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Regulation of Real Estate Business in Ethiopia

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DECLARATION

I Menen Abebe, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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Abstract

The business of real estate development is a recent phenomenon in Ethiopia. It flourished in the beginning of the 1990's after the privatization of the market. This business has been seen to contribute to the development of the Ethiopian economy significantly; it has also provided housing for the middle and high income generating families. However, even though it had its own contribution to the economy, the non-regulation of this business has been seen to create undesirable result to the market in general. Lack of laws on how a good working condition can bring sustainable development to the real estate market hasn't been given the attention it deserves. For this reason, this sector has shown numerous fraud and created mistrust upon potential clients. Hence this paper has tried to study on the need of having a regulatory legal framework and institution so as to have a peaceful real estate developing business in Ethiopia.

Abbreviations and Acronyms

PLC	Private Limited Company
SC	Share Company
MOC	Ministry of Construction
MUDH	Ministry of Urban Development Housing
MUDC	Ministry of Urban Development Housing and Construction
RERA	Real Estate Regulating Authority
ESIC	Ethiopian Standard Industrial Classification

Chapter One:

Proposal of the Study

1.1. Background of the Study

The term real estate doesn't have a fully agreed upon and uniform definition, different jurisdictions defines them as per their pursuant legal systems. The Black's Law dictionary defines real estate as something that includes the land and anything fixed, immovable, or permanently attached to it such as buildings, walls, fixtures, improvements, roads, trees, shrubs, fences, roads, sewers, structures, and utility systems.¹

Real estate therefore can be defined as a property comprised of land and the buildings on it as well as the natural resources of the land and including uncultivated flora and fauna, farmed crops and livestock, water and minerals. Even though most refer "real estate market" to only mean residential living, it can however be grouped into three broad categories as: residential, commercial and industrial. Residential real estate can include undeveloped land, houses, condominiums, and townhomes. Commercial real estate on the other hand can include office buildings, warehouses and retail store buildings. Whereas, factories, mines and farms can be categorized as industrial real estate.

The real estate market on the other hand is the market that comprises of all transactions, which involves in dealing with rights or interests in land and building. In this case the dealing mostly involves the transfer of a right permanently or temporarily from one person to another, for consideration.

Having seen what a real estate and what the market of real estate means briefly, it can be inferred that the concept of real estate market is a wide area which deals with the different nature that is inherent to the property.

Coming to the main theme of this paper, this research will focus on the residential real estate category. Residential property is real estate that has been developed or zoned for living which is for non-business use, most often to provide a home for individuals and families to live in. In

¹Henry Campbell Black, Black's Law Dictionary (2nd Ed. West publishing Co. 1910)

Ethiopia even though residential real estate has been existent and has been developed historically by the government, housing, cooperatives, and by individual persons until recently, in the past few decades there has been an addition of an actor in the development of real estates. The past few decades has brought a paradigm shift where real estate developing companies have been flourishing and involving in developing and selling of such kind of residential real estates. Such development came into existence during the late 1990's and early 2000's with the establishment of few real estate companies. It was after that, and more specifically after 2002 when government incentivized construction of condominium houses with a market oriented lease law that real estate developers flourished.

Even though this sector is a new development in the Ethiopian urban development, it has become one of the fastest growing segments of the economy. The growth of real estate development has a positive impact over the general economy of the country, in which case one author puts this in this way, "Real estate generally contributes to a country's economic development as a result of a corresponding growth in the demand for materials, labor inputs and backward and forward linkage effects in the economy".² According to a review made by Access Capital an independent consultant group, had it not been for the expansion of the real estate sector and the closely affiliated construction sector, Ethiopia would not have registered double digit economic growth in the past five years.³

However, even though the development of real estate business is seen to be crucial for the development of a country's economy, such development is sustainable if the actors involved in such development are working in a fair practice so as to meet their objectives. It is inevitable that failure of a developer will have a negative impact on the overall economy of the country. Therefore, monitoring such business as to whether they are fulfilling their objective is very vital to ascertain the well-functioning of the industry and the whole economy.

²Abraham Tarekegn, 'Urban Development and Housing for Low-Income Groups in Ethiopia', 2004, RICS Foundation, p.1-31

³Access Capital, Access Capital Research, Sector Report – Real Estate ,2010 www.ethioconstruction.net/files> accessed January 10,2018

With the increasing number of real estate companies in Ethiopia, there is an absence of proper support, monitoring and control over real estate developers from the respective government organs. The un-regulation of such companies has been creating a huge havoc in the past years, there has been numerous complaints from home buyers over the works of a developer.

One of the major unregulated areas of the real estate business sector is that most of such companies pre-sell the properties before building them, and at the end fail to deliver such houses as per the contract they concluded. Most of such developers lack the proper capacity to construct the houses. Hence, when the developers are faced with financial problem to construct the houses for reasons such as lack of bank loans, they tend to look for other means of finance so as to accomplish their day-to-day activity. One of the means to do so is pre-selling the houses to potential home buyers by showing them 3D design of the houses to be built in the future. However, such type of selling has become very problematic because they mostly result in delay of delivery and in worst situations to the failure of delivering the houses totally. This in effect is seen to negatively affect the very important key to do such business, which is trustworthiness of the home buyers on the home developers.

Late delivery of the houses further brings numerous complications on the relationship between the client and the developer. This is so because as time goes by, there is a high tendency of cost escalation and quality problem. This in return has a major spillover effect on several institutions of the government and more specifically on the judiciary. It is very common since recent years for courts to adjudicate cases brought by home buyers upon real estate companies.

The non-regulation of real estate companies has brought a lot of mess not only on the home buyers but also on the government and on the court system. The mishap of Access Real Estate S.C is one indication for the spillover effect the failure of the developer had over such organs. Attorney General Office, which was then Ministry of Justice, has written a letter for Federal Supreme Court, Ministry of Trade, Document Authentication and Registration Authority, and to the Addis Ababa City Administration Land Development and Management office on January 29/2014 (Tir 21/2006 EC). The letter stated because of the illegal act made by Access Real Estate S.C and its previous general manager Mr. ErmiasTeklAmelga and the problem it has

created government has been trying to find solutions. The letter specified the following instruction to be followed for the government to curb the predicament faced:-

- For the injunction of all the property owned by the company and the previous general manager which is for it not to be transferred to third party in any way;
- Not authenticate any form of sale made by the company and its previous general manager;
- In case such contract of sale is authenticated, to prohibit its function by the registering authority, and
- To stay any sort of pending case brought to the court that involves the company and the then manager whether the case is pending, or has been decided and reached on the execution stage until the government finds solution and gives direction to the solution.

This letter wrote by the government shows the gravity of the problem the real estate sector faces because of the lack of proper regulation. It can be seen that the executive part of the government, trying to look for solution has over passed the limit set by the constitution which is the independence of the judiciary. The court has been ordered by the Ministry of Justice, to immediately drop all the case that involves the developer, this act is in a clear contradiction with Art 78 (1) and Art 79 (2) of the constitution, to the extent of taking power of the judiciary. This shows that such problem even has the ability of compromising a system already developed by the supreme law of the land, the constitution.

However, had the issue of real estate sector been given the attention it deserves in due time, things would not have come to the situation that the industry and the government is now in. Prevention techniques are better used instead of looking for a solution after the damage is done. Therefore, this research will try to look at the problem of the absence of regulation on real estate developers and the possible solutions.

1.2. Statement of the Problem

A real estate market can provide a lot of social and economic yields or benefits to a country if it is regulated at its level best. This sector accommodates a wide range of services and operations for employment and investment which thereon, will significantly aid development.

The construction industry in Ethiopia is the major sector where the public and private are investing huge amount of fund too. Significant amount of the country's budget is allocated to economic development through financing infrastructure for development of educational and power projects, construction of railway and road projects, construction of health projects to increase access for water and sanitation infrastructure. Share of the private sector in the value add of construction industry is also significant. The construction industry has contributed in the reduction of poverty and in increasing employment expansion.

The real estate industry represents a relatively new area of investment for the general public. This sector is a key industry to the Ethiopian economy, which also initiates other industries such as that of the steel, cement, paint and other building materials in general. After the post 1991 economic liberalization and specifically at the end of that decade, this industry has flourished to a huge number. This is partly because of rapid urbanization; increase in foreign investors and more importantly because of the Diaspora's interest in investing on this area. However, this sector hasn't gotten the proper attention it deserves. Real estate developers haven't been regulated by the proper government administration. Clients normally buy home by giving away their life time savings with the hope that they would be home owners within a time frame they programmed and the time of delivery they stipulated under the contract they made with the real estate.

However, it can be seen that the companies pre-sell future homes to their clients by providing specification of the houses they would deliver under a contract. This lacuna has opened room for such real estate companies to do business without any assurance of its delivery as provided by their contract, and in worst cases to a fraudulent act. This failure is partly the result of lack of proper legal instrument to regulate the details of real estate sector. Issues such as the well-functioning of the real estate sector, how its relationship with the client should be, effect of

failure to perform its duty as provided under the contract, possible measures to be taken by the administrative organ and the institutions responsible to regulate real estate companies is not strong and in some situations inexistent in Ethiopia.

1.3. Research Questions

Hence in order to make such real estate companies accountable it is necessary to do a study in order to come up with a solution on the following questions:

- Is it necessary to bring about legislation on the regulation of real estate or is it better to let them be regulated with the contracts they make with their client?
- If legislation is necessary to regulate real estate companies, what kind of regulatory mechanisms should be provided by the law?
- What should be the role of institutions in regulating and maintaining good working environment for the real estate industry?

The research will hence try to come up with possible solutions to the above framed issues.

1.4. Objectives of the Study

This research will try to study the necessity of having a regulatory framework on real estate businesses. The need of having a proper legislation and a competent institution on maintaining a good working environment of the real estate business will try to be seen under this paper. Absence of real estate regulation has a huge impact on the judiciary, on the market of the real estate, on the government, and most importantly on the home buyers. Hence this research will try to study these effects on such bodies and will try to come up with such solutions.

1.5. Research Method

The research will follow both doctrinal and empirical methodology. On the doctrinal part, the research will try to look at relevant laws related with the regulation of real estate companies. On the other hand the research will follow the non-doctrinal approach whereby a study on how to regulate such business will be studied using primary data which will be collected by interviewing

prominent figures in the real estate development sector such as real estate developer, lawyer of a real estate company, clients, federal judges that works on a civil bench, and persons related persons that works in a government institution. Besides the interview, the research will also try to see practical cases adjudicated in the Federal High Court in their first instance jurisdiction in order to see the practical challenge of the non-regulation of real estate business. As a secondary source the research will look at related books, articles, and websites. An experience of two foreign law jurisdictions will be studied. The two countries are chosen because they have been exemplary on how they regulate real estate developers, in addition to that, the forms of business organizations those jurisdictions have and the socio-economic resemblances they have with Ethiopia has been considered in selecting these countries for this study.

