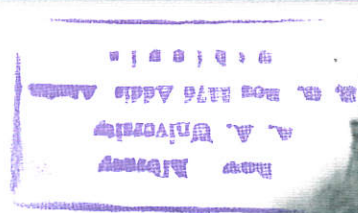


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**ADDIS ABABA UNIVERSITY**  
**COLLEGE OF LAW AND GOVERNANCE**  
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**GRADUATE STUDIES**

**FORM OF CONTRACTS RELATING TO IMMOVABLES IN  
ETHIOPIA: ANALYSIS OF THE POSITION OF THE  
FEDERAL SUPREME COURT CASSATION DIVISION**

**BY:**

**WORKNEH ALEMNEW**

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**February, 2014**

**ADDIS ABABA**

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**By:**

**Workneh Alemnew**

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**A Thesis Submitted to Addis Ababa University, School of Law,  
in Partial Fulfillment of the Requirements for the Degree of  
Masters of Laws (LL.M) in Business Law**

**February, 2014**

**Addis Ababa**

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**APPROVAL SHEET**

**Form of Contracts Relating to Immovables in Ethiopia:  
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## **DECLARATION**

I, the undersigned, declare that this thesis is my original work, and has not been presented for a degree in any other university, and that all sources of materials used in the thesis have been duly acknowledged.

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## Abstract

The justifications for the importance of the doctrine of precedent rest on the need for certainty, reliance, equality and efficiency in the law. Hence, cases involving similar legal issues are expected to have similar outcome in all courts. When the Ethiopian Federal Supreme Court Cassation Division (FSCCD) tries to hold on its decisions of prior cases, its credibility will increase. This paper, however, finds that the Cassation Division rendered many contradictory interpretations on Article 1723 of the Civil Code of Ethiopia which deals with form of a contract relating to an immovable. The FSCCD neither clearly follows nor overrules its own interpretation rendered in Cassation File No. 21448 (the Gorfie Case) and this creates a conflict within its jurisdiction. It, in this case, held that the requirement of registration before a court or a notary as embodied in Article 1723 is binding thereby rendering unregistered contract of sale of an immovable a mere draft that is non-enforceable. The debate that arises after this interpretation partly lies in the fact that the Cassation division has departed from settled practices to enter into a contract relating to an immovable. The judges in the FSCCD state that this interpretation is the governing principle as to form of contracts relating to immovables so far. However, in the opinion of the writer, registration is not a formal requirement for the validity (*ad validitatem*) of a contract relating to an immovable. The sole purpose of registration is publicity as envisaged under Articles 2877 and 2878 of the Ethiopian Civil Code. The prevailing practices proved that contracts relating to an immovable were not registered with a court or a notary.

The writer has not observed a consistent approach in the other interpretations of the Cassation Division which he has examined as to form of a contract relating to an immovable. The Cassation Division rendered clashing interpretations with the Gorfie Case in Cassation File Numbers- 36887 (Alganesh v. Gebre), 39336 (Nyala Insurance S.C v. Adugna and Tenaye), 38666 (Development Bank of Ethiopia v. Ato Tesfay) and others. Almost all of the inconsistent interpretations of the Cassation Division are rendered within two years time span, i.e. from 1999 to 2001 E.C. Hence, the decisions of the FSCCD on form of a contract relating to an immovable have not stayed for reasonable long period of time without being overruled. As a result, trial courts, lawyers and other planners of transactions find themselves in untenable position where they are bound by conflicting decisions of the Cassation Division. In the present Ethiopian situation, it is hard for lawyers to advise their clients with a confidence that the law as to form of a contract relating to an immovable is settled. Such inconsistent interpretations of laws, if allowed to persist, forfeit the benefits of certainty, stability and predictability of the law which the doctrine of precedent is intended to foster.

Consequently, there is a need for further reform of the position of the FSCCD on form of a contract relating to an immovable. The Cassation Division should clearly overrule its blameful interpretation rendered in the Cassation File No. 21448 (the Gorfie Case) since the interpretation has departed from settled practices. Every ruling of the FSCCD has far reaching implications on the legal system of the country. Therefore, the cassation judges should critically consider the impacts of their interpretation on social, economic, political, cultural and moral contexts of the people. They have to make sure that their decision would exist and applicable relatively for a reasonable long period of time. The FSCCD should follow one fairly reasoned position and clearly overrule other contradictory decisions. Every interpretation has to be made in accordance with the concept of horizontal *stare decisis* that the Cassation Division should refrain from creating conflicting interpretation of laws.

# CHAPTER ONE

## 1. INTRODUCTION

### 1.1. Background of the Study and Literature Review

Form of a contract is a conditional requirement of the law so as to ensure the validity of a contract.<sup>1</sup> Based on formality requirements, contracts can be classified in to Simple contracts and Special contracts.<sup>2</sup> Simple contracts are those contracts which need not be made as per a prescribed form.<sup>3</sup> Most contracts relating to movable properties are simple contracts.<sup>4</sup> On the other hand, special contracts are those contracts that have to observe special forms expressly prescribed by law.<sup>5</sup> Freedom of form is the prevailing principle to be exercised between parties who enter in to a contract.<sup>6</sup> However, the law exceptionally requires the observance of certain formalities for certain kinds of contracts which are very important juridical acts.<sup>7</sup>

The rationale behind the requirement of certain acts to be made in a special form is mostly related to public interest or the importance attached to the things under consideration by the populace.<sup>8</sup> A contract relating to an immovable is one category of contracts that the law requires to be expressed in an established and legally prescribed manner.<sup>9</sup> However, there has been a controversy as to the scope and applicability of Article 1723 of the Civil Code of Ethiopia among judges and legal scholars of the country. Many judges and scholars argue that lack of registration with a court or notary of written contracts relating to “immovables”<sup>10</sup> does not affect the validity

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<sup>1</sup> See J.L Francis and H.J Gilbert, *Corpus Juris Secundum*, volume 37, 1969, West publishing co. p.10.

<sup>2</sup> See William .P. Anson, *Principles of English Law of Contract*, 19<sup>th</sup> ed. 1945, Oxford University Press, pp. 4-88. See also Million Assefa, *Form of contract relating to immovables in Ethiopia, the law and interpretation*, Wonber, Alemayehu Haile Memorial Foundation's Periodical, 6<sup>th</sup> half year, April/may 2010, p.17.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> See *Civil Code of the Empire of Ethiopia, Negarit Gazeta*, Proclamation No. 165 of 1960, 19<sup>th</sup> year, No 2, (hereinafter called the 1960 Civil Code of Ethiopia), Art. 1719 (2)

<sup>6</sup> See Ibid Art.1719 (1).

<sup>7</sup> See Tilahun Teshome, *Basic Principles of Ethiopian Contract Law*, 1996, Federal Supreme Court, Research and Publication Department, pp. 64-67.

<sup>8</sup> See Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p.34.

<sup>9</sup> See Art. 1723 of the 1960 Civil Code of Ethiopia

<sup>10</sup> An immovable, considered in its legal aspect, is a piece of land that includes a determinate portion of the earth's surface: the ground beneath the surface down to the center of the world; and, possibly the column of space above the surface ad infinitum. See John Salmond, *Jurisprudence*, 10<sup>th</sup> Edition, 1947, Glanville L. Williams ed, p. 428 as cited in Henry Campbell Black, *Blacks law Dictionary*, 5<sup>th</sup> Edition, 1979, West Publishing Company.

of a contract.<sup>11</sup> Others argue that a contract relating to an immovable can only be valid if both the requirements as to writing and registration before a court or a notary are met. Since 1999 E.C the later argument has become the principal position of the Federal Supreme Court Cassation Division of Ethiopia. The interpretation of the Cassation division of Ethiopia in *Gorfe Gebre Hiwot v. Aberash Dubarge and Getachew Nega*<sup>12</sup> has given rise to a controversy extending well beyond the ranks of legal profession.<sup>13</sup> In this case, the Cassation Division held that a contract of sale of an immovable can only be valid if the two requirements as to form are satisfied; i.e, the contract shall be in writing and it shall be registered with a court or notary. “The reason for the unusual interest and controversy partly lies in the fact that the Cassation division has, in so ruling, chosen to depart from settled practices and, in the process, lent life to provisions of the Civil Code long considered still born.”<sup>14</sup>

In Ethiopia, cassation may be taken as a means by which a final decision of any lower court, in relation to which appeal is exhausted; containing a basic error of law is reversed or varied by the Cassation Division.<sup>15</sup> The Ethiopian Parliament passed Proclamation No. 454/2005 which re-amended Proclamation No. 25/96 in order to avoid the likely disparity in the interpretation of laws among courts. According to this proclamation, an interpretation of a law rendered by the Cassation Division is binding on federal and state courts at all levels.<sup>16</sup> Hence, the Cassation Division is expected to render uniform, certain and predictable interpretation of cases having similar question of law. However, the cassation division gives different interpretation of laws over cases containing the same legal issue within very short period of time.

The cassation division renders several interpretations for Article 1723, which is one of the controversial provisions of the 1960 Civil Code of Ethiopia. The provision deals with form of contracts relating to immovables. Surprisingly, most of the interpretations of the cassation division on Article 1723 of the Civil Code are not consistent with each other. This has created a

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<sup>11</sup>They base their argument on the ideas of George. Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, 1983, Addis Ababa University, Faculty of law, p. 74. See also Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p.32.

<sup>12</sup>See *Gorfe Gebrehiwot v. Aberashe Debargie and Getahun Nega (Federal Supreme Court Cassation Division of Ethiopia)*, 2007 G.C, Civil Cassation File No.21448), vol. 4.pp.39-47

<sup>13</sup>See *Ibid* and Yohannes Heroui, *Registration of Immovables under the Ethiopian Civil Code; An Overview in Comparative Perspective*, Ethiopian Bar Review, Vol.2, No.2, March 2008, p.31.

<sup>14</sup> *Ibid*

<sup>15</sup>See Art. 80(3)(a) of the 1995 Constitution of Federal Democratic Republic of Ethiopia.

<sup>16</sup>See Art. 2(1) of Proclamation No. 454/2005 of Federal Democratic Republic of Ethiopia

doubt on the uniformity, certainty and predictability of the decisions of the Cassation Division. Moreover, the practice shows that most of the contracts relating to immovables are not registered before a court or notary due to different reasons. Even the prevailing practices of banks and micro financing institutions prove that most of the contracts of mortgage are not registered before a court or a notary. Consequently, the government enacted Proclamation No.639/2009 for the amendment of Article 1723 of the Civil Code. This proclamation, however, is problematic since it creates rule and out come inequality between the litigations of financial institutions and other persons in the country. It has also a retroactive effect since it has terminated the decisions of courts rendered prior to the effective date of the proclamation. It, therefore, violates the judicial independence of courts at all levels in the country.

## **1.2. The Research Problem and Questions**

Proclamation No. 454/2005 stipulates that interpretation of law by the Federal Supreme Court Cassation Division (hereinafter called the FSCCD), is binding on federal and state courts at all levels.<sup>17</sup> It has the purpose of maintaining uniform interpretation of law and avoiding any disparity in the interpretations of law by courts at all levels.<sup>18</sup> However, the practice shows a different thing. The FSCCD gives different interpretations of laws over cases containing the same legal issue within very short period of time. This research, therefore, tries to show the fact that FSCCD has rendered different interpretations on Article 1723 of the Civil Code of Ethiopia, which deals with form of contracts relating to immovables.

There is still a big issue as to which interpretation of the cassation bench is to be adopted by the lower courts. The problem has, in fact, created confusion on judges, lawyers, litigating parties and other stake holders to adopt the appropriate interpretation of the law. Hence, it has created a question on the uniformity, certainty and predictability of the decisions of the FSCCD as to form of contracts relating to immovables. As per Article 1723 of the Civil Code a contract relating to an immovable shall be in writing and registered with a court or a notary. On the other hand, Article 2877 of the Civil Code, which deals with Form of a contract of sale of an immovable, provides that a contract of sale of an immovable shall be of no effect unless it is made in writing. It remains silent as to registration requirement. This study argues that there is a

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

real contradiction between the general provision (Article 1723) and the special provision (Article 2877) of the Civil Code. However, the FSCCD, in the case (F. No. 21448) between Gorfie G/Hiwot and Aberash Dubargie on Miyazia 30, 1999 E.C,<sup>19</sup> holds a position that there is only apparent contradiction between the two provisions and concludes that the provisions shall be used cumulatively. In this case, the court held that a contract of sale of an immovable can only be valid if both the requirements as to writing and registration before a court or a notary are met.

The FSC CD, in the case between Nyala Insurance S.C Vs. Adugna, and Tenaye,<sup>20</sup> held that even though the contract relating to an immovable was not registered with a court or notary, the petitioner has made improvements on the building that it bought. And, it ruled that the contract shall not be invalidated since the invalidation would involve serious inconveniences. The FSCCD gave another conflicting interpretation in the case between Woizero Alganesh vs. Ato Gebru and Woizero Workit<sup>21</sup>. In this case, the court held that even though the contract relating to an immovable was not registered with a court or notary, it shall not be invalidated unless one of the parties to the contract challenged the contract for not being registered before a court or a notary. There are also other interpretations of the FSCCD on the same legal issue that are going to be analyzed in chapter four of this research.

Many legal scholars believe that the registration requirement is not practically observed by contracting parties in Ethiopia.<sup>22</sup> The prevailing practices of banks and micro financing institutions also prove that contracts of mortgage are not registered before a court or a notary.<sup>23</sup> Consequently, the government enacted Proclamation No.639/2009 for the amendment of Article 1723 of the Civil Code. The other important issue is; what is the scope of Article 1723? Article 1723 clearly governs any party that concludes a contract relating to immovables. But, Proclamation No. 639/2009 adds a new sub- article (3) as an exception under Article 1723.

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<sup>19</sup>See Gorfie G/ Hiwot v. Aberashe Debargie and Getachew Negga, *The Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, volume 4, Civil Cassation File No-21448, 1999 E.C, p. 40.

<sup>20</sup>See Nyala Insurance Share Company v. Ato Adugna Ejigu and W/o Tenaye Geleta, *Federal Supreme Court Cassation Division*, Cassation File Number- 39336 , 2001 E.C, pp.362-363.

<sup>21</sup>See Woizero Alganesh v. Ato Gebru and Woizero Workit , *Federal Supreme Court Cassation Division*, Cassation File Number 36887, Volume 13, 2001 E.C, pp. 233-235.

<sup>22</sup>See Mekibib Tsegaw “ *Contracts Relating to Immovables and the Question of Form; Current Concerns*” Amharic Ethiopian Bar Review, 2007, Vol.2, No.1, pp. 153-169

<sup>23</sup> We can infer the idea from *the Preamble of Proclamation No. 639/2009* of Ethiopia.

It provides that “a contract of mortgage concluded to provide security to a loan extended by a bank or a micro financing institution may not require to be registered by a court or a notary.” This provision creates rule and outcome inequality between the litigations of financial institutions and other persons in the country as to registration of contracts relating to immovables. Under similar circumstances, each party should be subjected to and protected by, similar rules.<sup>24</sup> Same issues should be resolved through similar legal rules. And, similar issues, under same grounds should have similar outcomes.<sup>25</sup> Generally, like cases should be treated alike.

In addition, Article 3 of the proclamation No. 639/2009 provides that the proclamation has a retroactive<sup>26</sup> effect on cases decided prior to the effective date of the proclamation. Accordingly, even if a contract of mortgage is concluded prior to the effective date of the proclamation, the validity of the contract may not be challenged for not being registered by a court or notary in accordance with Article 1723 of the Civil Code.<sup>27</sup> This proclamation, therefore, is totally against the principle of non-retroactivity of laws. Nowadays, modern legal systems limit the power of the government to impair or modify contractual rights.<sup>28</sup> The purpose of limitation on retroactivity of laws is to ensure that persons have fair warning of legislative acts and to restrain the government from arbitrary and potentially vindictive legislations.<sup>29</sup> The general principle is that substantive legal rules and measures which detrimentally affect the legal position of individuals and business enterprises may not have a retroactive effect.<sup>30</sup>

In addition to this, Proclamation No. 639/2009 erodes the judicial independence of courts since it has terminated previous decisions of courts. The FDRE Constitution provides that court decisions shall be reviewed only through appeal or cassation before superior courts of the

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<sup>24</sup>See Alem Abrha & Tafesse Habte, *Law of Civil Procedure I*, Teaching material, Unpublished (2009), Justice and Legal system Research Institute, p. 24.

<sup>25</sup> Ibid

<sup>26</sup>As per Black’s Law Dictionary, 7<sup>th</sup> edition, 1999, *Retroactive* relates to a statute or ruling that extends in scope or effect to matters that have occurred in the past.

<sup>27</sup>See Art. 3 (1) of the Federal Democratic Republic of Ethiopia: Proclamation No. 639/2009.

<sup>28</sup>See Deborah k. Mc Knight, *Retroactivity of Statutes, What a Constitutional limit are there on the retroactive application of laws?*, 2005, p. 8, accessed at [www.europeanlaws.com](http://www.europeanlaws.com) , last visited on October 12, 2013.

<sup>29</sup> Ibid

<sup>30</sup>See Ulf Bernitz, *Retroactive legislation in a European Perspective- on the importance of general Principles of law*, 2009, p. 58, accessed at [www.europeanlaws.com](http://www.europeanlaws.com) , last visited on October 12, 2013.

country.<sup>31</sup> The constitution establishes an independent judiciary and vests the supreme federal judicial authority to the Federal Supreme Court.<sup>32</sup> It also provides that courts of any level shall be free from any interference of a government body.<sup>33</sup> However, the legislative body of the Ethiopian government has interfered with and influenced the decisions of courts via Proc. No. 639/2009.

This study, therefore, attempts to delve deeper into the following research questions: and provide some theoretical and empirical answers.

- (1). Does the FSCCD give uniform legal interpretations on Article 1723 of the 1960's Civil Code of Ethiopia as to form of contracts relating to immovables ?
- (2). Are the decisions of the FSCCD on form of contracts relating to immovables stayed for a longer period of time without being overruled?
- (3). Is there any challenge which puts its shadow on FSCCD to achieve uniformity of legal interpretation?
- (4). What do the practices of the FSCCD on form of contracts relating to immovable properties look like?
- (5). Is the amendment of Article 1723 of the Civil Code by Proclamation No. 639/2009 consistent with the constitutional principles of independence of judiciary, equal protection of the law and non- retroactivity of laws?
- (6). Is there a need for further reform of the position of the FSCCD on form of contracts relating to immovables and what should the reform be, if any?
- (7). What are the lessons that can be drawn from the international experience and recommendations in this respect?

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<sup>31</sup> Article 80 of the Constitution Federal Democratic Republic of Ethiopia (FDRE) provides that the Federal Supreme Court and the State Supreme Courts shall have the highest judicial power over federal and state matters respectively. However, the Federal Supreme Court has a power of cassation over any final court decision in the country.

<sup>32</sup> See Art. 78 (1) and (2) of the 1995 FDRE Constitution

<sup>33</sup> See Art. 79(2) of the 1995 FDRE Constitution

### **1.3. The Research Objective and Significance**

The objective of this study principally is to deal with the different positions of the Ethiopian FSCCD on form of contracts relating to immovables. The study, accordingly, aims at achieving two equally important objectives. First, it aims at contributing to knowledge about the different positions of the FSCCD on form of contracts relating to immovables. Second, it, in light of the research background, problems and questions indicated above, aims at indicating the need, areas and nature of further action by the country in general and the FSCCD in particular in order to achieve uniform interpretation on Article 1723 of the Civil Code with emphasis on predictability and certainty of the cassation decisions. The research is useful to both the pursuit of knowledge and the identification of the reform measures for form of contracts relating to immovables. So, the research;

- ❖ provides relevant and research based information for law makers, judges, lawyers and other stake holders for further action.
- ❖ serves as a reference to further researches.
- ❖ contributes knowledge to the existing discourse on form of contracts relating to immovables.

### **1.4. Methodology of the Study**

Unlike the wealth of literature in respect of general remarks on contracts, not much is written in connection with form of contracts relating to immovables in Ethiopia. This study takes advantage of the gap and is conducted through the following:

- Analysis of the existing policies and laws on form of contracts relating to immovables;
- Use of selected decisions of the FSCCD (volume1-14) on form of contracts relating to immovables in the country;
- Field study of courts ;( through visits and discussions with appropriate personnel);
- Use of own work experience as former high court judge in the judicial organ of the country;
- Review of the studies available in Ethiopia;
- Consultation of best model laws and practices of different countries;
- The study also uses quantitative data to substantiate conclusions.

\_ The study is, however, fundamentally qualitative, analysing the different positions of the FSCCD on form of contracts relating to immovables. The approach taken is, therefore, to draw lessons from both the international experience and the domestic situation so as to achieve uniform interpretation of Article 1723 of the Civil Code (on form of contracts relating to immovables) with emphasis on predictability and certainty of the decisions of FSCCD.

### **1.5. Scope and Limitation of the Study**

The study deals with the nature and scope of Article 1723 of the 1960's Civil Code of Ethiopia. The study bases its assertion upon the very objective projected by Proclamation No 454/2005. The enactment of this proclamation introduces a new (*precedent*) system in to the existing legal system of Ethiopia and further anticipates various objectives. Particularly, the study analyzes the purposes and objectives of the proclamation. In the discourse on the above topics, the paper evaluates whether the binding interpretations of the FSCCD, on form of contracts relating to immovables, are uniform, predictable and certain. It also examines the impact of the Proclamation to provide for the amendment of Article 1723 of the Civil Code, i.e. Proc. No. 639/2009 on the achievement of uniform interpretations of the law by the FSCCD.

However, there are challenges for this study. Some Judges in FSCCD are not willing to give the writer sufficient information and/or documents necessary for the study. The fact that some cases are still pending also has its own negative impact as the writer is not able to get access to the recent cases of the FSCCD. Nevertheless, the writer believes that the cases analyzed in this study can depict a broad picture about the state of things as they exist presently.

### **1.6. The Chapters**

All the chapters are structured in a way that they will address both the international experience and the position of the Ethiopian FSCCD on form of contracts relating to immovables. The second chapter focuses on the general overview of forms of contracts. The third chapter discusses forms of contracts relating to immovables. The fourth chapter analyzes the position of the FSCCD on Form of Contracts Relating to immovables. The fifth chapter summarizes and concludes the study and indicates the measures that need to be taken by the country in general and the FSCCD in particular so as to achieve uniform, certain and predictable interpretations of laws regarding form of contracts relating to immovables in Ethiopia.

## CHAPTER TWO

### 2. FORMS OF CONTRACTS IN GENERAL

#### 2.1. Forms of Contracts; Definition and Concept

Form is an established procedure, behavior, method of expression or practice as per rule or custom.<sup>34</sup> It is “a methodology used to express rules of practice and procedure in a way that fits to the law defining it.”<sup>35</sup> Form of a ‘contract’<sup>36</sup> is “a legal and technical manner or order to be observed in contracts or in the construction of contracts or processes.”<sup>37</sup> Some legal scholars define formality instead of form. J.L Francis and H.J Gilbert define formality as;

*“a condition with regard to method, order, arrangement, use of technical expressions, performance of specific acts, etc, which are required by the law in the making of contracts or conveyances to ensure their validity and regularity.”*<sup>38</sup>

As per this definition, formality is a conditional requirement of the law so as to ensure the validity of a contract. Hence, we may take the definition of formality to serve our purpose of introducing the concept of form in general.

Even though the 1960 Civil Code of Ethiopia does not define form, it requires certain legal acts to be made in a prescribed form. The civil code provides certain formal requirements that should be observed by parties who conclude a contract.<sup>39</sup>

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<sup>34</sup> See Henry Campbell Black, *Blacks law Dictionary*, 9<sup>th</sup> Edition, West Publishing Company, p. 723 and see W.J Clark, *Handbook of the Law of Contracts*, 4<sup>th</sup> Edition, 1931, p.62.

<sup>35</sup> Ibid

<sup>36</sup> According to Article 1675 of *the 1960 Civil Code of Ethiopia* a contract is as an “agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.” Therefore, for a contract to exist there must be a minimum of two or more persons, there should be an agreement between the persons, the purpose of the agreement should be to create new obligation, or vary or extinguish existing obligations and the obligations that are created, varied or modified should be of proprietary nature

<sup>37</sup> See Henry Campbell Black, *Blacks law Dictionary*, 4<sup>th</sup> Edition, (1968) West Publishing Company, and W.J Clark, *Supra* note 34. See also J.L Francis and H.J Gilbert, *Corpus Juris Secundum*, volume 37, 1969, West publishing company, p.10.

<sup>38</sup> Ibid

<sup>39</sup> Under many legal systems, formal requirements are reserved for some very important juridical acts, such as, contracts relating to immovables because of the importance attached to land. See, Rene David, *Commentary on Contracts in Ethiopia*, 1973, Translated by Michael kindred (Haile selassie I University, Faculty of Law), p.34 and Articles 1719, 1720, 1723, 1727, 1728, 2877, 2878 of the 1960 Civil Code of Ethiopia.

## 2.2. Sources of Form of Contracts

The general rule of contract law is that contracts can be made quite informally and no writing or other form is necessary unless the law provides otherwise.<sup>40</sup> The principle is, therefore, no particular form of expression in a contract is mandatory. Accordingly, a contract can be made orally or in writing. It may also be shown by conduct. Freedom of Form is the governing principle under the Ethiopian Civil Code because Article 1719(1) provides that no special form shall be required and a contract shall be valid where the parties agree unless otherwise provided by law. All formal requirements in the law of contract are contained in the statutes which deal with specific contracts. Basically, there are two Sources of Form of contracts.<sup>41</sup> They are; (1) Agreement of the contracting parties and (2) the law.

### 2.2.1. Agreement of Parties

Agreement of parties is one source of form of contract since contracting parties are at freedom to stipulate any form they want. Pursuant to Article 1719 (3) of the Ethiopian Civil Code the contracting parties may stipulate that the contract shall be made in a ‘special form’<sup>42</sup>. Here, one may question what is “the special form” that the parties may stipulate? Is it any form that the parties choose or the form the law requires to certain types of contracts? So, the phrase “special form” as provided under Art.1719 (3) would be subject to interpretation. It could be construed to mean any particular form that the contracting parties choose for their contract or the special form that the law provides for certain types of contracts. Rene David, who is the expert draftsman of the Ethiopian Civil Code, in his discussion about Art.1719 of the code states that;

*“... this principle ( i.e the principle of “freedom of form”), however, is set aside in two cases; where the law requires that a particular contract be put in a special form and where the parties themselves have provided that their contract will be concluded in a particular form.”*<sup>43</sup>

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<sup>40</sup> See H.G Beale, *Chitty on Contracts, General Principles*, 28<sup>th</sup> Edition, Volume 1, 1999, London, Sweet and Maxwell, p. 261.

<sup>41</sup> Ibid

<sup>42</sup> The phrase “special form” is employed in all the sub articles of Article 1719 of the Ethiopian Civil Code. Sub-article (1) provides that unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree. Sub article (2) says that where a special form is expressly prescribed by law such form shall be observed. Sub art. (3) Provides that the parties may stipulate that the contract shall be made in a special form.

<sup>43</sup> See Rene David, *Civil Code for Ethiopia*, Tulane Law Review, Volume 37, 1962- 1963, p. 195.

According to Rene David the two exceptions of the principle of freedom of form of contracts are; (i) where the law prescribes a special form that falls under Art.1719 (2) of the Civil Code and (ii) where the parties have agreed to make their contract in a special form that falls under Art.1719 (3) of the same code.

G. Krzeczunowicz in his commentary on Art.1726 of the Civil Code of Ethiopia states that;

*“Where the parties agree that their contract shall be, for instance, in written form (Art.1727), it is not valid and completed until such form is observed. If they subsequently agree on all essentials and all terms of the negotiation, but do it by a letter or in a document certified by only one witness, there is no contract /compare Art.1720 (1) of the Civil Code./”<sup>44</sup>*

G. Krzeczunowicz argues that the stipulation of the parties to make their contract in a special form is a stipulation to be bound by the special form. Accordingly, the concept of the phrase “special form” provided under Article 1719 (2) and (3) of the Civil Code of Ethiopia is similar. In this regard, E. Bekette, who commented on the German Law of obligation, states that;

*“As a rule legal transactions in German Law don’t require a special form. A special form is required only in those cases where a statutory rule expressly prescribes it, or where the parties have agreed that a transaction or part of it can only be concluded in a certain form. Such requirements of form as German law provides have the purpose of either preventing the hasty conclusion of transactions or of securing the certainty about the content and purport of legal transactions.”<sup>45</sup>*

According to the Germany law of obligation, formal requirements of contracts are, therefore, intended to “secure certainty about the content and purport of legal transactions and to prevent the hasty conclusion of transactions.” In the opinion of the writer, the purpose of the Ethiopian contract law can not be different from that of the German law of obligation where requiring the observance of formal requirements. Hence, the special form that the parties stipulate should be the form prescribed by the law for some other juristic acts so as to achieve the purpose of formal

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<sup>44</sup>See George Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, 1983, Addis Ababa University, Faculty of law, p.75.

