Investment
1995/96	Birr 76,961,000
1996/97	95,780,000
1997/98	139,243,000
1998/99	19,569,000
1999/00	10,450,000

These figures show that investment in mineral exploration increased markedly during the first three years following the coming into force of the new mining law and the successful promotional effort of the Ministry of Mines and Energy in 1995. During 1998/99 exploration investment declined to one-seventh of the preceding year due to the fall of gold prices in February/March 1997. The volume of investment fell further by almost half for the next year following the Ethio-Eritrean war in May 1998. Since then exploration investment has not recovered. At the time of writing of this paper gold prices have risen to and remained in the $390 - 410/oz range for more than six months.[28] However, there is no sign of reviving interest by the mining companies in the exploration activities that they had abandoned in Ethiopia since 1997/98. This situation justifies investigating some factors that may have contributed for this lack of revival of interest.

[28] See, in general, *Mining Journal*, September 26, 2003, Volume 341, No.8755 to December 19, 2003 issues, The Mining Journal Limited and later Mining Communications Ltd., London. Gold was trading as low as US$255/oz in April 2001. For more information, see, *Mining Journal*, December 20/27, 2002, Volume 399, No. 8716, p.429.

6. Corporate Risk Management Strategies

Most mining companies consider a country a no go area where there is high risk in terms of discovering minerals, unrest in terms of peace and stability, where a clear or an attractive legal safeguards in terms of tenure of license is not available and the right to develop and exploit a discovered mineral resource is not certain.

Risk assessment has become one of the most important management tools to reach a decision whether to invest in a given country or not. The assessment technique is also sophisticated and well organized in terms of procedure and substance. In most cases mining companies use three sources of risk analysis.

- Institutionalized evaluation
- Specialists
- Local managers of subsidiary operations.[29]

Regarding the information that is used in risk analysis, the value of rating by mining companies is as follows, in descending order:

- regional managers
- headquarter personnel
- banks and trailing far behind mining consultants
- business magazines
- other firms
- agents
- outside counsels.

The simple and most applied risk management principle is avoidance of investing in a country perceived to have a high risk. This has been clearly confirmed in recent interviews by officials of three most influential mining companies of the world: Rio Tinto, Anglo American, and Barrick Gold. The officials are quoted as follows:

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[29] W.G.Prast and Howard L.Lax, *Political Risk as a Variable in TNC Decision Making*, in Natural Resource Forum, Vol. 6, (1982) p.183-199.

David Klingner, Rio Tinto's head of Exploration said that off-limit areas to Rio Tinto were "... regions which are considered to be too dangerous for our employees, or those of our partners, for example, some parts of Africa." Additionally, "governance problems in certain African countries and part of the former Soviet bloc" were also reasons for Rio Tinto not to invest in these areas. He also added that "the main stumbling block is the lack of conjunctive title (the automatic right of a company to develop a deposit that it has discovered)." Further, he said, "Rio Tinto requires a defined legal and fiscal regime in which to operate". He also said "any project that might be considered as constituting a 'national treasure' would not be of interest to us, since it would carry too much 'baggage'."[30]

Owen Bavinton, head of Anglo American exploration, on a similar issue, but in more open terms said that "Such areas would include Myanmar, Afghanistan, Angola, and the Democratic Republic of Congo. These countries pose unacceptable risk in terms either of the reputation of the company or the physical safety of our employees. ... In other countries, the perception may be that in order to gain an exploration or mining license, a bribe is required. In such countries, the risk to Anglo's reputation would preclude exploration.... Another factor in determining a country's suitability is a stable and acceptable legal, fiscal and regulatory regime."[31]

Alex Davidson, head of exploration of Barrick Gold, on the same issue stated, "... there are certain countries which we regard as being too dangerous from personal safety aspect, for example Colombia. When considering a country for an exploration effort, about 80% of the decision to proceed is based on geological prospectivity, and the rest on procedural aspects, such as security of tenure in converting an exploration license into a mining license.[32]

All three executives also emphasized that good geological potential is a very important factor for considering investing in any country.

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[30] *Mining Journal*, Volume 341, No.8761, November 7, 2003, p.368-369

[31] *Mining Journal*, January 16, 2004, p.17-18.

[32] *Mining Journal*, February 27, 2004, p.16-17.

"Beyond good geology, the free flow of capital is 'absolutely' essential, said Thomas M. Foster, vice president and controller for Phelps Dodge, the largest U.S. producer of copper. The lack of it is a major, maybe fatal flaw" in choosing a country in which to mine. "Political stability is, of course, an issue," said Foster "inflation is not so much an issue."[33]

The earlier study and the above interviews can be generalized by stating that most mining companies would not like to invest in a country where there is no:

- peace and stability
- clear and favourable legal regime
- good geology
- attractive working environment.

In these circumstances the simplest risk management rule is avoiding investment in countries perceived to be risky. Where there are over 172 countries competing for investment, avoiding some of them on the above grounds does not harm the industry.

It is also important to note that the above points being the general rule sometimes exceptions are observed. Combinations of the factors and emphasis of some of the companies in applying the factors may also vary depending on the circumstances and inclination of the management of the particular company. It was for this reason that there were some companies who took the opportunity to negotiate and acquire rights with the rebel movement of Zaire lead by the late Loron Dessire Kabila while he was fighting to overthrow Mobut's government.

7. African Countries Reputed to Fare Well in the Sector

The achievement of some countries in Africa in developing their mineral resource is remarkable. However it is not all rosy for the countries themselves.

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[33] Eileen Barrett Burns, *Hey, Over Hear*, Cover Story in Mining Voice, The Magazine of the National Mining Association, March/April 1996, p.22-28.

Ghana has an edge when it comes to mineral exploration and development due to its history as a gold mining country since time immemorial and particularly with the image that it created with the Ashanti gold mines. Ghana more than doubled its gold production within the last 10 years and presently produces 74 tons per year[34]

The other outstanding performer is Mali. Some twelve years back, Mali was just starting to attract mining investment. This writer remembers that some companies particularly one major company were leaving Mali because they were not happy with the high rate of royalty[35]. Nevertheless, in year 2000 Mali was able to produce 30.4 tons of gold and to become the third largest producer of gold in the continent.

The third outstanding performer is Tanzania. In 1990, when Ethiopia was working on its draft mining legislation, Tanzania's gold production was not more than 3-4 tons per year. In the year 2000, its production rose to about 17 tons. Depending on sufficient investments being made, the country has the potential of producing 46 tons a year in the medium term and between 93 and 124 tons a year over the longer term. Form the existing investment situation it seems very likely that Tanzania can achieve the projected long term output.[36]

On the other hand a recent research indicated that the mining industry of countries mentioned above and other African countries is in a very precarious condition or at best not benefiting the countries. According to the study, the problems are aggravated due to various forms of structural adjustment and reforms introduced during the 1990s. These reforms and adjustment include measures such as withdrawal of state involvement in the mining sector, minimized or absence of appropriate regulatory mechanism, leaving issues of environment as responsibility of the operating companies, absence of setting development objectives by governments, continuous

[34] *Mining Journal*, London, June 7, 2002, Volume 338, No. 8688, p. 410.