1.6. Literature Review

Property can be classified as Real property and personal property. Real property relates to land and those things that are more or less permanently attached to the land, such as homes, office buildings and trees. Personal property refers to all other things such as automobiles, furniture, computers, bank accounts, stocks and bonds.

Real estate can be defined as land and all permanent improvement on it, including building.⁴ On the other hand, Geissler defined the term as artificially delineated space referenced to a fixed point on the surface of the earth with a fourth dimension of time.⁵ It is built to house an economic activity that is subject to cultural preferences and restricted by the public infrastructure.

Real property is more than just earth and things that are attached to the earth. Real property includes everything beneath the surface of the earth and in the air space above.

An owner of real property owns the private air space above the surface of the land. This private air space is of a sufficient elevation to permit the construction of the tallest buildings and other

⁴ Tomlinson M.R., 'A Literature Review on Housing Finance Development in Sub-Saharan Africa', FINMark Trust, 2006.

⁵Geissler (2008) cited by KirosAkubamicheal, Factors Affecting the Real Estate Market, 2009, p 22

structures found throughout the world. Besides this, since the ownership of the surface of real property includes ownership extending from the surface to the center of the earth, an owner of real property usually owns all the minerals beneath the surface of the land.⁶

The chief legal rights accorded to an owner of real property are possession, use, and power of disposition. An owner of real property has the right to possess the property. Possession is occupation of the land evidenced by visible acts such as an enclosure, cultivation, the construction of improvements, or the occupancy of existing improvements. Possession gives the property owner the right to exclude others from the land. Occupancy of land by someone without the permission of the owner is a trespass.

A landowner has the right to use the land for profit or pleasure. Absolute freedom to use the land has never existed, and the modern owner is faced with several limitations on the use of land arising from public demands.

Hence, real estate developers are normally involved in developing and selling of such real properties defined above. In developing these real properties and engaging as a trader these developers has the primary intention of doing business.

Real estate business can take different forms of organization when established. Normally real estate venture starts with an entrepreneur who comes up with an attractive idea for a development project, he pitches the idea to potential investors, which may end up by them believing in the idea and going for it.

Yet, there may be a variety of possible entities that engages on this business; which includes: Sole proprietorship; different types of partnerships provided under the commercial law; or in the form of the two types of companies recognized under the Ethiopian law.

Sole proprietorship is a type of business run by a person owning realty by himself, this type of entity has the benefit of being unbeatably simple which combines with non-tax complicity. The down side of it is its personal liability.

⁶ Daniel Hinkel, *Practical Real Estate Law*, (4th Ed., 2004) 166

On the case of partnership, it is usually a type of business usually useful for family-run business or when a few competent people who have a similar vision of doing business intend to share in management decisions and profits.

While on the other hand, corporation is a type of entity totally distinct from its shareholders, officers, managers and employees. Shareholders are at risk only for the capital they invest. It is only rarely that their corporate veils are pierced, and hold individual shareholders of corporations liable for corporate conduct.

Chapter Two:

Conceptual Underpinning and Historical Development of Real Estate Businesses in Ethiopia

2.1. Introduction

Real Estate development can be thought of as the engine that propels growth in the real estate industry.⁷ Real estate developers get a plot of land on which they plan to develop their real estate projects, be it for commercial or residential purpose. Real estate business is a business encompassing activities that range from the renovation and re-lease of existing buildings to the purchase of raw land or parcels to developing and selling it. Real estate developers are the people and companies who coordinate all these activities, converting ideas from paper to real property.⁸ It can be said that real estate development is different from construction, although there may be a situation where the developer may manage the construction process as well. Developers buy land, finance real estate deals, build or have builders build projects, create, imagine, control, and orchestrate the process of development from the beginning to the end.⁹ Developers usually take the greatest risk in the creation or renovation of real estate—and receive the greatest rewards.¹⁰ Normally, a developer buys a plot of land, determines the marketing of the property, develops the building program and design, obtains the necessary public approval and financing, builds the structures, and rents out, manages, and ultimately sells it.¹¹

Developers work with many counterparts that are involved in coming up with the projects; as well as architects, city planners, engineers, surveyors, inspectors, contractors, lawyers, leasing

⁷How to Become a Real Estate Developer, www.allbusinessschools.com/real-estate-professional/ accessed January 10, 2018.

⁸https://en.wikipedia.org/wiki/Real_estate_development (accessed May 5, 2018)

⁹ New York Times, 'Personality Boom is Loud for Louis Lesser' , (March 16, 1963)

¹⁰ Brandon Donnelly, 'Three Risks that Real Estate Developers Face', www.brandondonnelly.com, accessed May 20, 2018.

¹¹ Anne B Frej, & Richard Peiser, *Professional Real Estate Development*, (2nd Edi, The ULI Guide to the Business Urban Land Institute, 2003)3.

agents etc. In most cases, the real estate developer is an entrepreneur, and takes significant financial risk to purchase land and develop the property. A developer gains the profit after finalizing the project; at the end the market values the finished property whether by purchasing or renting it for more than all the costs involved in developing the property.

A real estate development project may be divided into three phases. The first stage is known as early stage or pre-development: at this stage the developer focuses on due diligence, research and permission such as gaining license. It is often the most variable in duration.¹² The most common steps in this phase include environmental assessment, surveys, market analysis and feasibility study, and acquisition or securing option rights to purchase land, site plans, development plans, and building plans, permitting, arranging construction financing and infrastructure improvements.¹³

The second stage mainly comprises of construction, it involves constructing the improvements. Since this stage comes next to the pre-development stage most of the risks are greatly reduced. Some of the common steps on this stage include vertical construction, drawing on construction financing, project marketing, pre-leasing and arranging for property manager.¹⁴

The last stage of the development process is the operation; it is basically the first stage of the building's life. This stage includes finding a buyer if not done earlier, ongoing marketing and leasing, ramping up property management and achieving stabilization.

After looking at what real estate business is, it is relevant for this paper to endeavor on what regulation is. Regulation is an abstract concept of management of complex systems according to a set of rules and trends.¹⁵ When it comes to regulation it is very common to see that most jurisdictions give attention and recognizes the need of regulating financial sectors in comparison to other business types. Regulation of markets rests on the tenet that it protects the public interest

¹² Ian Formigle, 'The Real Estate Development Process: Understanding the Risks and Milestones', 2016.

¹³ William Smith, 'What is real estate Development', <https://www.quora.com/What-is-real-estate-development> (accessed 5/18/2018)

¹⁴ Ibid

¹⁵ www.wikipedia.org/wiki/Regulation (accessed 3/13/2018)

by (1) protecting investors and (2) guarding against systemic risk.¹⁶ Financial actors are regulated over and above in comparison to other industries because it exhibits market failures that can have devastating consequences. When financial markets malfunction seriously, the real economy takes a nosedive.¹⁷ It is common for institutions to be required to justify their actions in terms of suitability, risk, and other criteria. Government officials will have to become involved in the particulars of business decisions made by institutions to understand whether that institution's actions are suitable and within the bounds of allowable risk. Such follow up is important for this sector so as to balance the interests of unsophisticated consumers of products and their sophisticated sellers. This theme of consumer protection focuses on the regulation of how products are sold, who can sell them, and sometimes, what can be sold.¹⁸ Regulation is important because it provides stability to the markets and serves inter alia to protect consumers, workers, and taxpayers from moral hazards that are inherent in certain decisions. The effective regulation of different business sectors has an effect of maintaining confidence in the area and promoting business confidence generally. Secondly, regulation ensures that the risks inherent in a market economy are understood by stakeholders. Because of such reasons, different businesses and more importantly the financial sector has been given a wider attention when it comes to regulating and setting standards on the way they do business.

On the other hand, the case of real estate business regulation did not get the proper attention it deserves. Such businesses are left for parties, the market, and for the self-regulation of real estate companies in order for them to operate.

¹⁶ George Stigler, *The Theory of Economic Regulation*, *Bell Journal of Economics and Management Science*, (Vol. 2:1 1971) 3-21.

¹⁷ Ibid

¹⁸ www.warwick.ac.uk/research/ (accesses May 9, 2018)

2.2. Historical Development of Real Estate Developing Companies in Ethiopia

2.2.1. The Imperial Era

The Imperial Crown, the nobility and the church, and in some areas the community were the four major groups in whose hands land holding concentrated.¹⁹

There were three major traditional types of land tenure. The first type is the *rist* system in which it is the right to claim a share of land based on kinship to a historical ancestor held in common with other *rist* holders.²⁰ *Rist* right during the imperial period was only a use right, the land was hold perpetually without the right of alienation. In effect it was a descent corporation i.e. a person could inherit *rist* rights from either parent based on ambilibneal descent principles.²¹ Such land holders had certain obligations they had to meet such as that of meeting of taxes and service obligations which are associated with the land.²²

The second type of land tenure is the *Gult system* which is very much related with the expansion of state power. A land under the *gult* system was granted in lieu of other remuneration to certain persons who perform or are liable to be called upon to perform services to the state.²³ The nobility who acquired land as per the *gult* system collected salary from the settlers from the *gult* in a form of tax. There may also be a situation where there is a higher noble who takes part of the tax collected from an inferior noble. The *gult* owner had administrative and judicial power over those who tilt on that land, which somehow makes *gult* not a right on land but rather the power to tax on those people who uses the land.²⁴ *Gult* rights over land were given to members of the

¹⁹Adal Yigremew, 'Review of Landholding Systems and Policies in Ethiopia under the Different Regimes' (Ethiopian Economic Policy Research Institute, Working Paper No. 5/2002, 2002)

²⁰Firew Mengistu, 'Institutional Interfaces and Actors behavior In Transitional Real Estate Markets Of Addis Ababa(Ethiopia)', 2002, p. 131

²¹ Ibid

²²Richard Pankhurst, 'State and Land in Ethiopian History' (IES and the Faculty of Law, Haile Selassie I University 1966)

²³Hinkel(n.6) 132

²⁴Ibid, 133

ruling elite as a reward to loyal services to their lord and to religious institutions (*samon*) as endowment.²⁵ Just like *rist*, *gult* right is also not transferable.

The other type of land ownership during the imperial era was that of ownership of land by the government. It is said that 46.6% of the total land of Ethiopia and 11.8% of the agricultural land was under the government tenure²⁶.