<sup>45</sup> See E. Bekette, *Introduction to Civil and Commercial Law*, 1950, London, Sweet and Maxwell, p. 87.

requirements. For instance, when the parties agree to make their contract in written form, they shall observe every elements of a written contract as per the relevant provisions of the law.

### **2.2.2. The Law**

No valid contract shall exist unless the contract is made in the form prescribed by law, if any.<sup>46</sup> The phrase “if any” implies that the exceptional cases to freedom of form where formalities are prescribed by law are few. The necessity of formalities is important when courts are not confident enough to discover the truth about a case with out the trappings of formalities or perhaps other rituals.<sup>47</sup> If it is likely to discover a truth in a given case, the necessity of formalities will be minimal. The Civil Code of Ethiopia under Article 1719 (2) provides that “where a special form is expressly prescribed by law such form shall be observed.” However, “where a special form is prescribed by law and not observed there shall be no contract but a mere draft of a contract.”<sup>48</sup> The formal requirements are provided under different sections of the civil code of Ethiopia. A special form is prescribed by law for contracts relating to immovables.

Article 1723 (1) of the Civil Code of Ethiopia provides that;

*“(1). A contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgagee of an immovable shall be in writing and registered with a court or notary.*

*(2). Any contract by which an immovable is divided and any compromise relating to an immovable shall be in writing and registered with a court or notary.”*

Therefore, Article 1723 of the Ethiopian Civil Code is one of the formal requirements prescribed by the law. According to W.J. Clark, a form prescribed by law is part of the substantive obligations of the contract.<sup>49</sup> As a result, a non-compliance with formality requirements makes the contract void or unenforceable.<sup>50</sup>

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<sup>46</sup> See Article 1678(C) of *the 1960 Civil Code of Ethiopia*. The provision deals with elements of a valid contract that must be considered during formation of a contract.

<sup>47</sup> See P.S. Atiyah, *An Introduction to the Law of Contracts*, Fourth edition, 1989, Oxford University Press, New York, p.172.

<sup>48</sup> See Article 1720 (1) of *the 1960 Civil Code of Ethiopia*. The provision deals with Effect of provisions as to form of contracts.

<sup>49</sup> See W.J Clark, *Supra* note 34.

<sup>50</sup> See Article 1678(C), Article 1719 (2) cum 1720 and Article 1808 (2) of *the 1960 Civil Code of Ethiopia*. The latter provision specially provides that a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party.

## 2.3. Purposes (Advantages) of Form of Contracts

The rules on form of contract are intended “to coerce promise makers in to memorializing their contracts there by creating reliable evidence and reducing the possibility of enforcing fraudulent contracts proved by perjured testimony.”<sup>51</sup> Forms of contract discourage fraudulent persons who falsely allege the existence of agreements that have never been made. Courts are much more likely to make mistakes about the existence and proof of oral contracts than the existence and proof of written contracts. Hence, formality requirements are paternalistic devices that protect contracting parties from the consequences of nasty or ill-thought-out promises or agreements.<sup>52</sup> The major functions of form of contract are the following.

### 2.3.1. Evidentiary Function

Form of contract serves as a clear evidence of transaction and evidence of terms of a contract.<sup>53</sup> According to L.L. Fuller, the obvious function of form of contract is providing evidence of existence and support of a contract in case of controversy.<sup>54</sup> Controversies that arise as to the existence of a contract can be easily solved by the existence of settled formality requirement.<sup>55</sup> Accordingly, the Civil Code of Ethiopia provides that;

*“Where the law requires written form for the completion of a contract, such contract may not be proved by witnesses or presumptions unless it is established that the document evidencing the contract has been destroyed, stolen or lost.”*<sup>56</sup>

### 2.3.2. Cautionary Function

Formal requirements deter hasty, premature and ill-considered contracts from being made.<sup>57</sup> A person takes care of entering in to formal contract than entering in to an oral contract. That is why one is likely to hesitate longer before signing a deed than before making an oral promise. This is, therefore, the cautionary effect of form of contract that warns the contracting parties to think critically about the deal before putting their signature on a certain formal document.

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<sup>51</sup>See Robert E-Scott and Douglas L. Leslie , *Contract Law and Theory*, 2<sup>nd</sup> Edition, 1993, Contemporary legal education Series, the Michie Company Law Publishers, p.343.

<sup>52</sup>See G.H.Treitel, *the Law of Contracts*, 19<sup>th</sup> Edition, 1995, London, Sweet and Maxwell Publisher, pp. 161-171. See also H.G Beale, Supra note 40, p. 261.

<sup>53</sup> See H.G Beale, Supra note 40, p. 261.

<sup>54</sup> See L.L. Fuller, *Consideration and Form*, Columbia law Review, 1941, Volume 41, p.799.

<sup>55</sup> Ibid

<sup>56</sup> See Art. 2003 of the 1960 Civil Code of Ethiopia

<sup>57</sup> See H.G Beale, Supra note 40, p. 261.

### ***2.3.3. Channeling Function***

The use of certain form is very important to distinguish one type of transaction from another.<sup>58</sup> Formal requirements have a channeling function offering a legal framework in to which a party may fit his actions.<sup>59</sup> They may mark off transactions from one another and create a standardized form of transaction.<sup>60</sup> They distinguish not only formal contracts from ordinary contracts but they help also to identify one transaction from the other with in formal contracts.<sup>61</sup>

### ***2.3.4. Protective Function***

Formal requirements may be used as a device to protect the weaker parties to contracts.<sup>62</sup> Legal scholars state that formal requirements protect the weaker party to a contractual relationship by ensuring that he is provided with a written record of the terms of the contract.<sup>63</sup> In recent years, there has been an increasing tendency to impose formality requirements so as to protect the weaker parties to contracts. For example, in England, in the cases of tenants, employees, debtors and sureties under consumer credit agreements as consumers of certain classes of services like package holidays or time share accommodation.<sup>64</sup> Even though formal requirements apply equally to all of the contracting parties, they protect the weaker party from the abuse of the stronger party since they give the former an equal bargaining power with the latter.

### ***2.3.5. Function as a Validity Requirement***

Many legal systems recognize two kinds of contracts; special contracts and simple contracts.<sup>65</sup> The validity of a simple contract does not depend on its form.<sup>66</sup> On the other hand, a special contract should be made in a special form and its validity depends on its form.<sup>67</sup> Under the Ethiopian contract law, form is one of the validity requirements. Article 1678 (c) of the Civil Code of Ethiopia provides that “no valid contract shall exist unless the contract is made in the form prescribed by law, if any”. As per Article 1720 (1) of the code, there shall be no contract but a mere draft of a contract where a special form is prescribed by law and not observed.

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<sup>58</sup> See G.H.Treitel, Supra note 52.

<sup>59</sup> See H.G Beale, Supra note 40.

<sup>60</sup> Ibid

<sup>61</sup> See G.H.Treitel, Supra note 52, p. 163.

<sup>62</sup> See H.G Beale, Supra note 40.

<sup>63</sup> See G.H.Treitel, Supra note 52, p. 162.

<sup>64</sup> See H.G Beale, Supra note 40.

<sup>65</sup> See Supra note 2.

<sup>66</sup> Ibid

<sup>67</sup> Ibid

### **2.3.6. Function of Facilitation of Judicial Diagnosis**

Formal requirements simplify the problem of ascertaining the contents of a contract.<sup>68</sup> Hence, they save time, reduce cost and minimize the risk of error in judicial proceedings, and help judges to look in to the observance and non-observance of formalities.<sup>69</sup> In this regard, Fuller states that; “Form is for a legal transaction as what the stamp is for coin. Just as the stamp of the coin relieves us from the necessity of examining the value of the coin, in the same way legal formalities relieve judges from any inquiry whether a legal transaction was intended or not.”<sup>70</sup> Therefore, the intention of contracting parties to be bound by a contract can be easily determined by looking in to the formal requirements.

### **2.4. Disadvantages of Form of Contracts**

In some legal systems, there is little emphasis on formality requirements and much more emphasis is given to substance.<sup>71</sup> In England, this is true because of the fact that there is confidence in the ability of the courts to discover the truth even in complex cases.<sup>72</sup> Formal requirements become less important where they consume time and create inconveniences. In this regard, G.H Treitel argues that formal requirements are sources of technical pitfalls since they are time consuming and clumsy.<sup>73</sup> He states that even a simple requirement of writing is open to this criticism and it has been regarded as inconvenient from a commercial point of view.<sup>74</sup> Besides, standard form contracts are neither easily amended nor open to discussion.<sup>75</sup> There has been a recent move to drift away from the rigidity of the standard form contracts since contracting parties would make change in the special condition section.<sup>76</sup> Standard form contracts also have their fair share of disputes when it comes to offer and acceptance. As the terms of the standard form contract are not easily changeable both contracting parties engage in the “battle forms” until there is a mutual agreement on the last contract’s terms.<sup>77</sup> Consequently,

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<sup>68</sup> See G.H.Treitel, Supra note 52, p. 162.

<sup>69</sup> See P.S. Atiyah, *An Introduction to the Law of Contracts*, 4<sup>th</sup> edition, 1989, Oxford University Press, p. 172.

<sup>70</sup> See L.L. Fuller, Supra note 54.

<sup>71</sup> See Supra note 69.

<sup>72</sup> Ibid

<sup>73</sup> See G.H.Treitel, Supra note 52, p.163.

<sup>74</sup> Ibid

<sup>75</sup> See P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, 1979, Clarendon Press, Oxford, pp.398 – 419.

<sup>76</sup> Ibid

<sup>77</sup> Ibid

most legal systems prescribe formal requirements for few and very sensitive contracts by taking such disadvantages in to account.

## 2.5. Effect of non-compliance with Formal requirements

Under the Common law legal system, non compliance with statutory requirements may make the contract void or unenforceable or enforceable only on an order of a court.<sup>78</sup> The civil consequences of failure to comply with a formality requirement would presumably depend on the court's view of the objects which the legislature sought to achieve in imposing the requirement.<sup>79</sup> For instance, if the requirement was prescribed to protect one of the contracting parties, the party would probably be able to enforce the contract notwithstanding the formal defect; whether the other party could enforce it would depend on the principle.<sup>80</sup> Further more, failure to comply with formal requirements may constitute a criminal offence, and in some cases this is the sole consequence of failure which is actually specified in the relevant statute.<sup>81</sup>

Under many other legal systems, including the Ethiopian one, contracts not fulfilling the requirements of object or form as prescribed by the law are void (null) while those involving a defect in the consent or incapacity of one party are voidable.<sup>82</sup> According to George Krzeczunowicz, for all practical purpose, the terms "null and void" and "non-existent" shall mean the same.<sup>83</sup> The difference between voidable and void contracts is that the former may only be invalidated at the request of the party who is affected by the defect in his consent or by his incapacity.<sup>84</sup> On the other hand, a contract not made in the prescribed form (a void contract) may be invalidated at the request of any contracting party or interested third party.<sup>85</sup> A contract required to be made in a special form is void unless it observes every requirement of that special form. Consequently, the contract law of Ethiopia provides that any contract required to be in writing shall be of no effect unless supported by a special document signed by all the parties bound by the contract. It shall also be of no effect unless attested by two witnesses.<sup>86</sup>

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<sup>78</sup> See H.G Beale, Supra note 40, p. 263.

<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> See *the Land lord and Tenant Act of England*, (1962) cited in Supra note 40, p. 263.

<sup>82</sup> See George Krzeczunowicz, Supra note 40, p. 8.

<sup>83</sup> Ibid, p. 9

<sup>84</sup> See Article 1808 (1) of the 1960 Civil Code of Ethiopia.

<sup>85</sup> See Ibid, Art. 1808 (2)

<sup>86</sup> See Ibid, Art. 1727.

“Where a special form is prescribed by law and not observed there shall be no contract but a mere draft of a contract.”<sup>87</sup> In addition, a contract which the parties agree to make in a special form is incomplete unless it is made in the agreed form.<sup>88</sup>

Invalidation in principle has a retroactive effect. Under Ethiopian law, “where a contract is invalidated or cancelled, the parties shall as far as possible be reinstated in the position which would have existed, had the contract not been made.”<sup>89</sup> Hence, any delivery or payment made in the performance of the contract shall be returned and the parties shall be put in positions they would have held, had the invalidated contract never been concluded. However, there are two exceptions to this principle of retroactivity.<sup>90</sup> The first exception is that of “acts done in performance of the contract shall not be invalidated where the interest of third parties in good faith so requires.”<sup>91</sup> The basic query here is; who is a third party in good faith? Here, it is possible to argue that the third party in good faith is a person “who has acquired his rights without knowing of the ground for invalidation that tainted the right of his transferor.”<sup>92</sup> Consequently, if one of the contracting party transfers a thing he bought as a result of invalid contract to a third person in good faith, the third person is entitled to keep the thing he acquired in good faith. The second exception is a case where invalidation is impossible or would involve serious disadvantages or inconveniences.<sup>93</sup> In such a case, the court may order payment of damages or any other remedy which it thinks fit instead of order for invalidation.<sup>94</sup>

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<sup>87</sup> See Ibid, Art. 1720 (1)

<sup>88</sup> See Ibid, Art.1726

<sup>89</sup> See Ibid, 1815 (1)

<sup>90</sup> The exceptions to the principle of retroactivity are provided under Article1816 of the 1960 Civil Code of Ethiopia (which deals with Rights of third parties) and Article 1817 of the same code (which deals with restoring previous position not possible).

<sup>91</sup> See Art.1816 of the 1960 Civil Code of Ethiopia

<sup>92</sup> See Rene David, Supra note 43, p. 81.

<sup>93</sup> See Article1817 (1) of the 1960 Civil Code of Ethiopia.

<sup>94</sup> See Ibid, Art.1817 (2)

## CHAPTER THREE

### 3. LEGAL ASPECTS OF FORMS OF CONTRACTS RELATING TO IMMOVABLES

#### 3.1. Some Points on Immovable property

An Immovable is “a property that cannot be moved or an object so firmly attached to land that it is regarded as part of the land.”<sup>95</sup> An immovable in strict sense is either a building or a land.<sup>96</sup> We have to understand the term “building” not only in the restrictive sense of the word, such as, a house but also any construction incorporated in or adherent to the soil like store, shed, farm building, bridge, and dam.<sup>97</sup> Hence, buildings are said to be immovables because they form part of land and are one thing with the land.<sup>98</sup> An immovable, considered in its legal aspect, is a piece of land and includes the following elements: (1) a determinate portion of the earth’s surface; (2) the ground beneath the surface down to the center of the world; and, (3) possibly the column of space above the surface ad infinitum.<sup>99</sup>

At the heart of land law is the idea that “land” includes not only tangible physical property like tracts of land or houses, but also intangible rights in the land.<sup>100</sup> Intangible rights in the Land refer real rights in individual things less than ownership, such as, mortgages, usufructs, life interests, servitudes and easements.<sup>101</sup> The Ethiopian law does not expressly provide a definition of the term “building” though it states that buildings are immovables. Under the present Ethiopian legal system, land is not a private property.<sup>102</sup> The FDRE Constitution provides that “Land is a common property of the Nations, Nationalities and peoples of Ethiopia and shall not be subject to sale or other means of exchange.”<sup>103</sup>

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<sup>95</sup> See Henry Campbell Black, *Blacks law Dictionary*, 5<sup>th</sup> Edition, 1979, West Publishing Company.

<sup>96</sup> See *Civil Code of the Empire of Ethiopia*, 1960, Proclamation No. 105, Neg.gaz, Extra ordinary issue, year 19, No.2, (hereinafter called the 1960 Civil Code of Ethiopia), Art. 1130.

<sup>97</sup> See George C. Maller, *The Law of Real Property*, 1932, Montreal Press, p. 258.

<sup>98</sup> Ibid

<sup>99</sup> See John Salmond, *Jurisprudence*, 10<sup>th</sup> Edition, 1947, Glanville L. Williams ed, p. 428 as cited in Henry Campbell Black, *Blacks law Dictionary*, 5<sup>th</sup> Edition, 1979, West Publishing Company.

<sup>100</sup> See Yohanes Heroui, *Registration of Immovables under the Ethiopian Civil Code; An Overview in Comparative Perspective*, Ethiopian Bar Review, Vol.2, No.2, March 2008, p.37.

<sup>101</sup> Ibid

<sup>102</sup> See Article 40 (3) of the 1995 FDRE Constitution. It provides that “the right to ownership of rural and urban land, as well as all natural resources is exclusively vested in the state and in the peoples of Ethiopia.” Here, it is important to pose a query; what does the phrase “...vested in the state and in the peoples of Ethiopia” mean? In the opinion of the writer, Art.40 (3) is made in vague terms. Thus, the provision requires further clarification.

<sup>103</sup> Ibid

## 3.2. Forms of Contracts Relating to Immovables

The most prevalent type of formal requirement is that certain contracts must be in writing.<sup>104</sup> In a few cases, contracts are required to be made by “deed.”<sup>105</sup> Others set out the formal requirement in great detail and even specify the size of the lettering and the color of the print and paper.<sup>106</sup> However, others do not require the contract to be in writing, but only require one party to give the other written notice of specified terms of the contract.<sup>107</sup> Many legal systems, yet, prescribe that contracts relating to immovables shall be authenticated or registered with a court or a notary.<sup>108</sup> There are mainly three types of form of contracts recognized by many legal systems. They are;<sup>109</sup> (i) Written form (ii) Authentication and (iii) Registration.

### 3.2.1. Written Form

In many legal systems, the requirement of written form is a formal requirement for the validity of a contract but sometimes it is used as an evidence for the enforcement of a contract.<sup>110</sup> An advantage of written form of contract is that it is more proof secured than oral contracts.<sup>111</sup> Fixing a transaction in a written form is a more dependable and a certain way to keep a promise than fixing a transaction in the memory of an individual.<sup>112</sup> Therefore, it is advisable to make sensitive contracts in writing. When one thinks about written form of contract, the basic elements that come into picture are; a special document, signature and witnesses.<sup>113</sup>

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<sup>104</sup>See H.G Beale (General Editor), *Chitty on Contracts, General Principles*, 28<sup>th</sup> Edition, Volume 1, 1999, London, Sweet and Maxwell, p. 262.

<sup>105</sup>See *Ibid*, pp.16 and 24-27. It is provided that “a deed is an instrument which is not merely in writing, but which is sealed by the party bound thereby and delivered by him to or for the benefit of the person to whom the liability was incurred.” See also Yohannes Heroui, *Supra* note 100, pp. 33-34.

<sup>106</sup>See H.G Beale *Supra* note 104.

<sup>107</sup> See, for example, the Law of England; Land lord and Tenant Act 1962, Employment Rights Act 1996 as cited in H.G Beale, *Supra* note 10.

<sup>108</sup> See for instance, Article 1723 of the 1960 Civil Code of Ethiopia.

<sup>109</sup>See Million Assefa, *Form of Contract Relating to Immovables in Ethiopia, the Law and Interpretation*, Wonber, Alemayehu Haile Memorial Foundation’s Periodical, 6<sup>th</sup> half year, April/may 2010, p. 21.

<sup>110</sup>See George. Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, 1983, Addis Ababa University, Faculty of law, p. 8.

<sup>111</sup> See William .P. Anson, *Principles of English Law of Contract*, 19<sup>th</sup> ed. 1945, Oxford University Press, p. 67.

<sup>112</sup> In this regard, there is an important Amharic saying: “*Bekkal Yale Yiresal, Be Tsihuf Yale Yiweresal*” which literally means a written promise can be preserved for long while oral one is easily forgettable. If a contract is made in written form, there remains little doubt that there was no intention to be bound. A contracting party thinks twice before he gives his final consent to be bound by a written contract. Generally, written form makes parties to be conscious of the effect of the written contract. Hence, written form of contract may be taken as an indication of intention to create legal relation.

<sup>113</sup> See for instance, Article 1727 (1) of the 1960 Civil Code of Ethiopia.

### 3.2.1.1. Special Document

Many legal systems including the Ethiopian one, prescribe that “any contract required to be in writing shall be supported by a special document signed by all of the parties bound by the contract.”<sup>114</sup> G. Crezczunowicz, while discussing Article 1727 of the Civil Code of Ethiopia, states that; “it is peculiar to our legal system that a contract required to be in writing must be contained in a special document signed by every party bound by it.”<sup>115</sup> The special instrument is a formal manifestation of the agreement of the parties and of their irrevocable intention to be bound by the agreement.<sup>116</sup> Therefore, it shall be signed by all of the contracting parties.<sup>117</sup> The law also requires a contract made in a special form to be varied in the same form.<sup>118</sup>

### 3.2.1.2. Signature

A signature is “a formal device which indicates that some important legal consequences may follow from a document in which a signature is affixed.”<sup>119</sup> Unless a person puts his signature on a written contract, the mere fact that his name appears in the body of the contract cannot make him a party thereto. In this regard, P.S. Atiyah, states that where contractual document is signed by contracting parties the rule is that this signature absolutely binds the party signing and precludes him from pleading that he has no knowledge of the terms of the contract, provided that there is a valid offer and acceptance.<sup>120</sup> A signature is, therefore, a formal ground of legal liability as well as proof of contractual intention. Under the common law legal system, the memorandum need not be signed by all contracting parties.<sup>121</sup> Accordingly, even a party, who does not put his/her signature on a written contract, can enforce his /her right against the party who puts his/her signature.<sup>122</sup> However, under the Ethiopian legal system, the special document shall be signed by all the parties bound by the contract.<sup>123</sup>

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<sup>114</sup>See Article 1727 (1) of the 1960 Civil Code of Ethiopia.

<sup>115</sup>See George Krzczunowicz, *Supra* note 110, p. 75.

<sup>116</sup> See *Ibid.* The idea can be inferred from the concept provided under Article 1727 (1) of the 1960 Civil Code of Ethiopia.

<sup>117</sup> *Ibid.*

<sup>118</sup> See for instance, Article 1722 of the 1960 Civil Code of Ethiopia.

<sup>119</sup> See P.S. Atiyah, *An Introduction to the Law of Contracts*, 4<sup>th</sup> edition, 1989, Oxford University Press, p. 193.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> See Article 1727(1) of the 1960 Civil Code of Ethiopia.

The other point regarding signature is that of the possibility to sign a document through proxy. As to this point, William Anson, while discussing on the common law experience, especially the England one, states that “a document shall be signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized.”<sup>124</sup> The signature need not be an actual subscription of the party’s name; it may be a mark, it may be printed or stamped.<sup>125</sup> William Anson provides that a signature can be signed by a lawfully authorized agent under the common law legal system.<sup>126</sup> Under Ethiopian law, Article 1728 of the Civil Code of Ethiopia prescribes that; “any party bound by a contract shall affix his handwritten signature thereto.” However, this provision does not prohibit the conclusion of a contract by an agent on behalf of the principal and, thus, the agent may affix his signature thereto.<sup>127</sup>

George Krzeczunowicz, while commenting on Article 1728 of the Civil Code of Ethiopia, states that when the law says “handwritten” signatures “it excluded mechanical means and mere seals.”<sup>128</sup> The Ethiopian contract law is silent as to the place where a signature of the contracting parties should rest. Hence, one may argue that a signature can be put in any part of a document, at the top, bottom or in the middle of the document. As per the Swiss case law, if a document has several pages, the pages must be numbered, or denote continuity via the same phrase going on.<sup>129</sup> And, any separate addition to the continuous text should be separately signed.<sup>130</sup> The Ethiopian law provides nothing as to this point. The writer believes that every page of the contractual document shall be signed by the parties so as to prevent forgery.

If a party cannot write, he may affix his thumb- mark.<sup>131</sup> In this regard, Rene David<sup>132</sup> states that where one of the parties does not show how to write or is unable to sign his signature, he may affix his “finger print.”<sup>133</sup> However, the signature or thumb-mark of a blind or illiterate

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<sup>124</sup> See William .P. Anson, *Principles of English Law of Contract*, 19<sup>th</sup> ed. 1945, Oxford University Press, p.76.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> See *Article 2199 of the 1960 Civil Code of Ethiopia*, which defines Agency as; “a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts. One of the common legally binding acts is in fact conclusion of contracts.”

<sup>128</sup> See George Krzeczunowicz, *Supra* note 110, p. 75.

<sup>129</sup> See William .P. Anson, *Supra* note 124.

<sup>130</sup> *Ibid.*

<sup>131</sup> See Article 1728 (2) of the 1960 Civil Code of Ethiopia.

<sup>132</sup> See Rene David, *Preliminary Draft on the Ethiopian Civil Law*, translated by Michael Kindred, 1973, Haile Sellassie I University, Faculty of Law, p. 34.

<sup>133</sup> A finger print is a thumb-mark or finger mark since it is usually made by the thumb.

person must be authenticated by a notary, registrar or judge acting in the discharge of his duties.<sup>134</sup> The writer believes that the lists under Article 1728 (3) of the Civil Code of Ethiopia are not exhaustive. In addition to blind and illiterate person, there could be other person who cannot affix their signature due to different health reasons.

### 3.2.1.3. Witnesses

Many legal systems, including the Ethiopian one, have the same approach as to the importance of witnesses to affirm that a given contractual document is true. Under the Ethiopian contract law “any contract required to be in writing shall be of no effect unless it is attested by two witnesses.”<sup>135</sup> Blacks Law dictionary defines that “Attest” means “to affirm to be true or genuine, to certify to the verity of a copy of a document formally by signature.”<sup>136</sup> The contract law of Ethiopia prescribes capacity requirement to act as a witness.<sup>137</sup> Accordingly, unless otherwise expressly provided by law, where witnesses are required by law or agreement they shall be of age and not judicially interdicted.<sup>138</sup>

However, other conditions like sex or nationality shall not affect the capacity of a person to act as a witness.<sup>139</sup> The contract law of Ethiopia requires that witnesses shall certify that a contract was made and the terms thereof where necessary.<sup>140</sup> The witnesses shall be bound by their attestation. Therefore, not only the parties to a contract but also witnesses to it shall affix their signature on the document. The witnesses, however, are not guarantors of the performance of the contract unless they expressly act as such.<sup>141</sup> Where it is established that the document evidencing the contract has been destroyed, stolen or lost, the contract may be proved by witnesses.<sup>142</sup>

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<sup>134</sup> See Article 1728 (3) of the 1960 Civil Code of Ethiopia.

<sup>135</sup> See Ibid, Art. 1727 (2)

<sup>136</sup> See Henry Campbell Black, *Blacks law Dictionary*, 4<sup>th</sup> Edition, 1968, West Publishing Company.

<sup>137</sup> See Article 1729 of the 1960 Civil Code of Ethiopia.

<sup>138</sup> See Ibid, Art. 1729 (1)

<sup>139</sup> See Ibid, Art. 1729 (2)

<sup>140</sup> See Ibid, Art. 1730 (1)

<sup>141</sup> See Ibid, Art.1730 (2)

<sup>142</sup> See Ibid, Art. 2003

### 3.2.2. Authentication

McCormick discusses authentication in its proper but limited sense as “proof of authorship, noting that it may have a wider meaning.”<sup>143</sup> Morgan, on his part, suggests that authenticity of writing is “the quality of its being what it purports to be or what its proponent claims it to be.”<sup>144</sup> Despite frequently reiterated questions concerning its wisdom and necessity, the long-standing requirement that written contracts must be authenticated prior to their admission into evidence continues to possess great vitality.<sup>145</sup> The basis for authentication requirement lies on the familiar doctrine that “a writing does not speak for itself, but must be authenticated by extrinsic evidence.”<sup>146</sup> This rule has been the object of frequent and sometimes heated criticism for over a hundred years, yet, it still enjoys almost universal recognition.<sup>147</sup> The proponents of authentication requirement argue that there must be some evidence of genuineness before a writing is admitted as such.<sup>148</sup>

Some Ethiopian writers provide that Authentication refers certifying the signatures of parties who are bound by a contract.<sup>149</sup> Authentication has two aspects.<sup>150</sup> The first one is certifying the signatures of parties who are bound by a contract before witnesses.<sup>151</sup> This is, in fact, the prevalent practice throughout the majority of legal systems.<sup>152</sup> Its advocates argue that a stiff procedure of authentication hinders smooth business transactions and, thus, they believe that authentication before institutions is superfluous. The second aspect of authentication is certifying the signatures of contracting parties and witnesses before institutions.<sup>153</sup> Its advocates argue that much emphasis shall be given to security of ownership than smooth commercial transactions.<sup>154</sup> Therefore, the major difference between authentication and registration is that authentication is

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<sup>143</sup>See McCormick, *Evidence*, 1954, p.185 as cited in John William Strong, *Liberalizing the Authentication of Private Writings*, Cornell Law Rev. Vol.52, 1966-1967, p. 284.

<sup>144</sup>See Morgan, *Basic Problems of Evidence*, 1962, p.368 as cited in Ibid.