[35] Discussion with Dr. Roger Kuns, Regional Manager, Africa & Mediterranean, BHP, in 1996.

[36] *Annual Review Africa*, 1999, p. 97, a Mining Journal, London supplement to the Mining Journal of July 2, 1999; also see, *Mining Journal*, London, March 7, 2003, Volume 340 No. 8726, p. 9, *Mining Journal*, London February 19,1999, Volume 332, No. 8519, p.26, *Mining Journal*, supra note 34, p. 410, and *Mining Journal*, London, June 14,2002, Volume 338, No. 8689 p. 430.

In this connection, it is essential to ensure that it is not mineral production that should receive the major emphasis, though minerals should be exploited first, but it should rather be primarily the consumption of minerals and then allocations of fair proceeds (including from export earnings) of mining for the national socio-economic development purpose. In the same token, producing minerals on its own does not mean very much unless it is followed by mineral processing and consumption of the minerals as raw material by the local economy.

8. Why Ethiopia is Not Faring Well in the Mining Investment

This is a broad question that cannot be elaborately covered in this short work. However, attempt may be made to briefly enumerate some of the issues that this writer believes are some of the most important problems of the sector.

There is a common tendency to think that, if an industry did not work as intended, it has to do with the law and there is an almost impulsive urge to change it. However, the Ethiopian mining legislation is overall current in standard and fair. Some improvements as indicated above can make it more appropriate for encouraging more mining investment. It does not need to be made into something that promises more incentive than it is now. The industry is not well because of our own perception of the industry and the way we support it, not due to lack of incentives.

We fail always to appreciate that mineral exploration and development is a slow long drawn process requiring persevering support over long periods of time. It may be illustrative to consider the lesson learned from *Lege Dembi*: It took 14 years from the first discovery of primary gold at *Saccaro* (1976) to the first pouring of gold at Lege Dembi (1990). However, soon after beginning of production, the sale of the mine brought in nearly twice the amount of money spent on it (in US$ terms) illustrating the extent to which mining may be highly remunerative to the state. If the other prospects identified in the country were similarly pursued with vigor, state revenues would have been much higher by now.

There is also a tendency to concentrate on a few and selected minerals irrespective of considerations whether or not other potentials exist or there

are more immediate and relevant domestic needs. Particularly the low value high volume minerals do not get the attention that they require in spite of their being easier to look for and develop. Such minerals have the potential for being convenient entry points to mineral based manufacturing for domestic consumption. These may include minerals that go into the manufacturing of fertilizers and soil conditioners and various construction materials such as flat glass for the glazing work in building construction, just to mention two. It is notable that even the modest non-metallic mineral production is not recognized as such and is included under industry in the official statistics.[41]

In an attempt to resolve the outstanding issues of socio-economic problems, there is a tendency to dissociate minerals from other economic sectors and to consider that minerals do not have significant contributions to make to overall socio-economic development. A well thought out plan to develop mineral resources for domestic consumption in other productive sectors of the economy lays the foundation for the industrialization of the country.

There is also the tendency to deprive mineral development from the essential long term developmental view that it requires and to ignore it because it fails to respond to expectations of immediate returns on investment. Short-term tasks may be viewed in the nature of short term crisis management while developmental objectives are by nature long term perspective[42], congruent to the time scales of mining development.

Obviously, under the principles of free economic system governments are not expected to invest extensively in the sector. There are also no hard and fast rules as to the extent of government responsibilities in identifying types of minerals, mineral deposit or areas. The free enterprise system requires governments to engage in exploratory work with the purpose of risk reduction at the early investment stage, and the extent of the work should be decided on a case-by-case basis. In this way the government's efforts will be

[41] Statistical Abstract, 2001, by Federal Democratic Republic of Ethiopia, Central Statistics Authority, also see other issues of the abstract.

[42] One study revealed that "major mineral deposits discovered in the Circum-Pacific region during the past 25 years took an average of 19 years exploration time and required around nine years to develop from initial discovery to production; a surprisingly large number of the deposits were explored by at least two and sometimes as many as five or more companies (Sillitoe, 1995 as quoted by Naito and Otto cited earlier).

rewarded by the revenues generated by the periodic coming into line of additional mining capacity. There is no doubt that any government has to focus on obvious priorities such as provision of social service and infrastructure installation. But it should not be underestimated that an internally well-integrated economic development should accommodate mineral supply to a consumer base that would grow out of the effort in these priority areas.

The attraction of mining investment is based on the attraction that is created by geologic information. Ethiopia's overall geological make-up has been shown to hold good promise to the development of a wide suite of minerals due to its variety and mineral bearing potential. However, with just one hard rock precious metal mine the country does not yet have the credentials of an established mining country. This limitation requires that advanced exploration work be carried out more than would be the case for countries with established mining histories.

The modern economic system is aggressive in that initiative is very important. The Ethiopian psyche is marked by calm reserve, which fails to advertise and promote itself and its potentials. Whenever this shortcoming is recognized there are periodic campaigns to promote mining, separated by many years between them. Promotion should be a continuously sustained campaign ever evolving and avoiding redundancy of message. Prospecting and exploration information should be collected with the purpose of raising the level of knowledge of prospects and the reliability and coherence of the information. We cannot sit back and wait for mining companies to come to Ethiopia with just what we have. This has proved itself to be not enough to attract adequate investment to change the sector.

We may ask ourselves about how we rate ourselves as regards implementation of the mining law? We have a bureaucratic work culture, which is not amenable to efficiency and effectiveness. This has the tendency to also slow down both our partners in development and those that we regulate the works of. How do mining companies perceive our achievement? The assessment of this writer in this regard is that we need to be more accommodating to the investor who is proposing to assume responsibility for the risk involved regarding the uncertainties in exploration, the risks associated with mineral resource development and with the vagaries of the mineral marketplace. Many exploration companies

regard our manner of licensing and regulation as too heavy handed and a number of mining companies never went beyond due diligence aimed at evaluating the *modus operandi*. This writer was involved both as officer on the regulating side as well as on the side of the exploration company and from direct experience knows that the processing of licenses, export of samples for analysis, customs clearing of imports, even temporary importation, are all difficult, time consuming and costly. Extended bureaucratic process of the administration of the mining law is definitely the most obvious deterrent against mining investment.[43] This is illustrated by one member of the overseas exploration companies that was in Ethiopia during the heydays of the exploration during the mid-1990s:

> "The Mining community views Ethiopia as a country with significant undeveloped mineral potential that deserves major investment. We believe that many new deposits can be discovered which can develop its mines and that Ethiopia can take its proper places as a modern mining country. It is a country with a well-trained technical work force and good geological and minerals database, better than most African countries. On the other hand the mining community views Ethiopia as a place in which it is difficult to invest and operate. As a result Ethiopia has only a handful of companies currently operating here compared to other countries, which often have less potential. The main problem areas are the performance bond requirement and an excessive and over strict bureaucracy.
>
> .....
>
> Bureaucracy exists in all countries but few are as tough as Ethiopia. The procedure for clearing imports is extremely cumbersome. It commonly takes a minimum of a week and often longer to clear even simple shipments. In Ghana, we are often able to clear shipments the day of arrival."[44]

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[43] The government of Peru offers a 10-year tax stability and juridical stability agreement, guaranteeing that exchange, trade; drawback, administrative procedures and Labour hiring will remain unchanged for particular investments for 10 years. Protection like this is important to long-term, capital intensive development like mining.