Hence, to summarize the land tenure and real estate development of the pre-1974 of Ethiopia land was mainly the property of a few landlords, and private sector actors i.e. speculative developers, petty providers and owner-builders were the principal actors. However, such land owners were not engaged in developing and selling or renting houses as a real estate developing business. It was common to see landlords building a house for rent, but it was not made on a higher scale as business per se.

It can be seen under the Ethiopian Commercial code Art 5 (1) that the law recognizes person who purchases movable or immovable with a view to reselling them either as they are or with alteration or adoption as a trader.²⁷ Even though the law which came out during the imperial period recognized the business of developing a real estate and reselling them as a trader, such type of activity was not practiced in the full sense of a real estate business. It can be said that real estate developing companies did not exist during that time. Nonetheless, it was common to see people especially land owners to build a house and rent it as a source of income, but this was not done in a high scale and professionally so as to be called a real estate developer.

2.2.2. The Derg Period (1974-1991)

With the coming into power of the socialist oriented Military Government (*Derg*) in 1974, a centrally planned command economy became the economic policy of the country. The socialist government was known for its involvement in the supply of real estates and set cooperatives housing delivery system. Provision of land, building materials, and finance were few of the core

²⁵Hoben, A. *Land Tenure among the Amhara of Ethiopia: the Dynamics of Cognizant Descent*,(The University of Chicago, Chicago1973)

²⁶ Cohen, J. M. and D. Weintraub, *Land and Peasants in Imperial Ethiopia: The Social Background to a Revolution*, (Assen: Van Gorcum 1975)

²⁷ Commercial Code of the Empire of Ethiopia, 5th May 1960 Proclamation No.166 of 1960, Art 5(1)

tasks of the government²⁸, with the intention of helping the mass in becoming home owners. Not only that, in realizing its ideology, the then government came up with the Proclamation to Provide for Government Ownership of Urban Lands and Extra Urban Houses, Proclamation number 47/1974, by which the government nationalized all urban lands and extra houses. This has resulted in the role of the private sector in real estate development to be limited, if not non-existent. Yet, this has resulted in the public sector to operating better than they used to.

The *Derg* Government has nationalized all urban land and extra houses. The development of housing during the 1974-1991 periods was characterized by subsistence urbanization where all activities were geared toward self-support. Housing cooperatives were prompted by the ideological milieu of socialism.²⁹ For the main part of the *Derg* years benefiting from house rent was forbidden. Housing development for self-use negated the basic essence of housing as an economic function.³⁰ The then government had the objective of allocating land organizationally through a redistributive system as a production means which was based on use right for an indefinite period of time rather than by pricing mechanisms.³¹ Land was prohibited from being used as a commodity in order to gain economic benefit. Only governments, owner builders and more importantly cooperatives were the prominent actors in the development of real estate.

In general, during the *Derg* period, provision of housing to the society was given better attention compared to the previous era.³² This period is known for the promotion of housing cooperatives and private ownership of housing. Because of such reason, it can be said that private real estate developers were non-existent. The then government had the policy of forbidding housing development for self-use since it negated the basic essence of housing as an economic function.

²⁸Zerayehu Sime and Kagnehu Welde, 'Performance, Challenge. And Prospects of Real Estate Financing in Addis Ababa: Micro-and Macro Economic Implications', (Vol. 1, No.1) p.2

²⁹Urban Development Policy Design Project Office (NUP): (Draft Report Supported for Review and Comment by the Technical Committee Established by MoFA, October 2003)

³⁰Wubshet Berhanu, 'Prospects for Real Estate Form of Housing Supply in Ethiopia: Case studies from Addis Ababa', 2003

³¹Firew (n 17)139

³²Ibid, 17

The housing market, production and distribution of construction materials were put under the control of the central government. This policy has the consequence of forbidding real estate developers from going into the business of developing houses for clients for consideration. However, in conclusion, the limits imposed on housing tenure types, the modes of housing supply on land development and allocation aggravated the housing problem.

2.2.3. Post-1991 Era

After the overthrow of the socialist regime, the current regime came up with a more of market oriented approach that enhances the private sector's role in the development of the real estate sector.

The Constitution of the Federal Democratic Republic of Ethiopia provides under Article 40/3 that land, as one of the natural resources, is the common property of the nations, nationalities and peoples of Ethiopia and the right to ownership of land as well as natural resources is exclusively vested in the state and the peoples of Ethiopia. Further stating that land should not be subject to sale or other means of exchange.

With the introduction of the Urban Land Lease Holding Proclamation No.80/1993, the government came up with leasehold as the tenure form of choice. This Proclamation took a different approach from the previous ones in the allocation of urban land because it created a condition where urban land can be used as having economic value which goes along with the principle of free market economy. Differing from the former lease Proclamation, there was certain amendment of the Proclamation that dealt with land lease, which still has the objective of providing land to a developer through lease system. In addition to the land lease laws, the government also focused on coming up with various measures that helped in the liberalization of the real estate market. The official development policy of the Transitional Government came up with a market-led economy a market-led economy where the private sector played a major role.

In the beginning of the transitional period, there was a little tendency of moving from the previous policy subscribed by the *Derg* government, except only with respect to the land ownership policy. Housing cooperatives were denied access to land in favor of individual

applicants.³³ Further, housing loan was totally abolished; and the lease holding policy was issued.

Coming to the point of real estate developing business, the current government has made housing development and finance the joint responsibility of the Ministry of Housing and Urban Development, private investors and banks. A lot of private investors are seen to be involved in the real estate development business.³⁴ The government, besides this, has given emphasis to building condominium housing projects for low and medium income households

For the period of 1992-2006, the total number of real estate developers licensed by EIA (Ethiopian Investment Agency) reached 1,667 with a total capital of Birr 31.9 billion, of which, 87% is under pre-implementation, indicating how far it is behind the country's expectation and that there are many obstacles and inherent problems that bogged down real estate development

Real estate developers are now very much engaged in building residential homes and neighborhoods ever since the first large-scale development was initiated by the pioneer in this sector, namely Ayat Real Estate.³⁵

However it can be seen that such housing development has only been affordable to the middle and high income population. The clients of a real estate developing company are the ones that can afford the high prices the developer offers to sell at. Nonetheless, even though price of buying such houses from a developer is increasing at an alarming stage, the business of real estate development doesn't seem to be lessened. The number of developers in Addis Ababa and surrounding cities has been increasing as well as the demand for housing by the society.

³³ Ibid, 17

³⁴ Ibid,23

³⁵ Ibid, 3

No.	Year	Implementation	Operation			pre-Implementation		Total No of Projects
			No of Projs	No of Projs	Capital in '000' Birr	Perm Empl.	Temp Empl.	
1	1992		2	6,742	42	0	38	40
2	1993	8	5	24,453	74	0	19	32
3	1994	3	3	34,605	89	0	26	32
4	1995	8	9	12,932	109	1,020	17	34
5	1996	11	21	1,067,925	630	25	16	48
6	1997	5	9	120,113	92	30	21	35
7	1998	18	9	288,530	156	0	35	62
8	1999	10	9	51,726	241	0	34	53
9	2000	14	17	590,835	490	0	59	90
10	2001	18	34	269,986	835	30	116	168
11	2002	17	50	304,936	1,091	22	283	350
12	2003	9	55	278,922	843	123	305	369
13	2004	13	116	421,030	2,347	1,680	401	530
14	2005	38	290		2,607	2,265	675	1,003
15	2006	67	487	1,568,404	7,122	3,938	2,218	2,772
16	2007	36	132	1,070,878	1,974	1,847	1,397	1,565
17	2008	44	94	529,165	2,331	6,090	1,417	1,555
18	2009	34	90	826,748	1,438	1,682	928	1,052
19	2010	42	67	368,552	954	1,459	1,174	1,283
20	2011	23	68	690,276	952	1,054	1,778	1,869
21	2012	15	124	479,112	1,155	1,453	5,124	5,263
22	2013	9	46	2,621,832	650	469	2,511	2,566
23	2014	95	89	287,103	439	591	1,956	2,140
24	2015	20	773	6,359,973	5,847	8,333	2,624	3,417
25	2016	33	180	5,596,081	1,191	406	3,108	3,321
26	2017	12	89	757,440	5,032	333	2,886	2,987
27	2018						21	21
	Grand Total	603	2,870	25,585,814	38,731	32,850	29,193	32,666

**Summary of Licensed Real estate Development Investment Projects
by Year and Status**

Since June 24, 1992 - February 23, 2018 GC³⁶

From the above table one can infer that the number of real estate projects has been increasing tremendously after the coming to power of the EPRDF government, since 1991. The liberalization of the market and the encouragement of the government for private sectors may be acknowledged for such growth. The capital pooled by private investors for real estate development per project is also significantly high, a large amount of money is needed to accomplish such project, and as the number of real estate project increases through time, the amount of money invested on this sector also upsurges. The effect that the real estate sector has on providing employment opportunity can also be discerned from the table above. This sector hosts many people as employees in which case many families are presumed to be supported by this industry in one way or another. The real estate sector has boomed especially after the Ethiopian millennium because many Ethiopians in the diaspora showed interest in buying houses in Ethiopia. These demands by the Ethiopians in the diaspora triggered the increase in the number of developers and also the projects to be built.

³⁶ Data collected from Ethiopian Investment Commission

Chapter Three

Regulation of Real Estate Business in Some Selected Countries

2.1. The Indian Experience

India is a country located in South Asia. It is the seventh largest country in the world and the second largest populous country.³⁷ India maintains a hybrid legal system that incorporates common law, civil law, and religious or customary law within its legal framework.³⁸ The constitution prescribes federal structure of government, with a clearly defined separation of legislative and executive powers between the Federation and the States. From 1947 up to 1991, the Indian Economic System was based on social democratic-based policies feature protectionism, extensive regulation and public ownership. But the economy has moved to a market-based system with economic liberalization starting from 1991 onwards.³⁹

Looking at the form of business and the laws governing them, India has three types of business organization. The first type of business organization is Sole proprietorship; this type of organization is the oldest, simple and the most common type of business which is owned by a single private person. The persons who own and run the businesses are held liable towards third party creditors. In such case the law of India gives legal claimants against the sole proprietor to pursue the personal property of the proprietor and not simply the assets used by the business.