<sup>145</sup>See John William Strong, *Supra* note 143

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup>See A. L. Levin, *Authentication and Content of Writings*, Rutgers Law Review, Vol.10, No.3, 1955-1956, p. 634

<sup>149</sup>See Million Assafa, *Supra* note 109, p.22.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> See Beaton J., *Anson's Law of Contracts*, (28<sup>th</sup> ed) pp. 4-88 as cited in *Supra* note 109, p. 22.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

primarily designed to bring about certainty in transactions; whereas, registration is an act of publicity for third parties designed to bring about security in transactions.<sup>155</sup>

### **3.2.3. Registration**

The term Registration refers to “a formal act of investiture whose origins can be traced back to Roman law and times.”<sup>156</sup> The laws pertaining to registration of rights are of a recent origin, mainly dictated by the fundamental social and economic transformation which the beginning of the 20<sup>th</sup> century brought with it.<sup>157</sup> Laws on registration attempt to impose a structure on substantive rules with a view to facilitating and expediting transactions as well as lending security to the transactions.<sup>158</sup> However, they are not designed to affect substantive rules.<sup>159</sup> A number of studies provide that four basic principles are being followed in the creation of the Immovable Property Registration System (IPRS). They are:<sup>160</sup>

- I. The “**mirror**” principle, that is, the information about immovable property which is contained in the Registration Office should be a reflection of what really exists.
- II. The “**curtain**” principle, that is, the property registers should show information about ownership and other interests that does not require further verification.
- III. The “**certainty**” principle, that is, there is a guarantee that the information in the property register is correct in that if someone is damaged by incorrect information in the IPRS, he/she can be compensated by the state.
- IV. The “**accessibility**” principle, that is, the costs of access to the Registration Offices should be minimized so that any person, regardless of wealth or location, can have easy access to the registration system.

Laws on registration, thus, aim at promoting security in property transactions. They are designed to ensure that a purchaser of a property knows of the rights and interests of other persons over that property thereby ensuring that the price paid reflects the true economic and

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<sup>155</sup> See Yohannes Herui, *Supra* note 100, p. 51.

<sup>156</sup> *Ibid.*, p. 76

<sup>157</sup> See Martin Dixon, *Principles of Land Law*, third edition, 1999, Cavendish Publishing Limited, p.1.

<sup>158</sup> See *Ibid.* See also H.W.R. Wade, *The Law of Real Property*, Third Edition, 1966, Stevens & Sons publisher Limited, p. 32.

<sup>159</sup> *Ibid.*

<sup>160</sup> See Lida Stamo and Norman J. Singer *Albanian Immovable Property Registration System: Review of Legislation*, Working paper, Albania Series, No.7, 1997, p. 2.

social value of the property.<sup>161</sup> When we see the incidental benefits of laws on registration, they promote the development of accurate plans which can be equally used as a basis for an efficient and fair tax collection system as well as the provision of other municipal services.<sup>162</sup> In general, under many legal systems, the immovable property registration system has been chosen for the following four basic reasons:<sup>163</sup>

- (1) it protects the right of immovable property owners by providing strong and reliable evidence about ownership and other interests in immovable properties;
- (2) it is simple and inexpensive to administer and maintain;
- (3) it provides the public with easily accessible information which they need to buy and sell, mortgage, and rent immovable property, thereby providing the basis for a market-oriented economy; and
- (4) it permits the building of a Geographical Information System (GIS) with property information as an integral and fundamental segment.

It is believed that the necessity of writing, attestation and registration will make the rash promisor pause and think more about the consequences arising out of his promise.<sup>164</sup> Besides, the drawing up of an act by a court or a notary gives further guarantee to its authenticity as both parties are fairly represented prior to committing themselves to an agreement.”<sup>165</sup> Under the Civil Code of Ethiopia, the laws on registration have been neglected though the laws occupied a prominent place in the scheme of the code.<sup>166</sup> In some legal systems, such as German contract law, lack of registration of contracts relating to immovables affects the validity of the agreement between the parties itself.<sup>167</sup> On the other hand, in some others like the French contract law, lack of registration does not affect the agreement between the parties.<sup>168</sup>

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<sup>161</sup>See Yohannes Herui, *Supra* note 100, p. 76.

<sup>162</sup> *Ibid.*

<sup>163</sup> See *Ibid.*, p. 1.

<sup>164</sup> See *Ibid.*, p.76.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup>See K.W. Ryan, *An Introduction to the Civil Law*, 1962, Sydney Hallstead Press, p.176. According to Article 925 of the German Civil Code (B.G.B), “where the agreement is to convey land it must be declared in the presence of both contracting parties before a Land Registry official, a local court, a notary or certain public authorities.”

<sup>168</sup>See *Ibid.*, p.175. In France, ownership in immovables passes as a result of the contract alone without any additional requirement of registration. However, subsequent legislations attempt to introduce a measure of publicity in to the transfer of title to immovable properties.

### 3.3. Is Registration a Validity Requirement for Contracts Relating to Immovables?

Registration of contracts relating to immovables has different purposes in different legal systems. It serves either as a validity requirement or as publicity without affecting the interests of contracting parties.<sup>169</sup> As indicated in section 3.2.1, the requirement of written form is a formal requirement for the validity of a contract relating to an immovable under many legal systems. However, there are different positions among legal systems as to whether registration is a validity requirement for contracts relating to immovables or not. For instance, under the French legal system, ownership of an immovable passes as a result of a contract alone without any additional requirement of registration.<sup>170</sup> Hence, registration is not a validity requirement for contracts relating to immovables. The purposes of the French registration system are; (1) publicity, which helps to have a complete record of all rights existing over a particular immovable; and (2) to establish priority among transferees from a single transferor.<sup>171</sup>

However, German law subjects contracts relating to immovables to an additional validity requirement of registration unlike that of French law.<sup>172</sup> Registration is, therefore, a prerequisite or validity requirement for the alteration of rights over immovables. Under German law, registration is not a means for securing priority of rights as in French law. The position of the German law as to registration of acts is “where the agreement is to convey an immovable, it must be declared in the presence of both parties before the Land registry official, a local court, a notary or certain public authorities.”<sup>173</sup>

Under the Ethiopian Legal system, there has been a controversy among judges, legal scholars and other stake holders as to the query ‘whether registration is a validity requirement for contracts relating to immovables or not.’ Many judges and scholars argue that lack of registration with a court or notary of the written contracts relating to immovables does not affect the validity

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<sup>169</sup> See K.W. Ryan, *Supra* note 167, p. 173.

<sup>170</sup> *Ibid.*

<sup>171</sup> See *Ibid.*, p. 174.

<sup>172</sup> See *Ibid.*, p. 175.

<sup>173</sup> See *Ibid.* See also Article 925 of the German Civil Code (B.G.B).

of the contract between the parties.<sup>174</sup> Others argue that a contract relating to an immovable can only be valid if both the requirements as to writing and registration before a court or a notary are met with. Since 1999 E.C, the Federal Supreme Court Cassation Division of Ethiopia has held a position that registration is one of the validity requirements of contracts relating to immovables.

One legal scholar states that “the interpretation of the cassation division of Ethiopia in *Gorfe Gebre Hiwot v. Aberash Dubarge and Getachew Nega*<sup>175</sup> has given rise to a controversy extending well beyond the ranks of legal profession.”<sup>176</sup> In this case, the Cassation Division ruled that a contract of sale of an immovable can only be valid if the two requirements as to form are satisfied; i.e, the contract shall be in writing and it shall be registered with a court or notary. Yohannes Heroui<sup>177</sup> argued that “the reason for the unusual interest and controversy partly lies in the fact that the Cassation division has, in so ruling, chosen to depart from settled practices and, in the process, lent life to provisions of the Civil Code long considered still born.” This research will make a humble attempt to evaluate the social, political and economic impacts of the decisions of the cassation division under chapter four. It will also provide fairly reasoned critique of the rulings of the cassation division in Gorfie’s case and others.

### **3.4. The System of Registration of Contracts Relating to Immovables**

Researches on the development of laws of registration of the various legal systems reveal that there are three types of public registration systems in relation to rights and interests in land.<sup>178</sup> They are;<sup>179</sup> (1) Registration of Encumbrances; (2) Registration of deeds and (3) Registration of title. It is thus important to see the three types of public registration systems.

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<sup>174</sup>Those judges and legal scholars, who argue in such a way, base their argument on the ideas of George Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, 1983, Addis Ababa University, Faculty of law, p. 74, and Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p. 32. See Mekibib Tsegaw, “Contracts Relating to Immovables and the Issue of Form; Current Concerns (Amharic)” *Ethiopian Bar Review*, 2007, Vol.2, No.1, pp. 153-169. See also Million Assefa, *Supra* note 109, p.17. Yohannes Heroui, *Supra* note 100, p.31.

<sup>175</sup>See the whole judicial history of the case, *Gorfe Gebrehiwot v. Aberashe Debargie and Getahun Nega*, *Federal Supreme Court Cassation Division of Ethiopia*, 2007 G.C, Civil Cassation File No.21448, Volume 4. pp.39-47

<sup>176</sup> See *Ibid* and Yohannes Heroui, *Supra* note 100, p.31.

<sup>177</sup> *Ibid*.

<sup>178</sup> See *Ibid*, p. 38.

<sup>179</sup> See Patric J. Dalton, *Land Law*, Forth Edition, 1996, Pitman Publishing, pp. 398-403.

### **3.4.1. Registration of Encumbrances**

Blacks Law Dictionary<sup>180</sup> defines an encumbrance as “a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest.” As per this system of registration, any person claiming to be entitled to certain encumbrances on any land should register his claim.<sup>181</sup> When the owner of an interest relating to an immovable applies to have it registered, the registrar need not question the validity of an interest.<sup>182</sup> Hence, he neither investigates nor guarantees the document registered.<sup>183</sup> The applicant for registration is required to fill in a form containing the necessary particulars and file it in the appropriate registry. The major purposes of such registration system are;<sup>184</sup> (1) to enable a purchaser of land, when investigating the title, to discover easily whether certain encumbrances exist, and (2) to protect the beneficiaries of the encumbrances against defeat by a purchaser of the land who has no notice of them.

### **3.4.2. Registration of Deeds**

Registration of deeds is the oldest type of registration system.<sup>185</sup> It is similar to registration of encumbrances as there is no guarantee or investigation of the claim by the registrar.<sup>186</sup> The only difference is that in case of registration of a deed a full copy of the deed must be filed with the original and the original document is duly returned endorsed with a statement that explains it has been registered.<sup>187</sup> The purpose of the registration of deeds is “to assist a purchaser in verifying the title and to prevent the alteration or suppression of documents.”<sup>188</sup> Normally, a purchaser of an immovable demands some proof from the seller that he is the owner of the immovable which he is selling. Since a written instrument (a deed) is required each time when the property is transferred, a bundle of deeds would have accumulated.<sup>189</sup> Such a bundle of deeds that has passed on to successive owners is called

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<sup>180</sup> See Henry Campbell Black, *Blacks Law Dictionary*, 5th Edition, 1979, West Publishing Company.

<sup>181</sup> See Yohannes Herui, *Supra* note 100, p. 38.

<sup>182</sup> See S.H. Goo, *Source Book on Land Law*, 1994, Cavendish Publishing Limited, pp. 209-262.

<sup>183</sup> *Ibid.*

<sup>184</sup> See Patric J. Dalton, *Supra* note 179.

<sup>185</sup> *Ibid.*

<sup>186</sup> See Yohannes Herui, *Supra* note 100 p. 38.

<sup>187</sup> See Patric J. Dalton, *Supra* note 179.

<sup>188</sup> See R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 3<sup>rd</sup> edition, 1996, Stevens and Sons limited, London, p. 1027.

<sup>189</sup> See *Supra* note 100, p. 39.

“collectively the title deeds to the property.”<sup>190</sup> Therefore, a seller will show his ownership right over the immovable being sold by giving the purchaser details of the deeds, other documents and events affecting the property.<sup>191</sup> However, this does not provide any guarantee to the purchaser that the seller owns what he is selling since “there may be some defect prior to the point at which the seller chooses to commence the chain of title.”<sup>192</sup>

### 3.4.3. Registration of Title

Unlike the systems of registration of encumbrances and registration of deeds, registration of title is a registration of land rather than registration of owners.<sup>193</sup> The prime purpose of registration of title is “to substitute a title guaranteed by the state for a title which must be separately investigated on every purchase.”<sup>194</sup> Hence, the registrar investigates the title himself and guarantees it when satisfied.<sup>195</sup> This guarantee is supported by a system of statutory indemnity by providing a monetary compensation for any person who suffers loss by reason of the application of the registration system.<sup>196</sup> The effect of registration of title is that “on registration, the registered proprietor is entitled to a Land Certificate which effectively summarizes the entry in the Register and constitutes evidence of title.”<sup>197</sup>

Therefore, title to land depends on a person being registered as the owner and on no other proof of ownership.<sup>198</sup> When a title is registered, in essence, each plot of land would be assigned a “title number” and described by reference to an accurate plan based upon the ordnance survey map (cadastre) revised up to date.<sup>199</sup> Then, what a prospective purchaser has to do is inspect the Register to see that the seller is certified to be the owner. Hence, it revolutionizes the methods of carrying out sales, mortgages and other land transactions.<sup>200</sup> In this regard, Megarry and Wade<sup>201</sup> state that even though the intricacy of rights in land is “such as to render it impossible to make

<sup>190</sup> See I.R. Storey, *Conveyancing*, 1983, London Butterworth, p. 4.

<sup>191</sup> See Yohannes Herui, *Supra* note 100, p. 39.

<sup>192</sup> See I.R. Storey, *Supra* note 190

<sup>193</sup> See Theodore B. Ruoff, *Concise Land Registration Practice*, 2<sup>nd</sup> Ed, 1967, London, Sweet & Maxwell Ltd, p. 23.

<sup>194</sup> See Yohannes Herui, *Supra* note 100, p. 39.

<sup>195</sup> *Ibid*

<sup>196</sup> See Martin Dixon, *Principles of Land Law*, 3<sup>rd</sup> Edition, 1999, Cavendish Publishing Limited, p.28 and See Patrice J. Dalton, *Supra* note 179, pp. 436-443.

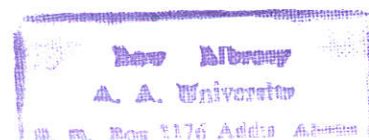
<sup>197</sup> See *Ibid*

<sup>198</sup> See Yohannes Herui, *Supra* note 100, p. 40.

<sup>199</sup> See Theodore B. Ruoff, *Supra* note 193.

<sup>200</sup> See Yohannes Herui, *Supra* note 100, p. 41.

<sup>201</sup> See R.E. Megarry and H.W.R. Wade, *Supra* note 188, p. 1046.



the transfer of registered land as simple as the transfer of shares registered in the books of a company, the system of registration of title attempts to follow that analogy in practice.”<sup>202</sup>

### **3.5. Form of Contracts Relating to Immovables: The International Experience**

#### **3.5.1. Common Law**

Under the United Kingdom (UK) legal system, forms of contracts have played an important role in the law since the earliest of times.<sup>203</sup> A deed (a contract under seal) is one of the earliest examples of a contract enforceable at common law.<sup>204</sup> It is an instrument in writing and “sealed by the party bound thereby and delivered by him to or for the benefit of the person to whom the liability was incurred.”<sup>205</sup> The significance of the promise given under seal was that it was enforceable even if there was no price for which the promise of the other is bought. The mere fact of the presence of the seal made the promise under seal enforceable despite the existence of consideration (price).<sup>206</sup> Therefore, a deed was enforceable because of its form at common law and it still plays an important role in English law though the traditional ritual of the seal as a formal requirement of a deed was abolished in 1989.<sup>207</sup> The origin of Statute of Frauds is also in England.<sup>208</sup> The Statute of Frauds is a law which requires that certain documents be in writing, such as, real property titles and transfers, leases and wills.<sup>209</sup> The purpose of the law is to protect against false claims for payment from contracts that were not agreed upon.<sup>210</sup>

Under the United States of American (USA) Legal System, the Statute of Frauds was adopted by the congress to prohibit fraud and perjury in disputes over the enforceability of oral contracts.<sup>211</sup> The relevant part of the original statute, called an Act for prevention of frauds and perjuries relating to immovables, is section four.<sup>212</sup> It provides that no action shall be brought

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<sup>202</sup> See Martin Dixon, *Principles of Land Law*, 3<sup>rd</sup> Edition, 1999, Cavendish Publishing Limited, pp. 23-24.

<sup>203</sup> See S.M. Waddams, *The Law of Contracts*, Second Edition, 1984, Canada Law Book Inc, p. 161.

<sup>204</sup> See Yohannes Herui, *Supra* note 100, pp. 33-34.

<sup>205</sup> H.G Beale, *Chitty on Contracts*, *Supra* note 104, pp16 and 24-27.

<sup>206</sup> See S.M. Waddams, *Supra* note 203.

<sup>207</sup> See Yohannes Herui, *Supra* note 100, p. 34.

<sup>208</sup> See H.G Beale, *Chitty on Contracts*, *Supra* note 104.

<sup>209</sup> *Ibid*

<sup>210</sup> *Ibid*

<sup>211</sup> Robert E-Scott and Douglas L. Leslie, *Contract Law and Theory*, 2<sup>nd</sup> Edition, (1993), Contemporary Legal Education Series, The Michie Company Law Publishers, p. 343.

<sup>212</sup> *Ibid*.

unless an agreement relating to sale of lands, tenement, or any interest in or concerning them shall be in writing, and signed by the party to be charged therewith.<sup>213</sup> Nowadays, in several states of USA, the confirmation of the immovable property contracts can be concluded in the electronic form (e-form), provided that the contract itself is concluded in the e-form.

For instance, according to the Electronic Notary Statute of Arizona (a USA state), notary actions can be completed in an e-form.<sup>214</sup> The notary uses a certain e-notation, which is connected with a notarial electronic document and constitutes a notarial e-signature.<sup>215</sup> The initiatives of transferring notarial practice to an electronic environment have been observed in other countries as well (e.g. Austria, Netherlands, France, etc.).<sup>216</sup> The main objective of immovable property public e-services is to allow notaries to present the information to the Centre of Registries in an electronic format.<sup>217</sup> With all that information, the Centre of Registries could register the real rights to the immovable property. In this situation, the issue does not concern form of the contract or how it was concluded, but the follow up procedures after concluding the contract, *i.e.* the registration of real rights to specific immovable property after the conclusion of the contract and transfer of information necessary for this type of registration.<sup>218</sup>

### **3.5.2. Roman law**

The particular importance of forms of contracts under Roman law is the special form required for the voluntary alienation of property.<sup>219</sup> Contracts only serve to create obligations, *i.e.* mere rights to be paid, but they alone could not transfer property.<sup>220</sup> Hence, a formal act of transfer is necessary for ownership of a thing to be transferred.<sup>221</sup> A purchaser does not become owner in virtue of the contract and he is merely the vendor's creditor.<sup>222</sup> For transfer of ownership of a thing, known as, *manicípio*, parties to a contract meet in the presence of at least

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<sup>213</sup> Ibid.

<sup>214</sup> See Electronic Notary Statute // <http://www.azleg.state.az.us/ars/41/00352.htm>. (Last visited September 20, 2013).

<sup>215</sup> Ibid.

<sup>216</sup> See Darius Stitilis, Rimantas Petrauskas, Irmantas Rotomskis, *The Implementation of Public E-Services for Immovable Property Contracts in Lithuania: Legal Aspects*, Journal of International Commercial Law and Technology, Vol.1, Issue 2, 2006, p. 81.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> See Yohannes Herui, *Supra* note 100, p. 33.

<sup>220</sup> See Planiol, *Treatise on the Civil Law*, Volume 1, Part 2, Louisiana State Law Institute, p.529 as cited in Yohannes Herui, *Supra* note 100, p. 34.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

five witnesses and an additional witness called *libripens* (balance holder) who holds a bronze balance as if for the purpose of weighing the bronze metal about to be produced.<sup>223</sup> The purchaser then holds a piece of bronze or coin as a symbol of the price and seizing the thing to be acquired says; “this thing I assert to be mine by the law of the Quirities, and it shall be bought for me with this bronze and bronze balance.”<sup>224</sup> He finally strikes the balance with the bronze or coin and hands it to the other party (the vendor) as a symbolic act.<sup>225</sup> A number of studies show that the modern notion of registration as a necessary formality for the transfer of ownership rights in real property is influenced by Roman law which initiates formal acts of delivery.<sup>226</sup>

### 3.5.3. French Law

According to Planiol, when the Civil Code of France was compiled, the compilers abandoned the old Roman law principle that made delivery necessary for transfer of ownership.<sup>227</sup> The new French Civil Code adopts a principle that “a contract does not merely create an obligation as in Roman law; it may also be translatiue of ownership.”<sup>228</sup> Hence, Art.1138 of the French Civil Code provides that; “the obligation of delivering a thing is perfected by the consent alone of the contracting parties.”<sup>229</sup> Regarding contract of sale, Article 1582 of the same Code states that; “A sale is an agreement whereby one obligates him self to deliver a thing and the other to pay for it.” Further more, Art.1583 of the Code provides that;

*“A sale is perfected between the parties and the ownership is acquired by law by the buyer with regard to the seller as soon as they have agreed on the thing and the price, although the thing has not yet been delivered nor the price paid.”*

On this point, Yohannes Heroui<sup>230</sup> argued that the phrase “A sale is perfected between the parties...” is deliberately provided in the provision so as to recognize the latent danger, i.e, a fear of the existence of a previous sale. He states that “the law leaves the question of the rights of

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<sup>223</sup> See Id, p. 35.

<sup>224</sup> Ibid.

<sup>225</sup> See Henry John Roby, *Roman private Law in the times of Cicero and Antonim*, Vol. I, 2000, The Law book Exchange Ltd, pp.423-424.

<sup>226</sup> See Yohannes Herui, Supra note 100, p. 35.

<sup>227</sup> See Planiol, Supra note 220, p. 35.

<sup>228</sup> See Supra note 100, p. 35.

<sup>229</sup> See John H. Crabb, *The French Civil Code*, Revised Edition, 1995, Fred B. Rothman and Co.

<sup>230</sup> See Yohannes Herui, Supra note 100, p.36.

third parties open to be taken care of, presumably, either by statute or court decisions.”<sup>231</sup> Under the French law, ownership of an immovable passes as a result of a contract alone without any additional requirement of registration.<sup>232</sup> Subsequent legislations attempt to introduce a measure of publicity into the transfer of title to immovables.<sup>233</sup> In this regard, K.W. Ryan states that,<sup>234</sup>

*“In the first place publication is conceived as a means of settling conflicts between successive transferees by according preference to the one who first registers the act of transferring the property. And, secondly, it is regarded as having the role of giving the picture of the various interests which exist over the property to the administration and to individuals”.*

As we can infer from this concept, the sole purpose of registration is publicity which helps to have a complete record of all rights existing over a particular immovable. And, the other important function of registration is to establish priority among transferees from a single transferor.<sup>235</sup> For instance, priority between two duly registered documents concerning the sale of the same immovable property will be determined by the date of registration.

#### **3.5.4. German Law**

According to Planiol, among the Continental laws, it is only the German legal system that “occupies an intermediary place between the French system of transfer by mere agreement and the Roman system of transfer by special procedure.”<sup>236</sup> The purchaser of an immovable cannot become an owner of the property unless he/she makes an entry in the land registry books, made following an act of investiture.<sup>237</sup> In this regard, sub-section (1) of Section 873 of the German Civil Code provides that the conveyance of the ownership in piece of land, the encumbrance of a piece of land with a right, as well as the transfer or encumbrance of such right requires the agreement of the person entitled and of the other party with regard to the occurrence of the

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<sup>231</sup> Ibid.

<sup>232</sup> See K.W. Ryan, Supra note 167, p. 173.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> See Id, p. 174.

<sup>236</sup> See Planiol, Supra note 220, p. 36.

<sup>237</sup> Ibid.

change of title and the registration of the change of title in the Land Register unless otherwise provided by law.<sup>238</sup> Sub-section (2) of Section 873 of the German Civil Code provides that;

*“The parties are bound by the agreement before the registration only if the declarations have been notarially authenticated or given before the Land Registry Office or filed with the same, or unless the person entitled has handed over to the other party an authorization for registration in accordance with the provisions of the Land Registration Law.”*

Planiol justifies this law by the expression; “He who lends on a mortgage is never sure to be paid; he who buys is never sure to become owner and he who pays is never sure that he pays the true owner.”<sup>239</sup> Any purchaser has to fear the existence of a previous sale, unknown to him because it may have been carried out without real delivery.<sup>240</sup> Similarly, he who desires to acquire rights relating to an immovable, such as, servitude and mortgage, without buying an immovable, is never certain of dealing with the true owner.<sup>241</sup> Consequently, the German law requires contracts relating to an immovable to fulfill additional validity condition of registration unlike that of French law.<sup>242</sup> Registration, therefore, is not a means for securing priority of rights as in French law; rather it is a prerequisite for the alteration of rights over immovables. The position of the German law as to registration of acts is “where the agreement is to convey land, it must be declared in the presence of both parties before the Land registry official, a local court, a notary or certain public authorities.”<sup>243</sup>

### **3.5.5. The Latin American Legal System**

In Latin American countries, contracts that create, transfer, declare, modify or extinguish property rights, contracts, acts or judicial decrees that attach or impose liens, prohibitions on transfer of disposition, and other measures of a precautionary or enforcement nature are subject to registration in the real estate registry offices.<sup>244</sup> A statute imposing this requirement can be

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<sup>238</sup> See Simon L.Gores, *The German Civil Code*, Revised Edition, as amended to January 1, 1994, Fred B. Rothman

<sup>239</sup> See Planiol, *Supra* note 220, p. 36.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> See *Id.*, p. 175.

<sup>243</sup> Article 925 of the German Civil Code (B.G.B), See also K.W. Ryan, *An Introduction to the Civil Law*, 1962, Sydney Hallstead press, page 175. Such a concept is also provided under Article 1723 of the 1960 Civil Code of Ethiopia, which prescribes that contracts relating to an immovable shall be registered with a court or a notary.

<sup>244</sup> See Armando J. Tirado, *Notarial and Other Registration Systems, Notaries in Latin America*, Florida Journal of International law, vol.11, 1996, pp.183 -184.

found in most Latin American jurisdictions. Generally, Latin American countries utilize the concept of “first to record, first in right.”<sup>245</sup> Thus, priority between two duly registered documents concerning the same property will be determined not only by the date of registration but also by the number assigned to each document.<sup>246</sup> However, the parties to the transaction cannot take advantage of the lack of registration or defeat by a prior document regarding their mutual liability and the document will be considered valid and duly registered.<sup>247</sup>

### 3.6. Form of Contracts Relating to Immovables under the Ethiopian Law

Many argue that the Ethiopian Civil Code follows its French source as to forms of contracts.<sup>248</sup> The sale of an immovable is perfected as between the parties by the agreement to convey and the effect of failure to register is that, “the purchaser who fails to register the sale is defeated by any rival who registered it first”.<sup>249</sup> In addition, the purchaser of an immovable is not compelled to suffer the effect of mortgage, or of servitude or of other encumbrances placed upon it if it has not been registered.<sup>250</sup> The only difference between the Ethiopian and French laws is that, under Ethiopian law, the contract of sale has to be in the form of a certified instrument whereas, under the French Code, such form is optional.<sup>251</sup>

Under the Ethiopian Civil Code, a contract relating to an immovable shall be of no effect unless it is made in writing.<sup>252</sup> However, so far there is a controversy in Ethiopia whether “registration of a contract of sale of immovables at a court or notary is a formal requirement for the validity of the contract (*ad validitatem*), or a formal requirement (*ad probationem*) for proving the existence of contract in a manner that conflicts with the interest of third parties.<sup>253</sup> Even though, the Civil Code of Ethiopia<sup>254</sup> provides that an entry in the registers of immovable

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<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> See Yohannes Herui, *Supra* note 100, p. 37.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

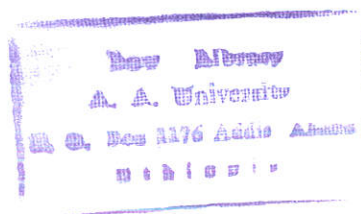
<sup>251</sup> Ibid.

<sup>252</sup> See Articles 1723 cum Article 2877 of the 1960 Civil Code of Ethiopia.

<sup>253</sup> See Mizan Law Review, *Cases, Issues for Reflection*. Volume 4 No.2, Autumn 2010, p. 363.

<sup>254</sup> See Article 1185 of the 1960 Civil Code of Ethiopia.

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property must be required for the purpose of transferring the ownership of immovable property by contract or will, it does not put the effect of unregistered contracts relating to immovables.

According to Article 1719 (2) of the Civil Code of Ethiopia where a special form for a contract is expressly provided by law such form shall be observed. One of the typical juridical acts that are required to be in a special prescribed form is a contract entered into between parties for the purpose of transferring ownership of immovables.<sup>255</sup> Hence, Article 1723 of the Civil Code of Ethiopia provides that a contract relating to an immovable has not only to be in written form but also has to be registered in a court or a notary. At this juncture, it is important to pose the following queries. They are;

- 1) Whether a requirement of registration of contracts relating to an immovable in Ethiopia is one of the validity requirements like German law or mere publicity with effect of granting priority like French law?
- 2) Do unregistered contracts relating to immovables have effect of invalidation of the act between the contracting parties, or simply warning or giving preference when third parties are involved?