[44] Bill Boberg, Canyon Resources Africa Ltd., *Mineral Exploration in Ethiopia by International Mining Companies*, Presentation on 15 November 1996, 3rd Congress of the Ethiopian Geosciences and Mining Engineering Association.

On the other hand we have countries whose practices are worth emulating:

> "Chiles's Decree, Law 600, has three principles that investors, whatever they mine or manufacture, cherish: non-discriminatory treatment of foreign investment, free access to all markets and sectors of the economy, and minimum intervention in the investors' activities.
>
> "The simplicity of Chile's investment law, the clarity of the rules for doing business in Chile, and the predictability of its decision makers have drawn mining companies to Chile. As other countries adopt these principles, American mining investment moves there as well."[45]

War is another major problem attached to Ethiopia for long period of time. Most of the wars may not have been creations of the country; rather they were imposed by outside forces and interests. However, whether we like it or not it has dented our image. If we take the years following the legislation of 1928 there were eight seemingly peaceful years. However those years were prelude to the 1936 invasion of the country by Italian forces and the Second World War. The world went into the bloodiest and devastating war of 1939 –1945, which started with the invasion of Ethiopia in 1936.

The end of the Second World War in 1945 may have brought peace to the world but obviously the whole attention was focused to construct Europe. During this period we see limited activity to develop the mineral wealth of Ethiopia until the coming of the Mining Proclamation in 1971. One may think Ethiopia was at peace from 1945-1971, but not very much so. There was the war with Somalia in 1956 and this was the decade in which the movement in Eritrea began and the country remained in unstable condition until 1993.

As the new mining law was issued things seemed to be more stable and exploration activities started in earnest. Unfortunately the respite did not continue for more than five years as in 1998 a new wave of war started between Ethiopia and the newly indcpendent state of Eritrea.

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[45] Eileen Barrett Burns, op. cit, pp. 22-28.

Famine and poverty are very interrelated and seem to play a negative role. The degree of famine and poverty has increased year after year in our part of the world. The per capita income of Ethiopia has been going down for years. At one stage various reports showed that per capita income of the country was about $170. In such a low-income condition famine is not a surprising situation. As the per-capital income is declining the number of people suffering from starvation is increasing. The number of people affected by famine in 2003 was close to 14,000,000.

The *Nestle* case of 2003 is very relevant to project the effect of famine and poverty in the investment environment of the future. Nestle, one of the largest companies specialized in food processing and trading, wanted to recover compensation for its nationalized property during the 1970s. The amount of compensation claimed by Nestle was some $6 million. As soon as the matter was publicized it caused uproar all over the world. People all over the world were outraged by the claim. The outrage was that "how could a company such as Nestle demand compensation of this magnitude from a country where its people are dying of hunger." Extraordinary pressure was put on Nestle from all over the world and its representative in Addis Ababa. Finally Nestle modified its claim and declared that the compensation will be used in Ethiopia.

From humanitarian point of view this case seems to be a great generosity and fraternal solidarity. But on the other hand, it is highly unlikely that such situations play a positive role in encouraging investment in the country.

Conclusions

From the above observation it is concluded that the mining legislation of Ethiopia is fairly suitable for the purposes of guiding mineral development for the benefit of its people and for adequately remunerating the private investor. Indeed there is no doubt that some improvements can further advance its attractiveness. However, it seems that the problem with the mineral exploration and mining sector in the country is more complex and is in fact not one of legislative inadequacy. These complex problems range from adequate application of the provisions of the law in a way that encourages efficient and effective exploration activity, easy access to available geological information, fast and transparent treatment of

applications for license, lack of sustained promotion of the sector, misunderstanding of the industry, and to some extent prevalent lack of long term peace and stability are but few to mention. While focusing in alleviating these problems it is also equally important to aggressively work in developing local capacity to add value on locally extracted minerals and using minerals as an input for various manufacturing purposes. It is only then that the country will benefit from its mineral resource and spur industrial development.

During the mid to late 1970s Ethiopia missed the opportunity to enter the modern mining age as a result of the chaotic situation that followed the 1974 popular uprising. During the late 1990s mineral exploration investment declined following the fall in gold prices, the war with Eritrea and inadequate implementation of the law. Exploration activity did not recover during the early 2000s due to the inability of the country to promote and effectively support exploration investment and inability to change its image to an attractive investment destination. It is believed that it is now necessary and timely to address the issues raised in this brief survey in order to reverse the prevailing unhappy circumstances.[46]

[46] At the time of publication (March 2008), the price of one ounce of of gold was hovering around US$ 1,000.00 as against US$ 400.00 in December 2003. Global exploration expenditure has soared to US$ 10.5 billion in 2007 as against US$ 1.9 billion in 2002 and just over US$ 2 billion in 2003. In March 2008, there were six companies exploring for oil. At the background, the price of a barrel of crude oil was hovering around US$ 100.00, up from an average of US$ 22-27 in 2000-2003.