The second type of business organization recognized in the Indian legal system is Partnership firm. Section 4 of the Indian Partnership Act of 1932 defines it as, "...the relation between two or more persons who have agreed to share the profits and losses according to their ratio of business run by all or any one of them acting for all".⁴⁰

From this, it can be inferred that persons who have agreed to combine their property, labor, and skill in some business with the aim of sharing the profit that will come later on as between

³⁷ www.factsninfo.com/2015/06/indian-geography-facts-and-information.html (accessed May 17,2018)

³⁸ https://en.wikipedia.org/wiki/Law_of_India (accessed May 17,2018)

³⁹ www.business.mapsofindia.com/india-economy/system.html (accessed May 17, 2018)

⁴⁰ The Indian Partnership Act, 1932 (Act No. IX of 1932) Section 4.

themselves is partnership. This type of business organization gives a right to every partner to take part in the conduct of business. Decisions are made by a majority vote of the partners. Coming to liability to creditors, Indian law stipulates that the partners are jointly and severally liable to any claimant in relation to the business the partners pursue⁴¹. Private property of the partners is open to be claimed by such creditors, showing that their liabilities are not limited.⁴²

The third type of business organization is that of the Joint Stock Company. Under such company there are two categories, namely Private Limited Company and Public Limited Company.⁴³

India is one of the countries that have the strongest Real estate regulating laws. Some of the ugly experiences it has come through in the past few decades and more specifically in the past few years have made it necessary for the country to come up with a way of controlling and maintaining the safety of the real estate developing industry. For this reason they came up with The Real Estate (Regulation and Development) Act, 2016 (RERA). The act was passed by the Parliament in the year 2016 and the Union Ministry of Housing and Urban Poverty Alleviation was given time till May 1, 2017, to formulate and notify rules for the functioning of the Regulator.⁴⁴ RERA has the objective of bringing clarity and fair practices which at the end of the day will protect the interests of buyers and also impose penalties on errant builders.

To understand the objective of RERA, it is important to see the preamble, of the Regulation. The preamble states the following as the objective of the Act:-

“An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.”

⁴¹ Ibid, Section 25.

⁴² Ibid, Art 25

⁴³ Companies Act No. 18 of 2013

⁴⁴ <http://indianexpress.com/article/what-is/what-is-rera-and-how-will-it-help-homebuyers-4635705/>,

(accessed January 4, 2018)

It can be noted from the preamble of the above Regulatory Act that all transactions of real estate are to be regulated by a pertinent authority concerned, for the purpose of having a safe industry and for the protection of buyers. This act also has a purpose of providing an adjudicating body different from the ordinary court system so that cases are disposed of without delay. In order to achieve these objectives, this act has come up with 92 articles that try to cover problems associated with the real estate industry.

According to this act, each state and Union territory are expected to have their own regulator and set of rules to govern the functioning of the regulator.⁴⁵ RERA seeks to address issues like delays, price, quality of construction, title and other changes.⁴⁶ Delays in projects are the biggest issue faced by buyers.⁴⁷ The reasons are many and the impact is huge. Since the last 10 years, many projects have seen delays of up to 7 years. Projects launched after the turn of this decade have faced delays as well.⁴⁸ Some have run into obstacles even before a brick was laid. The reasons include diversion of funds to other projects, changes in regulations by authorities, the environment ministry, national green tribunal etc and other bodies like those involved in infrastructure development and governing transport.

The RERA has dealt with numerous issues that were problems posed by real estate companies. Some of the regulatory mechanisms followed are the following. Before everything begins, the promoter of a real estate development firm has to maintain a separate escrow account for each of their projects. A minimum 70 per cent of the money from investors and buyers will have to be deposited.⁴⁹ This money can only be used for the construction of the project and the cost borne towards the land. The information gap that used to happen between the developer and the buyer

⁴⁵The Real Estate (Regulation and Development) Act, No. 16 of 2016, Art. 20(1)

⁴⁶ What is RERA and How Will it Impact the Real Estate Industry and Homebuyers, <https://housing.com/news/rera-will-impact-real-estate-industry/> (accessed May 1, 2018)

⁴⁷ Ibid 44

⁴⁸ Ibid, 46

⁴⁹ The Real Estate (Regulation and Development) Act, No. 16 of 2016, Art 4 (2)(d)

has also been addressed by obliging the companies to provide clarity to buyers; developers will have to keep them informed of their other ongoing projects.⁵⁰

RERA has made it a requirement that real estate developers have to submit the original approved plans for their ongoing projects and the alterations that they made later. Further they have to furnish details of revenue collected from allottees, how the funds were utilized, and the timeline for construction, completion, and delivery that will need to be certified by an Engineer/Architect/practicing Chartered Accountant.⁵¹

Another point of regulation that RERA gives attention to is the quality of construction in projects. It was very common in the last few years to see buyers protesting about poor of flats in India.⁵² To overcome this problem, the regulator will ensure protection to buyers in this matter for five years from the date of possession. If any issue is highlighted by buyers in front of the regulator in this period including in quality of construction and the provision of services, the developer will have to rectify the same in a matter of 30 days.⁵³

The Indian real estate regulation is very tight and provides that developers are prohibited from inviting, adverting, selling, offering, marketing or booking any plot, apartment, house, building, investment in projects, without first registering it with the regulatory authority. This is very essential because home buyers will not be deceived into buying houses that do not exist or houses which practically can't be built by the developer. Furthermore, after registration, all the advertisement inviting investment will have to bear the unique RERA registration number. The registration number is provided project-wise for every individual project.⁵⁴ After registering the project, developers will have to furnish details of their financial statements, legal title deed and supporting documents.

⁵⁰ Ibid, Art. 19 (1)(2)

⁵¹ Ibid, Art 4 (2)(d)

⁵² www.moneycontrol.com/news//business/personal-finance/real-estate-regulation-act-how-it-will-change-the-paradigm-2264005.html/amp accessed May 1, 2018

⁵³(n. 49) Art 14 (3)

⁵⁴ Ibid, Art 9

Another interesting area of regulation covered by the Indian law is on the issue of late delivery. It is provided under RERA that if the promoter defaults on delivery within the agreed deadline, they will be required to return the entire money invested by the buyers along with the pre agreed interest rate mentioned in the contract based on the model contract given by RERA. If the buyer however chooses to retain having the house delivered rather than getting the money, the act bestows him with the option of the builder to pay monthly interest on each delay month to the buyer till they get delivery.⁵⁵

After registry of developers by the regulator has been made, a page will be created for the builder on the regulatory authority's website. The developer will be given login credentials using which it will upload all the information regarding the registered projects on the regulator's website. The number, type of apartments, plots and projects and their completion status will be updated at a maximum quarterly basis.⁵⁶

It is also provided under RERA that developers are prohibited from taking more than 10% of the property's cost as an advanced payment for the purpose of booking or as an application before actually signing a registered sale agreement, this further gives security to the buyer.⁵⁷

There are also points where the developers may face criminal sanctions in case it contravenes with any of the orders or directions made by the appellate tribunal which are given such power under the RERA. In such a case the imprisonment may extend to up to three years or with a penalty, such penalty also extends when the offender is a company.⁵⁸ For the case of companies, the person in charge or the one responsible for the conduct as well as the company itself will be criminally held responsible.⁵⁹

From the Indian experience it can be seen that most of the problems faced by the real estate sector starting from advertisement, to minimum threshold to be fulfilled by developers, up to quality and delivery of the developed real estate on time has been given a huge attention and are

⁵⁵ Ibid, Art 18 (1) (b)

⁵⁶ Ibid, Art 5(1)(a)

⁵⁷ Ibid, Art 13(1)

⁵⁸ Ibid, Chapter VIII

⁵⁹ Ibid, Art 69

dealt succinctly by their laws. Such regulation has curbed the fear that home buyers had when they were about to engage in buying a house before the coming out of the RERA, which has brought sense of security and trust over the real estate sector.⁶⁰

2.2. Experience of Malaysia

Malaysia is a federal constitutional monarchy in South East Asia. It consists of thirteen states and three territories.⁶¹ The government system is closely modeled on the Westminster parliamentary system and the legal system is based on common law. The head of the government is the prime minister. Malaysia has had one of the best economic records in Asia in the past few decades, and is classified as an emerging economy by the World Bank; the IMF has also classified as an emerging and developing country.⁶²

Looking at the government's political structure, legislative power in Malaysia is divided into federal and state legislature. The parliament follows a multi-party system and the government is elected through a first past the post system, which means the candidate who receives the most votes win, which is also known as winner takes all.. On the other hand the executive is led by the prime minister, who is also a member of the House of People's Representative.

Coming to its legal system, the legal system of Malaysia is based on English Common Law.⁶³ The highest court is the Federal Court, followed by the Court of Appeal and the two High Courts.

In Malaysia, the most common types of business are sole proprietorship, partnership and private limited companies.⁶⁴

Similar with many jurisdictions, sole proprietorship run businesses are solely owned by one individual, in this type of business liability is unlimited. Partnership on the other hand is a business where two or more partners combine their resources to carry out a legal business. All

⁶⁰ (n. 46)

⁶¹ www.en.m.wikipedia.org/wiki/Malaysia<accessed May 1,2018>

⁶² Investopedia, 'Top 25 Developed and Developing Countries', 28 September 2016 www.investopedia.com/updates/top-developing-countries (accessed May 23, 2018)

⁶³ www.expatsfocus.com Accessed May 5,2018

⁶⁴ Ibid

business partners share the profits and liabilities in the business undertaking in which all have invested, in this kind of business as well liability of partners is not limited.⁶⁵

Limited companies in Malaysia are governed by the Companies Act, 2016, which protects the rights and interests of shareholders and investors, and provides regulation for the incorporation of companies, the formulation of company constitutions, management and closure. This business offers limited liability to its shareholders, but plays certain restrictions on its ownership so as to prevent any hostile takeover attempt.⁶⁶ There are two types of limited companies recognized by the Malaysian Companies Act, namely, Private Limited Company and Public Limited Company. The other type of company is the Public Limited Company; these types of company pool their capital by selling shares to the public. Limited companies under the Malaysian law can be limited by share. In such a case liability of member's contribution to this company is limited to the amount specified on their unpaid shares.⁶⁷

Finally the other type of business organization under the Malaysian law is the Limited Liability Partnership (LLP), this type of business is a new form of business organization regulated under the new Limited Liability Partnership Act, 2012 combining a characteristic of a company and a conventional partnership. This business type offers protection of limited liability to its partners similar with the limited liability offered to shareholders of a company. On the other hand, it has flexibility of internal business regulation through partnership agreement similar to a conventional partnership.