In line with Article 1723 of the Ethiopian Civil Code, the Ethiopian law on ‘mortgages’<sup>256</sup> provides that a mortgage created shall not produce any effect except from the day when it is entered in the register of immovable property.<sup>257</sup> It is also provided that the registration of a mortgage shall be effective ten years from the day when the entry was made.<sup>258</sup> Therefore, the cumulative reading of Article 3052 and Article 3058 (1) of the Civil Code of Ethiopia reveals that registration is the fundamental requirement for the validity of a contract of mortgage. Further more, it is also provided that a servitude shall be of no effect on third parties unless it has been entered in the register of immovables.<sup>259</sup>

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<sup>255</sup> See Article 1723 (1) of the 1960 Civil Code of Ethiopia.

<sup>256</sup> According to M. Planiol, a mortgage is “a real security which without dispossessing the owner of the property hypothecated, permit the creditor at due date to take it over and have it sold, in whosoever hands it is found and to get paid from the proceeds by preference to other creditors.” See M. Planiol, *Treatise on the Civil law*, 12<sup>th</sup> Edition, Volume 1, Pt 2, 1939, p. 472.

<sup>257</sup> See Article 3052 of the 1960 Civil Code of Ethiopia.

<sup>258</sup> See Ibid, Art.3058

<sup>259</sup> See Ibid, Art.1364

However, it is not provided as to the effect of unregistered contract of servitude between the contracting parties. The purpose of Article 1364 of the Civil Code is to relieve the common burdens of multiplication of ownership on a single immovable. There is a danger that the purchaser of land may be unaware of the burdens attached to it. Hence, this is one aspect of the general problems of ensuring publicity for the creation and transfer of rights in rem. Some modern systems attempt to address this problem by prescribing the registration requirement for both ownership title and any encumbrance over the immovable.

Similarly, Article 2878 of the 1960 Civil Code of Ethiopia provides that “the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situated.” This provision expresses the effect of unregistered sales contract of an immovable on third parties. The form of the contract is stipulated under Article 2877 of the Civil Code of Ethiopia that reads; “a contract of sale of an immovable shall be of no effect unless it is made in writing.” From the way Article 2877 and 2878 of the Civil Code are stipulated, it is possible to argue that the formal requirement for the validity of a contract of sale of an immovable is prescribed by Article 2877 to be in written form as stated under Article 1723 of the Civil Code.

However, Article 2878 of the Civil Code provides the effect of unregistered contract on third parties but not between the contracting parties. Therefore, it is possible to argue that unregistered contract of sale of an immovable will have effect on the contracting parties until third parties rights are involved in the same contract. Where as, if a third party’s interest involves into an immovable, the contract will have no effect unless it is registered. Here it is important to raise a query, i.e, what is the purpose of registration under Article 1723 of the Civil Code? In this regard, George Krzeczunwic argues that;

*“Lack of registration with a court or notary of the written contracts contemplated by this article (Art.1723) does not affect their validity between the parties [(Article 1720 (3)]. But rights on an immovable purported to be granted to a party by a non registered contract can’t prevail over incompatible rights, granted to a third party by a later but registered contract...”<sup>260</sup>*

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<sup>260</sup> See George Krzeczunowicz, Supra note 110,p. 74.

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According to this commentary on the importance of registration, registration is valuable when plurality of claims arise relating to an immovable property. Disputes as to priority of claims may arise on a certain immovable. When such disputes arise, a contract relating to an immovable which is registered with a court or a notary will survive. In principle, however, registration is not a validity requirement. And, the mere fact that the contract lacks registration does not lead to the invalidation of the contract. Registration, according to G. Krzeczunwic, is a measure of publication. To substantiate this, he has made a reference to Article 1720 (3) of the Civil code which provides; “Unless otherwise provided, a contract shall be valid notwithstanding that prescribed measures of publication have not been complied with.”

Rene David, while commenting on this point also argues that:

*“Requirement of form must not be confused with tax requirements such as registration that may be required by the law at the conclusion of the contracts. Unlike formal contracts, requirements of the tax laws usually are not sanctioned by invalidation of the contract in question. Non-compliance with them results in other sanctions (fines, impossibility to enforce the contract through the courts, etc.) that are stated in the statutes concerned. [Article 1720 (2) states this rule which is of great importance with respect to international contracts. Similarly, failure to comply with requirement of publication, such as, the copying or mention of a contract in a public registrar, does not lead to the invalidation of the contract.”*<sup>261</sup>

Rene David states that the importance attached to land by Ethiopians justifies Article 1723, which requires the conclusion in writing of all acts creating or transferring ownership, usufructs, or servitudes on immovables, as well as for contract of compromise or partition relating to an immovable.<sup>262</sup> He argues that registration is not a validity requirement, thus, lack of registration with a court or notary is not sanctioned by invalidation. Rather non-compliance with these requirements results in fines or impossibility to enforce the contract in the court of law. However, he puts a proviso as to the effect that when the law gives an expressly contrary provision, it would result in the invalidation of the contract. This contrary

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<sup>261</sup> See Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p.32.

<sup>262</sup> See *Ibid*, p.34.

provision can be exemplified by the mortgage provisions which require registration as a prerequisite of validity. Furthermore, the intention of the legislature can also be grasped from idea provided under Article 1645 of the Civil Code of Ethiopia. The provision provides that “where, in default of a registration of an act in the registers of immovable property, the right of a person may not be set up against third parties, and no person may acquire from such person a right which may be set up against third parties.” This provision also states the effect of unregistered acts relating to an immovable against third parties. But, it provides nothing as to the effect of unregistered act upon the contracting parties.

Disputes between contracting parties as to formal requirements are nowadays becoming frequent problems appearing before courts. Writing as a formal requirement in the transfer of ownership of an immovable is not disputable. The point of controversy among judges, legal scholars and other stake holders is whether registration of contracts relating to an immovable is one of the validity requirements under the Ethiopian law or not. Generally, many legal scholars believe that registration is not a validity requirement for transfer of ownership of an immovable under the Ethiopian law. They argue that registration of contract of sale of an immovable is not a validity requirement as stated under Articles 2877 and 2878 of the Civil Code. However, registration is a validity requirement for some acts like mortgage as it is specifically provided under Article 3052 of the Civil Code.

Therefore, the status of registration under the Ethiopian law is dependent upon the special provisions of the Civil Code. The special provisions of the law may require registration as a validity requirement like what is prescribed by the provisions as to mortgages. Besides, in studying the provisions of the Civil Code on the registration of immovable property, it is necessary to consider two closely related concepts; proof of ownership of an immovable on the one hand, and formal requirements on the other hand. “The issuance by the administrative authorities of a title deed to the effect that a given immovable belongs to a given person shall raise a presumption that such person is the owner of such immovable.”<sup>263</sup> Formal

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<sup>263</sup>See Article 1195 of the 1960 Civil Code of Ethiopia.

requirements, on the other hand, are required for the validity of a contract creating or transferring a real right on an immovable.<sup>264</sup>

### **3.7. The System of Registration of Immovable Property under the Civil Code of Ethiopia**

#### **3.7.1. Registration under Title X of the Civil Code of Ethiopia**

##### **3.7.1.1. Types of Registers to be maintained**

Registration under Title X may be classified into two main categories; Registration of Acts and Registration of Land.<sup>265</sup> The Civil Code on registration of immovable property (Title x) provides that “all acts ... purporting to recognize, transfer, modify or extinguish the right of ownership of one or more persons over an immovable shall be registered.”<sup>266</sup> The registers in which these acts are registered are of two kinds; they are;<sup>267</sup> (1) register of property and (2) register of mortgages (Art.1556). The list of acts which must be registered in the register of property is quite wide since the registers should reflect the full character of the property so that an intending purchaser knows what he is buying and the person with an interest in the property knows that it will be protected.<sup>268</sup> These are spelled out in Articles 1568 to 1573 inclusive.

Mortgages have also their own registers reflecting their importance as well as precedence in the history of registration of liabilities affecting land.<sup>269</sup> Registers of property and mortgages are required to be kept in each place of conservation as per the districts into which the land is divided.<sup>270</sup> In urban areas, such registers may be devoted to registration of restrictions or servitudes imposed by the municipality “not to build, rights of way or servitudes relating to municipal sewers and pipes.”<sup>271</sup> Furthermore, the Registers of property and mortgages have to consist of files made up of printed forms, made available to private individuals “who shall

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<sup>264</sup> See for instance, Article 1723 of the Civil Code of Ethiopia which requires certain rights on an immovable be in writing and registered with a court or notary.

<sup>265</sup> See Yohannes Herui, *Supra* note 100, p. 43.

<sup>266</sup> See Article 1567 of the 1960 Civil Code of Ethiopia.

<sup>267</sup> See *Supra* note 100, p. 43.

<sup>268</sup> See *Supra* note 100, p. 44.

<sup>269</sup> *Ibid.*

<sup>270</sup> See *Ibid* and Article 1555 of the 1960 Civil Code of Ethiopia. According to this provision, the geographic area constituting a district for such purposes is to be determined by the Ministry of Agriculture.

<sup>271</sup> See Article 1538 (2) of the 1960 Civil Code of Ethiopia.

cancel any useless indications and fill in any blanks therein”.<sup>272</sup> Therefore, the registers are transcriptions of the act giving rise to the right to be registered rather than the registration of the act itself.<sup>273</sup> Basically, the Registers of property and mortgages are registers of names, in the sense that the registrations are effected against the name of the land owner or other person whose interest on the land is intended to be affected thereby.<sup>274</sup> Under Register of Land, it is a plot of land that is registered and once so registered all acts subject to registration i.e. titles and encumbrances which concern the immovable are entered against it.<sup>275</sup> This type of registration resembles the system of the modern registration of title.<sup>276</sup> Hence, the registers shall be kept “in permanent and absolute conformity with the cadastral survey plan.”<sup>277</sup>

### **3.7.1.2. The Procedure for Registration under Title X**

When an interested person requests for registration, there are certain procedures that the person requesting shall follow.<sup>278</sup> The keeper of registers is not allowed to effect any registration on his own motion.<sup>279</sup> The person making the request for registration may attach thereto the act itself or any other supporting document that he thinks fit. The keepers of registers cannot refuse to accept a request on the grounds that all the necessary documents for registration are not attached to such request.<sup>280</sup> They shall inform the person making the request to attach the necessary documents and warn him the consequences that arise from the absence of the necessary documents.<sup>281</sup> The keeper shall assign to each request a serial number in the register to which such request corresponds and shall hand back to the person making the request one of the forms duly signed by him with the seal of the place of conservation affixed thereon.<sup>282</sup> According to Articles 1598-1600 of the Ethiopian Civil Code, the other form shall be incorporated in one of the two principal registers to which it appertains in the order in which the requests are made.

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<sup>272</sup> See Article 1587 of the 1960 Civil Code of Ethiopia.

<sup>273</sup> See Yohannes Herui, *Supra* note 100, p.44.

<sup>274</sup> See *Ibid* and Article 1558 of the 1960 Civil Code of Ethiopia.

<sup>275</sup> See *Supra* note 100, page 45.

<sup>276</sup> *Ibid*.

<sup>277</sup> See Articles 1575 and 1576 of the 1960 Civil Code of Ethiopia.

<sup>278</sup> See *Ibid*, Art.1594

<sup>279</sup> See *Ibid*, Art. 1593

<sup>280</sup> See *Supra* note 100, p. 46.

<sup>281</sup> See Article 1613 of the 1960 Civil Code of Ethiopia.

<sup>282</sup> See *Supra* note 100, p. 46.

protection of third parties. They also argue that as a special law Article 2878 prevails over the general principle of law provided under Article 1723. There were “no laws on notaries and laws enabling the courts to perform the tasks attributed to them by Article 1723 both prior and subsequent to the enactment of the 1960 Civil Code of Ethiopia.”<sup>305</sup> This is the major problem that has contributed its own share for the existence of different opinions on the issue.

### **3.8.1. Registration with a Notary**

A Notary is an institution essentially French even though it is a universal institution and exists in some form in common law countries and, to lesser extent, in continental ones too.<sup>306</sup> It was Napoleon Bonaparte who recognized and formed the basis of the modern Notary institution by the law of 25 *Ventose*, Year XI (1803).<sup>307</sup> According to the law of France;

*“Notaries are public officials instituted for the purpose of receiving all acts and contracts to which the parties are required by law, or desire, to invest with the character of authenticity attaching to the acts of the public authority, of establishing the date thereof, of having the custody of the originals, and of furnishing copies both common and executory.”*<sup>308</sup>

We can infer from this definition that Notaries are public officers who are rewarded for their services by fees collected from their clients as per a schedule set by the law. In American Jurisprudence, a notary or notary public is an “officer whose duty is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained.”<sup>309</sup> Notaries can only function within the territorial jurisdiction of the district for which they are appointed.<sup>310</sup> The most important function of notaries is the drawing up of acts which the parties must or wish to invest with the character of authenticity.<sup>311</sup> Hence, individuals prefer to conclude contracts of any significance before notaries because of the respect and confidence commanded by notary institutions.<sup>312</sup>

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<sup>305</sup> See Yohannes Herui, *Supra* note 100, pp.51-52.

<sup>306</sup> See M. Cappelletti, J.H. Merryman and J.M. Perillo, *The Italian Legal System, An Introduction*, 1967, Stanford University Press, pp.95-102.

<sup>307</sup> See *Supra* note 100, p. 52.

<sup>308</sup> See Amos and Walton's, *Introduction to French law*, 2<sup>nd</sup> edition, 1963, Clarendon Press, Oxford, p. 24.

<sup>309</sup> See James. B. (General Editor), *American Jurisprudence Legal Forms Annotated*, 1954, New York, Bancroft-Whitney Co., p. 73.

<sup>310</sup> See *Supra* note 100, p. 53.

<sup>311</sup> *Ibid.*

<sup>312</sup> See Planiol, *Treatise on the Civil Law*, Vol. 1, Part 2, Louisiana State law Institute, p. 79.

The “authentic act”<sup>313</sup> made before a notary conclusively establishes the following three things.<sup>314</sup> (1) The act was in fact so drafted and executed; (2) the recitals and agreements expressed in the act are accurate reports of the parties’ statements and agreements; and (3) any fact that the act recites to have occurred in the presence of the notary did occur and any act the instrument recites to have been performed by the notary and attesting witnesses, if any, was in fact performed. However, the conclusive nature of a notarial act can only be impeached by a special procedure.<sup>315</sup> The notary is expected to be the guarantor of the identity of parties.<sup>316</sup>

Besides, a notarial act is full proof of its date and confers an authentic date upon the instrument unlike instruments under private writings.<sup>317</sup> The date of the instrument becomes important in determining the order of priorities in real rights.<sup>318</sup> Notarial acts are drawn in originals and copies as the originals must remain with the notary for the sake of safe preservation and it is only certified copies that are issued to the parties.<sup>319</sup> Some argue that the reason why the Civil Code of Ethiopia under Article 1723 uses the term “registration” instead of the more appropriate term “authentication” is the practice of drawing up Minutes by notaries in relation to sales of immovables that give the function of the notary the characteristics of registration proper.<sup>320</sup> In this regard, D. Barlow Burke describes the practices of the French Notaries as follows;

*“The provisions of the ‘acte de vente’ (sales of immovables) give the document an all inclusive contractual and conveyancing quality... The first element is a recitation that the parties appeared before the notary at a particular place. The second provision identifies the parties with greater particularity: their names, marital status, addresses, occupation, and dates and places of birth. These preliminaries recited, the major portion of the document declares that the parties purchase and sale the property, which*

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<sup>313</sup> Here it is important to put the definition of Authentic act. Pursuant to Article 1317 of the French Civil Code, Authentic act is “any instrument which has been drawn up, with the proper formalities, by a public officer duly empowered by law to that effect, in the place where he officiates.”

<sup>314</sup> See M. Cappelletti, J.H. Merryman and J.M. Perillo, Supra note 306, p. 100.

<sup>315</sup> See Amos and Walton’s, Supra note 308, p.51.

<sup>316</sup> See Ibid, and Planiol, Supra note 213, page 86.

<sup>317</sup> This idea seems similar to Article 2015 (a) and (b) of the 1960 Civil Code of Ethiopia. See Supra note 6, page 55.

<sup>318</sup> See Planiol, Supra note 312, p. 562.

<sup>319</sup> See Yohannes Herui, Supra note 100, p. 55.

<sup>320</sup> See Ibid, pa. 56 and Amos and Walton, Supra note 308.

*is then physically described. If a dwelling unit is involved, a description is given room by room, detailing the function of each...*<sup>321</sup>

There is also a section of the '*acte de vente*' (sales of immovables) which contains a history of the title to the immovable property extending back in time over 30 years and passes a resume of the title on the land to successive owners like title deeds.<sup>322</sup> So, the notary is turned into an archivist by reason of his duty to conserve his acts in minutes and the traditions of its practice.<sup>323</sup> Besides, since acts must be registered at state office, a notary must keep a daily journal of all the acts which it receives.<sup>324</sup> Even though the minutes of the notary are not public records like registers of property, a visit at the notary's office where the land is situated would yield, to the prospective purchaser, much the same information as a visit to the land registry office would.<sup>325</sup> Hence, a notary may not deliver the documents in his custody to third parties except by an order of a court.

Here, it is important to raise a query: i.e whether the act set forth under Article 1723 of the Civil Code of Ethiopia is "authentication" or "registration"?<sup>326</sup> Some argue that there are two reasons which pull Article 1723 closer to registration proper. They are:<sup>327</sup> (1) the practice of notaries in the drafting of their minutes and (2) the drafter of the Civil Code of Ethiopia, Professor Rene David, who is the expert draftsman of the Ethiopian Civil Code, must have this idea in mind when selecting the term "registration". Consequently, it is possible to conclude that under the Civil code of Ethiopia, the sale of an immovable is perfected by the agreement to convey as between the parties, but this agreement must be in the form of an authentic act so as to be valid.<sup>328</sup> Besides, private agreements alone would not be adequate and herein alone lies the difference between the Ethiopian law and its French counterpart.<sup>329</sup>

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<sup>321</sup> See D. Barlow Burke, *The Notaries in North America: A Short Study of the Adaptation of a Civil Law Institution*, Tulane Law Review, Volume 50, 1975-1976, p. 323.

<sup>322</sup> See Ibid, p. 324.

<sup>323</sup> Ibid

<sup>324</sup> Ibid

<sup>325</sup> See Yohannes Herui, *Supra* note 100, p. 58.

<sup>326</sup> Here it is important to understand the difference between Authentication and Registration. Authentication is primarily designed to bring about certainty in transactions: whereas, registration is an act of publicity designed to bring about security in transactions. This point is provided under Section 3.2.2 of the research in detail.

<sup>327</sup> See *Supra* note 100, p. 58.

<sup>328</sup> Ibid

<sup>329</sup> Ibid

Practically in Ethiopia, to establish notaries that serve as drafters of acts and legal advisor in all valuable acts of daily life in every district of the country is a righteous idea. In addition to their benefits in the economic spheres, notaries also have the beneficial effect of raising the level of legal awareness of the public and enhancing respect for the rule of law.<sup>330</sup> As far as the history of a notary institution in Ethiopia is concerned, a notary was first introduced into Ethiopia by the Italians during their brief period of occupation (1935-1941).<sup>331</sup> After the departure of the Italians, notarial services were discontinued for some time until around 1945 when the registrar of the High Court commenced providing these services.<sup>332</sup> However, since the enactment of the 1960 Civil Code of Ethiopia, unfortunately it took more than 40 years to establish a notary institution somehow similar to the one envisaged by the code. This research shall provide some points about this new notary office under section 3.7.4.

### **3.8.2. Registration with a Court**

For the first time, the Registrar of the High Court of Ethiopia started providing notarial services in Addis Ababa in the year 1945 and soon extended to other localities.<sup>333</sup> Then, the Registrars of *Awraja* and *Wereda* Courts began rendering such services according to a Circular issued by the then Ministry of Justice.<sup>334</sup> However, this Circular was soon outdated by the 1965 Civil Procedure Code of Ethiopia which nowhere assigns to the courts and court officials functions similar to those of a notary. Nevertheless, Registrars continued performing their previous functions as if nothing affecting their powers has happened.<sup>335</sup> In 1970, registrars were relieved of their notarial functions and a separate unit, known as “Contract Section” established for this purpose as a different office within the High Court, and the head and deputy head of this section replaced the registrar in assuming notarial functions.<sup>336</sup>

In the year 1976, the Contract Section was detached from the High Court and became part of the Ministry of Justice under the Civil Affairs Division.<sup>337</sup> Since then, the legally undefined

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<sup>330</sup> See Ibid, p.59.

<sup>331</sup> Ibid

<sup>332</sup> See Abate Yimer, *The Function of the Notary Public of Ethiopia*, 1985, unpublished, Justice and Legal System Research Institute (JLSRI), p. 19.

<sup>333</sup> Ibid

<sup>334</sup> Ibid

<sup>335</sup> See Yohannes Herui, *Supra* note 100, p. 60.

<sup>336</sup> See Ibid, citing Thomas Gebreab and Girma Wakjira, *The Duties and Responsibilities of the Notary in Ethiopia*, 1981, *Ministry of Justice*, unpublished, p. 18.

<sup>337</sup> See *Supra* note 100, p. 60.

and the little known roles of courts as notarial offices have ended.<sup>338</sup> According to Yohannes Heroui, “the new section within the Ministry of Justice served as a nucleus for the latter establishment of the Addis Ababa City Government Acts and Documents Registration Office and its successor the present Federal Office of the same name, now an autonomous institution under the Ministry of Justice.”<sup>339</sup> Moreover, the Civil Code of Ethiopia contains provisions giving the courts functions of registration similar to those of notaries under a number of Articles.<sup>340</sup> From this we can infer that some role was also assigned to the courts to serve as depositories of records dealing with non-debatable matters at the time of the enactment of the Civil Code of Ethiopia. This function of courts has the purpose “to give registered acts as much publicity as possible as courts are not only readily accessible but also places which one would naturally approach to obtain information on such matters.”<sup>341</sup> The main reason of the rule that the documents shall be deposited in a district other than the one where the registrar resided is in order to prevent possible alterations of documents since same documents are deposited in several places.<sup>342</sup>

So, it is possible to conclude that the “registration” provided under Article 1723 is different in its essence from the “registration” provided under Article 2878.<sup>343</sup> To be valid, a contract of sale of an immovable must be in the form of an authentic act. However, the law under Article 1723 on registration with notaries was a dead law until the year 2003. The laws that mandatorily prescribe on registration with courts were not also effective laws “as neither the Civil Procedure Code nor other special laws passed to date enable the courts to perform such functions.”<sup>344</sup>

### ***3.8.3. The Nature and Functions of the Ethiopian New Notary Office of 2003***

In the year 2003, a law establishing Notary Offices was enacted. The “Authentication and Registration of Documents Proclamation No.334/2003 came out and entered into force on May 2003. This law marks a turning point on the status of the provisions of the Civil Code of Ethiopia relating to Notarial Acts. Accordingly, the question of failure to comply with the formalities of the provisions of the Code on registration acquires a place of practical importance.<sup>345</sup> The new

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<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> See, for instance, Articles 630 (Deposit of Contracts), 891 (Deposit of Wills) and also 632, 962,964,967.

<sup>341</sup> See Yohannes Herui, *Supra* note 6, p. 61.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> See *Ibid*, p. 62.

notary office is far different from the notary envisaged by the Civil Code since it more resembles the “public notary” of the Anglo-American system than the French notariat per se.<sup>346</sup>

The new notary offices are government organs performing their functions under the directions of the Ministry of Justice and Regional Justice Bureaus, in case of the federal offices and in the case of regional states, respectively.<sup>347</sup> Hence, the employees of the notary offices are to be administered by the relevant civil service laws.<sup>348</sup> As far as the territorial competence of the notary offices is concerned, each regional state is obligated to organize its own notary offices and “may issue details based on the facts of its own area.”<sup>349</sup> The cities of Addis Ababa and Dire Dawa, which are accountable to the federal government, shall also establish notary offices.<sup>350</sup> Except organizational details, states are expected to establish notary offices similar in content to the federal notary offices so as to bring about uniformity.<sup>351</sup> The new Notary Office does not have the all-important function of drawing up acts and it is forbidden to “change or cause to be changed the contents of a document submitted for authentication apart from ascertaining its legality.”<sup>352</sup> The main functions of the new notary office are the following:<sup>353</sup>

- I. To authenticate and “register documents”.<sup>354</sup>
- II. To verify copies of documents against their originals and register same.
- III. To ascertain the capacity, right and authority of persons who are about to sign or who have signed documents submitted for registration.
- IV. To ascertain the legality of documents submitted for authentication.
- V. To ascertain with respect to contracts made to transfer properties for which title certificates are issued under the law; (a) the right of the transferor to transfer the property; and (b) that the property is not mortgaged or pledged or not attached by a court order.<sup>355</sup>

<sup>346</sup> See Thomas Gebreab, *The “Notariat” in Ethiopia; Its Present Functions and Status in Comparative Perspective*, Unpublished, 2000, Addis Ababa University, Faculty of Law, p.10.

<sup>347</sup> See “Authentication and Registration of Documents (Amendment) Proclamation No.467/2005, Article 1 cum Article 50(2) and (6) of the FDRE Constitution.

<sup>348</sup> See Article 3 (2) (a) of Authentication and Registration of Documents (Amendment) Proclamation No. 467/2005.

<sup>349</sup> See Article 19 of Authentication and Registration of Documents Proclamation No.334/2003.

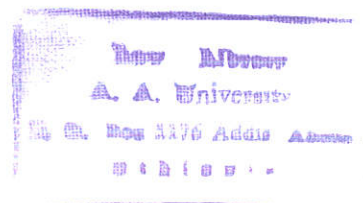
<sup>350</sup> See Ibid, Article 20 (1).

<sup>351</sup> See Yohannes Herui, *Supra* note 100, p. 63.

<sup>352</sup> See Article 13 (2) of Authentication and Registration of Documents Proclamation No.334/2003

<sup>353</sup> See Ibid, Article 4.

<sup>354</sup> As per the definition of Authentication and Registration of Documents Proclamation No.334/2003 “to register a document” means “to register an authenticated document by marking it with identification number, in a register prepared for this purpose and to deposit the same document, or to register or deposit a document which is required by law to be deposited with a notary.”



However, the documents so registered are not open to the public as the notary owes a duty of secrecy. Hence, the notary is duty bound not to give to third parties information which comes into his possession in the course of performing his duties unless ordered by a court or by other body empowered by law.<sup>356</sup> According to Yohannes Heroui, registration before a notary under Article 1723 refers to “authentication of an act and the deposit of such act by registering it in a book prepared for this purpose.”<sup>357</sup> The purpose of “depositing” is basically for the sake of conservation rather than giving publicity to the act.<sup>358</sup> As a result, the provisions of the Civil Code of Ethiopia “dealing with notaries are activated bearing the attributions conferred on notary offices by the new Authentication and Registration of Documents Proclamation.”<sup>359</sup>

#### ***3.8.4. The Effect of Failure to Register Contracts Relating to Immovables***

Under the Ethiopian Civil Code, a contract of sale of an immovable shall be of no effect unless it is made in writing and a contract required to be in writing shall be of no effect unless it is attested by two witnesses.<sup>360</sup> The law uses a slightly different language as regards contracts creating or assigning rights in real property under Article 1723. This provision employs the mandatory word “shall” and states that contracts creating or assigning rights in real property shall be in writing and registered with a court or a notary. This seems to imply that a distinction is drawn, as regards their effect, between lack of proper form relating to writing, which makes the act inexistent and those relating to lack of registration that makes the act null and void.<sup>361</sup>

In theory, where an act is inexistent the law does not have to annul it since the act has not been performed in reality and exists only in appearance.<sup>362</sup> So, judicial intervention would not be necessary “as one does not destroy that which does not exist.”<sup>363</sup> Whereas, an action at law becomes necessary if a dispute arises relating to the validity of the act, thereby casting doubt as to its nullity since “nobody can take the law into his own hands”.<sup>364</sup> According to Professor Krzeczunowicz, the practical consequences of the distinction between inexistent, null or void,

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<sup>355</sup> See Article 4 of Authentication and Registration of Documents Proclamation No.334/2003.

<sup>356</sup> See Ibid, Art. 9

<sup>357</sup> See Yohannes Herui, Supra note 100, p. 64.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> See Article 2877 cum Article 1727 of the 1960 Civil Code of Ethiopia.

<sup>361</sup> See Supra note 100, p. 65.

<sup>362</sup> Ibid.

<sup>363</sup> See Aubry and Rau as quoted in Planiol, Supra note 312, p.223.

<sup>364</sup> See Ibid, p. 233.

and annulable or voidable contracts “amount to so little under the Ethiopian legal system”.<sup>365</sup> Under the Ethiopian Civil Code, all types of nullities are governed by the provisions of Section one of Chapter three on obligations.