የፍርዶች አምድ

በዛሬው የፍርዶች አምዳችን ባሕላዊ የሙግት መፍቻ ዘዴ ከሆነው ከሽምግልና ሥርዓት በመጀመር ወደ ቀበሌ ማኅበራዊ ፍርድ ቤት አምርቶ ከዚያም በየደረጃው ያሉ ፍርድ ቤቶችን አልፎ እስከ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዘልቆ ውሣኔ ያገኘ አንድ የክስ መዝገብ አቅርበንላችኋል፡፡ ይህን ጉዳይ ልናቀርብላችሁ የወደድነው በሦስት ምክንያቶች ነው፡፡ የመጀመሪያውና ዋነኛው፣ ለእኛ እንግዳ የሆኑ ግን በአንዳንድ አካባቢዎች አብዛኛው ጨዋ ሕዝብ ከሚጠቀምባቸው አንዳንድ የሕግ ቃላት (እንዲያውም ጽንፀ ሃሳብ?) ጋር ያስተዋውቀናል በማለት ነው፡፡ በየአካባቢው የተለመዱትን ይህን የመሰሉትን ትውፊቶች ትኩረት ሰጥተን ብናሰባስባቸው የሕግን ብቻ ሳይሆን የቋንቋሥቻችንንም መዝገበ ቃላት እንደሚያበለጽጓቸው ጥርጥር የለውም፡፡ ሕዝቡ በለመዳቸው ምናልባትም ራሱ ባፈለቃቸው ቃላት መጠቀምም አንድን ሕግ የበለጠ ሕዝባዊ እንደሚያደርጉት እንዲሁ ጥርጥር የለውም፡፡ ሁለተኛም፣ ጉዳዩ በዓይነቱም ሆነ በገንዘቡ መጠን ሲታይ አንድ ሩቅ ሥፍራ ከሚገኝ ቀበሌ ገበሬ ማኅበር አንስቶ እስከ አዲስ አበባ የመጨረሻው ሰበር ችሎት የሚያደርስ አይደለም፡፡ በዚህ ሙግት ባለጉዳዮቹ ገበሬዎች እንደመሆናቸው ጉዳዩን ለመከታተል የባከነው ጊዜ ሳይታሰብ ያወጡት ወጪ ብቻ ቢሰላ እንኳን ክስ ከቀረበበት ገንዘብ በእጥፍ ቢበልጥ እንጂ አያንስም ቢባል ማጋነን አይሆንም፡፡ ከዚህ ከአንድ ገጠመኝ ተነስቶ ጉዳዩ መፍትሔ ያሻዋል ለማለት ባይቻልም ይህን የመሰሉ ጉዳዮች ምን ያህል ብዛት እንዳላቸው ጥናት ማካሄድና በተቀላጠፈ ሁኔታ ሊመሩ የሚችሉበትን ሥርዓት መሻት ግን አስፈላጊ ነው፡፡ ሁለተኛው ምክንያታችንም ይህ ነው፡፡ የውሣኔዎቹን ግልባጭ ያገኘነው «የኢትዮጵያ የሽምግልና ዳኝነት የግልግልና የዕርቅ ማዕከል» እየተባለ ከሚጠራው ተቋም ሲሆን ስለተደረገልን ትብብር ምስጋናችንን እናቀርባለን፡፡

አዘጋጁ፡፡

በአማራ ብሔራዊ ክልላዊ መንግሥት
በይልማና ዲንሳ ወረዳ
በአንበሲት ቀበሌ ማኅበራዊ ፍርድ ቤት

ነሐሴ 17 ቀን 1994 ዓ.ም.

ዳኛ፡- ዓለሙ ክንዴ
ቄስ አለልኝ በላይነህ
ንጋቱ ይመን
አለንበት

ከሣሽ አቶ ተፋረድ መኮንን ተከሣሽ አቶ አያሌው አቻምየለህ የተባሉት ባለፈው በዚሁ ፍ/ቤት ተካሰን ስንታረቅ እኔም እሱም ክሳችንን አንስተን ስንታረቅ፣ እኔም ሆነ እሱ ብንበደል አስታራቂ ሽማግሌዎች ግፍ ሳይሰጡን ብንከስ ግድም 820 ብር (ስምንት መቶ ሃያ ብር) ልንከፍል አስታርቆን የነበረውን ይህንን ውል በማፍረስ ይህ ግለሰብ እኔን እንደ አፍራሽ በመአስመሰል ስለከሰሰኝ ስለሆነ፣ ቀርቦ ተጠይቆ ቢአምን ወዶ የገደመውን እንዲከፍል ብለው መረጃ ቆጥረው አመልክተዋል። ተከሣሽ የሰጡት መልስ ከዚህ ከሣሽ ጋር ከአሁን በፊት በአፈላማ ተካሰን በዘመድ ተገላግለን መታረቃችን አይካድም። እሱም እኔም ክሣችን አንስተን ስንታረቅ እርቁን የአፈረሰ ከሸማግሌ ግፍ ሣይሰጥ የከሰሰ 820 ብር (ስምንት መቶ ሃያ ብር) ግድም የአፈረሰ ሊከፍል ታርቀን የነበረውን ውል አፍርሶ እኔን እንደአፍራሽ በመአስመሰል የከሰሰኝ ስለሆነ ውል አፍርሶ የታረቅንበትን የግድም ገንዘብ እንዳስከፍለኝ ለሚለው በውል በፊርማ ከታረቅን የውሉን መዝገብ አብሮ አያይዞ የአላቀረበው ስለሆነ ከበቂ ኪሣራ ጋር ተዘግቶልኝ እንድሰናበት ብለው የመቃወሚያ መልሳቸው ሰጥተዋል። የከሣሽ የመልስ መልስ ደግሞ ከአሁን ቀደም ተጨቃጭቀን ስንታረቅ መጀመሪያ የከሰሰው እሱ ነው እኔ አልከሰስሁም የከሰሰ እራሱ ተከሣሽ ስለሆነ ክርክሩ ቀጥሎልኝ የቆጠርኩአቸው ማስረጃዎች ቀርበው መስክረውልኝ ለውሣኔ እንድበቃ ሲል የመልስ መልሱን ሰጥዋል። የመልስ መልስ ከሰጡ በኋላ የተቆጠሩ የሕግ ምሥክሮች እንዲቀርቡ አዝዞአል። የተቆጠሩ የሕግ ምሥክሮች ቀርበው 4ቱ የሕግ ምሥክሮች በአልተለያየ ድምፅ አያሌው አቻምየለህ ነው የአፈረሰው ብለው ሲመሰክሩ 5ኛ የሕግ ምሥክር ማነኛው እንደአፈረሰ አላውቅም አጥሩ ከአያሌው የነበረው ወደተፍረድ መሬት ተወርውሮ አይቻለሁ ብለው ሲመሰክሩ የተከሣሽ 2ኛ የሕግ ምሥክር አቶ እንደግ ባየህ መ/አገሬ አንበሲት ሥራዬ ግብርና እድሜዬ 50 ብለው የሰጡት የምሥክርነት ቃል አምን የውነት ነው፣ እነዚህ ሰዎች ከአቶ አቻምየለህ ጋር ቢጨቃጨቁ

ልጄንም እናስታርቅ ተብሎ የፈረስ ማህበርተኛው አሸማግሉት አስታርቁ ተብለን 2 ቀን አስታርቄ በ3ኛ አቶ ተፋረድ መኮነን እርቁ ፈረሰ ብሎ እኔም ሄጄ አየሁ:: 4 ድንጋይ ኩልኩል አንድ የውሽ ናጫ አለች ሁሉንም ኩልኩልና አጥሩን ነቅሎ ወደ ጐዳናው ወደ ተፋረድ ገፍቶታል:: ስለዚህ እርቁን ያፈረሰው አያሌው አቻምየለህ ነው፣ ግፍም ሰጥቻለሁ ሲሉ መስክረው ተመልሰዋል::