Coming to the experience of real estate development in Malaysia, it can be seen that real estate practice became visibly lucrative during England's Industrial Revolution of the 19th C. During this period, new wealth and employment were created, the market for property development widened considerably and the property market grew exponentially.⁶⁸ Over time real estate

⁶⁵ Partnership Act 1974

⁶⁶ Advanced Corporate Resources, 'Types of Business in Malaysia'

⁶⁷ Laws of Malaysia Act 77, Companies Act 2016, 31st August 2016, Section 192

⁶⁸ Abayomilbiyemi and others, 'Regulation of Real Estate Agency Practice in Malaysia: An Investigation for Nigeria', (IJHSSE, Vol. 1, Issue 10, 2014)p65-76

business became marred by incompetent and unwholesome behavior due to lack of control over the self-styled estate agents, there were many victims of fraud.⁶⁹

Therefore to safeguard public interests against unscrupulous practice of estate agency of unqualified parties' rogues in the 1970's and 1980's, the Malaysian parliament enacted the legislation known as the Valuers, Appraisers and Estate Agents Act 1981.⁷⁰

This Act provides a Director General of Valuation and Property Services by the government where standards of valuation, estate agency, and other property related matters in Malaysia. The board that is established by this law maintains a register of Valuers, Appraisers and Estate Agents and Firms. It holds disciplinary proceedings and causes written professional examinations to be held, prescribes professional fees, appointment of examiners, and consideration of applications for authority to practice as a Valuer, appraiser or estate agent.⁷¹

Under this act no person, except a registers estate agent can practice or carry in business or take up employment under any name as an estate agent.⁷² If an estate agent or probationary estate agent whose name has been placed in the Register has been convicted of any offence involving fraud or dishonesty or moral turpitude; has been found to have obtained his registration or authority to practice under this act by fraud or representation; or his qualification withdrawn or cancelled by the authority through which it was acquired or by which it was awarded; has been found guilty by the board of any professional misconduct or of any act or conduct which on the opinion of the board is infamous or disgraceful, the board may take order the following.⁷³ Cancel his registration, suspend his practice for a period not exceeding three years, admonishing him and recording such admonishment in the appropriate register, admonish him or impose a fine.

Registered estate agent has a duty to render service to his client and uphold the interest of his client and the dignity if the profession with devotion to the high ideals of integrity, honor and

⁶⁹ Ibid

⁷⁰Valuers, Appraisers and Estate Agents Act 1981, 4th February 1981

⁷¹ Ibid, Section 18

⁷²Valuers, Appraisers and Estate Agents Act 1981, 4th February 1981, Part VA, Section 22B and 23C

⁷³ Ibid, Section24

courtesy, loyalty to his country, fairness and goodwill.⁷⁴ An estate agent is expected to act professionally towards his client and in fiduciary manners.

In relation to advertisements, the Malaysian law on real estate provides that a registered agent cannot provide an inaccurate or misleading statement of fact.⁷⁵ It is a fact that estate agents by the very nature of their practice hold money belonging to other people. Because of this reason, there is a standard dealing with estate agent's accounts and the handling of client's money. The purpose of this is to ensure that monies entrusted to registered persons are paid into a separate designated account, properly recorded in the accounts maintained by the registered estate agent, and properly monitored.

From the Malaysian experience it can be discerned that dealings of a real estate property is regulated by a special organ established by law. This organ oversees that estate agents do their jobs efficiently and professionally so as to protect the interest of clients involved. The nature of business that they are involved in gives them the opportunity to run a huge amount of money. Therefore, the law by recognizing this very fact came up with different regulatory mechanisms. These mechanisms are that of registering them and making sure that they are competent enough to run the business in real estate. In addition to this, the money that is trusted to an estate agent is not simply left unregulated, rather the account of the agent is followed up by the regulating organ so as to prevent fraudulent acts. Issue as to the ways the developer ought to advert its business is also part of the regulatory methods under the act.

Ethiopia can take a lot of lessons from the countries where regulation of real estate is advanced. From both jurisdictions seen, the need for having a regulation on the area came because of the chaos and sometime fraudulent act made by the developers. It was seen that a real estate developer was benefiting unfairly while home buyers were victimized by these acts. This predicament was a reason for coming up with a legislation that standardizes the real estate industry. The same is true for Ethiopia; the past decade has shown that the lack of real estate regulation has brought a lot of problems on clients, the government and the overall economy of

⁷⁴ (n.44)

⁷⁵ Ibid, Section17 (1)(ab)

the country. For this reason, studying how countries with developed real estate regulation handle such situations is important. Hence, areas such as registration, fulfillment of competency by the developer, delivery on time, ways of advertisement, and generally institutional framework of the regulatory organ can be learnt from these two countries.

Chapter Four:

The Ethiopian Experience of Real Estate Company's Regulation and its Lacuna

4.1. Legal Lacuna

4.1.1. Minimum Requirement in the Early Stage of Real Estate Company

A real estate company is a company that is involved in converting an idea on paper to something tangible. Such company is in to the business of developing a real estate for the purpose of commercial or residential usage and selling them so as to gain profit. A developer is usually the architect of the business project in which case they can either be involved in the construction of the real estate or not in some instances. Real estate involves different steps starting from the planning of the project, to the buying or leasing of a plot of land, and building the structure up to finding a market to sell the houses, buildings, flats etc.

In the process of development, it can be seen that there are numerous possible requirements a developer should adhere to before commencing the business. Looking at the Ethiopian situation, the law has recognized real estate developers as traders. The Commercial Code of Ethiopia under Article 5(1) states that a person who professionally and for gain purchases movables or immovable with a view to reselling them either as they are or after alteration or adoption is considered as a trader. A real estate developer being a trader, s/he in Ethiopia may assume one of the types of business organizations as provided under Art. 212⁷⁶ of the Commercial Code in the form of a sole proprietorship. However, most developers in Ethiopia take the form of a share company, private limited company and in some instance a form of joint ventures.⁷⁷

⁷⁶The Ethiopian commercial code recognizes that a trader may perform its business being established in to the six types of business organizations. Real estate developer being a trader also has the option of being incorporated as an ordinary partnership, joint venture, general partnership, limited partnership, a share company or as a limited share company.

⁷⁷ Data from Ethiopian Investment Commission on Real Estate Developers

4.1.2. Registration of Company and Project

A real estate company after deciding on the form of business organization it adapts as to fulfill other requirements. It has to be being registered within the appropriate government organ. The Commercial Registration and Licensing Proclamation No. 980/2016 is applicable on business persons, sectorial associations, commercial representatives and any other persons engaged in commercial activities, except on some business activities which are regulated with a different government organ and by a special law relevant to its nature of business such as banking, mining and air transport.⁷⁸

Real estate development business because of it being a commercial activity and not falling under the exclusion of Art 21(4) of the Proclamation, it falls within the ambit of the Registration and Licensing Proclamation. Developers pursuant to Art 22 of the Proclamation are obliged to obtain a business license before engaging into its business activity. It is provided under this law that such persons engaging in business shall apply to the appropriate authority for the provision of the required business license.⁷⁹ However, coming to the issue of real estate developing companies, the relevant authority to give such business licenses is not specified. Real estate development business has an element of construction and also of a simple profit making business. Because of such reasons it has been difficult to ascertain whether it is the Ministry of Trade or that of Ministry of Construction that is responsible and considered as relevant organ in giving away business licenses. This is especially difficult in the case of real estate developers who are involved in the construction of the houses. According to AtoBeyene⁸⁰ of the Urban development and Housing Agency, such aspect has not been given due attention by the law.

Ato Beyene said that real estate developing companies faces problem starting from conceiving the business and going to the relevant authority to acquire business license. Since the business

⁷⁸ Commercial Registration and Licensing Proclamation, 5th August, 2016, No. 980/2016 Art 21 (4)

⁷⁹ Ibid, Art 23

⁸⁰Interview with Ato Beyene Mellese, Research and Information Administration Directorate Director at the Ministry of Urban Planning and Development, (Addis Ababa May10, 2018).

has construction aspect especially for those who built the houses, they may be expected to go to the Construction Minister to get the necessary permit, while on the other hand, since they are businesses in the strict sense, they are also required to get business license from the Ministry of Trade. Ato Beyene said that the practice in this regard is getting license from the Ministry of Trade, because Ministry of Construction denies real estate companies because of the confusion they have in their undertaking and the lack of proper law to guide them through. Hence, even though the law has put it as a minimum requirement for real estate companies to have a license, the peculiar nature of this business and the relevant authority to provide such license has not been duly cover by the law.

4.1.3. Capacity to Performance

The other pre-requirement that a real estate developer has to maintain is having the necessary land and capital to develop the project it has planned so as to achieve its purpose and transfer it to its client.

In the Ethiopian legal system since ownership of rural and urban land is conferred on the state and nations, nationalities and people of Ethiopia; and because land is not available for sale⁸¹, real estate companies acquire land through lease from the government. Before the coming in to force of the Urban Lands Lease Holding Proclamation No 721/2011, provision of land for real estates in Addis Ababa was regulated by the Addis Ababa City Government Regulations Issued to Provide Land for Real Estate Regulation Number 20/2005. This regulation had the objective of encouraging investment, minimizing residence house problems related to residential houses and using land economically and in a planned way.⁸² The overall land provision for real estate developers in Addis Ababa was regulated by this Regulation; the size of land and the method of pricing land were the major issues raised under this law. By the coming into force of proclamation No. 721/2011, the previous regulation was repealed. The lease Proclamation has a scope of application on all urban lands all over Ethiopia. It applies to real estate developers that

⁸¹ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 21st August 1995, Art 40 (3)

⁸² Addis Ababa City Government Regulations Issued to Provide Land for Real Estate Regulation, 29th Nov., 2005, No.20/2005

wish to acquire land from the government. In order to get land, the private sector which includes real estate developers are expected to go through tender, that results in leasing the land with the maximum amount of money offered for a given plot of land.

Even though the law has provided a mechanism through which developers may acquire land, the payment they have to make is a huge amount of money.⁸³ Practically though, real estate companies instead of leasing land from the government looks for other alternatives of acquiring land, which is working as a joint venture with other real estate companies that have already acquired land but have difficulty of constructing houses on it. This has especially been a common phenomenon for Access Real Estate S.C when it was in business; this company has created a joint venture agreement with real estate developers such as that of Laura Plc. Real Estate Company and Pacific-Link Plc.⁸⁴

There are also developers that simply get into business, advertise their company, and even enter into contract of developing real estate with client without priory getting the necessary land.⁸⁵ Such act of the developer is a serious misconduct which in the long run will lessen the necessary trust and confidence a client would have on the developer. Land is the most important component a developer needs to have in order to accomplish its mission of delivering a house. However, without having land concluding a contract to build and deliver a house would be a fraudulent act. Even though it is common to see such act by developers, there isn't any law or regulating organs that can curb if not minimize the problem. Clients would only have the possibility of bringing their case to court where their disputes is only seen according to the

⁸³ Interview with Ato Ermias Tekel Amelga founder of Access Real Estate SC (Addis Ababa April 7/2018)

⁸⁴ Interview of Ato Ermias Tekel Amelga with Sheger FM 102.1 Andand Negeroch Program ,March 8, 2018.