The very fact that a contract relating to an immovable is made in writing is likely to discourage fraudulent claims which have never been made. However, there shall be due care not to use formalities as a means to trap innocent third parties. Under the Ethiopian law, a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party.<sup>366</sup> The effect of invalidation is governed by Article 1815 of the Civil Code which requires the reinstatement of parties “in the position that would have existed had the contract not been made.” This provision could provide a possible remedy in discouraging the rules as to forms from being used as a device of fraud. “Reinstatement” of the innocent purchaser to his previous position could be interpreted to mean the position of equality in comparison with the seller in respect of the value of the property bought and sold.<sup>367</sup> It would be a reasonable “reinstatement” if the reinstatement approximates the value of the property at the time invalidation was sought.<sup>368</sup> It would be a poor reinstatement, however, if reinstatement is meant the price paid at the time of the sale of the property.<sup>369</sup>

#### **3.8.4.1. Draft Contracts under Article 1720 (1) of the Civil Code of Ethiopia**

Article 1720 (1) provides that “where a special form is prescribed by law and not observed there shall be no contract but a mere draft of a contract.” According to some studies, this provision seems to be superfluous and could be confusing unless followed by an answer to the question “what if the contract is considered a mere draft contract?”<sup>370</sup> The search for an answer to the question would guide us to Article 1808 (2) of the Civil Code which provides that a contract not made in the prescribed form may be invalidated. However, Sub-articles (2) and (3) of Article 1720 state that formalities additional to those provided in the code such as those relating to stamp duties or registration fees and “prescribed measures of publications” found in other laws do not affect the validity of the contract. In this regard, as we have seen under section

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<sup>365</sup> See George Krzeczunowicz, *Supra* note 110, p. 9.

<sup>366</sup> See Article 1808 of the 1960 Civil Code of Ethiopia.

<sup>367</sup> See Yohannes Herui, *Supra* note 100, p. 67

<sup>368</sup> See *Ibid*, pp. 67-68.

<sup>369</sup> See *Ibid*.

<sup>370</sup> See *Ibid*, p.72.

3.6 of this research, Rene David argues that formal requirements must not be confused with tax requirements such as registration that may be required by the law at the conclusion of the contracts.<sup>371</sup> He states that requirements of tax laws usually are not sanctioned by invalidation of the contract in question unlike formal contracts.<sup>372</sup> Similarly, failure to comply with requirement of publication does not lead to the invalidation of the contract.<sup>373</sup>

The Federal Supreme Court Cassation Division of Ethiopia held a position that where a contract relating to an immovable property is not registered before a court or notary there shall be no contract but a mere draft of a contract.<sup>374</sup> Besides, it ruled that such mere draft contracts shall be invalidated and the parties shall be reinstated to the position which would have existed had the contract not been made.<sup>375</sup> This decision of the cassation division, however, has given rise to a controversy as we shall see under Chapter 4 of the research. Here, it is natural to raise a query: is there any legal ground to reinstate the parties to the position which would have existed had the contract not been made if a contract does not exist from the very beginning?

Judge Ali Mohammed, who is one of the judges in the Cassation Division, says no.<sup>376</sup> He provides, in his dissenting opinion regarding unregistered contracts of sale of a house, that it is hardly possible to categorize a mere draft contract as a void contract or voidable contract.<sup>377</sup> He also argues that unregistered contract relating to an immovable before a court or notary shall not be considered as a mere draft contract so long as it is made in written form and attested by two witnesses and material circumstances prove the formation of the contract.<sup>378</sup>

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<sup>371</sup>See Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p. 32.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup>The Cassation Division holds this position in its interpretation rendered in the Civil Cassation File Number 21448 between W/o Gorfie Gebre Hiwot v. Aberash Dubargie and Getachew, Negga, 1999 E.C. It is accessible at the Decisions of the Federal Supreme Court Cassation Division of Ethiopia, volume 4, p. 40.

<sup>375</sup>See the Interpretations of the Cassation Division rendered in the case between Ato Mekuant Werede v. Meskerem Dagnaw and others in the Cassation File Number 34803, Decisions of the Federal Supreme Court Cassation Division of Ethiopia, volume 8, p. 294, and, in the cassation case between Ato Muhadin Faris v. Ato Eyasu Bede Mariam in Cassation File Number 34803, Decisions of the Federal Supreme Court Cassation Division of Ethiopia, volume 7, p. 153. The Cassation Division rendered its interpretations on both cases pursuant to Articles 1808 and 1815 of the Civil Code of Ethiopia.

<sup>376</sup>See the Dissenting opinion of Judge Ali Mohammed in the case between Ato Mekuant Werede v. Meskerem Dagnaw and others in the Cassation Case No. 34803, Decisions of Federal Supreme Court Cassation Division, Volume 8, pp.297-306. An Interview with Judge Ali Mohammed, Judge in the FS CCD, on November, 4, 2013.

<sup>377</sup> See Ibid.

<sup>378</sup> See Ibid.

### 3.8.4.2. Who may require Invalidation?

The Civil Code of Ethiopia makes a distinction between annulment of acts relating to form and those relating to substance. A contract which is affected by defect as to substance (consent and capacity of one of the party) may only be invalidated at the request of the party suffering from lack thereof.<sup>379</sup> Whereas, a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party.<sup>380</sup> Hence, in both cases the right to invalidate a contract does not belong to everybody: rather, only to a party with vested interest. In principle, contracts do not have any absolute effect against everybody. They normally bind only the parties to them and can neither confer rights nor injure the rights of third parties.<sup>381</sup> Nevertheless, this general rule has its own exception. For instance, the effects of a contract may extend to the heirs and successors by universal title of the contracting parties unless the contrary was stipulated or flows from the nature of the contract.<sup>382</sup> The heirs and successors are deemed to continue the person of the deceased. Thus, the rights and obligations arising from the contract entered into by the deceased during his life time are transferable to the heirs and successors in proportion of their hereditary portions.<sup>383</sup>

### 3.9. The Effect of Nationalization of Rural and Urban Lands in Ethiopia

In Ethiopia, soon after the February Revolution of the year 1974, all rural lands were nationalized by "Public Ownership of Rural Lands Proclamation No.31/1975".<sup>384</sup> This was followed by "Government Ownership of Urban Lands and Extra Houses Proclamation No.47/1975."<sup>385</sup> The rural lands nationalization proclamation provides that all rural lands are "the common property of the Ethiopian people" and that, from this time onward, no person or business or any other organization may hold rural lands in private ownership.<sup>386</sup> Article 5 of the proclamation declares that a person may not by "sale, exchange, succession, mortgage, antichresis, lease, or otherwise" transfer his holding to another except that, upon the death of the holder, the wife or husband or minor children of the deceased or where they are not present, any child of the deceased who has attained majority, shall have the right to use the land.

<sup>379</sup> See Article 1808 (1) of the 1960 Civil Code of Ethiopia.

<sup>380</sup> See *Ibid*, Art. 1808 (2)

<sup>381</sup> See, for instance, Article 1952 of the 1960 Civil Code of Ethiopia and Article 1165 of the French Civil Code.

<sup>382</sup> See, for instance Article 1986 of the 1960 Civil Code of Ethiopia and Article 1122 of the French Civil Code.

<sup>383</sup> See Yohannes Heroui, *Supra* note 100, p. 69.

<sup>384</sup> See *Ibid*, p. 72.

<sup>385</sup> See *Ibid*.

<sup>386</sup> See Article 3 of the Public Ownership and Rural Lands Proclamation No.31/1975, *Neg.Gaz.*, 34<sup>th</sup> Year No.26.

In the same stratum, the Urban Lands and Extra Houses Nationalization Proclamation provides that all urban land is the property of the government and that any person, family or business organization may not hold urban land in private ownership.<sup>387</sup> It proclaims also that any person or family may own only a single dwelling house and may in addition own business houses the number and size of which shall be determined by the government.<sup>388</sup> It further provides that henceforth any person or family may be granted the possession of up to 500 square meters of land for the purpose of building a dwelling house. Besides, organizations may also be granted lands for the purpose of building offices or dwelling houses.<sup>389</sup> “Any person, family, or organization who owns a house, by virtue of these provisions, has the right to transfer such house by sale, barter or succession.”<sup>390</sup>

The FDRE Constitution of 1995, which is presently in force, endorses the principles underpinning the above two proclamations which were enacted during the ‘Derg’ regime.<sup>391</sup> It proclaims that “The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.”<sup>392</sup> However, the two recent developments of laws relating to immovables in Ethiopia are the law on “Urban Lands Lease Holding” and the law on “Condominiums.”<sup>393</sup> The FDRE “Re-enactment of Urban Lands Lease Holding Proclamation No.272 of 2002” creates another land holding system, known as, the leasehold “in which the use right of urban land is transferred or held contractually.”<sup>394</sup> Leasehold is granted for a term of years that may be of up to 99 years.<sup>395</sup> The leasehold title deed possessor may transfer his right of leasehold, mortgage it, and may also use it as a capital contribution to the amount of the lease payment he has made as leasehold.<sup>396</sup>

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<sup>387</sup>See Article 3 of the “Government Ownership of Urban Lands and Extra Houses Proclamation No.47/1975, Neg.gaz.,34<sup>th</sup> Year No.41.

<sup>388</sup>See Ibid. Article 11.

<sup>389</sup>See Ibid. Article 5.

<sup>390</sup>See Ibid. Article 12.

<sup>391</sup>See Supra note 6, page 73.

<sup>392</sup>See Article 40(3) of the 1995 Constitution of Federal Democratic Republic of Ethiopia (FDRE).

<sup>393</sup>See Supra note 100, p. 74.

<sup>394</sup>See Article 3(1) of the “Re-enactment of Urban Lands Lease Holding Proclamation No.272 of 2002”

<sup>395</sup>See Ibid, Articles 6 and 7.

<sup>396</sup>See Supra note 100, p. 74.

The FDRE “Condominium Proclamation No.370/2003” attempts to create favorable conditions to individuals to build their own houses by pooling their limited resources so as to improve urban land use and supply houses via making great number of people benefit and commonly hold a small size of urban land.<sup>397</sup> A building may be registered as a condominium when the owners submit a written application declaring their intention that the building be so designated as a condominium. When the building is so registered, a certificate of registration shall be issued to the promoter (declarant).<sup>398</sup> A promoter may raise the necessary capital for the construction of the building by selling a unit (a flat or an apartment) of the condominium. Accordingly, the promoter shall deliver the necessary documents relating to the formation of the condominium to every person who purchases a unit before or after the registration of the building.<sup>399</sup> A unit owner is entitled to ownership right upon the unit and he can thus sell or transfer his right of ownership to others. A unit of a building registered may also “be subject of any legal transaction” and the owner may thus create encumbrances on the unit.<sup>400</sup>

To sum up, we have seen that the laws on registration aim at promoting security in land transactions. However, the provisions of the Civil Code of Ethiopia on this subject have been rendered useless by the advent of the rural lands nationalization proclamation which forbids the transfer of rural lands by sale, exchange, succession, mortgage etc.<sup>401</sup> The situation is different regarding urban lands and houses. According to Yohannes Heroui, “the idea that land belongs to the public and land is, therefore, extra commercium whereas houses could be objects of private ownership and thus subject to commerce is at best a legal fiction, and the law knows of such fiction.”<sup>402</sup> It is a thing fixed on land which makes land an item of great value especially in urban areas. In this regard, Romans say that “what is affixed to the soil belongs to the soil.”<sup>403</sup> Hence, as houses are freely sold and bought, it is actually the land too which is being sold and bought. In relation to urban lands, it is possible to conclude that the changes introduced by nationalization laws do not affect the laws on registration in any significant way.

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<sup>397</sup> See the Preamble of the FDRE “Condominium Proclamation No.370/2003”

<sup>398</sup> See Ibid, Articles 4 and 5.

<sup>399</sup> See Ibid, Art. 21

<sup>400</sup> See Ibid, Art. 8

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> According to Roman language, the saying is “*Quicquid plantature solo solo cedit*”, quoted in Sir Hari Gour’s Commentary, pp. 76-77 as cited in Yihannes heroui, Supra note 100, p.76.

## CHAPTER FOUR

### 4. The Position of the Ethiopian Federal Supreme Court Cassation Division on Form of Contracts Relating to Immovables

#### 4.1. General Overview of Cassation Court under the Ethiopian Legal System

One of the features that distinguish the common law legal system from the civil law legal system is the nature of decisions rendered by courts.<sup>404</sup> In the common law jurisdictions, a decision rendered by a Superior Court of a country is authoritative on any case having the same question of law with that of the decision of the Superior Court.<sup>405</sup> This is known as the doctrine of precedent or “*stare decisis*”,<sup>406</sup> which has similarity with the concept of “Cassation”.<sup>407</sup> However, there are countries in the civil law jurisdictions which adopt the doctrine of precedent by way of cassation during adjudication of cases.<sup>408</sup>

Although some scholars consider the Ethiopian legal system as a hybrid of common law and civil law legal families, many scholars classify it in the civil law legal family.<sup>409</sup> The term “cassation” was used in Ethiopian legislation for the first time in the treaty signed between Emperor Menelik II and France in 1908.<sup>410</sup> The treaty stated that the Emperor had the prerogative power to review final decisions of the special courts by way of cassation.<sup>411</sup> It was not, however, a full-blown form of cassation.<sup>412</sup> During the reign of Emperor Haile Silasse I, there was a special tribunal known as the *Zufan Chilot* (or His Imperial Majesty’s Chilot), which was

<sup>404</sup> See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, Third Revised Edition, 1998, p. 185.

<sup>405</sup> See Mackay R. *Elements of English Legal System judicial precedent*, 2008, Accessed at <http://www.lectureme.studio400.me.uk/resources/Elements+of+English+Legal+System> last visited on May 5, 2013.

<sup>406</sup> “*Stare decisis*” is an abbreviation of the Latin phrase “*Stare decisis et quia non movere*”- that, in English, means-to stand by and adhere to decisions and not disturb what is settled. See Sara Ball man, *Stare Decisis in California State Courts: The Decisions that bind us*, 2011, The Marin Lawyer, p. 1, accessed at [www.saraballman.com/pdf/Marin-Lawyer](http://www.saraballman.com/pdf/Marin-Lawyer), last visited on 12/12/2013 See also SM. Harding and I. Malkin, *Overruling in the High Court of Australia in Common Law Cases*, 2010, Melbourne University Law Review, Volume 518, p. 34. See also James Lee, *The doctrine of Precedent and the Supreme Court*, Inner Temple Academic Fellow’s Lecture, 2011, p. 21, Accessed at [j.s.f.lee@bham.ac.uk](mailto:j.s.f.lee@bham.ac.uk), last visited on 13/12/2013.

<sup>407</sup> The term ‘Cassation’ comes from the French verb ‘*Casser*’ and its literal meaning is to “quash the force and validity of a judgment.” See Supra note 405. See Muradu Abdo, *Review of Decisions of State Courts over State matters by the Federal Supreme Court*, Mizan Law Review, Vol.1, No.1, 2007, p. 62.

<sup>408</sup> See Muradu Abdo, *Legal History and Traditions, Teaching Material*, unpublished, 2009, Justice and Legal System Research Institute, pp.215-219.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> See Article 7 of the 1908 Treaty between Emperor Menelik II and the government of France as cited in Ibid.

<sup>412</sup> Ibid.

not bound by the law, and the power and jurisdiction of the emperor on it was based on the prerogative power of the Emperor.<sup>413</sup> Hence, any party who was aggrieved by the decision of an appellate court was entitled to bring his matter to the Emperor irrespective of the nature of the problem of the case.<sup>414</sup> During the Derg regime, Proclamation No. 9/1987 heralded that any final court decision containing a fundamental error of law was supposed to be reviewed by a division of the Supreme Court which used to be tentatively constituted.<sup>415</sup>

The 1995 FDRE Constitution provides that the Federal Supreme Court has a power of cassation over any final court decision containing a fundamental error of law.<sup>416</sup> And, the State Supreme Court has power of cassation over “any final court decision” on state matters which contain a fundamental error of law.<sup>417</sup> Accordingly, the present legal system has adopted a precedent system through cassation divisions of the Federal and State Supreme Courts.<sup>418</sup> Currently, cassation may be taken as a means by which a final decision of any lower court containing a basic error of law, in relation to which an appeal is exhausted, is reversed or varied by the Cassation Divisions of the Federal and State Supreme Courts.<sup>419</sup>

Consequently, the Ethiopian Parliament passed Proclamation Number 454/2005, which re-amended the Federal Courts Establishment Proclamation No 25/96, so to avoid the likely disparity in the interpretation of laws among courts. According to Article 2 sub- Article (1) of this proclamation, an interpretation of a law rendered by the cassation division of the Federal Supreme Court is binding on the federal and state courts at all levels.

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<sup>413</sup>See R. A. Sedler, *Chilot Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective*, Journal of African Law, Vol. 8, No. 2, 1964, p. 67.

<sup>414</sup> Ibid.

<sup>415</sup> See Proclamation to Establish the Supreme Court of the Peoples' Democratic Republic of Ethiopia No 9/1987, 47<sup>th</sup> Year, No. 9, Art 5.

<sup>416</sup> See Article 80 (3) (a) of the 1995 FDRE Constitution. The Minutes of the Constitutional Assembly suggest that the Federal Supreme Court has the power of cassation not only over federal matters but also on state matters and even the federal Supreme Court reviews state matters in which the State Supreme Court has rendered a final decision by way of cassation. See *the Minutes of the Council of Representatives of the Transitional Government of Ethiopia* May 4-25, Unpublished, 1993, pp. 253-256. Furthermore, a study indicated that in the years between 1996-1998, 1,121 cases came from the State Supreme Courts to the Federal Supreme Court for cassation and this constituted fifty percent of the workload of the cassation division of the Federal Supreme Court as cited in Silesh Zeyohannes, *Constitutional law II*, 2009, Teaching Material, unpublished, Justice and Legal System Research Institute, p. 205.

<sup>417</sup> See Article 80 (3) (b) of the 1995 FDRE Constitution

<sup>418</sup> See Ibid.

<sup>419</sup> Ibid.

#### **4.1.1. *The Scope of the Decisions of the Ethiopian Federal Supreme Court Cassation Division***

Under the FDRE Constitution, the Cassation Division does not have the power to resolve factual issues as its power is limited to resolve only legal issues involved in a case.<sup>420</sup> The Federal and the State governments have their own respective legislative, executive and judicial powers.<sup>421</sup> Hence, the state Supreme Court is the pertinent body which has a final say on any judicial matter that falls within the jurisdiction of the state.<sup>422</sup> However, the Constitution confers to the Federal Supreme Court to have jurisdiction on state matters having basic error of law in declaring that the court has power of cassation on any final decision. Many argue that the need for having a cassation division within the Federal Supreme Court is to accomplish the goal of having a uniform interpretation of laws throughout the country.<sup>423</sup> Thus, the Federal and State courts, which are bound by the decision of the Cassation Division, should determine the existence of similar legal issue/s between the case before them and the binding decision of the cassation division. However, one may question the legitimacy of intending uniform interpretation of laws throughout the country in the existence of federal system of government.

#### **4.1.2. *The Binding Nature of the Decisions of the Federal Supreme Court Cassation Division***

Pursuant to the Federal Courts Proclamation Re-amendment Proc.No.454/2005, an interpretation of a law rendered by the Federal Supreme Court Cassation Division with not less than five judges shall be binding on federal as well as regional courts at all levels.<sup>424</sup> It should be noted, however, that a binding decision rendered by the Cassation Division does not amount to judge made law (legislation power) since, in doing so, the division is exercising its power to interpret laws as per the Constitution.<sup>425</sup> It interprets laws which are enacted by the parliament.

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<sup>420</sup> See Article 80 (3) of FDRE Constitution of 1995.

<sup>421</sup> See Ibid, Art. 50.

<sup>422</sup> See Ibid, Art. 80.

<sup>423</sup> See *the Minutes of the Council of Representatives of the Transitional Government of Ethiopia* May 4-25 Unpublished, 1993, pp. 253-256 as cited in Muradu Abdo, *Supra* note, p. 68.

<sup>424</sup> See the FDRE Federal Courts Proclamation Re-amendment Proclamation No.454/2005, Article 2 (1).

<sup>425</sup> See Art 72 of the FDRE Constitutions.

Thus, the interpretation of the law by the Cassation Division is different from the essence of judge made law that is envisaged in Common law legal system.

Proclamation No.454/2005 does not provide its objective. As a result, the writer opts to cross-refer other relevant literatures in the area. If we make a look into the Minutes of the Constitutional Assembly which was accorded to draft the Articles of the FDRE constitution, we can understand that the framers had in their mind the need to have a uniform interpretation of laws through out the country as it was stated in the following manner:

*“ ... The wisdom of and necessity of having a Cassation Division within the Federal Supreme Court is to accomplish the goal of having a uniform interpretation of laws-federal or regional-throughout the country. To this end, any final court decision in this country shall be reviewed by the Federal Cassation Division provided it contains a fundamental error of law.”*<sup>426</sup>

Hence, the general purpose of the proclamation is to ensure the objective of having a uniform, certain and predictable interpretation of laws throughout Ethiopia.<sup>427</sup> The uniform, certain and predictable decisions of the cassation division in turn will be able to win the trust and confidence of the public on the court. This is, in fact, the basic goal of the judiciary organ of government. Some writers argue that having a uniform interpretation of laws throughout the country is not only about ensuring certainty, predictability and encouraging private investment in the economy, it is also about basic constitutional rights-equality before the law.<sup>428</sup> If a particular provision of the law is interpreted in one way by the Cassation Division then it should be interpreted in the same manner in all courts throughout the country insofar as the matters are similar in their essential legal issues. Thus, it is a matter of basic constitutional rights and in the public interest that laws should be uniformly applied.<sup>429</sup>

Besides, by having uniform, certain and predictable court decisions, it is also possible to reduce cost, time and energy of litigation. This will have positive impact on national economic

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<sup>426</sup>See Minutes of the Council of Representatives of the Transitional Government, Supra note 423, pp, 253-256.

<sup>427</sup>See Tegene Getaneh, President of the Federal Supreme Court of Ethiopia, in his Message to Volume-6 of the Federal Supreme Court Cassation Division Decisions, 2001, p. 1.

<sup>428</sup>See Mulugeta Mengstie, *Precedents*, <http://www.ethiopianlawonline.com/p/about.html>, E-LAW Research and Publishing, Accessed on May 12, 2013, p. 2. See also Article 25 of the FDRE Constitution.

<sup>429</sup> Ibid.

development. Whether these objectives of the re-amendment proclamation are being achieved or not will be discussed briefly in the following sub-sections. However, the decisions of the Cassation Division are not binding on itself as expressly provided in the Proclamation No. 454/2005.<sup>430</sup> Accordingly, the Cassation Division may provide a different legal interpretation some other time.<sup>431</sup> When overruling its previous decisions, the division must be careful enough not to disturb the legal system and not to cause uncertainty by overruling its previous decisions repeatedly.<sup>432</sup> The proclamation firmly provides that the Federal Supreme Court shall publish and distribute decisions of the cassation division that contain binding interpretation of laws to all levels of courts and other relevant bodies.<sup>433</sup>

#### 4.2. The Justifications for following Precedent

The most common justification for the doctrine of precedent (*stare decisis*) rests on the need for certainty in the law.<sup>434</sup> The people should be able to forecast the legal consequences of their action. Such predictability can only be obtained if judges can be expected to follow precedent in making their decisions. The second justification holds that the use of precedent is important to ensure that similarly situated litigants are treated equally.<sup>435</sup> Thirdly, the doctrine of precedent is defended on the ground that it promotes judicial efficiency.<sup>436</sup> As per Justice Cardozo, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secured foundation of the courses laid by others who had gone before him.”<sup>437</sup> Fourthly, precedent promotes the appearance of justice and avoids arbitrary decision making.<sup>438</sup> It has practical nature since it is based more on facts rather than theories. It is detailed as there are ample cases which you can refer to. Hence, it ensures and enhances public trust and confidence on courts.<sup>439</sup>

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<sup>430</sup> See Article 2(1) of the FDRE Proclamation No 454/2005.

<sup>431</sup> Ibid

<sup>432</sup> See Tilahun Teshome(Professor), *Commentary on the Decision of the Ethiopian Federal Supreme Court Cassation Division in Cassation File No. 53366*, Wonber, Alemayehu Haile Memorial Foundation’s Bulletin, 10<sup>th</sup> Half-Year, August 2012, p. 15.

<sup>433</sup> See Article 2(2) of the FDRE Proclamation No 454/2005.

<sup>434</sup> See Earl Maltz, *The Nature of Precedent*, North Carolina Law Review, Volume 66, 1988, p.369.

<sup>435</sup> Ibid

<sup>436</sup> Ibid

<sup>437</sup> See B. Cardozo, *The Nature of the Judicial Process*, 1925, p.149 as cited in Earl Maltz, Supra note 434, p. 370.

<sup>438</sup> See Earl Maltz, Supra note 434, p. 371.

<sup>439</sup> See “Judicial precedent” accessed at <http://www.lawteacher.net/PDF/Judicial%20Precedent>, visited on may 13,2012

### 4.3. Analysis of the Position of the Cassation Division of the Federal Supreme Court on Form of Contracts relating to Immovables

The writer, in this section, will examine the application of doctrine of precedent in the Federal Supreme Court Cassation Division (FSCCD) of Ethiopia. He will scrutinize the FSCCD's treatment of its previous interpretations as to form of contracts relating to immovables. A court's approach to its own decisions is sometimes referred to as "horizontal *stare decisis*".<sup>440</sup> It is an idea that a cassation judge is bound by decisions of earlier judges of similar or coordinate level. Judges in the FSCCD state that the precedent of the Ethiopian Cassation Division can be overruled by a session of not less than seven active cassation judges in the FSCCD.<sup>441</sup>

#### 4.3.1. The Position of the FSCCD on Article 1723 of Civil Code of Ethiopia

The interpretation of the Cassation Division as to form of contracts relating to an immovable rendered in the *Gorfe Gebre Hiwot v. Aberash Dubarge and Getachew Nega*<sup>442</sup> case has given rise to a controversy extending well beyond the ranks of legal profession.<sup>443</sup> The facts of the case are summarized as follows.<sup>444</sup> Woizero Gorfie (the Cassation Petitioner) filed a claim against Woizero Aberash (the first Cassation Respondent) before the Federal First Instance Court seeking her deceased father's share of common property held by the first Respondent who was wife of the deceased at the time of his death. The Court decided in her favor and ruled that, as an heir, she is entitled to her father's half of the property held in common. Thereafter, Ato Negga (the second Cassation Respondent) brought his opposition claiming that the proceeds of the judgment included a 400 square meter plot of land and a house on it which was transferred to

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<sup>440</sup>See Sara Ball man, *Stare Desisis in California State Courts: The Decisions that bind us*, 2011, The Marin Lawyer, page 1, accesses at [www.saraballman.com/pdf/Marin-Lawyer](http://www.saraballman.com/pdf/Marin-Lawyer), last visited on December 13, 2013 See also SM. Harding and I. Malkin, *Overruling in the High Court of Australia in Common Law Cases*, 2010, Melbourne University Law Review, Volume 518, p. 34. See also James Lee, *The Doctrine of Precedent and the Supreme Court*, Inner Temple Academic Fellow's Lecture, 2011, p.21, Accessed at [j.s.f.lee@bham.ac.uk](mailto:j.s.f.lee@bham.ac.uk), last visited on December 13, 2013.

<sup>441</sup>An Interview with Judge Adane Nigusie, who is Judge in the Federal Supreme Court Cassation Division of Ethiopia, (hereinafter called FSCCD) October 27, 2013 in his office and an Interview with Judge Ali Mohammed, Judge in the Federal Supreme Court Cassation Division of Ethiopia, November, 4 2013 in his office.

<sup>442</sup>See Gorfie Gebrehiwot v. Aberashe Debargie and Getahun Nega, *The Decisions of Federal Supreme Court Cassation Division of Ethiopia*, Volume 4. Civil Cassation Case No.21448, (1999 E.C), pp. 39-47.

<sup>443</sup>See Ibid and Yohannes Heroui, *Registration of Immovables under the Ethiopian Civil Code; An Overview in Comparative Perspective*, Ethiopian Bar Review, Vol.2, No.2, March 2008, p. 31.

<sup>444</sup> See Ibid, p. 32.

him under a contract of sale entered into between him and the deceased father of W/o Gorfie on Hidar 23, 1985 E.C. In reply, the Cassation Petitioner contended that the contract of sale is not valid as the property in question did not have a title certificate and that, upon examination of the records relating to the house by the engineer of the Judgment Execution Office in 1992, no document indicating that Ato Negga owned the premises was found. On the other hand, the first Cassation Respondent affirmed that the sale did take place. Thereafter, the First Instance Court held the validity of the contract of sale and accordingly revised its earlier decision. An appeal was lodged by W/o Gorfie but the appellate Federal High Court dismissed her appeal.