3ኛው የሕግ ምሥክር አቶ ክብረት እጅጉ ቀርበው መ/አገሬ አንበሲት ሥራዬ ግብርና እድሜዬ 53 አመት ብለው የሰጡት የምሥክርነት ቃል አምን የውነት ነው:: በሐምሌ ወርህ 92 ዓ.ም. ግንቦት 3 ቀን 92 አቶ አቻምየለህና አቶ አያሌው፣ ተፋረድ መኮነንን አስታርቀናል:: ሽማግሌ አይደለሁም አይ ነኝ:: አቶ ተፋረድ መኮነን እርቃቸን አፈረሰብኝ ብሎ ሄጄ ሳየው 1 ድንጋይ ያልተፈነቀል የውሽ ናጫ ነው ያሉት፣ ሌላው ኩልኩል ወደ መንገዱ ወደ አቶ ተፋረድ ገፍቶ አጥሩንም ወደ መንገዱ ጥሎታል:: ስለዚህ አያሌው አቻምየለህ ሲአፈርስ አውቃለሁ ሲሉ መስክረው ተመልሰዋል:: እርቅ ያስታረቀን 2 ጊዜ ነው::

1ኛ የሕግ ምሥክር አቶ አለባቸው ጥሩነህ መ/አገሬ አንበሲት ሥራዬ ግብርና እድሜዬ 73 ዓመት ብለው የሰጡት ቃል አይበር ከፈረስ ማህበር አቶ ተፋረድ መኮነን ተበደልን ብሎ ሲናገር ያለው ሰውም አስታርቁአቸው ተብለን እኔም ከድንጋዩ ኩልኩል ሄጄ በኋላም አቶ ተፋረድ መኮነን እርቁ ፈረሰብኝ ብሎ ሄጄ ድንጋዩም ተበትኖአል፣ አጥሩም በግራ ቀኝ ተበትኖ ለምንነው እንደዚህ ያረከው ብለው አሣሩን ሰጠነው ብሎኛል:: እርቁን ያፈረሰ አያሌው አቻምየለህ ነው ሲሉ መስክረው ተመልሰዋል:: በተጨማሪ 2 ጊዜ አስታርቁአለሁ፣ 820 ብር ግድም አድርገን ያፈረሰ ሊከፍል ነው:: 5ኛ ምሥክር ቁ/በለጠ ባየህ ስላልቀረቡ ቀጠሮው ለየካቲት 21 ቀን 94 ዓ.ም. ተቀጠረ::

የካቲት 21 ቀን 94 ዓ.ም. በዛሬው ችሎት ቀን ከሣሽ ተከሣሽ ቀርበው 5ኛ የሕግ ምሥክር ቁ/በለጠ ባየህ ቀርበው መ/አገሬ አንበሲት ሥራዬ ግብርና እድሜዬ 50 ዓመት ብለው የሠጡት ቃል አምን የውነት ነው:: በ92 ዓ.ም. ተጣልተው ሽማግሌ ሁኜ ስናስታርቃቸው በዚኽው ውል ቁመ· ብለን ምልክት ኮልኩለን አስታርቀን ሄድን:: አሁን እርቁ ፈረሰብን እየአሉ ሄጀ ሣይ እጥሩን ያፈረሰውን አላውቅም እጥሩ ከአያሌው አቻምየለህ ያለው እጥር ተነስቶ ወደ ተፋረድ መኮነን ወድቆ አይቻለሁ ሲሉ መስክረው ተመልሰዋል:: ሦስቱም የሕግ ምሥክሮች ከመሠከሩ በኋላ ተከሣሽ መከላከያ አለኝ ስለአሉ መከላከያ ምሥክር ይቅረቡ ብለን አዝዘናል::

1ኛ/ አቶ ይበል ገበየሁ
2ኛ/ አቶ መኮነን
3ኛ/ አቶ አማረ ደለለ አሉኝ ሲሉ አቅርበዋል::

ቀጠሮው ለመጋቢት 12 ቀን 94 ዓ.ም. ተቀጠረ። መጋቢት 12 ቀን 94 ዓ.ም. በዛሬው ችሎት ቀን ከሣሽ ተከሣሽ ቀርበው መከላከያ ምሥክር 1ኛ የመከላከያ ምሥክር አቶ ይበል ገበየሁ መ/አገሬ ጐሽዬ ሥራዬ ግብርና እድሜ 50 ብለው የሠጡት የምሥክርነት ቃል አም የእውነት ነው። አቶ አቻምየለህ እና ተፋሪድ ተጨቃጭቀው ከቦታው ሄደን እናስታርቅ ብለን ከቦታው ሄደን ከአያሌው ጋርም ተጣልተው አግኝተን አንተም ተው አንተም ተው ብለን ስናስታርቅ ሰኔ 25 ቀን 92 ዓ.ም. እኛ ግፍ ሣንሰጥ የከሰሰው ሁሉ 820 ብር ሊከፍል ነው። አንድ ድግር ከታች አንድ ድግር ከታች አልፏል፣ አቶ ተፋሪድ መኮንን አይቻለሁ በአጋጣሚ ቢያገኝኝ እርቁን አፍርሶ ከሠሠኝ ብሎ ማመልከቻውን አሣይቶኛል። አያሌውን ስጠይቀው የተዘጋውን መዝገብ ቀስቅሶ የሰጠኝ እሱ ነው።

ሌሎቹ የአቀረባቸው የመከላከያ ምሥክር ደግሞ ቀርበው ሰኔ 25 ቀን 1992 ዓ.ም. ስናስታርቅ 820 ብር ግድም ገድመን እርቁን የአፈረሰ፣ ሊከፍል አስታርቀናቸው ነበር። ግፍም ሣንሰጣቸው ላይከሱ ነበር፣ ቀድሞ የከሰሰ አፍራሽ ነው። መጠን ድንበሩን የአፈረሰ ተፍረድ አንድ ድግር አፍርሷል። አያሌው ከሰሰኝ ብለው አቶ ተፋሪድ ነግሮናል፣ ቀዳሚ ከሣሽ ማን እንደሆነ አላወቅነውም ግፍም አልሰጠናቸውም፣ ቀድሞ የከሰሰ አፍራሽ መሆኑንና ግድመን የሚከፍል መሆኑን በአልተለያየ ድምጽ መስክረዋል። የሕግ ምሥክርና የመከላከያ ምሥክር ከመሰከሩ በኋላ ተከሣሽ ዳግም ቀድሞ የከሰሰኝ አቶ ተፋሪድ ነው ከግንቦት እስከ መስከረም ከሶኝ ስንከራከር የቆየን መሆናችን ማጣሪያ ምሥክር አለኝ ብለው ቀርበው በአልተለያየ ድምጽ የምናውቀው የለም ብለው መስክረው ተመልሰዋል። የተቀጠሩት የሕግ ምሥክሮችና የመከላከያ ምሥክሮች የማጣሪያ ምሥክሮች ከመሰከሩ በኋላ የሚከተለውን ውሣኔ እንሰጣለን።