⁸⁵ According to Ato Beyene it is very common to see real estate companies starting business and selling of housing by simply showing the design of the house in a blue print and persuading the client to buy the houses before the company realizes the plot of land necessary. He said that clients after realizing this event comes to their office (Ministry of Urban Development and Planning) and convey this fact to get solution from the ministry. Advertising the project on different medias, he said, is also common by developers.

contract they conclude and the existing law, which at the end of the day, would only result in payment of damage for non-performance and ends without delivery of the house to the client since the developer won't be able to provide the house.

Another input by a real estate company at the early stage of the desired development would be arranging construction finance. Constructing a building is a very expensive project because it requires the hard work, expensive specialized tools, equipment, and refined skills of many people. The construction phase of real estate development can be performed either by the developer itself or it can be outsourced to a contractor who has the skills of building houses. In both cases, the developer, who has taken the responsibility of actualizing the project and transferring it to the client, is expected to have the requisite financial strength to fund the projects. This being the responsibility of a real estate developer, the reality in Ethiopia is that price of real estate construction material has increased in the past few decades because of demand led inflation, increased production cost, increased charges for production inputs like electricity, and because of the increased cost of imported inputs such as fuel and finishing materials.⁸⁶ Such escalation in price of construction has been one of the biggest reasons for conflicts between developers and a client. The Developers simply assume the obligation of delivering specific houses within the period provided for in their contracts; however it is very common for developers to sign that contract without initially having the required finance to accomplish the project. Not only that, the price escalation of construction expenses serves also an additional fuel to the already raging fire. According to a Federal High Court judge⁸⁷, from what he's seen in the litigation of real estate development cases, one of the greatest reason for the triggering of conflicts and non-performance of contracts between developers and the home buyers is the inability of developers to deliver the house in due time as provided in their contract. He said, such non-performance of contracts is results of the developer not having the required

⁸⁶Tesfaye Misganaw, 'Assessment of Affordability of Private Residential Developments in Addis Ababa', 2011, p. 24

⁸⁷Interview with Ato Bereket Seifu, Judge in a Civil Bench at Federal High Court of Ethiopia, (Addis Ababa April 12/2018)

capacity of pursuing a business of development. The capacity especially the one related to financial strength is one area where minimum threshold is not provided for under the Ethiopian law.

It is very common to see in Ethiopia that many people who acquire land due to different opportunities such as through succession, leasing from the government, through donation or for other reasons decide to get into business of real estate development thinking of the good profit they will make. The financial need of constructing and finishing up the project is not well thought about by the developer; rather what developers do is that they will advertise the houses they are going to build through the media in order to persuade clients to sign contracts to buy houses. After doing so, the developer collects a huge amount of money from the potential home buyers. Huge amount of money will be in the hands of one developer who would be tempted to take away the money since there is no government intervention and regulation in the area. According to a lawyer of Access Real Estate SC, the developer because it had a very mesmerizing contract that appealed to lots of home buyers; was able to mobilize around 1.2 billion birr which is a very huge amount of money. The noted that this amount of money was very big and even higher than the capital most private banks in Ethiopia had at the time.⁸⁸ On the current status of the company, the lawyer said that this company is now run by a tripartite body that includes representatives of homebuyers who had paid money to the previous developer, by a technical committee organized by the government and by a high level special committee. Hence, from all this it can be discerned that that developers seduce clients by coming up with adverts which are over ambitious compared to their capacity and lure them with contracts which at the end would be un-enforceable. It can also be inferred that it is very unwise to just trust real estate developers with such a huge amount of money mobilized from the public and leave them to regulate themselves.

⁸⁸Ato Tibebe Sirak, Consultant and Attorney-at-law and lawyer of Access Real Estate S.C (Addis Ababa, Feb. 12,2018).

4.2. Conditions Necessary to be met by Real Estate Developing Companies

After establishing the company as a developer and ascertaining its capacity, there are several duties that the developer assumes in fulfilling its objective of finishing up its project and giving away the developed immovable property to its clients. To begin with, it is obvious that there will be a time frame within which the developer shall have to deliver the house in accordance within the contract. Besides the time frame, contract of house development will also put on the developer the responsibility to build the house as per the description and quality priority agreed upon. Such duties of the developer and the Ethiopian experience will be discussed as follows.

4.2.1. Delivery on Time

The major obligation of a real estate developer is delivering the property it has promised to develop as stipulated under the relevant contract. Time is essential when it comes to contracts of real estate development. Home buyers, usually choose developers to build and deliver their houses because they expect such companies to be experienced in this area where they would fulfill their responsibility without any hurdle, and with professionalism.⁸⁹ Ms. Wossene is an Ethiopian diaspora who decided to buy a house from CCD Real Estate PLC. She said that after hearing a lot of good news about the real estate company, she decided to buy two homes one for birr 7,000,000 (seven million) and the other one comparatively smaller for birr 4,000,000 (Four million), the contract stated that the developer would deliver the house within 18 months. However, she said that it took around 24 months to finish and deliver the two houses.

However, after the client pays the required down payment as provided in their contract, the developer fails to perform its obligation. Such non-performance of a contract by the developer is one of the basic issues raised by home buyers in Ethiopia. Delays in construction of residential projects are very common phenomena in Ethiopia, which has caused many controversies between homebuyers and developers. Courts have dealt with close to hundreds of cases of buyers

⁸⁹ Interview with Ms. WosseneGebremedhin, Homebuyer of CCD Real Estate PLC(Addis Ababa, April 25,2018).

suing developers over delays and either seeking to get their money back or to get compensation.⁹⁰

Such grievances are also the basic reason for disagreement that prompts clients to sue developers in the court of law.⁹¹ Judge Sinayehu further stated that most of the cases that come to his bench are results of non-performance of their contract. Non-performance usually relates to late delivery of the houses. He said that developers are usually at fault in delivering the houses as provided in the contracts. In such cases the developer commonly raises defense such as non-observance of formality of a contract provided for in the law (such as signature of witnesses and registration with the relevant authority, default by the client like payment, and price escalation of construction materials. When such cases arise, the court will resolve the conflict using the contract of the parties, Ethiopian general contract law, and using the provisions of the Civil Code under Art 3019 and the following articles which deals with contract of work and labor related with immovable.⁹² However, the part of the Civil Code that deal with contract of work and labor related with immovable property is only appropriate to cases that arise between the contractor and a client. Coming to the case of real estate developing companies though, the nature of the business is different from that of a performance of a contractor. The client of a real estate developer deals with a developer which in some cases may be a contractor like in the example of Sunshine Real Estate PLC, or in other scenarios the developer may give the construction part to the contractor. Therefore, since a real estate developer is not a contractor as provided under Art 3019 and the following provisions, applying it to such cases wouldn't be relevant. Hence, because of the salient features the real estate company has, it is difficult for courts to apply the Civil Code's Article 3019 and following, since a developer is not a contractor in the strict sense.

⁹⁰Addis Fortune, Ethiopia's Real Estate Market, Still Under Construction, www.addisfortune.net/columns/ethiopias-real-estate-market-still-under-construction/ accessed May 10,2018

⁹¹ Judge Sintayehu Zeleke, Construction Bench Judge at the Federal High Court of Ethiopia, (Addis Ababa, April 12, 2018).

⁹²Anne B Frej, & Richard BPeiser, *Professional Real Estate Development*, (2nd Edi, The ULI Guide to the Business Urban Land Institute, 2003)3.

AtoBereket⁹³, has emphasized on the need of having a regulatory mechanism and a legal regime that deals with the problem that individuals encounter when they conclude a contract with a real estate developer. He said that had there been a law that regulates such issues; case flow in relation to a developer would have decreased significantly. Not only that, it would also be easy for courts to apply a law that specifically deals with real estate development, rather than the private contract the parties conclude. This is so because the contracts are adhesive which are prepared by the developer so as to benefit its interest solely. Therefore, even if there is a late delivery by the developer, since the court is going to interpret their contract and because subsequently the contract is drafted so as to benefit the company, the relief the client would get from the court wouldn't compensate the damage incurred because of late delivery.

Hence the issue of timely delivery of the real estate by the developer is a very important area that needs special consideration and regulation by the pertinent body. Even though the parties involved in the real estate market may provide a clause in their contract on the time of performance, this contract is not enough to guide and bring a peaceful and prosperous industry.⁹⁴

4.3. Institutional Aspect

A regulatory agency is a governmental body that is created by a legislature to implement and enforce specific laws. An agency may have quasi-legislative functions, executive functions, and judicial functions.⁹⁵ Therefore regulatory agencies have two major purposes which are

⁹³ Interview with Ato Bereket Seifu, Judge in a Civil Bench at Federal High Court of Ethiopia, (Addis Ababa April 12/2018)

⁹⁴Ato Sintayehu Zeleke said that for the disputes that arise between a contractor and a client, there is a standard contract prepared by the MUPD where most parties make them part of their contract. Because of this, he said that resolving such issue using the standard contract is easier and balanced to both parties. However since real estate developing companies, lack such intervention from the government which would balance interest of the developer and the homebuyer, courts generally adhere to the private contracts.

⁹⁵Shawn Grimsley, 'Regulatory Agencies: Definition, Role, and Impact on Business', www.study.com/academy/lesson/regulatory-agency-definition-role-impact-on-business.html accessed May 10,2018

implementing laws and interpreting them in some instances, they have the objective of implementing laws which are enacted by the legislature. Once the legislature comes out with a law that regulates a certain sector, a relevant authority is needed to follow up and maintain the safety and standard of that specific area.

It has been stated above that the real estate development sector needs to have a special law that recognizes and addresses the distinguishing feature it has as a business, so as to curb the crisis seen in the industry and to prevent similar problems from occurring in the future. Similarly, a regulatory agency that would oversee the implementation and enforcement of the desired special laws is also necessary. In the previous chapter, the case of India has been seen thoroughly as a good set of example. The special laws relevant to real estate developers are regulated by the Authority which was established via the Real Estate Regulation Authority (RERA) Act. This regulatory body has the objective of ascertaining that selling real estate projects are made efficiently and transparently, protecting consumers from fraudulent and other misbehaving acts of a developer, and in establishing a semi-judicial organ that sees cases related to real estate development.

4.3.1. Ascertaining Competency of the Developer

Looking at the Ethiopian case there is no special government body that regulates the real estate sector. Not only that, there are also different issues that are seen in relation to the institution that is responsible for ascertaining the competency of the real estate business and in registering it.

The Ethiopian Standard Industrial Classification herein after referred to as ESIC, is a directive issued by the Ethiopian Ministry of Trade that has the importance of tracing businesses and business activities and creating condition for better regulation, to better establish the flow and chain of transaction of goods and services, to have general licensing, to ascertain whether a particular license is used for legitimate purpose, to have a coordinated approach in giving business licenses, and to clarify responsibilities of government agencies within the sector they're in and help them promote it.