Subsequently, W/o Gorfie filed a protest before the FSCCD asking for review of the judgments of the lower courts contending that the lower courts committed a fundamental error of law in holding that the contract of sale was valid. Finally, the Cassation Division decided in her favor and held that the sale of immovable property, to be valid, must be made in writing and be registered before a court or a notary as per Article 1723 of the Civil Code. The requirement of registration before a court or a notary as embodied in the provision is binding thereby rendering the contract of sale of an immovable property in the case at hand a mere draft that is non enforceable. In this case, no party challenged the contract for not being registered with a court or notary and the question of registration was not raised as an issue in the First Instance Court. In view of the controversy surrounding the question, however, the Cassation Division wanted to set a precedent and overturned the decisions of the lower courts. The Cassation Division believed that public policy demands that special protection be given to contracts relating to an immovable.

So far this interpretation is the governing principle as to “form of contracts”<sup>445</sup> relating to immovables.<sup>446</sup> Basically, the debate that arises after the decision of the Cassation Division

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<sup>445</sup>Even though the term “form” is not defined under the Ethiopian Civil Code, the Code requires a number of contracts to be made in certain forms. In certain situations, the law demands a contract to be made in writing and be registered. For instance, the Commercial Code requires partnership agreements to be made in writing and be registered. Hence, registration may be taken as a formal requirement. In some situations, copies of all written documents have to be deposited and this may also be taken as a formality. Articles 1721-1725 of the Civil Code provide general conditions that demand attestation. Accordingly, all written contracts must be attested by two witnesses. Thus, attestation is a formality requirement. Similarly, Articles 1728 to 1730 of the Civil Code make signature of contracting parties as a formal requirement. As per Article 1726 of the Civil Code, contracting parties may also prescribe a given kind of formality other than those mentioned in the Civil Code.

<sup>446</sup>An Interview with Judge Adane Nigusie, Judge in the Ethiopian FSCCD, on October 27, 2013, in his office. An Interview with Judge Alemaw Wollie, Judge in the Ethiopian FSCCD, on October 27, 2013 in his office. An Interview with Judge Ali Mohammed, Judge in the FSCCD, on November, 4, 2013 in his office. He provides dissenting opinions regarding form of contract relating to immovables in many Cassation cases.

which is rendered in the Gorfie case partly lies in the fact that the Cassation division has, in so ruling, chosen to depart from settled practices to enter into a contract relating to an immovable. In the opinion of the writer, registration is not a formal requirement for the validity of a contract relating to an immovable. The sole purpose of registration is publicity as envisaged under Articles 2877 and 2878 of the Civil Code of Ethiopia.

Rene David, who is the expert draftsman of the Ethiopian Civil Code, does not mention registration with a court or a notary as a requirement for the validity of a contract relating to an immovable in his commentary but only refers to the requirement of written form. It reads;

*“The importance attached to land by Ethiopians justifies Article 1723, which requires the conclusion in writing of all acts creating or transferring ownership, usufructs, or servitudes on immovables, as well as for contract of compromise or partition relating to an immovable.”<sup>447</sup>*

The writer believes that Rene David’s omission of registration before a court or notary as a requirement for the validity of a contract relating to an immovable cannot be an oversight. Therefore, it is possible to argue that the drafter of the Civil Code believed that registration was not a formal requirement for the validity of a contract relating to an immovable.

Professor George Krzeczunowicz, on his part, argued that the requirement of written form as envisaged under Article 1678 of the Civil Code is a formal requirement (*ad validitatem*) for the validity of a contract relating to an immovable, while the requirement of registration under Article 1723 is a formal requirement (*ad probationem*) to prove the existence of a contract.<sup>448</sup> His interpretation of Article 1723 is the following:

*“Lack of registration with a court or notary of the written contracts contemplated by this article (Art.1723) does not affect their validity between the parties (Article 1720 (3)). But rights on an immovable purported to be granted to a party by a non*

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<sup>447</sup> See Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p. 34.

<sup>448</sup> See George Krzeczunowicz, *Formation and Effects of Contract in Ethiopian Law*, 1983, Addis Ababa University, Faculty of law, p. 8.

*registered contract can't prevail over incompatible rights, granted to a third party by a later but registered contract...*<sup>449</sup>

In the opinion of the writer, the debate that arises after the decision of the Cassation Division in the Gorfie Case lies in the fact that the Cassation division has ignored the settled practices.<sup>450</sup> The prevailing practices proved that contracts relating to an immovable were not registered with a court or a notary. In the Gorfie Case, the contracting parties made negotiations. They also wrote, signed and exchanged the contract documents. Hence, “the objective test of intention of contracting parties”<sup>451</sup> showed that there was a lawfully given assent which indicated the existence of a valid contract between the parties. Besides, when the parties concluded the contract, they had relied on the good faith among each other and believed to give their real intention after negotiating on the terms and conditions of the contract. Before the decision of the Cassation Division, a contract relating to an immovable made in writing were taken to be valid and enforced by courts. The invalidation of such contract increases uncertainty in business transaction while its enforcement provides security for transactions.

In the view of the writer, the registration requirement should not be a decisive factor in rendering a contract relating an immovable void as long as the contract is made in writing and the performance of both parties is based on the terms of the contract and the material circumstances prove its formation.<sup>452</sup> The sole purpose of registration is publicity which helps to

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<sup>449</sup>Ibid, p. 74

<sup>450</sup>One of the fundamental rules of statutory interpretation is that a fairly reasoned and logical interpretation is necessary whenever the strict literal reading of a given legal provision is absurd, unreasonable or inconsistent with other provisions despite a seemingly clear reading of the provision. Under such situation, resort shall be made to the function, spirit and purpose of the provision rather than its rigid literal reading. See Lantera Nadew, *Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of their Effects*, Mizan Law Review, volume 2, and Number 1, January 2008, p.100.

<sup>451</sup>See Wayne Barnes, *The French Subjective Theory of Contract: Separating Rhetoric from Reality*, (Works –in-progress presentation, Texas Wesleyan University, School of Law, August 26, 2008, pp. 5-6. See Also Hussien Ahmed, *Interpretation of Contracts under Ethiopian Civil Code: Subjective or Objective Method?* Addis Ababa University Student Law Review, Vol.2, No.1, 2011, pp. 85-86. A number of literatures in the field of contract law mention two apparently contradicting approaches to the problem of interpretation of contract cases. Wayne Barnes states that “Objective Theory of Contract examines the external evidences of the parties’ intention as the only relevant consideration. On the other hand, Subjective Theory of Contract is concerned with the actual meeting of the minds or literal intentions of the parties.”

<sup>452</sup>See Mizan Law Review, Cases, Issues for Reflection. Volume 4 No.2, Autumn 2010, p. 364. See Mekibib Tsegaw “*Contracts Relating to Immovables and the Question of Form; Current Concerns (Amharic)*” Ethiopian Bar Review, Volume 2, No.1, (2007), pp. 153-169. See also Lantera Nadew , *Supra* note 450 , pp. 49-50. See Yohannes Heroui, *Registration of Immovables under the Ethiopian Civil code; An Overview in Comparative perspective*, Ethiopian Bar Review, Vol.2, No.2, March 2008, p. 31. See Million Assefa, *Form of Contract Relating to*

have a complete record of all rights existing over a particular immovable. The other important function of registration is to establish priority among transferees from a single transferor. Hence, registration of contracts relating to an immovable with a court or a notary serves as “a means of settling conflicts between successive transferees by according preference to the one who first registers the act of transferring the property.”<sup>453</sup> For instance, priority between two duly registered contract documents concerning the sale of the same immovable property will be determined by the date of registration. As revealed in Article 2878 of the Civil Code, registration of a contract of sale of an immovable serves as creating public awareness as to the facts of registered contracts. This means unregistered contracts cannot affect the interest of third parties but valid among contracting parties.

As indicated in Section 3.7.2 of this research, before the enactment of the 1960 Civil Code of Ethiopia, customarily, transactions involving immovable properties were being registered in the “Rist” section of municipalities.<sup>454</sup> Even after the enactment of the Civil Code, the part of the code that was meant to regulate the process of registration of immovable properties is still under suspension.<sup>455</sup> The guiding rules are customary rules that were being used before the coming into effect of the Civil Code.<sup>456</sup> The Civil Code declares that “The customary rules relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable properties may be set up against third parties shall apply.”<sup>457</sup> In England, before the incorporation of European Communities law, the purpose of registration was similar to the Ethiopian stand.<sup>458</sup> Later on, the English law gave protection only to innocent third parties.<sup>459</sup> Accordingly, unregistered contract may affect the interest of a third party that has awareness as to the contract. This implies that a third party having awareness as to the unregistered contract cannot be protected. However, the Ethiopian law is silent in this regard. Hence, it is possible to argue that where a contract relating to an immovable is not registered, third parties are generally

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*Immovables in Ethiopia, the Law and Interpretation*, Wonber, Alemayehu Haile Memorial Foundation’s Periodical, 6<sup>th</sup> half year, April/may 2010, p. 21.

<sup>453</sup> See K.W. Ryan, *An Introduction to the Civil Law*, 1962, Sydney Hallstead press, p. 174.

<sup>454</sup> See Kassa Nakumo (Fitawrari) v. Aklilu Gobeze, Civil Appeal No. 353/57, Supreme Imperial Court Div, No.1, Journal of Ethiopian Law, Vol. IV, No.1, page 69. See also Lantera Nadew, Supra note 450, p.101.

<sup>455</sup> See Article 3363 cum Article 3364 of the 1960 Civil Code of Ethiopia

<sup>456</sup> Ibid

<sup>457</sup> See Article 3364 of the 1960 Civil Code of Ethiopia.

<sup>458</sup> See Lantera Nadew, Supra note 450, p. 101.

<sup>459</sup> Ibid

protected. And, the contract cannot be enforced against the interest of third parties. This research, therefore, finds that the interpretation of the Cassation Division rendered in the Gorfie Case as to Article 1723 of the Civil Code is blameful.

In a cassation case between Ato Mequannt Werede v. Woizero Meskerem Dagnaw and others (Cassation Case No.34803)<sup>460</sup>, the FSCCD based its decision on its previous interpretation rendered in the Gorfie Case (Cassation Case No.21448)<sup>461</sup>. The facts of the case may be summarized as follows. The Cassation Respondents (W/o Meskerem Dagnaw and others) started the case at the South Gondar High Court seeking the restitution of their deceased father's house unlawfully held by the Cassation Petitioner (Ato Mequannt Werede). They also demanded payment of rental money for the period during which the house was held by the petitioner. The Cassation Petitioner, on his part, argued that he held the house as per a contract of sale of house concluded with the deceased father of the Cassation Respondents. The South Gondar High Court maintained the validity of the contract and decided that the Cassation Petitioner should not reconstitute the house to the Cassation Respondents. Thereafter, the Cassation Respondents appealed to the Amhara Supreme Court which reversed the decision of the High Court. The Amhara Supreme Court decided that the contract of sale of the house shall be of no effect because it was not registered before a court or a notary as per Article 1723(1) of the Civil Code. Finally, the petitioner brought the case to the FSCCD.

The Cassation Division referred to Articles 1723(1) and 1720(1) of the Civil Code cumulatively and ruled that the contract of sale of the house, in the case at hand, is a mere draft contract since it was not registered with a court or a notary. Accordingly, it modified the decision of the Supreme Court and held that where a contract is invalidated, the parties shall as far as possible be reinstated in the position which would have existed had the contract not been made as per Article 1815(1) of the Civil Code. Hence, the Cassation Division rejected the allegation of the Cassation Petitioner and ordered that he should reconstitute the house to the Cassation Respondents who should also return the purchase money that they received from the petitioner. It also rendered similar interpretation in a Cassation Case of Ato Muhidin Faris v. Ato Eyasu

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<sup>460</sup>See Ato Mekuquant Werede v. Meskerem Dagnaw and others, *The Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, Volume 8, Civil Cassation File No.34803, (2001 E.C), pp. 294-306.

<sup>461</sup> See the Gorfie Case, *Supra* note 442.

Beade Mariam (Cassation Case Number 29233)<sup>462</sup>. In this case, the Cassation Division upheld that contract of sale of a house must be registered with a court or a notary under Article 1723 of the Civil Code since the provision is a mandatory contract law provision. Where a contract relating to an immovable is not registered with a court or a notary there shall be no contract but a mere draft of a contract.<sup>463</sup> It ruled that the parties, who concluded a mere draft contract, shall be reinstated in the position which would have existed had the contract not been made.

However, Judge Ali Mohammed, who is one of the judges in the FSCCD, provided his dissenting opinions in the cases of Ato Mequannt v. Meskerem and others (Cassation File No.34803), and Ato Muhidin v. Ato Eyasu (Cassation File No. 29233).<sup>464</sup> He argues that the interpretation rendered by the Cassation division on Articles 1723(1), 2877 and 2878 of the Civil Code is flawed. According to him<sup>465</sup>, the drafter of the Civil Code provided three major types of contract law provisions which have different characteristics. They are;

**(1) Permissive provision of contract law:** it gives the parties a wide freedom of form of contracts. The non- observance of a permissive provision of contract law does not affect the validity of the contract. Such provisions are intended to fill the gap when contracting parties failed to put some important terms in their written contract.<sup>466</sup>

**(2) Mandatory provision of contract law:** it prescribes compulsory requirements to be complied during conclusion of a contract. So, contracting parties must observe such requirements. The non-compliance with such mandatory requirements makes the contract void.<sup>467</sup>

**(3) Directory provision of contract law:** it is a “statutory provision which does not relate to the essence of things to be done, and as to which compliance is of convenience rather than substance.”<sup>468</sup> Hence, “the observance of a directory provision of contract law is not necessary to the validity of the proceeding to which it relates.”<sup>469</sup> Legal dictionaries provide the difference

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<sup>462</sup> See Ato Muhidin Faris v. Ato Eyasu Beade Mariam, *The Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, Volume 7, Civil Cassation Case No.34803,( 2000 E.C), pp. 153-158.

<sup>463</sup> The FSCCD based its decision, in the case, on Articles 1723 and 1720(1) of the Civil Code.

<sup>464</sup> See Ibid, and Cassation File No. 34803 Supra note 57, (Ato Mekuannnt v. Meskerem ), pp. 297-306.

<sup>465</sup> See Ibid, Cassation File No. 34803. And an Interview with Judge Ali Mohammed, Judge in the FSCCD, on November, 4, 2013 in his office.

<sup>466</sup> Ibid

<sup>467</sup> Ibid

<sup>468</sup> See Cassation File No. 34803, Supra note 460, pp.297-306

<sup>469</sup> See Ibid and Henry Campbell Black, *Blacks law Dictionary*, 5<sup>th</sup> Edition, 1979, West Publishing Company.

between mandatory and directory provisions of contract law as “mandatory provisions prescribe in addition to requiring the doing of the thing specified, the result will follow if they are not done. Whereas, directory provisions, their terms are limited to what is required to be done.”<sup>470</sup> In many cassation cases, the FSCCD held that Article 1723(1) of the Civil Code is one of the mandatory provisions of contract law. However, Judge Ali argues that Article 1723(1) is not a mandatory provision of contract law. According to him, Article 1723(1) is a directory provision of contract law because of the following reasons.<sup>471</sup>

Firstly, there is no prescription under Article 1723 as to the effect of unregistered contracts relating to an immovable. He argues that the existence of the phrase “...shall be in writing and registered with a court or a notary” under Article 1723(1) is not sufficient to prove that the provision is mandatory since it does not provide the effect of unregistered contracts. Under Article 2877 of the Civil Code which is one of the mandatory provisions, it is provided that a contract of sale of an immovable shall be of no effect unless it is made in writing.

Secondly, Article 2878 of the Civil Code states that “the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate.” In the opinion of Judge Ali, this provision implies that unregistered contract of sale of an immovable does not affect the validity of the contract between contracting parties. The cumulative reading of Articles 1723(1) and 2877 of the Civil Code shows that the law maker mandatorily requires only the compliance of written formality. Therefore, lack of registration under Article 1723 does not affect the validity of a contract as between the parties since registration under Article 2878 is only designed for the protection of the rights of third parties. Besides, the special provisions (Articles 2877 and 2878) shall prevail over the general provision (Article 1723).

Thirdly, the drafter of the Ethiopian Civil Code was aware of the fact that there were no notaries in the country when the Civil Code was enacted. There was also no law on notaries both prior and subsequent to the enactment of the Civil Code as well as a law enabling the courts to perform the tasks attributed to them by Article 1723. Judge Ali argues that unregistered contract

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<sup>470</sup> Ibid

<sup>471</sup> See Cassation File No. 34803 Supra note 460, (Ato Mekuannt Werede v. Meskerem Dagnaw) , pp. 297-306.

relating to an immovable shall not be considered as a mere draft contract.<sup>472</sup> According to him, the concept of draft contracts under Article 1720(1) of the Civil Code is concerned with the non-compliance of Articles 1726, 1727(1) and 1728 of the Civil Code. Generally, he states that registration before a court or notary is not a validity requirement and a contract of sale of an immovable is valid as between the parties so long as it is made in writing as this is the only formal requirement prescribed by Article 2877.<sup>473</sup>

In the opinion of the writer, the argument of Judge Ali Mohammed is righteous. Lack of registration with a court or notary of written contracts does not affect their validity between the contracting parties. Hence, registration is not a formal requirement for the validity of a contract relating to an immovable under Article 1723 of the Civil Code.

Regarding a contract of a house rent, the FSCCD rendered an interpretation in the Cassation Case Agency for Rented Houses v. Woizerit Sosina (Cassation File No. 15992).<sup>474</sup> In this case, the cassation petition is made against the decision of the Federal First Instance Court and its confirmation by the Federal High Court. The lower courts had decided that the contract of house rent concluded between the Cassation Petitioner (the Agency) and the Cassation Respondent (W/t Sosina) is not made in writing and attested by witnesses as per Articles 1727(1) and 1728(1) of the Civil Code thereby rendering it a draft and not a valid contract. However, the Cassation Division reversed the decisions of the lower Courts. It held that contracts relating to an immovable are not required to be in writing as stipulated under the provisions of the law unless they involve “a contract creating or assigning rights in ownership or bare ownership on an immovable or a usufruct, servitude or mortgage of an immovable.”<sup>475</sup> The Cassation Division, therefore, ruled that contract of house rent shall not be governed by Article 1723.

In the writer’s view also, registration before a court or notary is not a validity requirement to contracts of house rent since such contracts are not creating or assigning rights in ownership, usufruct, servitude or mortgage. One can argue that there is no a special form prescribed by the

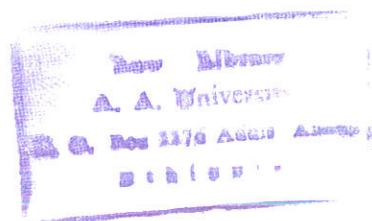
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<sup>472</sup>Interview with Ato Ali Mohammed, Judge, Federal Supreme Court Cassation Division of Ethiopia, November, 4 2013 in his office.

<sup>473</sup> Ibid

<sup>474</sup>See Agency for Rented Houses v. Woizerit Sosina , *Federal Supreme Court Cassation Division of Ethiopia*, Cassation File No.15992, Volume 1, (1997 E.C), p. 68. The judicial history of this case is provided in Mizan Law Review, Cases, Vol.4, Number 2, Autumn 2010, p. 365.

<sup>475</sup> See Article 1723 of the 1960 Civil Code of Ethiopia.



provision of the Ethiopian law of contract as to form of contracts of house rent. This research finds that the interpretation of the Cassation Division rendered as to form of contract of house rent is in the right direction.

In a Cassation case [Ato Alehegn G/Hiwot v. Woizero Atenesh Bekele and others (Cassation File No. 39803)]<sup>476</sup>, the Cassation Division ruled that a donation relating to an immovable shall not be governed by Article 1723 of the Civil Code. The Cassation Petitioner (Ato Alehegn) started the case at the Federal First Instance Court seeking the confirmation of a donation relating to a house. He stated that he was a donee of a house from Woizero Delelech (the donor) in 1974 E.C and claimed for the confirmation of the donation. Subsequently, the Court confirmed the donation relating to the house. However, the legal heirs of the donor, i.e Woizero Atenesh and others (the Cassation Respondents) opposed the confirmation of the donation and requested the court for the invalidation of the donation since the donation was not registered with a court or a notary as per Article 1723 of the Civil Code. Accordingly, the court invalidated the donation and stated that the donation agreement relating to the house was a mere draft contract because it was not registered before a court or a notary. The appellate Federal High Court also confirmed the decision of the lower Court.

Finally, the Cassation Petitioner brought the case to the FSCCD which reversed the decisions of the lower courts. The Cassation Division ruled that the formality requirement of a donation relating to an immovable is different from the formality requirement prescribed under Article 1723. The Cassation Division based its interpretation on Articles 2443, 881 and 882 of the Civil Code. Article 2443 provides that “a donation relating to an immovable or a right on an immovable shall be of no effect unless it is made in the form governing the making of a public will (Art. 881-883).” And, Article 881(1) states that “a public will shall be written by the testator himself or by any person under the dictation of the testator.” Sub-Article (2) of the same Article provides that a public will “shall be of no effect unless it is read in the presence of the testator and of four witnesses, and mention of the fulfillment of this formality and of its date is made therein. Sub -Article (3) prescribes that a public will “shall be of no effect unless the testator and the witnesses immediately sign the will or affix their thumb mark thereon.” In addition, Article

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<sup>476</sup> See Ato Alehegn G/Hiwot v. Woizero Atenesh Bekele and others, *Federal Supreme Court Cassation Division of Ethiopia*, (2001 E.C), Civil Cassation File No. 39803, Volume 8, p.387.

882 states that “a public will shall be valid where it is made in the presence of two witnesses one of whom is a registrar or a notary acting in the discharge of his duties.”

Thus, the Cassation Division held that the donation of the house concluded between Woizero Delelech (the deceased donor) and the Cassation Petitioner (the donee) has satisfied the formality requirements of a public will. It stated that Articles 2443, 881 and 882 of the Civil Code do not require registration of donations relating to an immovable with a court or a notary. It also ruled that Article 1723 of the Civil Code is a general provision of contract law. On the other hand, Articles 2443, 881 and 882 of the Civil Code are special provisions of contract law. If there is an inconsistency between the general and special provisions, the special ones shall prevail over the general one. Hence, the Cassation Division concluded that a donation relating to an immovable need not be registered with a court or a notary as per Article 1723(1).

The FSCCD also rendered a similar interpretation as to form of donation relating to an immovable in the Cassation File No. 17742<sup>477</sup>(Abebech Tadesse and others v. Sisay Kabtimer and others). The Cassation Petitioners (Abebech and others) started the case at the Federal First Instance Court seeking the confirmation of a donation relating to a house. They stated that they were donees of a house from the Cassation Respondents (Sisay and others) who were the donors. In this case, the donation was neither made in the presence of witnesses from court registrar nor a notary. It was made before the Social Court. The Cassation Respondents, on their part, argued that Social Courts had no power to register donations relating to an immovable under Article 882 of the Civil Code. The First Instance Court decided that the donation was not made before a regular court and stated that Social Courts were not entitled to register donations relating to an immovable. The appellate Federal High Court also confirmed the decision of the lower court. Finally, the Cassation Division held that Social Courts are courts established by law. Hence, Social Courts shall be considered as regular courts. The Cassation Division ruled that Social Courts have the power to register donations relating to an immovable under Article 882.

This research finds that there is discrepancy between Article 1723 of the Civil Code which is the general provision of contract law and Articles 2443, 881 and 882 of the Civil Code which are special provisions of contract law. Consequently, the interpretation of the Cassation Division

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<sup>477</sup> See Abebech Tadesse and others v. Sisay Kabtimer and others, *Federal Supreme Court Cassation Division of Ethiopia*, Civil Cassation File No.17742, Volume 5, (2000 E.C), p. 49.

as to form of donations relating to immovables was based on the rule of interpretation of “*lex specialis derogat generalis*”<sup>478</sup> or special provisions of law shall prevail over the general provisions of law. In the opinion of the writer, it is possible to empower social courts to register donations relating to an immovable since social courts are easily accessible to the populace. As indicated earlier, the major objective of registration of juridical acts is publicity. It is, thus, convenient for third parties to access any information regarding an immovable in social courts. Therefore, the writer believes that the interpretation of the Cassation Division rendered as to form of donations relating to an immovable is in the right direction.

In a Cassation File No. 36294 (Woizero Senait Geneme v. Ato Bekele Gameda and Woizero Worknesh Jebessa)<sup>479</sup>, the Cassation Division rendered an interpretation as to form of contract of sale of a house constructed by a House Cooperative Society. The Cassation Petitioner (Woizero Senait) started the case at the Federal First Instance Court seeking the performance of a contract of sale of a house concluded with the Cassation Respondents because the Respondents failed to transfer the ownership of the house as per the contract. The Cassation Respondents, on their part, admitted the existence of the contract between the petitioner and them and argued that the non-observance of the contract was attributable to the Cassation petitioner. The facts of the case clearly showed that the petitioner bought a house that is constructed by “Yichalal House Cooperative Society” to which the Respondents were a member. However, the contract of sale of the house was not registered with a court or a notary. The First Instance Court decided that the agreement of sale of the house was a mere draft contract since it was not registered with a court or a notary. The appellate High Court also confirmed the decision of the lower Court.

Finally, the Cassation Petitioner brought the case to the FSCCD which reversed the decisions of the lower Courts. The Cassation Division held that form of contract of sale of a house constructed by a House Cooperative Society shall only be governed by the Proclamation to provide for the Establishment of Cooperative Societies; FDRE Proclamation No.147/1998. Article 19 of the proclamation, which deals with transfer of share or benefit, provides that:

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<sup>478</sup> See Mekibib Tsegaw, *Contracts Relating to Immovables and the Question of Form; Current Concerns* (Amharic) Ethiopian Bar Review, Vol.2, No.1, (2007), p. 166.

<sup>479</sup> See Woizero Senait Geneme v. Ato Bekele Gameda and Woizero Worknesh Jebessa, *Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, (Civil Cassation File No.36294) Volume 8 (2001E.C), p.319.

*“No transfer by a member of his share or benefit in a society shall be valid unless (1) the member has held such share or benefit for at least one year before he transfers, (2) the transfer is approved by management committee.”*

Accordingly, the Cassation Division stated that a contract of sale of a house constructed by a Cooperative Society need not be registered with a court or notary. It, thus, concluded that Article 1723 does not apply to a contract of sale of a house constructed by a Cooperative Society.

The above interpretation of the Cassation Division is based on the rule of interpretation of “*lex specialis derogat generalis*” or special provisions of law shall prevail over the general provisions of law. Article 1723 of the Civil Code is a general provision of contract law which applies to all kinds of contracts relating to immovable properties. On the other hand, Article 19 of the Proclamation No. 147/1998 is a special provision which applies only to a case of transfer of share or benefit of a house constructed by a Cooperative Society. The form and system of transfer of ownership of house constructed by a cooperative Society are different from the form and system of transfer of ownership of an immovable provided under Article 1723. In the opinion of the writer, therefore, it is possible to conclude that Article 19 of the Proclamation, which deals with transfer of share or benefit, is an exception to Article 1723. Hence, the interpretation of the Cassation Division rendered as to form of contract of a house constructed by a House Cooperative Society is blameless.

In the Cassation File No. 32222 (Ato Mohammed Ibrahim v. Ato Tayder mach)<sup>480</sup> the Cassation Division rendered an interpretation as to form of Contract of Work and Labour relating to an immovable. In this case, the Cassation Respondent (Ato Tayder) started the case at the Gambella High Court seeking the restitution of a house because the Cassation Petitioner (Ato Mohammed) had deprived his possession of a house. The Cassation Petitioner, on his part, argued that he had built a house having two rooms on the land of the Cassation Respondent based on a contract of work and labour concluded with the later. He stated that the Cassation respondent, thus, transferred the ownership of one room of the house to him as per the contract. Thereafter, the High Court decided that the Cassation Petitioner should restore the one room house to the Cassation Respondent since the contract of work relating to the house was not

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<sup>480</sup> See Ato Mohammed Ibrahim v. Ato Tayder Mach, *Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, Civil Cassation File No.32222, Volume 7 (2000 E.C), p. 170.

registered with a court or a notary. The appellate Gambella Supreme Court also confirmed the decision of the High Court. Finally, Ato Mohammed brought the case to the FSCCD which reversed the decisions of the lower courts.

The Cassation Division stated that the Cassation Petitioner and the Respondent concluded the contract before the existence of the house which was the cause of the litigation. It, therefore, held that the contract, in the case at hand, was a contract of work and labour relating to an immovable and not a contract of sale of a house. It based its decision on Article 2876 of the Civil Code which provides that;

*“A Contract whereby one of the parties undertakes to deliver to the other party a house, a flat or another building which does not yet exist, is a contract of work and labour relating to immovables and not a contract of sale.”*

Hence, the making and proof of a contract of work and labour relating to an immovable is governed by Articles 3019 and 3020 of the Civil Code. Article 3020 (1) provides that “the contract shall be complete where the parties have agreed on the work to be done and on the price.” Sub-article 2 of Article 3020 states that “there shall be evidence of the contract where the contractor has undertaken work to the knowledge of the client or received an advance from the client.” The Cassation Division decided in favor of the Cassation Petitioner and maintained the validity of the contract. It concluded that a contract of work and labour relating to an immovable need not be registered with a court or notary.