ው ሣ ኔ

በመሠረቱ በቤተ ዘመድ ሽማግሌ ክታረቁ በኋላ ወደው የገቡበትን ውልና ግድም ማፍረሳቸውን ተከሣሽ አንደኛ ቀድሞ የከሰሰ መሆኑን 2ኛ ግፍ ሳይሰጡት ስለከሰሰ 3ኛ ኩልክሉንና አጥሩን አፍርሷል ብለው የሕግ ምሥክሮች ስለመሰከሩበት ወዶ የገባውን ውልና ግድም 820 ብር (ስምንት መቶ ሃያ ብር) ይከፍላል ብለን በአልተለያየ ድምፅ በተከሣሽ በአቶ አያሌው አቻምየለህ ፈርደንባቸዋል። ለአቶ ተፋሪድ መኩንን ፈርደንላቸዋል።

ይግባኝ ለሚል ከ15 ቀን በአልበለጠ ተገልብጦ ይሰጣቸዋል ብለን መዝገቡን ዘግተን ወደ መዝገብ ቤት መልሰናል።

በአማራ ብሔራዊ ክልላዊ መንግሥት
የይልማና ዴንሳ ወረዳ ፍርድ ቤት
አዴት

<u>ይግባኝ ባይ</u>፡- አያሌው አቻምየለህ

<u>መልስ ሰጭ</u>፡- ተፋረድ መኮንን

ው ሣ ኔ

<u>ዳኛ፡-</u> ካሣሁን ይሁኔ፡፡

ይህ ይግባኝ ሊቀርብ የቻለው የአንበሲት ቀበሌ ማኅበራዊ ፍርድ ቤት ነሐሴ 19 ቀን 94 ዓ.ም. በዋለው ችሎት የሰጠውን ውሣኔ በመቃወም ነው፡፡

የነገሩ መነሻ ከይ/መዝገብ ግልባጭ እንደተረዳነው መ/ሰጭ ሰኔ 27 ቀን 93 ዓ.ም. በተጻፈ ክአቶ አያሌው አቻምየለህ ጋር በነበራቸው ጠብ በአፈላማ ተከሰው እርቅ ሲታረቁ ይ/ባይም ሆነ መ/ሰጭ ክሳቸውን ትተው በደል ቢኖር ለአስታራቂ ሽማግሌዎች ሊያቀርቡና ሽማግሌዎች ባዩ ግፍ ሊሰጡ ከነርሱ ግፍ ሳይሰጡ ክስ የመሠረተና እርቅ ያፈረሰ ሁሉ ብር 820 (ስምንት መቶ ሃያ ብር) ሊከፍል ታርቀው ይ/ባይ እርቁን በማፍረስ መ/ሰጭን በመክሰስ እርቅ በአፈረሰበት ብር 820 (ስምንት መቶ ሃያ ብር) እንዲከፍላቸው ሰኔ 27 ቀን 1993 ዓ.ም. በተጻፈ ማመልከቻ ክስ መሠረቱ፡፡

ይ/ባይም በተከሣሽነት ቀርበው ሐምሌ 12 ቀን 93 ዓ.ም. እና ነሐሴ 27 ቀን 93 ዓ.ም. በተጻፈ መልስ ከመ/ሰጭ ጋር መታረቃቸውን አምነው እርቁን የአፈረሰ መ/ሰጭን እንጅ እርሱ አለመሆኑን ተከራክሯል፡፡

የቀበሌው ማ/ፍ/ቤትም ነሐሴ 19 ቀን 94 ዓ.ም. በዋለው ችሎት ይ/ባይ ወዶ የገባበትን ውል የአፈረሰ ለመሆኑ ስለተረጋገጠበት ብር 820 (ስምንት መቶ ሃያ ብር) ይከፍላል በማለት ውሣኔ ሰጥዋል፡፡

በዚህ ውሣኔ ቅር በመሰኘትም ይ/ባይ ነሐሴ 30 ቀን 94 ዓ.ም. የተጻፈ ሦስት ገጽ ይግባኝ ቅሬታ ማመልከቻ አቅርበው ከመዝገቡ ጋር

ተያይዟል። ፍሬ ሃሣቡም ከሣሽ በአቀረበው ክስ ላይ መጀመሪያ የተቃውሞ መልስ ሰጥቸበት ለተቃውሞው ብይን ሳይሰጥበት፣ ውሉ ባልቀረበና በውሉ ላይ አስታራቂ የነበሩ ሳይመሠክሩብኝ ግፍ ሳይሰጥብኝ በእርቁ ውሉ ላይ ያልነበሩ ምሥክሮች እንደመሠከሩ ተደርጉ የተሠጠ ውሣኔ ስለሆነ ፍትህ የጐደለው ነው የሚል ነው።

ይግባኝ ሰሚው ፍ/ቤትም ይ/ባይ ያቀረበውን የይግባኝ ቅሬታ ማመልከቻና የተባለው ማኅበራዊ ፍርድ ቤት የሰጠውን ውሣኔ በመመርመር ግራ ቀኙ አደረጉት የተባለው ውል ሕጋዊ ነው ወይስ አይደለም የሚለውን ለመመርመር ይግባኙ ያስቀርባል በማለት ብይን ሰጠ። መ/ሰጭ ታህሣሥ 9 ቀን 95 ዓ.ም. የተጻፈ ሁለት ገጽ መከላከያ መልሱንና 1 ገጽ የተጻፈበት የማስረጃ ዝርዝር አቅርበዋል። ፍሬ ሃሣቡም ይ/ባይ ውል ለማፍረሱ አስታራቂ ሽማግሌዎች አረጋግጠው የመሠከሩበት ስለሆነ ሽንጐውም ከዚህ ተመርኩዞ በአግባቡ የሰጠው ውሣኔ ነው የሚል ሰ.ሆን በቀበሌ ማ/ፍ/ቤት በኩል የአደረጉትን ክርክርም በዝርዝር አቅርበዋል።

ከዚህ በላይ በየደረጃው የተመዘገበው ይ/ባይ የአቀረቡት ይግባኝ ቅሬታ እና መ/ሰጭ የአቀረቡት ክርክር እንዲሁም የቀበሌው ማ/ፍ/ቤት የሰጠው ውሣኔ ነው።

እኛም የግራ ቀኙን ክርክር አግባብ ካለው ሕግ ጋር በማገናዘብ መርምረናል። እንደተረዳነውም ይ/ባይና መ/ሰጭ በነበራቸው አለመግባባት ተጣልተው ሰ.ታረቁ ይ/ባይ መ/ሰጭን በፖሊስ በኩል ክስ መሥርቶበት የነበረውን ጉዳ ይህን ያፈረሰ ብር 820 (ስምንት መቶ ሃያ ብር) ለክፍል ታርቀው እያለ መ/ሰጭ ሰኔ 3 ቀን 93 ዓ.ም. ቀደም ሰ.ል የነበረውን ክስ እንደገና ስለቀሰቀሰ ውል ስለአፈረሰ ወዶ የገባውን እርቅ በአፈረሰበት ብር 820 (ስምንት መቶ ሃያ ብር) መ/ሰጭ እንዲከፍል በማለት ይ/ባይ ሰኔ 4 ቀን 93 ዓ.ም. ለአንበሲት ቀበሌ ማኅበራዊ ፍርድ ቤት ከአቀረቡት ክስ መሠረት ለመረዳት ችለናል።