Therefore, it can be deduced that the ESIC has the objective of regulating businesses through providing mechanisms through which a business can get a license and of offering competency certification to these businesses.

Looking at what the take is for the case of real estate developing businesses under the directive, the business of developing real estate, subdividing real estate into lots and residential development which is the scope of this study, is verified by the Ministry of Urban Development Housing and Construction (MUDC) while the licensing mandate is given to the Ministry of Trade.

However, after the issuance of the above directive, Proclamation No. 916/2015 came into effect to redefine the organization, powers, and duties of the executive organs of the FDRE. This Proclamation has divided the MUDC which previously had the function of regulating and working on the issues of both urban planning and construction. The Ministry was split into two as the Ministry of Urban Development and Housing and The Ministry of Construction, both with different powers and functions. The Proclamation didn't provide as to which pertinent government organ deals with the regulation of real estate business is not provided.

ESIC provides that competency of the real estate developer is given by the MUDC; however proclamation No. 916/2015 has separated the organs and created the MUDH and the MOC. However the issue as to which of the two organs should give the competency license of the business is not provided by the proclamation.

According to Ato Yitagessu Nigusse⁹⁶, he said that when they go through registration of a real estate business, the ascertainment of the competency of the business is not implemented yet by any organ. He said that mechanism through which a real estate company under establishment is evaluated whether it is competent to do the business or not has not been provided for both by the MUDH and by the MOC. On the other hand Ato Beyene Melesse stated that competency of real estate business activity practically is given to the MOC, however he noted that the requirements that needs to be fulfilled by the applying company is not yet set out by the ministry. Therefore because of such lack, the real estate companies simply goes to the Ministry of Trade to be registered without assuring that they are competent enough to engage in this business.

Therefore this legal gap as to which government organ is responsible in assuring the competency of this huge sector of business is one practical problem that can be observed. Not only that, the minimum threshold expected to be fulfilled by the developer has not yet been prepared by the relevant government agency. Such lack of providing competency requirements can be seen as

⁹⁶ Interview with Ato Yitagessu Nigussie, Attorney and Consultant at Law, (Addis Ababa, May 1, 2018).

one reason for real estate developers to get into business without first acquiring land and the financial capacity to develop houses.

4.3.2. Maintaining Safety and Standard

A wise regulating of a real estate developer ensures that only suitable and qualified people are allowed to operate in the real estate industry. It requires applicant to have certain qualifications, experience, and be a person of good character and repute.⁹⁷ To do this, it is inevitable that there will be a government organ that ascertains and monitors the well-functioning of the industry. Starting from the registration of the company itself and the project it involves to, to keeping record of real estate transaction, to complying with the requisites provided such as on advertisement, evaluating legal documents like that of the contracts signed, and up to complying with consumer protections laws a regulating organ is required.

Looking at the Ethiopian case, absence of such regulatory institution has brought about a lot of mess in the past creating unpredictability and non-uniform system in the housing sector. Ato Biruk Shimeles, Deputy Manager for Development at Flintstone Real Estate on this regard has said that, "...there have been cases where real estate developers have sold houses that do not exist, through false advertisements and because of lack of regulations in the sector"⁹⁸

The real estate market has been heating up in Addis Ababa; attracting capital from foreign and domestic investors because of rapid urbanization and severe housing problems, this development has contributed 12.5% to domestic growth in the past 10 years.⁹⁹

However, even though this sector has been increasing and has been having a positive effect on the overall economy of the country, it has not yet received the necessary follow up needed. The

⁹⁷ Government of Western Australia Department of Mines, Industry Regulation and Safety, *Real Estate and Business Agents Licensing, Registration, and Code of Conduct*, www.commerce.wa.gov.au/consumer-protection/licensing-and-registration-real-estate accessed May 21, 2018

⁹⁸ Addis Fortune Magazine, Interview by with Ato Biruk Shimeles, Deputy Manager for Development at Flintstone Real Estate

⁹⁹ Samson Berhane, 'Ethiopia's Real Estate Market, Still Under Construction', Addis Fortune (April 1, 2017 Vol.17 No.882)

real estate business in the past has encountered different hindrances that mostly resulted from the failure of the developer, which at the end of the day has brought fear and mistrust in the sector by home buyers. One of the earliest catastrophes faced by this sector was the case of Jakros Real Estate, this company was amongst the first developer to come into the scene. This company collected a total of 27 million birr from over 250 home buyers¹⁰⁰, but failed to meet its objective where it finally declared bankrupt without even delivering a single house to its clients. History has also repeated itself in the case of Access Real Estate SC. Even though this company isn't declared bankrupt yet, the financial crunch it has experienced was a reason of chaos to the 2500 home buyers that has paid up around 1.2 billion birr. It is evident that when a single developer fails, the buyers will be affected, not only the buyers but also their families will also be shocked by the aftermath. It doesn't only stop there; the economy and the development of the country will also be hampered. The large sum of money mobilized from the public will be wasted, in which case the potential of the sector for the development of the economy will be barred.

Trust is a key component in the business of real estate development. Homebuyers need to have confidence on the developer since they hand over their money they have saved probably their entire life. However, because of the lack of regulatory body that they can go to and file their complaints in case of failure to deliver as promised, this essential element of lack of trust coupled with the non-existence of a regulatory organ has impeded the real estate sector significantly. Ato Tibebe Sirak further stated that from the disputes that end up in courts the experience he has in the area, he emphasized on the need of having a regulatory institution that deals with the issue of real estate development. Preventive measure could be taken before sliding down the mud and going into serious problems. This can only be realized if there is a strong authority that knows the sector and is able to enforce the special laws so as to keep the safety and standard of the industry.

¹⁰⁰ Addis Shiferaw, 'Real Estate Run Likely; What to do About It?', Addis Fortune, (Vol. 13, No.670, March 3,2013)

4.4. Impact on the Judiciary

4.4.1. Case Analysis

In this part, the paper will try to look at few cases brought to the Federal High Court of Ethiopia so as to understand the type of disputes that arise between developers and the client. The cases are chosen randomly but they show the different reasons for disagreement between the parties and the effect non-regulation of the business has on the judiciary by bringing a case load.

In a case brought to the Federal High Court¹⁰¹, the plaintiff Captain Eyasu Gutema sued Pacific link Ethiopia Real Estate PLC for reason that despite a contract of work relating to immovable where the defendant agreed to build and deliver two separate houses within 15 to a maximum of 18 months from the date where the contract was concluded (Hamle 20/1999) one for a price of 3,380,000 and the other for 1,430,000; the developer was not able to deliver the house. The plaintiff further stated that even after paying 25% of the overall payment on Tahisas 23/2000 the developer didn't perform according to their contract up until this suit was filed which was on Meskerem 12/2007. Hence, the relief sought by the plaintiff was for the defendant to perform as per the contract and deliver the house; and if the defendant is not able to finalize building the house, he claimed for the developer to be forced to hand over the unfinished house and the plaintiff to build the house until 50% of it is completed and after that for the defendant to transfer the title deed and other relevant documents to the plaintiff. In addition to that, the plaintiff demanded the defendant to refund additional cost, if there is any, for finishing up the construction if the court decides for the plaintiff to finish building the houses; and for payment of damage pursuant to the contract they agreed on.

The statement of defense brought by the defendant was that the house was not delivered to the plaintiff because he did not make payment in due time as was provided under their contract. The company stated that after completing 40% of the construction it gave a notice to its client both in writing and in words to pay the second payment provided under their contract. However, it argued that since the plaintiff didn't perform his obligation, the developer was not obliged to build the houses and deliver it to its client.

¹⁰¹Federal High Court 8th Civil Bench, File Number 153424, decided on Sene 13/2009

The court, after looking at the statement of claim and defense made by the parties and in accordance with the evidence they produced and the relevant laws, decided in favor of the plaintiff. The reasoning of the court was that the real estate developer did not substantiate its argument that it has given notice with any evidence. The court further stated that even though their contract provides for the developer to bring about the consultant's affirmation that the work is actually completed, the defendant didn't show that such affirmation was made. Hence, the court made a decision that the contract was not performed due to the developer's failure to perform its obligation; and made a ruling for the forced performance of the contract by the defendant, and if that's not possible for delivery of the houses as they are, and the defendant to fulfill all the requirements needed to transfer the title to its client, the plaintiff.

From this case it can be seen that even though the contract concluded between the developer and the client has a due date for building and delivering the house until mid-2000 E.C, the developer was not able to perform its obligation up until 2007 E.C. The developer further failed to notice the client in written form and have an independent consultant approve the works done by the developer in order for the client to pay what is expected of him as per their contract. Hence, it can be observed that real estate companies that engage in developing a house have a predicament of delivering on time they say they would. Not only that, even though the real estate company has provided under their contract for the conditions the company has to fulfill before accepting further payment from the client such as that of sending a written notice and getting an approval from a consultant, they failed to do so. So, one can see that late delivery and conditions to be fulfilled for payment by the client is one of the issues that are prevalent in the real estate industry.

In *Tarekegn Gizaw vs. Pacific Link Ethiop Real Estate and Access Real Estate*¹⁰², the plaintiff brought a suit to the court stating as per a joint venture made by the defendants to develop a house and sell, the plaintiff entered into a contract to buy a house which was to be developed by the defendants. He stated that he paid a total of 1,360,000 as a first payment and that even though

¹⁰² A Case Brought to the Federal High Court 15th Civil Bench with a File Number 190719, Decided on Hidar 7/2010

the house has been built and completed by the defendants, they were not willing to hand over the house. Therefore, the relief he sought was for the defendants to deliver the house as per their contract.

Since the 1st defendant was not present on the 1st hearing, the case was seen ex-parte in relations to it. On the other hand, the 2nd defendant raised defenses such as: the contract was not signed by two witnesses therefore it didn't fulfill legal formality, the plaintiff was expected to make final payment until Nehasse 29/2003 but he didn't pay that in accordance with specific date provided under the contract. Because of the insolvency faced by the 2nd defendant, the government (Ministry of Trade) has facilitated a scheme to bring a solution for clients of the developer and an injunction has been passed by Addis Ababa City Land Development Management Office on any construction upon the land acquired by the 2nd defendant. Therefore, the defendant argued that the plaintiff can only demand to be refunded the money he has paid and not the house itself.