The above interpretation of the Cassation Division also provided another exception to Article 1723 of the Civil Code. As per Article 2876 of the Civil Code where one contracting party undertakes to deliver to the other party a house which does not yet exist, the contract is not a contract of sale. Therefore, the form of such contract is not governed by Articles 1723, 2877 and 2878 of the Civil Code. The interpretation of the Cassation Division is based on the rule of interpretation of “*lex specialis derogat generalis*”.<sup>481</sup> In the opinion of the writer, the interpretation of the Cassation Division rendered as to form of a contract of work and labour relating to an immovable is righteous.

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<sup>481</sup> “*lex specialis derogat generalis*” refers that the special provision prevails over the general provision. See Mekibib Tsegaw , Supra note 452.

In another Cassation File No. 57356 (Woizero Meseret Bekele v. Woizero Elsa Somonela)<sup>482</sup>, the Cassation Division held that a mere fact that a contract of sale of a house is registered with a court or notary does not prove the existence of valid contract unless the contract is made in writing and attested by two witnesses. In this case, the Cassation Respondent (Woizero Elsa) started the case at the Federal First Instance Court seeking the invalidation of a contract of sale of a house concluded with the Cassation Petitioner (Woizero Meseret) because the contract was not made in the prescribed form. The Cassation Petitioner, on her part, argued that the contract was valid since it was registered with a notary under Article 1723 (1) of the Civil Code though the contract was not attested by two witnesses. The Federal First Instance Court decided that the contract shall be of no effect for it was not attested by two witnesses as per Article 1727 (2) of the Civil Code despite the fact that contract was registered with a notary. The appellate Federal High Court also confirmed the decision of the First Instance Court.

Finally, the Cassation Petitioner brought the case to the FSCCD which confirmed the decisions of the lower courts. The Cassation Division stated that “where a special form is expressly prescribed by law such form shall be observed”<sup>483</sup> and “no valid contract shall exist unless the contract is made in the form prescribed by law, if any.”<sup>484</sup> A contract of sale of a house shall be of no effect unless it is made in writing.<sup>485</sup> “Any contract required to be in writing shall be of no effect unless it is attested by two witnesses.”<sup>486</sup> In the case at hand, however, the contract was not attested by two witnesses. Hence, the Cassation Division ruled that the contract was not valid since it did not comply with Articles 1678(C), 1719 (2), 2877, and 1727 (2) of the Civil Code which are mandatory provisions of contract law.

As indicated in Chapter 3 of this research, the contract law of Ethiopia requires that witnesses shall certify that a contract was made and the terms thereof where necessary.<sup>487</sup> And, witnesses shall be bound by their attestation. Therefore, not only the parties to a contract but also witnesses to a contract shall affix their signature on the contractual document. If a contract relating to an immovable is not attested by two witnesses, there shall be no contract but a mere

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<sup>482</sup> See Woizero Meseret Bekele v. Woizero Elsa Somonela, *Decisions of the Federal Supreme Court Cassation Division of Ethiopia*, Civil Cassation File No.57356, Volume 12 (2003 E.C), p. 98.

<sup>483</sup> See Article 1719 (2) of the 1960 Civil Code of Ethiopia.

<sup>484</sup> See Ibid, Art. 1678 (C)

<sup>485</sup> See Ibid, Art. 2877

<sup>486</sup> See Ibid, Art. 1727 (2)

<sup>487</sup> See Ibid, Art. 1730 (1)

draft of a contract although the contract is registered before a court or a notary.<sup>488</sup> Hence, the interpretation of the Cassation Division rendered in the above case is blameless.

#### **4.3.2. The Position of the FSCCD on Articles 2877 and 2878 of Civil Code of Ethiopia**

Article 1723 of the Civil Code provides that a contract relating to an immovable shall be in writing and registered with a court or a notary. On the other hand, Article 2877 of the Civil Code, which deals with form of a contract of sale of an immovable, provides that “a contract of sale of an immovable shall be of no effect unless it is made in writing.” It remains silent as to registration requirement. However, in the Cassation File No. 21448 (Gorfie vs. Aberash and Getachew),<sup>489</sup> the FSCCD ruled that there is only apparent contradiction between Articles 1723 and 2877 and concluded that these provisions should be interpreted in synchrony. The Cassation Division stated that the contradiction between the provisions is not real. It held that Articles 2877 and 2878 are not special provisions that can prevail over Article 1723. Hence, there is no way to apply the rule of interpretation “*lex specialis derogat generalis*.” In the opinion of the Cassation Division, a contract of sale of an immovable can only be valid if both the requirements as to writing and registration before a court or a notary are met.

Article 2878 of the Civil Code provides that “the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situated.” The Cassation Division stated that Article 2878 provides the effect of non-registration at the place where the property is situated and this is different from the requirement of registration embodied under Article 1723. Thus, it concluded that a contract of sale of an immovable has to satisfy the registration requirement as per Article 1723 in addition to those relating to writing and attestation so as to be valid. In the opinion of the writer, however, lack of registration under Article 1723 does not affect the validity of a contract relating to an immovable as between the parties since registration under Article 2878 is only designed for the protection of the rights of third parties. And, there is a real contradiction between the general

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<sup>488</sup> See Ibid, and Articles 1678(C), 1719 (2), 2877, 1727 (2) of the 1960 Civil Code of Ethiopia cum. Article 1720(1) of the same code.

<sup>489</sup> See Supra note 442, Gorfie G/ Hiwot v. Aberashe Debargie and Getachew Negga, *Federal Supreme Court Cassation Division*, Civil Cassation File No.21448, volume 4 (2007), p. 40.

provision (Article 1723) and the special provision (Article 2877) of the Civil Code. The former provision prescribes two formal requirements, whereas, the latter one prescribes only one formal requirement. As a special law, thus, Article 2877 shall prevail over the general principle of contract law provided under Article 1723. Here, it is important to note that there were no laws on notaries and laws enabling the courts to perform the tasks attributed to them by Article 1723 both prior and subsequent to the enactment of the 1960 Civil Code of Ethiopia. In addition to this, the prevailing practices of contracts relating to immovable properties prove that such contracts are not registered with a court or a notary.

Article 2878, which provides that “the sale of an immovable shall not affect third parties unless it has been registered”, implies that unregistered contract of sale of an immovable does not affect the validity of the contract between contracting parties. The cumulative reading of Articles 1723 and 2877 of the Civil Code shows that the law maker mandatorily requires only the compliance of written formality. Hence, in the writer’s view, registration with a court or notary is not a validity requirement and a contract of sale of an immovable is valid as between the parties so long as it is made in writing as this is the only formal requirement imposed by Article 2877. Many legal scholars argue that registration of a contract of sale of an immovable serves as creating public awareness as to the facts of registered contracts.<sup>490</sup> Unregistered contracts cannot affect the interest of third parties but valid among contracting parties. Under the contract law of France which is similar to the Ethiopian contract law, registration is not a validity requirement for contracts relating to immovables. According to K.W. Ryan, the sole purposes of the French registration system are;<sup>491</sup> (1) publicity: registration helps to have a complete record of all rights existing over a particular immovable; and (2) a means for securing priority: registration helps to establish priority among transferees from a single transferor.<sup>492</sup>

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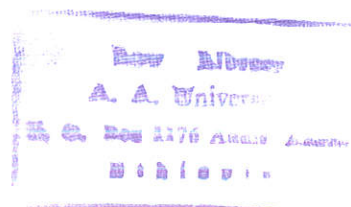
<sup>490</sup>An interview with Tilahun Teshome (Professor), on December 15, 2013 at his office, See Rene David, *Supra* note 447, See George Creznowicz *Supra* note 448, See Mekibib Tsegaw, *Supra* note 452, See Yohannes Heroui, *Supra* note 443, See Million Assefa, *Supra* note 452, See Lantera Nadew, *Supra* note 450. An Interview with Ato Ali Mohammed, Judge, Federal Supreme Court Cassation Division of Ethiopia, November 4, 2013 in his office

<sup>491</sup> See K.W. Ryan, *An Introduction to the Civil Law*, 1962, Sydney Hallstead Press, p. 174.

<sup>492</sup>Under the German legal system, however, Registration is not a means for securing priority of rights as in French law; rather it is a prerequisite for the alteration of rights over an immovable property. The position of the German law as to registration of acts is “where the agreement is to convey land, it must be declared in the presence of both parties before the Land registry official, a local court, a notary or certain public authorities. See Article 925 of the German Civil Code (B.G.B). See K.W. Ryan, *Supra* note 491.

**Table 1. Summary of positions of the FSCCD on form of contracts relating to immovables:**

N o.	Name of the Parties	Cassat ion File No.	Volum e &Page	Date of the decision in Ethiopian Calendar	The Position of the FSCCD on the Case
1.	Agency for Rented Houses v. Sosina Asfaw	15992	Volume 1, page 68	Hamle 19, 1997	A contract of house rent is not required to be made in writing since it does not create or assign rights in ownership, usufruct, servitude or mortgage on an immovable.
2.	Woizero Gorfie G/H v. Woizero Aberash and Ato Getachew	21448	Volume 4, page 40	Miazia 30, 1999	A contract of sale of an immovable can only be valid if the two cumulative requirements as to form are satisfied; i.e, the contract shall be made in writing and it shall be registered with a court or notary.
3.	Ato Mohammed Ibrahim v. Ato Tayder Mach	32222	Volume 7, page 170	Yekatit 4, 2000	A contract of work and labour relating to an immovable need not be registered with a court or notary. The making and proof of a contract of work and labour relating to an immovable is governed by Articles 3019 and 3020 of the Civil Code but not by Article 1723.
4	Woizero Abebech Tadesse and others v. Sisay kabtimer and others	17742	Volume 5, page 49	Megabit 2, 2000	A donation relating to an immovable is governed by the formal requirements provided under Articles 2443, 881 and 882 of the Civil Code. It need not be registered before a court or a notary as per Article 1723(1) of the Civil Code. Social Courts have the power to register donations relating to an immovable under Article 882.
5.	Ato Muhidin Faris v. Ato Eyasu Beade Mariam	29233	Volume 7, page 153	Ginbot 7, 2000	When unregistered contract relating to an immovable is invalidated, the parties, who concluded a mere draft contract, shall be reinstated in the position which would have existed had the contract not been made.
6.	Ato Mequannt Werede v. Woizero Meskerem Dagnaw and others	34803	Volume 8, page 294	Tikimt 27, 2001	A contract of sale of a house must be registered with a court or a notary as per Article 1723 of the Civil Code since the provision is a mandatory contract law provision. And, the parties, who concluded a mere draft contract, shall be reinstated in the position which would have existed had the contract not been made.
7.	Woizero Senait Geneme v. Ato Bekele Gemeda and Worknesh J.	36294	Volume 8, page 319	Hidar 9, 2001	A contract of sale of a house constructed by a House Cooperative Society need not be registered with a court or notary. Its form shall only be governed by the Proclamation to provide for the Establishment of Cooperative Societies; Proclamation No. 147/1998.



8.	Ato Alehegn G/Hiwot v. Woizero Atinesh Bekele and others	39803	Volume 8, page 387	Hamle 2, 2001	A donation relating to an immovable need not be registered before a court or a notary under Article 1723(1) of the Civil Code. It is governed by the formal requirements provided under Articles 2443, 881 and 882 of the Civil Code but not by Article 1723.
9.	Nyala Insurance S.C. v. Ato Adugna and Woizero Tenaye	39336	Volume 8, page 337	Hamle 7, 2001	As per Art.1817 (1) of the Civil Code, acts done in performance of a contract shall not be invalidated where such invalidation is not possible or would involve serious disadvantages or inconveniences. The petitioner has made improvements on the building that it bought. The value of the premises has been affected by the present high rate of inflation and the return of the money will not be fair. The goodwill of the petitioner will be affected as the building is being used for business.
10	Development Bank of Ethiopia v. Ato Tesfaye.	38666	Volume 9, page 57	Hamle 9, 2001	A contract of mortgage concluded to provide security to a loan extended by a Bank may not require to be registered with a court or a notary as per Article 1723 of the Civil Code.
11	(I). Alganesh v. Gebru And (II). Kokebe v. Ayalew	36887 And 43825	Volume 13, p. 233 and Vol.10, p. 133	Hidar 18, 2001 and Tahisas 6, 2002	Unregistered contract of sale of a house shall not be invalidated when contracting parties admitted that there was a contract of sale of an immovable between them. Under Article 1808(2) of the Civil Code, the unregistered contract shall not be invalidated by the motion of the court.
12	Woizero Meseret Bekele v. Woizero Elsa Somonela	57356	Volume 12, page 98	Megabit 22, 2003	A fact that a contract of sale of a house is registered with a court or a notary as per Art. 1723 of the Civil Code does not prove the existence of valid contract unless the contract is made in writing and attested by two witnesses.
13	Ato Shiferaw Dejene and W/o Tsehay Tesfaye v. Ato Sisay Abebe	78398	Volume 14, page 73	Tikimit 19, 2005	A Contract of sale of a house must be registered with a court or a notary. A written agreement, which is not registered with a court or a notary as per Article 1723(1) of the Civil Code, is a mere draft contract and the agreement shall not be conclusive evidence under Article 2005 (1) of the Civil Code.

Ato

**Note:** The decisions of the FSCCD on form of a contract relating to an immovable are provided in this table as per the chronological order of their dates.

#### 4.4. Practical Cases showing Inconsistent Interpretations of Laws between the Decisions of the FSCCD on the same Legal issue

The Judges in the Cassation Division state that so far the interpretation rendered in the Gorfie Case<sup>493</sup> is the governing principle as to form of contracts relating to immovables.<sup>494</sup> In this case, the Cassation Division held that a contract of sale of an immovable can only be valid if the two cumulative formal requirements are satisfied; i.e, the contract shall be in writing and it shall be registered with a court or notary. It ruled that Article 1723 of the Civil Code is a mandatory provision of contract law. In the Gorfie case, the question of registration with a court or notary was not raised as an issue in the court of first instance. The Cassation Bench invalidated the contract for not being registered with a court or notary by its own motion.

However, the Cassation Division rendered another different interpretation on Article 1723 of the Civil Code in the Cassation File No.36887, [Woizero Alganesh (Cassation Petitioner) vs. Ato Gebru (Cassation Respondent 1) and Woizero Workit (Cassation Respondent 2)]<sup>495</sup> in 2001 E.C. The Cassation Petitioner started the case at the South Wollo High Court seeking forced performance of a contract against the Respondents. She argued that she had bought a house from the Respondents and paid them the full payment as per the contract of sale of a house but they failed to deliver necessary documents relating to the house. Hence, she requested the court for the transfer of ownership of the house from the respondents to her. The Cassation Respondents, on their part, argued that they had terminated the contract of sale of the house though they had received the full payment from Cassation Petitioner and stated that they were ready to return the money to her. The High Court decided that the Cassation Respondents should deliver the necessary documents to the Cassation Petitioner and perform their obligations as per the contract since they admitted that there was a valid contract of sale of a house between the petitioner and them. Thereafter, the Cassation Respondents lodged their appeal to the Amhara Supreme Court. The Supreme Court reversed the decision of the high Court and decided that the contract of sale of the house shall be of no effect since it was not registered with a court or a notary. Thus, the

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<sup>493</sup>See Gorfie Gebrehiwot v. Aberashe Debargie and Getahun Nega , *The Decisions of Federal Supreme Court Cassation Division of Ethiopia*, Volume 4. Cassation File No.21448, (1999 E.C), pp. 39-47.

<sup>494</sup> See Supra note 446, an Interview with Judge Almaw Wollie, Judge Ali Mohammed and Judge Adane Nigussie.

<sup>495</sup> See Woizero Alganesh v. Ato Gebru and Woizero Workit , *The Decision of Federal Supreme Court Cassation Division*, Volume 13, Cassation File Number 36887, 2001 E.C, pp. 233-235.

Supreme Court ordered for the reinstatement of the parties in the position which would have existed had the contract not been made as per Article 1815 (1) of the Civil Code.

Finally, the Cassation Petitioner brought the case to the FSCCD which reversed the decision of the Supreme Court and confirmed the decision of the High Court. The Cassation Division ruled that Article 1723 of the Civil Code and the interpretation rendered in the Gorfie Case (Cassation File No. 21448) do not apply when contracting parties admit that there was a contract of sale of an immovable between them though the contract was not registered with a court or a notary. It also stated that unregistered contract of sale of an immovable shall not be invalidated if any one of contracting parties does not expressly deny the existence of the contract. In addition to this, the FSCCD rendered similar interpretation in the case between Kokebe Terefe and Ayalew Kasaye.<sup>496</sup> In this case, the Cassation Division held that even though a contract relating to an immovable was not registered with a court or notary, it shall not be invalidated since one of the parties to the contract did not challenge the contract for not being registered with a court or notary. Pursuant to Article 1808(2) of the Civil Code, a contract not made in the prescribed form may be invalidated at the request of any contracting party or interested third party. Hence, the Cassation Division ruled that unregistered contract of sale of a house shall not be invalidated if there is no request by any contracting party for the invalidation of the contract. It stated that unregistered contract shall not be invalidated by the motion of the court.

In the above two cases, the question of registration of the contracts with a court or a notary was not raised as an issue by contracting parties. However, the Cassation Division raised the question of registration of contract of sale of the house by its own motion in the Gorfie case. In this case, neither of the parties to the contract filed a protest before the First Instance Court seeking for the invalidation of the contract since the contract was not registered before a court or a notary. The Cassation Division ruled that the requirement of registration before a court or a notary as embodied in Article 1723 is binding thereby rendering the unregistered contract of sale of an immovable property a mere draft that is non enforceable. It, in so ruling in Gorfie Case, ignored the settled practices and wanted to set a precedent. But, it changed its previous position

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<sup>496</sup> See Kokebe Terefe v. Ayalew Kasaye , *The Decision of Federal Supreme Court Cassation Division*, Cassation File Number 43825, Volume 10 (2002 E.C) , p. 115.

in the decisions rendered in Alganesh Case (Cassation File No. 36887)<sup>497</sup> and in Kokebe Case (Cassation File No. 43825).<sup>498</sup> These decisions clearly show that the Cassation Division held inconsistent positions as to form of contracts relating to an immovable within two years time span. Judge Almaw Wollie states that following the interpretations rendered in the above two cases, the number of cassation cases involving the issue of form of contract relating to an immovable becomes minimum.<sup>499</sup> This implies that the unreasonable ruling of the Cassation Bench in the Gorfie Case enabled dishonest sellers escape liability by claiming that they had no real intention to the contract. Given the sky rocketing prices currently being witnessed in the housing market, the inconsistent rulings of the Cassation Bench may encourage dishonest sellers to deny the existence of transactions long considered closed.

Recently in 2005 E.C, the Cassation Division upheld that registration is a formality requirement to contracts relating to immovables in Cassation File No. 78398 (Ato Shiferaw Dejene and Woizero Tsehay Tesfaye vs. Ato Sisay Abebe).<sup>500</sup> In this case, the Cassation Respondent (Ato Sisay) started the case at the First Instance Court seeking forced performance of a contract against the Cassation Petitioners (Ato Shiferaw and W/o Tsehay). He argued that he had bought a house from the Petitioners and paid them the full payment, i.e. 20,000 Birr as per a contract of sale of a house but they failed to deliver necessary documents relating to the house. Consequently, he requested the court for the transfer of ownership of the house from the Petitioners to him. The Cassation Petitioners, on their part, argued that the non-performance was attributable to the Respondent because he failed to pay the purchase money that is 40,000 Birr as per the contract. Thereafter, the First Instance Court decided in favor of the Cassation Respondent and it stated that the written contract concluded between the disputing parties proved that Cassation Respondent had paid the purchase money, i.e. 20,000 Birr to the Cassation Petitioners. The court based its decision on Article 2005(1) of the Civil Code which provides that “a written instrument shall be conclusive evidence, as between those who signed it, of the agreement therein contained and of the date it bears.” On appeal, the East Wellega High Court and the Oromia Supreme Court confirmed the decision of the First Instance Court.

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<sup>497</sup> See Supra note 495, W/o Alganesh v. Ato Gebru and W/o Workit , Volume 13, Cassation File No. 36887/2001 .

<sup>498</sup> See Supra note 496, Kokebe Terefe v. Ayalew Kasaye , Cassation File No.43825, Volume 10 (2002 E.C), p 115.

<sup>499</sup> See Supra note 446, Interview with Judge Almaw Wollie, Judge Ali Mohammed and Judge Adane Nigussie.

<sup>500</sup> See Ato Shiferaw Dejene and Woizero Tsehay Tesfaye v. Ato Sisay Abebe, *The decision of Federal Supreme Court Cassation Division*, Volume 14, Cassation File Number 78398, (2005 E.C), pp. 51-54.

Finally, the Cassation Petitioners brought the case to the FSCCD which reversed the decisions of lower Courts. The Cassation Division ruled that a contract of sale of an immovable can only be valid if the contract is made in writing and registered with a court or notary as per Article 1723 of the Civil Code. In the case at hand, the contract was not registered with a court or notary and it did not satisfy the formality requirements prescribed under Articles 1678(C), 1719(2) and 1723(1) of the Civil Code. Hence, the Cassation Division held that the written agreement concluded between the disputing parties was a mere draft contract and the agreement shall not be conclusive evidence under Article 2005 (1) of the Civil Code. It finally rejected the unregistered contract and decided in favor of the Cassation Petitioners.

In the opinion of the writer, the Cassation Division is not ready to overrule its unreasonable ruling on form of contracts relating to an immovable as it rendered the above interpretation before a year in 2005 E.C. Lack of registration with a court or notary of a written contract relating to an immovable does not affect the validity of the contract between the parties. As indicated in Chapter 3, under the French contract law which is similar to the Ethiopian contract law, ownership of an immovable passes as a result of a contract alone without any additional requirement of registration with a court or a notary.<sup>501</sup> Under Ethiopian law, registration of contract of sale of an immovable is not a validity requirement as stated under Articles 2877 and 2878 of the Civil Code. Article 2877 provides that a contract of sale of an immovable shall be of no effect unless it is made in writing. However, it remains silent as to registration requirement. Further more, Article 2878 provides that the sale of an immovable shall not affect third parties unless it has been registered. This implies that unregistered contract of sale of an immovable does not affect the validity of the contract between contracting parties.

Therefore, the ruling of the Cassation Division in the above case is blameful. In the view of the writer, a contract of sale of an immovable is valid as between the parties so long as it is made in writing as per Article 1727 of the Civil Code. In addition, the contract shall be conclusive evidence as between those parties who signed it of the agreement therein contained and of the date it bears.<sup>502</sup>

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<sup>501</sup> See K.W. Ryan, *Supra note* 453.

<sup>502</sup> See Article 2005 (1) of the 1960 Civil Code of Ethiopia.

The Cassation Division also rendered another different interpretation on Article 1723 of the Civil Code in the Cassation File No. 39336 (Nyala Insurance S.C v. Adugna Ejigu and Tenaye Geletta).<sup>503</sup> In this case, the Cassation Respondents (Ato Adugna and W/o Tenaye) started the case at the Federal High Court seeking the invalidation of the contract of sale of a house concluded with the Cassation Petitioner because the contract was not registered with a court or a notary under Article 1723 (1). They also demanded payment of rental money for the period during which the house was held by the Petitioner. The Cassation Petitioner (Nyala Insurance S.C), on its part, argued that the contract of sale of the house is valid though it was not registered before a court or a notary. The Federal High Court decided that the contract should be invalidated and the house should be restituted to the Cassation Respondents who should also return the purchase money. Thereafter, the Cassation Petitioner appealed to the Federal Supreme Court which confirmed the decision of the Federal High Court.

Finally, the Cassation Petitioner brought the case to the FSCCD which reversed the decisions of the lower courts. The Cassation Division ruled that a contract of sale of an immovable which is not made before a court or a notary shall be invalidated as per Article 1808(2) of the Civil Code. Where a contract is invalidated, Article 1815(1) of the Civil Code requires that the parties shall as far as possible be reinstated in the position which would have existed had the contract not been made. And, under Article 1815(2), acts done in performance of the contract shall be of no effect. Under Article 1817(1), however, acts done in performance of the contract shall not be invalidated where such invalidation is not possible or would involve serious disadvantages or inconveniences. In the case at hand, the Petitioner had made improvements on the building that it bought and had also bought land next to the building to serve as parking lot. And, the value of the premises had also been affected by the present high rate of inflation and the return of the money would not be fair. The goodwill of the Petitioner would be affected as the building was being used for business. The lower courts should not have dealt only with the failure to meet the formal requirements of the contract but should also have considered what the result of their decision would be. The lower courts did not consider all the provisions of the Civil Code and owing to the serious inconvenience that would be caused to the

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<sup>503</sup> See Nyala Insurance Share Company v. Ato Adugna Ejigu and Woizero Tenaye Geleta, *Federal Supreme Court Cassation Division*, Cassation File Number- 39336, Volume 8, 2001 E.C, p. 337 , see also the translation of the case made in Mizan Law Review, Cases, vol.4, No.2. Autumn 2010, pp. 362-363.

parties as envisaged under Article 1817(1) of the Civil Code.<sup>504</sup> The Cassation Division concluded that the contract should not be invalidated.

In the opinion of the writer, the ruling of the Cassation Division is blameworthy because of the following reasons. Firstly, a contract of sale of the house, in the case at hand, was valid as between the parties so long as it is made in writing. Secondly, if we assume that registration of the contract before a notary or a court is a validity requirement (though the writer does not believe so) the invalidation of the unregistered contract was possible and would not involve serious disadvantages or inconveniences. The concept of “Reinstatement”<sup>505</sup> provided under Article 1815 of the Civil Code could provide a possible remedy in discouraging the rules as to forms from being used as an engine of fraud.<sup>506</sup> Reinstatement of the innocent purchaser to his previous position would mean the position of equality vis-à-vis the seller in respect of the value of the property sold and bought.<sup>507</sup>

It would be erroneous reinstatement if by reinstatement is meant the price that the purchaser paid at the time of the sale. The re-instatement should approximate the value of the immovable property at the time when the invalidation was sought. In the above case (Nyala Insurance S.C vs. Adugna and Tenaye), therefore, the Cassation Division should have rendered an order for the reinstatement of the parties by considering the approximate value of the house at the time when the invalidation was sought. It was possible to get expert opinions from Civil Engineers. Accordingly, it was not hard to estimate and determine the approximate value of the house at the time of invalidation. In this regard, George Krzeczunowicz states that contractual compensation is not equal to the actual damage, but to the normal damage which could reasonably be expected to result from the breach.<sup>508</sup>

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<sup>504</sup> See Ibid.

<sup>505</sup> In some legal systems, if a contract is void the court need not order for restitution. In English law, for instance, a contract for gambling and gaming is void and the court cannot assist for restitution to the former position. In Ethiopia, however, as the part of the Civil Code governing restitution does make distinction, where a contract is declared void, things that were given or delivered under the pretext of contract should be restituted. See Lantera Nadew, *Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of their Effects*, Mizan Law Review, volume 2, and Number 1, January 2008, p. 102.

<sup>506</sup> See Yohannes Heroui, *Supra* note 443, p. 67.

<sup>507</sup> Ibid

<sup>508</sup> See Professor George Krzeczunowicz, *The Ethiopian Law of Extra Contractual Liability*, 1970, Haile Selassie I University, Faculty of Law, p. 121.

In the writer's view, the justification stated by the Cassation Division, that is "the value of the house has been affected by the present high rate of inflation and the return of the money will not be fair", is unqualified since the reinstatement could consider the approximate value of the house at the time of invalidation. The Cassation Division also stated that "the goodwill of the Nyala Insurance S.C. will be affected by the invalidation as the building is being used for business." In the view of the writer, however, the good will of the company would not be affected by the invalidation and the restitution of the building to the Cassation Respondents since it is prevalent to change the venue of branch offices of companies in Addis Ababa. It is a matter of advertisement to let the populace know the site of the new branch office.

As the Cassation Division held a position that registration of a contract relating to an immovable is a validity formal requirement, it should have ruled for the invalidation of unregistered contract in the case at hand. A number of studies show that non-compliance with the form required by law or prescribed by the contracting parties makes the contract non-existent from the very beginning (*void ab initio*).<sup>509</sup> The old maxim "*forma dat esse rei*"<sup>510</sup> (form gives existence to the transaction) envisages the effect of non observance of "the form" requirement. If contracting parties enter into a contract ignoring the form prescribed by law or by the parties, the act is deemed not to have been made and there shall be no contract but "a mere draft"<sup>511</sup> of contract.<sup>512</sup> Hence, the court cannot lend its hand for enforcement of a void transaction; however, it can assist towards the avoidance of effects of defective dealing.<sup>513</sup>

In the opinion of the writer, the non-compliance of registration requirement does not render a written contract relating to an immovable *void ab initio* and the contract remains valid since the contract by itself is sufficient to prove the existence of a binding agreement. As indicated in Section 2.2.2 of this research, the registration requirement prescribed under Articles, 1723 and 2878 of the Civil Code serves as creating public awareness as to the facts of registered contracts.