ይ/ባይና መ/ሰጭ ይህን ዓይነት የእርቅ ውል ሊፈፅሙ የቻሉበት ምክንያት መ/ሰጭ ከአቀረበው መልስ ለመረዳት የቻልነው ይ/ባይና መ/ሰጭ ከመታረቃቸው በፊት መ/ሰጭ በቀበሌው ማ/ፍ/ቤት በኩል ክስ መሥርቶ አስወስኖበት በአፈፃፀም በሚጠይቁት ጊዜ በመከለል የግራ ቀኙ ወገን በሽምግልና በእርቅ ይሂቸው ሰ.ታረቁ መ/ሰጭ አሁን በይግባኝ የሚከራከሩበትን ገንዘብ ብር 820 (ስምንት መቶ ሃያ ብር) ትተው ለወደፊት ይ/ባይ ችግር የሚፈጥር ከሆነ ፍርድ የነካውን ብር 820 (ስምንት መቶ ሃያ ብር) ያለምንም ጥያቄ ይ/ባይ ለክፍል መታረቃቸውን ነው። ይ/ባይና መ/ሰጭ አደረጉት የተባለው እርቅ ሕጋዊ ነው ወይስ አይደለም የሚለውን ስንመረምር ይ/ባይና መ/ሰጭ በነበራቸው አለመግባባት ይ/ባይ በፖሊስ በኩል መሥርቶት የነበረውን ክስ ላይከታተለው መ/ሰጭ ደግሞ በቀበሌው ማ/ፍ/ቤት መሥርተውት የነበረውን ክስ ትተው የታረቁ መሆኑን

ነው። ይሁን እንጅ ማንም ሰው መብቱን በሕግ ለማስከበር የሚችል መሆኑን ለመተው የሚያደርገው ስምምነት ሁሉ በሕግ ፊት ተቀባይነት የለውም። ስለሆነም ግራ ቀኙ አደረጉት የተባለው እርቅ በሕግ ፊት የሚፀና ባለመሆኑ አልተቀበልነውም። ስለሆነም መ/ሰጭ ከይግባኝ ባይ ጋር ከመታረቃቸው በፊት በቀበሌው ማ/ፍ/ቤት በኩል ከሰው አስወስነው ከሆነ በውሣኔው መሠረት ማስፈፀም የሚችሉ ስለሆነ ይ/ባይ እርቅ በማፍረስ ወዶ የገባውን ብር 820 (ስምንት መቶ ሃያ ብር) ይከፍላል በማለት የቀበሌው ማኅበራዊ ፍርድ ቤት የሰጠው ውሣኔ አግባብ ባለመሆኑ በፍ/ሥ/ሥ/ሕግ ቁጥር 348(1) መሠረት ሽረናል። ታኅሣሥ 6 ቀን 1996 ዓ.ም.

ት ዕ ዛ ዝ

- የቀበሌው ማ/ፍ/ቤት የሰጠው ውሣኔ የተሻረ መሆኑን እንዳያውሰውና መ/ሰጭ ከይ/ባይ ጋር ከመታረቃቸው በፊት በይ/ባይ ላይ ተወስኖበት ከሆነ መ/ሰጭ የአፈፃፀም ክስ ሲያቀርቡ እንዲታይላቸው ይጻፍ።

- ወጭና ኪሣራ በተመለከተ በፍ/ሥ/ሥ/ሕግ ቁጥር 463 እና 464 መሠረት የማስረጃ ዝርዝር ሲቀርብ ይታይ፣ መዝገቡ ተዘግቷል ወደ መ/ቤት ይመለስ።

በአማራ ብሔራዊ ክልላዊ መንግሥት
የምዕራብ ጐጃም ዞን ከፍተኛው ፍርድ ቤት
ባሕር ዳር

አመልካች፡- ተፋረድ መኮንን

ተጠሪ፡- አያሌው አቻምየለህ

የፋ.ይ.መ.ቁ. 06218

ዳኞች፡- ታደሰ መኮንን፣ ጽጌ አስፋው፣ አበበ እምቢአለ

መዝገቡን መርምረን የሚከተለውን ውሳኔ ሰጥተናል፡፡

ው ሣ ኔ

የነገሩን አመጣጥ ከመዝገቡ ግልባጭ ላይ እንደተረዳነው የአሁን አመልካች በማኅበራዊ ፍ/ቤቱ በቀረበው አቤቱታ ሸማግሌዎች «ግፍ» ሳያሰጡን ብንካሰስ ብር 820.00 (ስምንት መቶ ሃያ ብር) ልንከፍል የተስማማነውን ውል አፍርሶ በሸማግሌዎች ጥፋተኛ መሆኔ ሳይረጋገጥ የከሰሰኝ ስለሆነ የእርቅ ውሉን ገንዘብ እንዲከፍለኝ በማለት አቤቱታ ያቀርባሉ፡፡ የማኅበራዊ ፍ/ቤቱም ግራ ቀኙን ከአከራከረ በኋላና የግራ ቀኙን ማስረጃ ከሰማ በኋላ የአሁን ተጠሪን ውል አፍርሶ የተገኘ መሆኑ ስለተረጋገጠ የእርቁን ውል ገንዘብ ብር 820.00 (ስምንት መቶ ሃያ ብር) ለአሁን አመልካች እንዲከፍል ሲል ውሳኔ ሰጥቷል፡፡ የአሁን ተጠሪም ይህንን ውሳኔ በመቃወም ለወረዳው ፍ/ቤት ይግባኝ ይጠይቃሉ፡፡ የወረዳው ፍ/ቤትም ግራ ቀኙን ካከራከረ በኋላ የማኅበራዊ ፍ/ቤት የሰጠውን ውሳኔ በመሻር የአሁን ተጠሪ ኃላፊነት የለበትም ሲል ውሳኔ ሰጥቷል፡፡ የአሁን አመልካችም የውሳኔውን መሻር በመቃወም አቤቱታውን በሰበር አቅርቧል፡፡ የቅሬታው ፍሬ ነገርም ውል በተዋዋይ ወገኖች መካከል እንደሕግ እንደሚፀና በሕጉ ተደንግጐ እያለና ይህ ከሆነ ደግሞ ተጠሪው ውል ማፍረሱ ተረጋግጦ እያለ በውሉ መሠረት የተዋዋልንበት የመቀጫ ገንዘብ እንዲከፍል የማኅበራዊ ፍ/ቤቱ የሰጠው ውሳኔ በአግባቡ ሆኖ ሳለ የወረዳው ይግባኝ ሰሚ ፍ/ቤት ውሉ ሕጋዊ ውል አይደለም በማለት ውሳኔውን