The court after framing the issue as to whether or not the defendants should deliver the house to the plaintiff or not, it analyzed the case as follows. It said that the contract of work concluded by the parties obliges the client (plaintiff) to make 40% payment of the total 3,400,000 as part of the first payment. However, what the plaintiff actually paid was that of 1,360,000 which was below the 40% requirement by birr 1,372,000 which was provided under their contract; and it was also said that the rest of the payment expected from the plaintiff was not effected in due time. Therefore the court concluded that the plaintiff cannot ask for the performance and delivery of the house without him first fulfilling his obligation of paying pursuant to the contract.

In the above case, it can be seen that the court made its decision based on the contract of work concluded by the parties. Their contract has provided 40% initial payment on the date of conclusion of their contract; and the first payment which was almost 40% of the overall price was already paid by the client. Further, the rest of the payment is said to be made once the developers build the house up until what was paid by the client, and when the developer informs him of the status of the house and require him to pay the rest of the price. However, the court even after acknowledging the fact that the client has paid a significant amount of the required 40% first payment provided under the contract, it overlooked the obligation that follows on the developer. The developer has failed on giving notice to its client to pay the rest of the money in

order to complete building the house and delivering it. Hence, it can be seen that while the real estate developers themselves didn't fulfill their obligation, the court only saw it from the perspective of the buyer's obligation.

From this case it can be inferred that the non-existence of legal regulation of the real estate business will force the client to pursue its case to court, where the court would only look at the contract concluded with the possibility of wrongly interpreting it.

In a case between Mrs. Elisabeth Kokeb (etal) vs Access Real Estate S.C and Tulu Dimtu Real Estate plc, the plaintiff brought a suit to the Federal High Court in file number 134249 stating that they concluded a contract with the defendants who were then working as joint venture with the object of building a house for Birr 850,000. They stated that the defendants further agreed to pay a 15 % penalty on the amount of total money paid by the plaintiff if the developer failed to perform the contract as per their agreement. However, even though the plaintiffs paid the whole amount of money provided under the contract, the defendants were not able to perform their obligation. They pleaded that the court should terminate the contract, and that the defendants should return back their money together with the agreed 15% penalty, and for the defendants to pay liquidated damage because they didn't build the house in due time.

The first defendant stated in its Statement of Defense that it was not party to the contract, the defendants have separate legal personality, and that it didn't accept any sort of money from the plaintiffs.

The second defendant on the other hand raised arguments such as:- it doesn't know the contract brought by the plaintiffs, since contract is a contract of sale of immovable it should have been made in the relevant government institution, that it was not signed by the plaintiffs and witnesses, and that the 2nd defendant didn't agree to provide land or build a house.

The court after looking at the contested contract concluded that there was a contract of developing and selling of a house, the plaintiffs being buyer, while the defendants acted as developers. It further analyzed that since it's a contract made for developing a building as per Art 2876, there is no any requirement of concluding it at a notary office. However the court cited Art 1726 of the civil code where it is provided that if the parties agree to conclude their contract in a

written form, the formality provided on the subsequent article which is a signature by two witnesses on the contract should be fulfilled. However the court reasoned that even though the parties agreed to make their contract in a written form, they didn't meet the threshold of having two witnesses as signatories, and hence invalidated it. Finally it decided against the 2nd defendant to give back the Birr 850,000 for the plaintiffs with a 9% interest starting from the date they received the money from the plaintiffs.

From this case it can be inferred that real estate companies that usually prepares an adhesive contract of developing and selling a house bring defenses by raising loopholes under the contract. It can be seen from the statement of defense brought by both defendants that their defense was more or less related with the contract concluded with the defendant. It is obvious that legal documents such as that of a contract of selling of a house which is not yet built can become complex than that of a sale of a simple immovable property. In such a case, the party doesn't have a clear knowledge of the property they are going to acquire unless full information of the house to be built is succinctly provided under the contract. In addition to that, since delivery of the house is not made effective with the conclusion of the contract, payment is also expected to be made by way of installment. Hence, the contract is also expected to be deal with methods of payment by the client. Issues such as formality of the contract provided by the law should also be adhered to. Nonetheless, because parties especially the client is a layman, the contract made by the client and the developer is usually more beneficial to the real estate companies. In this specific case too, it can be seen as an instance where the real estate company who obviously prepared the contract failed to meet the formality requirement of two witnesses, which at the end had the effect of invalidating the contract itself with a negative consequence upon the clients.

There are also other controversies that are raised in courts after judgments have been rendered and at the execution stage. In one instance where Access Real Estate S.C is a judgment debtor, the court decided on sale by auction of the debtor's immovable property to satisfy the decree made by the court for the individual judgment creditor. The developer and the Addis Ababa City Administration filed an objection to the execution bench stating that the immovable property of the debtor ordered to be sold by the Federal Courts Execution Directorate is a bare land with a

small mud house, and such land cannot be sold to a third party because the developer after taking the land through lease from the government hasn't met its objective of developing a building on that bare land. Therefore they argued that while the debtor was expected to build a house on this land, its failure to do so will impede such land to be registered in the name of the debtor to be auctioned in anyway.

However the court didn't accept the objection filed by the city administration and the petition brought by the judgment debtor. The reason for this was that the land of the debtor was already sold through the Federal Courts Execution Directorate after making sure that the property was that of the debtor's, and the Lease Proclamation doesn't prohibit land of the debtor to be auctioned by an order of the court. The court has further reasoned its judgment by citing the civil procedure's article.¹⁰³

This decision of the execution bench shows that real estate developers after getting a land through lease, fail to use such land as pertinent to their objection. Even though they are granted a piece of land to develop homes upon it, they fail to do so and just possess the land without making any use of it, which is an inappropriate usage of resources. Not only this, if the real estate company becomes a debtor, it is expected that the creditor will try to satisfy its claim by going against the debtor's property. However, if such property is a bare land it would hinder the execution of the debt just like it did in this specific case.

¹⁰³ The civil procedure code under Art 418 does not apply to situations where the property ordered to be sold by auction has already been sold. It only applies to instances where the property to be auctioned has not yet been sold. Further, the court stated that Art 445 only applies to situations where the bid is set aside in case where there are substantial problems such as irregularity or fraud. However, since the bid did not have any of those problems the court rejected the argument of the judgment debtor.

Chapter Five

Conclusion and Recommendation

The final chapter of this research is dedicated on answering to the research questions framed. The final conclusion of the paper will be forwarded. Based on the finding, recommendation will be forwarded on the regulation of real estate development business.

5.1. Conclusion

The first issue raised by this research paper is:-

- Is it necessary to bring about legislation on the regulation of real estate or is it better to let them be regulated with the contracts they make with their client?

It has been seen by the paper that the idea of real estate development as one part of business to be a recent phenomenon in Ethiopia. Even though the commercial code recognizes buying immovable and altering and adopting them for the purpose of selling them as trade activity, it has been seen that people during the imperial or the Derg era was not involved in this business per se. However after the liberalization of the market post 1991, the business of real estate development by the private sector has increased immensely. This increase has played its part in the development of the Ethiopian economy.

Nonetheless, even though this sector contributed to the economy of the country and has the potential of providing housing for the middle and high income generating family, due attention has not been given to it by the government. Real estate developing companies has been doing business basically without any intervention from the government. Developers have been seen to draft contracts which at the end of the day have benefited their interests solely. Such contract has not been enough to maintain the safety and soundness of the industry. Many home buyers have chosen to bring their cases to court in order to find solution. However, because the contracts are not balanced, it is difficult for buyers to be compensated.

Not only that, it has also been seen under the paper that the contract made by the parties does not have a preventive mechanism so as conflict not to arise. The real estate developing country takes the upper hand in every dealing they undertake with the client.

Hence the research has comprehended that the simple contract between the developer and the home buyer is not enough to curb the problem. Rather, it is of essence that the government plays its role so as to bring fair play in to the game.

The second issue framed by the paper is:-

- If legislation is necessary to regulate real estate companies, what kind of regulatory mechanisms should be provided by the law?

The response for the first issue raised was that parties should not be left to regulate themselves and that there is a need for legislation that governs this area. The paper has seen that major problems of a developer starting from its establishment as a company up until fulfilling its object and delivering the houses should be appreciated. A developer is expected to have the required business license and satisfy a competency requirement provided by the pertinent government organ. These requirements could be having land and a title deed and having the financial capacity. Satisfaction of these requirements is seen not be enough, developers also have the obligation to deliver houses on time as per the promises they make initially.

- The last question of the research was:-

What should be the role of institutions in regulating and maintaining good working environment for the real estate industry?

The Ethiopian law has not clearly forwarded the responsible government organ that oversees the real estate business sector. Starting from which organ ascertains competency is not clearly defined. Not only that, it has been seen that victims of fraudulent act by a developer only has the option of going to court in order to get justice. There isn't any authority that checks the well-functioning of the sector, and a place where clients can apply to when they face difficulty in their relation with the developer. A lot of chaos has been experienced in the

past such as bankruptcy of a developer and loss of a huge amount of mobilized money from the public. This has cracked the trust element necessary for doing business of real estate development.

Therefore the role of real estate regulating authorities should be to provide mechanism into which a real estate developer can be competent and making sure that only the competent ones gets into business. Maintaining the safety and standard of the industry by taking into consideration the protection of homebuyers as well as developers is also seen to be a very important duty.

5.2. Recommendation

Given the unregulated status of real estate companies and the impact it has on home buyers, developers themselves, the government and the overall economy of the country, the writer would like to recommend the following points.

- The government should take the initiative to issue a legislation that regulates the real estate business. The regulator should incorporate a triangular notch in which the major actors within this business which are, real estate developers, the client, and the real provider (the government organ that provides certification and land) to be addressed as to what their obligation with the view to ensure a peaceful industry.
- There should be established a special organ that monitors and enforces the law that relates to real estate business. Since real estate development has a unique feature that mingles construction and trade as its major activities, this special organ should have know-how on these matters so that it can effectively regulate them. The MOT and MUDP are the government organs that have closely worked with developers; hence these organs should create a desk that can control this business. It is also wise to have a standard contract drafted by this organ for developers and clients so that it will create predictability and certainty within the industry.
- A special law that regulates real estate developers should incorporate comprehensive and concrete laws that seek solutions to current problems such as competency of a developer, timely delivery of properties, and mechanism through which title deed are acquired by

the developer, and methods and types of advertisement made by a developer company should be thoroughly regulated by the government. And the status of statements made in brochures and advertisements need to be determined.

- The regulatory legal framework should also include ways to punish a real estate developer in case there is a wrongdoing by the developer, so that it will have a deterrence effect for the future. This will make the industry safe for investment and create a peaceful industry which at the end will aid the development of the country.
- The researcher, at last, recommends for further study in the area and for the sharing of experience of states that have sharp laws in this regard such as that of India. Stakeholder in this area like developers themselves, clients and relevant government organs should work together in detecting and preventing potential problems.

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