መሸሩ በአግባቡ አይደለም የሚል ነው። ይህ ቅሬታም በሰበር የሚጣራ ሆኖ በመገኘቱ የአሁን ተጠሪ መልስ እንዲሰጥበት በተደረገው መሠረት በ29/06/96 ዓ.ም. በተፃፈ በሰጠው መልስ ውሉ ለሕግ ተቃራኒ ሆኖ በመገኘ ቱ የወረዳው ፍ/ቤት ውሉን ውድቅ ማድረጉ በአግባቡ ነው። ይኸውም በሽማግሌዎች «ግፍ» ሳይሰጠው ላይከስ የሚለው መብትን የሚያጠብብ በመሆኑ ውሉ ተቀባይነት ሊኖረው አይገባም። ስለሆነም ይህንን መሠረት አድርጐ ይግባኝ ሰሚው ፍ/ቤት የማኅበራዊ ፍ/ቤቱን ውሳኔ መሻሩ በአግባቡ ስለሆነ ውሳኔው ሊፀና ይገባል የሚል ነው። ለዚህ ለተሰጠው መልስም አመልካች በ26/8/96 ዓ.ም. በተፃፈ የመልስ መልስ ሰጥቶ ክርክሩ በዚሁ ተጠናቋል። ክርክሩ በዚህ መልኩ በመጠናቀቁም ይህ ፍ/ቤት መዝገቡን መርምሮ የእርቅ ውሉ እንዲቀርብ ትዕዛዝ ተሰጥቶ በዚሁ መሠረት የእርቅ ውሉ በሽማግሌዎች አማካኝነት ቀርቦ ከመዝገቡ ጋር ተያይዟል።

እንግዲህ የክርክሩ ሂደት በአጭሩ ይህንን ሲመስል እኛም መርምረነዋል። እንደመረመርነውም የአሁን አመልካች በማኅበራዊ ፍ/ቤት ያቀረበውን አቤቱታ ከማኅበራዊ ፍ/ቤቱ የውሳኔ ሀተታ ላይ እንደተረዳነው በአስታራቂ ሽማግሌዎች ጥፋተኛ መሆኔ ሳይፈረድብኝ (እነርሱ ግፍ እያሉ የሚጠቅሱት) ከሶኛል የሚል ሲሆን ከዚያም በኋላ ከሶታል ወይስ አልከሰሰውም የሚለው ላይ ክርክሩ ሳያተኩር በአጠቃላይ ውል አፍርሷል ወይስ አላፈረሰም ከሚለው ላይ ተከራክረው ማስረጃም በዚሁ መሠረት ተሰምቶ የማኅበራዊ ፍ/ቤቱ ውል አፍርሶ የተገኘ በመሆኑ በእርቅ ውሉ ላይ የተቀመጠውን ገንዘብ ይከፍላል ሲል የሰጠውን ውሳኔ የወረዳው ፍ/ቤት ውሉ ከመጀመሪያም ቢሆን ሕጋዊ ውል ስላልሆነ ተዋዋይ ወገኖች ሊገደዱበት አይገባም ሲል ውሳኔ ሰጥቷል። በእርግጥ የማኅበራዊ ፍ/ቤቱ ውሳኔ ሲሰጥ መሠረት ያደረገው 1ኛ/ በሽማግሌዎች «ግፍ» ሳይሰጠው በመከሰሱ 2ኛ/ ውሉን ለማፍረሱ ስለተረጋገጠ የሚል ነው። የወረዳው ፍ/ቤት ውሳኔውን ሲሽር መሠረት ያደረገው «ግፍ» ሳይሰጠው ክሷል የሚለው መብቱን የሚያሳጣ በመሆኑ የሚለውን መሠረት በማድረግ ነው። ሆኖም ግን ከላይ እንደተጠቀሰው ይህ የክርክሩ መነሻ ሆኖ ክርክሩ በአጠቃላይ ውል አፍርሷል አላፈረሰም የሚል መሆኑን ተረድተናል። ውል ያፈረሰ ለመሆኑ በምሥክሮች የመከላከያ ምሥክሮች ሳይቀሩ አረጋግጠውበታል። እንደሥር ወረዳው ፍ/ቤት የእርቅ ውል የመክሰስ መብትን የሚያሳጣ በመሆኑ ተቀባይነት የለውም የሚለውን ብቻ እንኳን መሠረት አድርገን ብናየውና በእርግጥ በእርቅ ውሉ ለሕግ ተቃራኒ ነው ሊባል የሚችል ነው ወይ የሚለውን ስንመለከት የመክሰስ መብትን የሚያሳጣ ነው የሚለውን እንዲሁ በአጠቃላይ ካየነው እውነትም ሊመስል ይችላል። ሆኖም ግን ከእርቅ ውላቸው ጋር በማያያዝ ከተመለከትነው በእርቅ በጨረስነው ጉዳይ ላይ እርቁን ያፈረሰው ወይም ያጐደለ ለመሆኑ በመጀመሪያ በአስታራቂ ሽማግሌዎች ሳይፈረድብን ከመካከላችን የከሰሰ ጥፋተኛ ነው የሚል እንደሆነ ነው መረዳት የሚቻለው። ይህ ማለት በእርቅ በጨረስነው ጉዳይ ላይ ለመከሰስና ለመካሰስ በመጀመሪያ እርቁን የጣስነና

ፌደራል ጠቅላይ ፍርድ ቤት
ሰበር ሰሚ ችሎት

አመልካች፡- አያሌው አቻምየለህ

መልስ ሰጭ፡- ተፋረድ መኮንን

የሰበር መ.ቁ. 19367

ዳኞች፡- ሐጎስ ወልዱ፣ ዳኜ መላኩ፣ ሆሳዕና ነጋሽ።

ለዚህ ችሎት ሚያዝያ 4 ቀን 1997 ዓ.ም. በተጻፈ አቤቱታ በአማራ ብሔራዊ ክልላዊ መንግሥት የምዕራብ ጎጃም ከፍተኛ ፍርድ ቤት በመ.ቁ. 06218 በመጋቢት 16 ቀን 1997 ዓ.ም. የተሰጠው ውሣኔ መሠረታዊ የሕግ ስህተት አለበት በማለት ጉዳዩ በሰበር እንዲታይ ማመልከቻ ቀረቧል። አንድ መዝገብ ለሰበር ችሎት ሊቀርብ የሚችለው ቅሬታ የቀረበበት ውሣኔ መሠረታዊ የሕግ ስህተት የተገኘበት እንደሆነ ብቻ መሆኑን ዓዋጅ ቁ.25/1988 አንቀጽ 22(1) ይደነግጋል። በዚህ መሠረት ችሎቱ አቤቱታውን መነሻ በማድረግ የሕግ ስህተት ተፈጽሞባቸዋል የተባሉትን ውሣኔዎች አግባብ ካለው ሕግ እና በየፍርድ ቤቱ ከተደረጉ ክርክሮች ጋር መርምሮአል።

ት ዕ ዛ ዝ

በቀረበው ጉዳይ መሠረታዊ የሕግ ስህተት ተሰርቷል ለማለት አልተቻለም። በመሆኑም መዝገቡ ለሰበር ችሎት አይቀርብም ብለናል። ይጻፍ። ግንቦት 22 ቀን 1997 ዓ.ም.