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<sup>509</sup> See Tilahun Teshome, *Basic Principles of Ethiopian Contract Law*, 1996, Federal Supreme Court, Research and Publication Department, pp. 64-67.

<sup>510</sup> See Planiol M. *Treatise on Civil Law*, 12<sup>th</sup> Edition, Volume 1, part 1, Translated by Louisiana State Law Institute, (1939), p. 233.

<sup>511</sup> A mere draft is not a contract but a simple intention to inter into a contract, thus, it can be ignored by any contracting party or third party. See Lantera Nadew, *Supra* note 450, p. 96.

<sup>512</sup> See *Ibid* and See Article 1720 (1) of the 1960 Civil Code of Ethiopia.

<sup>513</sup> See Lantera Nadew, *Supra* note 450, p. 102.

This implies that unregistered contracts relating to immovable properties cannot affect the interest of third party but valid among the contracting parties.

In a Cassation File No. 38666 (Development Bank of Ethiopia vs. Ato Tesfaye)<sup>514</sup> the Cassation Division held that a contract of mortgage concluded to provide security to a loan extended by a Bank may not require to be registered with a court or a notary. In this case, the Cassation Petitioner (the Bank) started the case at the Mekelle High Court seeking the transfer of ownership of a store house, which was provided as a security to a loan extended by the Bank according to a contract of mortgage concluded with the Cassation Respondent, because the Respondent failed to pay the loan. The Cassation Respondent (Ato Tesfaye), on his part, admitted the existence of the contract of mortgage but argued that the store house was in his control as per the order of the Court because of the fact that there was no interested third party purchaser to buy the house. Thereafter, the High Court decided that the Bank shall not have an ownership right over the store house since the contract of mortgage was not registered with a court or a notary. The Tigray Supreme Court also confirmed the decision of the High Court.

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Finally, the Cassation Petitioner (the Bank) brought the case to the FSCCD which reversed the decision of the lower Courts. According to the decision of the Cassation Division, ownership right over an immovable comes from either the law or a contract. In the case at hand, the Bank acquired the ownership right over the store house as per Proclamations No. 97/97, 98/97 and 216/99. These Proclamations proclaim that if there no interested third party purchaser to buy an immovable which was provided as a security to a loan extended by the bank in the contract of mortgage, the ownership of such house shall be transferred to the Bank. Consequently, the source of ownership right of the Bank over the mortgaged store house is the law. The Cassation Division held that Article 1723 of the Civil Code applies only to cases involving transfer of ownership of an immovable via contracts. It ruled that Article 1723 of the Civil Code does not apply to a contract of mortgage concluded to provide security to a loan extended by a Bank to any other party since the source of ownership right of the Bank over the mortgaged immovable is not a contract. It, thus, decided that the ownership right of the store house shall be transferred to

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<sup>514</sup> See Development Bank of Ethiopia v. Ato Tesfaye, *The Decision of Federal Supreme Court Cassation Division*, Volume 9, Cassation File Number 38666, (2001 E.C), p. 57.

the Bank in spite of the fact that the contract of mortgage was not registered with a court or notary under Article 1723 of the Civil Code.

In this case, the Cassation Division rendered its decision on the day, Hamle 9, 2001 E.C. However, the FDRE government provided the Civil Code as Amended Proclamation No.639/2009 on the day, Sene 23, 2001 E.C. The Proclamation deals with a contract of mortgage concluded to provide security to a loan extended by a Bank or a Micro Finance Institution. It entered into force prior to the date of the decision rendered by the Cassation Division in Cassation File No. 38666 (Development Bank of Ethiopia vs. Ato Tesfaye). However, the Cassation Division did not cite this relevant law in its decision. The writer strongly believes that the Cassation Division should have based its interpretation mainly on the Proclamation No.639/2009, which is provided for the amendment of Article 1723 of the Civil Code.

The Proclamation provides that notwithstanding Article 1723(1) of the Civil Code “a contract of mortgage concluded to provide security to a loan extended by a bank or a micro financing institution may not require to be registered by a court or a notary.”<sup>515</sup> In addition, Article 3 of the proclamation provides that the proclamation has a retroactive effect on cases decided prior to the effective date of the proclamation. Judge Ali Mohammed, who is one of the judges in the Cassation Division, argues that the Government enacted Proclamation No.639/2009 following the erroneous interpretation of the FSCCD on Article 1723 (1) of the Civil Code in Cassation Case No.21448 (Gorfie Case).<sup>516</sup> He states that this proclamation has saved banks and micro financing institutions from loosing over 1 billion Birr<sup>517</sup> because the prevailing practices of Banks and Micro Financing Institutions prove that contracts of mortgage were not registered with a court or a notary.<sup>518</sup> However, this proclamation has certain shortcomings. Above all, it creates rule and outcome inequality between the litigations of financial institutions and other persons as to registration of contracts relating to an immovable. This research will provide a critique on Proclamation No.639/2009 under Section 4.6.2.

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<sup>515</sup> See Article 2(3) of the FDRE Proclamation No. 639/2009.

<sup>516</sup> Interview with Ato Ali Mohammed, Judge, Federal Supreme Court Cassation Division of Ethiopia on November 4, 2013 in his office

<sup>517</sup> Ibid

<sup>518</sup> See *the Preamble* of the FDRE Proclamation No. 639/2009.

#### **4.5. The Practical Problems of the Decisions of the FSCCD in achieving Uniform Interpretation of Laws**

As indicated in section 4.3 of this study, the FSCCD rendered many inconsistent interpretations on Article 1723 Civil Code of Ethiopia, which deals with form of contracts relating to immovables. There is still a big issue that which interpretation of the cassation bench is to be adopted by the lower courts.<sup>519</sup> The problem has created confusion on judges, lawyers, litigating parties and other stake holders to adopt the appropriate interpretation of the law. In the present situation, it is hard for lawyers to advise their clients with confidence that the law as to form of contract relating to immovables is settled, and clients can conduct business under a stable system. Without stability, people would remain perpetually unsure of their rights and duties. A number of studies indicate that the less predictable the court decisions are, the more likely that individuals will transgress the decisions.<sup>520</sup> Uncertain and unpredictable cassation decisions maximize the possibility that an inexperienced judge will fall into errors of injustice.<sup>521</sup> The legitimacy of the court system as a whole depends in large part on the public's belief that the courts are not composed of "judges free to write their policy views into law."<sup>522</sup>

The FSCCD neither clearly follows nor overrules its own interpretation in the Gorfie Case and this creates a conflict with in its jurisdiction. Trial courts, lawyers and other planners of transactions find themselves in untenable position where they are bound by conflicting decisions of the Cassation Division which is a court of last resort. Litigants, to the extent that they understand the situation at all, may believe that there is no equal protection of the law.<sup>523</sup> Such

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<sup>519</sup> Interview with Ato Belachew Ancheso, Judge, Federal Supreme Court, May 15, 2012, Interview with Ato Abel Girmay, Legal Expert, Research and Legal Aid Department, Federal Supreme Court, May 19, 2013, Interview with Ato Belayhun Awole, Judge, Federal High Court, May 14, 2013, Interview with Woizero Worknesh Esubalew, Judge, Federal First Instance Court, Bole Division, May 22, 2012, Interview with Ato Dememew Shiferaw, Judge, Federal First Instance Court, Addis Ketema Division, May 21, 2012, Interview with Ato Kibatu Tadesse, Judge, Federal First Instance Court, Nefas Silk Division, May 22, 2012, Interview with Ato Mieso Arbessa, Judge, Federal First Instance Court, Nefas Silk Division, May 22, 2012, Interview with Ato Getachew Lemma, Assistant Judge, Federal First Instance Court, Akaki-Kaliti Division, May 14, 2012, Interview with Woizero Yeshi Tarekegn, Registrar, Federal First Instance Court, Akaki-Kaliti Division, May 14, 2012.

<sup>520</sup> See Deborah G. Hankinson, *Stable, Predictable, and Faithful to Precedent: The Value of Precedent in Uncertain Times*, The University of Texas, School of Law, Presented: 17<sup>th</sup> Annual Conference on State and Federal Appeals, May 31- June 1, 2007, Austin Texas, page 3. Accessed at, [www.utcle.org](http://www.utcle.org), last visited on December 12, 2013.

<sup>521</sup> Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis*; 1947, p. 501, as cited in Ibid (Hankinson).

<sup>522</sup> Ibid.

<sup>523</sup> The right to equal protection of the law is a Constitutional right. It is provided under Article 25 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE).

inconsistent interpretations of laws, if allowed to persist, forfeit the benefits of certainty, stability and predictability of the law which the doctrine of precedent is intended to foster.<sup>524</sup>

After the ruling of the Cassation Division in the Gorfie Case, there has been uncertainty as to form of contracts relating to an immovable that enables unscrupulous sellers escape liability by claiming that they had no real intention to the contract. One of the fears expressed by many is that, given the sky rocketing prices currently being witnessed in the housing market, the unreasonable ruling of the Cassation Bench may hearten dishonest sellers to renege on contracts already made and even deny the existence of transactions long considered closed.<sup>525</sup> In addition to this, the prevailing practices of Banks and Micro Financing Institutions prove that contracts of mortgage are not registered with a court or a notary.<sup>526</sup> The registration requirement for the conclusion of mortgage contracts exerted negative impact on the efficiency of loan provision service which is the day- to day activity of Banks and Micro Financing Institutions.<sup>527</sup> The interpretation of the Cassation Division rendered as to Article 1723 (1) of the Civil Code in Cassation Case No. 21448 (Gorfie Case) invalidated contracts of mortgage concluded under the prevailing practices of Banks and Micro Financing Institutions for not being notarized. It left most of the loans unsecured with a serious threat to the existence of the Banks and Micro Financing Institutions and to the country's overall economy.<sup>528</sup>

A judgment may become a precedent when it is known not only by the parties to a single case but also by all courts, lawyers, and finally by the public.<sup>529</sup> The use of precedent results in the publication of reports of cassation decisions. These reports are used by judges, prosecutors, researchers, lawyers and other stakeholders to find the decisions relevant to a particular case. They are important to determine whether the legal issue of a particular case precisely matches that

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<sup>524</sup> In this Regard, Judge Pickard said that "I concur in the case *State v. Bothne* only because the issue was recently decided by a panel of the appellate court and I believe that, notwithstanding my concerns about whether the issue was correctly decided in that case, it is more important for this court to follow its own precedents than to allow justice to be a gamble in which the rights of the parties are governed by the draw of a particular panel of judges." See Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 1992, Southern Illinois University, School of Law, p. 538.

<sup>525</sup> See *Supra* note 40 (Yohannes Heroui), p. 67.

<sup>526</sup> See *the Preamble* of the FDRE Proclamation No. 639/2009.

<sup>527</sup> *Ibid*

<sup>528</sup> *Ibid*

<sup>529</sup> See Lilit Hambadzumyan, *The Precedent of the Court of Cassation and its application in Armenian legal system*, American University of Armenia, 2011, accessed at [www.aua.winetrterm.com](http://www.aua.winetrterm.com), last visited on December 14, 2013, p.22.



of previous cases. In this regard, the FRDE Federal Courts Proclamation Re-amendment Proclamation No.454/2005 imposes on the Federal Supreme Court a duty to publish decisions of the Cassation Division that contain binding interpretation of law to all levels of courts and other relevant bodies. However, it does not indicate whether the decisions are binding before the time of publication or not.

Delay of publication of the decisions of the FSCCD has been and is still continuing to be one of the major setbacks for the proper application of the rule of precedent in Ethiopia. For instance, the decision in Cassation File No.36887, (Woizero Alganesh vs. Ato Gebru and Woizero Workit)<sup>530</sup>, which is one of the controversial decisions of the FSCCD rendered in 2001 E.C as to form of contracts relating to an immovable, is published in 2005 E.C. There are also a number of decisions of the Cassation Division which are not officially published.<sup>531</sup> In the opinion of the writer, the Cassation Division is not willing to publish all of its decisions because of many reasons. One of the reasons may be that the Cassation Division might not be confident in all of its decisions. The other reason may be that those unpublished decisions might not have jurisprudential value. The FSCCD should publish all of its decisions so that the public become aware of the position of the cassation bench as to a certain legal issue.

#### **4.6. Reasons for the Inconsistent Interpretations of Laws on Form of Contracts relating to an Immovable**

There are various reasons which pose difficulty in achieving uniform legal interpretation on the same legal issues by the Cassation Division. The reasons may be classified as internal and external reasons. The internal problems are attributable to the Cassation Division itself. On the other hand, external problems arise as a result of external factors that are not attributable to the Cassation Division. In the opinion of the writer, so far most of the reasons for the inconsistent interpretation of laws are internal ones.

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<sup>530</sup> See Woizero Alganesh v. Ato Gebru and Woizero Workit , *The Decision of Federal Supreme Court Cassation Division*, Volume 13, Cassation File Number 36887, 2001 E.C, pp. 233-235.

<sup>531</sup> Interview with Ato Abel Girmay, Legal Expert, Research and Legal Aid Department, Federal Supreme Court, May 19, 2013.

#### 4.6.1. Internal Reasons

The internal reasons for the inconsistent interpretation of laws relate to knowledge, skill and attitude of the Cassation Judges.<sup>532</sup> The ruling of the Cassation Division on a specific legal issue will have far reaching implications on the legal system of the country.<sup>533</sup> Hence, the cassation judges should critically consider the impacts of their interpretation on social, economical, political, cultural and moral context of the people.<sup>534</sup> They have to make sure that their decision would exist and applicable relatively for a long period of time.<sup>535</sup> They should not only limit their decisions in interpreting proclaimed laws but they should also support their decisions with deep researches.<sup>536</sup> However, the practice shows a different thing. Judge Ali Mohammed<sup>537</sup> states that the prevailing practices of the Cassation Division show that the judges do not support their decisions with researches. In the opinion of the writer, there is a knowledge gap in the Cassation Division as the bench rendered various interpretations of laws that are conflicting with the intention of the legislature. As indicated in section 4.3 of this research, the Cassation Division held that registration with a court or notary is a validity formal requirement to contracts relating to an immovable. In the writer's view, this position of the Cassation Division is against the intention of the drafter of the Civil Code.<sup>538</sup>

Above all, lower court judges, academicians, lawyers and others accuse the judges in the FSCCD of holding many inconsistent positions as to the same legal issue within very short period of time.<sup>539</sup> They state that the judges in the Cassation Division apply the doctrine of precedent selectively despite the existence of similar legal issue in previous interpretations.

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<sup>532</sup> See Million Assefa, *Supra* note 452, p. 45.

<sup>533</sup> See Tilahun Teshome (Professor), *Commentary on the Decision of the Ethiopian Federal Supreme Court Cassation Division in Cassation File No. 5336*, Wonber, Alemayehu Haile Memorial Foundation's Bulletin, 10<sup>th</sup> Half-Year, August 2012, p. 15.

<sup>534</sup> Interview with Ato Ali Mohammed, Judge, Federal Supreme Court Cassation Division of Ethiopia, Nov. 4, 2013.

<sup>535</sup> See Professor Tilahun Teshome, *Supra* note 533

<sup>536</sup> *Ibid*

<sup>537</sup> Interview with Ato Ali Mohammed, Judge, Federal Supreme Court Cassation Division of Ethiopia, Nov. 4 2013.

<sup>538</sup> See Rene David, *Commentary on Contracts in Ethiopia*, translated by Michael Kindred, 1973, Haile Sellassie I university, Faculty of Law, p. 34. Rene David, who is the expert draftsman of the 1960 Civil Code of Ethiopia, does not mention registration with a court or a notary as a requirement for validity of a contract relating to an immovable in his commentary but only refers to the requirement of written form. It reads; "The importance attached to land by Ethiopians justifies Article 1723, which requires the conclusion in writing of all acts creating or transferring ownership, usufructs, or servitudes on an immovable, as well as for contract of compromise or partition relating to an immovable." The writer believes that Rene David's omission of registration before a court or notary as a requirement for the validity of a contract relating to an immovable has a purpose of showing that registration is not a validity requirement to a contract relating to an immovable.

<sup>539</sup> Interview with judges, *Supra* note 519

Of course, it is known that there is a caseload on the judges. And, the judges may lack ample time to support their decisions with deep researches. These factors also pose difficulty in achieving uniform legal interpretation.

#### **4.6.2. External Reasons**

Most of the Ethiopian laws are transplanted from the legal systems of western countries. Sometimes, however, the size of the laws of developed legal systems may not fit the Ethiopian size because the laws are not adopted based on the context of the Ethiopian society. Consequently, there are a number of provisions of laws which depart from settled practices. For instance, Article 1723 of the Civil Code may create puzzlement on the judges of the Cassation Division as to form of contract relating to an immovable. Further more; the judges in Ethiopia are not well familiar with doctrine of precedent since the doctrine is new to the country.<sup>540</sup> So, the above mentioned facts put their shadow in applying uniform interpretation of laws.

In addition, except some legal scholars,<sup>541</sup> the academic communities in Ethiopia do not write continuous critiques against the unqualified rulings of the Cassation Division. They are expected to write commentaries on the decisions of the Cassation Division so as to strengthen the jurisprudential values of the decisions. A group pressure against decisions of the Cassation Division is the other reason which negatively affects the application of uniform interpretation of laws. For instance, the financial sector was very much disappointed with the interpretation of the FSCCD in the Gorfie Case. Thus, it insisted the government to make law that repeals the binding interpretation of the Cassation Division.

The other external reason, which poses difficulty in achieving uniform legal interpretation, is the special proclamation enacted as to form of contract relating to an immovable. The

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<sup>540</sup>Although some scholars classify the Ethiopian legal system as a hybrid of Civil law and Common law legal systems, many scholars classify it in the Civil law (Continental) legal family. See Muradu Abdo, *Legal History and Traditions, teaching material*, unpublished, 2009, Justice and Legal System Research Institute, pp.215-219. Most of the Civil law jurisdictions do not adopt a *stare decisis* principle in adjudication of cases. In deciding any given legal issue, precedents serve a persuasive role.

See Mackay R. *Elements of English Legal System, Judicial Precedent, 2008, page 2, accessed at <http://www.lectureme.studio400.me.uk/resources/elements+of+english+legal+system++++precedent.pdf>*. last visited on April 4, 2013.

<sup>541</sup>I am grateful to Professor Tilahun Teshome who wrote a commentary as to one of the controversial rulings of the FSCCD. See Tilahun Teshome (Professor), *Commentary on the Decision of the Ethiopian Federal Supreme Court Cassation Division in Cassation File No. 5336*, Wonber, Alemayehu Haile Memorial Foundation's Bulletin, 10<sup>th</sup> Half-Year, August 2012, p. 15 and the following.

prevailing practices of banks and micro financing institutions prove that contracts of mortgage are not registered before a court or a notary.<sup>542</sup> Subsequently, the FDRE government provides a controversial Proclamation No.639/2009 for the amendment of Article 1723 of the Civil Code. Article 1723 clearly governs any party who concludes a contract relating to an immovable. However, the proclamation adds a new sub- article (3) as an exception under Article 1723. It provides that “a contract of mortgage concluded to provide security to a loan extended by a bank or a micro financing institution may not require to be registered by a court or a notary.” In the opinion of the writer, this provision creates rule and outcome inequality between the litigations of financial institutions and other persons in the country as to registration of a contract relating to an immovable. Under similar circumstances, each party should be subjected to and protected by similar rules.<sup>543</sup> Same issues should be resolved through similar legal rules. Similar issues, under same grounds should have similar outcomes.<sup>544</sup> Generally, like cases should be treated alike.

In addition, Article 3 of the proclamation provides that the proclamation has a retroactive<sup>545</sup> effect on cases decided prior to the effective date of the proclamation. Accordingly, even if a contract of mortgage is concluded prior to the effective date of the proclamation, the validity of the contract may not be challenged for not being registered by a court or notary in accordance with Article 1723 of the Civil Code.<sup>546</sup> This proclamation, therefore, repealed the binding interpretation of the FSCCD rendered in the Gorfie Case (Cassation File No. 21448)<sup>547</sup>. As indicated in section 4.3.1 of this research, the Cassation Division held, in the Gorfie Case, that the sale of an immovable property, to be valid, must be made in writing and be registered before a court or a notary as per Article 1723 of the Civil Code. This research finds that Proclamation No.639/2009 is absolutely against the principle of non-retroactivity of laws. Nowadays, modern legal systems limit the power of the government to impair or modify contractual rights.<sup>548</sup> The purpose of limitation on retroactivity of laws is to ensure that persons have fair warning of

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<sup>542</sup> See the Preamble of FDRE Proclamation No. 639/2009.

<sup>543</sup> See Alem Abrha & Tafesse Habte, *Law of Civil Procedure I*, Teaching material, Unpublished, 2009, Justice and Legal System Research Institute, p. 24.

<sup>544</sup> Ibid.

<sup>545</sup> As per Black’s Law Dictionary, 7<sup>th</sup> Edition, 1999, *Retroactive* relates to a statute or ruling that extends in scope or effect to matters that have occurred in the past.

<sup>546</sup> Article 3 (1) of the Federal Democratic Republic of Ethiopian Proclamation No.639/2009

<sup>547</sup> See the Gorfie case , FSCCD Cassation File No. 21448, Supra note 442

<sup>548</sup> Deborah k. Mc Knight, *Retroactivity of Statutes; What Constitutional limits are there on the retroactive application of laws?* , 2005, accessed at [www.house.leg.state.com](http://www.house.leg.state.com) last visited on 12/13/2013, p. 8

legislative acts and to restrain the government from arbitrary and potentially vindictive legislations.<sup>549</sup> The general principle is that substantive legal rules and measures which detrimentally affect the legal position of individuals and business enterprises may not have a retroactive effect.<sup>550</sup> In the opinion of the writer, the proclamation should have respected the principle of non-retroactivity of laws.

Furthermore, the proclamation erodes the judicial independence of courts since it has terminated the previous decisions of courts. The FDRE Constitution provides that court decisions shall be reviewed only through appeal or cassation before superior courts of the country.<sup>551</sup> The Constitution establishes an independent judiciary and vests the supreme federal judicial authority to the Federal Supreme Court.<sup>552</sup> It also provides that courts of any level shall be free from any interference of a government body.<sup>553</sup> However, the legislative body of the Ethiopian government has interfered with and influenced the decisions of courts via Proc. No. 639/2009. Therefore, the government is expected to enact laws that guarantee equal protection of the law.

#### **4.7. A Need for Further Reform of the Position of the FSC CD on Form of Contracts relating to an Immovable**

The justifications for the importance of the doctrine of precedent rest on the need for certainty, reliance, equality and efficiency in the law. Accordingly, cases involving similar legal issues should have similar outcome in all courts, be it first instance, high or supreme courts. And, similar legal issues should be resolved through similar legal rules, i.e, like cases should be treated alike. When the Cassation Division tries to adhere to its decisions of prior cases, its trustworthiness will increase. As indicated in Section 4.3 of this research, however, the FSCCD rendered many inconsistent interpretations on Article 1723 of the Civil Code. There is still a big issue that which interpretation of the cassation bench is to be adopted by the judges of lower

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<sup>549</sup> Ibid

<sup>550</sup> See Ulf Bernitz, *Retroactive Legislation in a European Perspective- on the importance of general Principles of law*, 2009, page 58, accessed at [www.scandinavianlaw.com](http://www.scandinavianlaw.com) last visited on December 12, 2013.

<sup>551</sup> Article 80 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) provides that the Federal Supreme Court and the State Supreme Courts shall have the highest judicial power over federal and state matters respectively. However, the Federal Supreme Court (cassation division) has a power of cassation over any final court decision in the country.

<sup>552</sup> See Article 78 (1) and (2) of the 1995 FDRE Constitution

<sup>553</sup> See Ibid, Art. 79(2)

courts.<sup>554</sup> The problem has created puzzlement on judges, lawyers, litigants and other stake holders to adopt the appropriate interpretation of the law. The writer has not seen a consistent approach in the decisions which he has examined. In his opinion, the Cassation Division should consider its precedents seriously. Where a decision is to be departed from, it should be made clearly and deliberately, with an appreciation of the consequences.<sup>555</sup>

The experiences of the developed legal systems reveal that most of the interpretations rendered by Supreme Courts as to similar legal issues are uniform, certain and predictable.<sup>556</sup> In United States of America, judges frequently cite previous decisions involving similar legal issue to support their arguments or sometimes to point out controversies or to argue against previous opinions, or to overturn past decisions.<sup>557</sup> However, the Ethiopian Cassation Division did not cite previous decisions involving similar legal issue to support its arguments in most of the cases. It should also learn from the experience of Italy in which the Court of Cassation ensures the proper application of precedents in the lower and appellate courts.<sup>558</sup> In Italy, the Cassation Court has surveillance mechanisms so as to check the existence of uniform interpretation of laws that contain similar legal issues throughout the country.<sup>559</sup> But, in Ethiopia, there is no mechanism to control the application of precedents in lower courts.<sup>560</sup> Therefore, there is a need for reform of the position of the Cassation Division as to form of contracts relating to immovables.

In the opinion of the writer, the prevailing practices of the Cassation Division show that the judges do not support their decisions with researches. Therefore, the judges shall adopt the best experience of France in this respect. In France, the Legal Research Department, which is placed under the authority of the president of the court of cassation, is directed by a Justice (*conseiller*) at the court of cassation and consists essentially of judges (*auditeurs*) at the court and of senior

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<sup>554</sup> Interview with judges, Supra note 519

<sup>555</sup> See James Lee, *The Doctrine of Precedent and the Supreme Court*, Inner Temple Academic Fellow's Lecture, 2011, page 21, Accessed at [j.s.f.lee@bham.ac.uk](mailto:j.s.f.lee@bham.ac.uk), last visited on December 13, 2013

<sup>556</sup> See H. Fowler, S. Jean, *The Authority of Supreme Court Precedent, Forthcoming in Social Networks* (2007), page 21 accessed at <http://www.law.aua/files/2012>, last visited on December 12, 2013.

<sup>557</sup> Ibid

<sup>558</sup> See Gianluca Gentili, *Italian Constitutional and Cassation Courts*, Hein on line, 2011, accessed at <http://www.academia.edu>, last visited on December 16, 2013, pp.73-88.

<sup>559</sup> Ibid

<sup>560</sup> Interview with judges, Supra note 519

registrars.<sup>561</sup> When the cassation applications are referred to the various chambers, the legal research department helps to streamline the processing of cases.<sup>562</sup> It groups together proceedings raising identical or related issues and helps to reduce any conflict in the case law of the court of cassation.<sup>563</sup> The creation of a database of laws in the department provides a useful tool for analyzing the problems arising from the implementation of laws by courts.<sup>564</sup> The department is instrumental in developing the court's case law policy by publishing its judgments and also by publicizing them in the courts, by electronic as well as other means.<sup>565</sup> In the State of New Mexico, whenever there are two or more published decisions involving similar legal issue but having opposite results, the Supreme Court would likely assume that the earlier decision was impliedly overruled by the latter.<sup>566</sup>

The Ethiopian FSCCD is expected to adopt the experience of the Cassation Court of Netherlands as to composition of judges. In Netherlands, the Cassation Court is divided into four chambers: they are; the civil chamber, criminal chamber, tax chamber and “ombuds” chamber.<sup>567</sup> Consequently, the judges render uniform interpretation of laws to cases involving similar legal issues since they are specialized in a specific subject matter.<sup>568</sup> In Ethiopia, however, all of the interpretations on form of contracts relating to immovables are rendered by judges who have also presided in criminal, tax and other subject matters.

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<sup>561</sup>See Cour de Cassation, *The Role of the Court of Cassation in France*, accessed at <http://www.courdecassation.fr> , last visited on 12/12/2013, pp.1-14.

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.

<sup>564</sup> Ibid.

<sup>565</sup> Ibid.

<sup>566</sup> See Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 1992, Southern Illinois University, School of Law, p. 541.

<sup>567</sup>See the home page of the Website of Supreme Court of the Netherlands, accesses at <http://www.rechtspraak.nl> , last visited on December 10,2013, p. 1.

<sup>568</sup> Ibid.

## CHAPTER FIVE

### 5. CONCLUSION AND RECOMMENDATION

#### 5.1. Conclusion

This paper analyzed the position of the Ethiopian Federal Supreme Court Cassation Division (FSCCD) as to form of a contract relating to an immovable. The justifications for the importance of the doctrine of precedent rest on the need for certainty, reliance, equality and efficiency in the law. Hence, cases involving similar legal issues are expected to have similar outcome in all courts. When the FSCCD tries to hold on its decisions of prior cases, its credibility will increase. This paper, however, finds that the Cassation Division rendered many contradictory interpretations on Article 1723 of the Civil Code of Ethiopia which deals with form of a contract relating to an immovable.

In the present Ethiopian situation, it is hard for lawyers to advise their clients with confidence that the law as to form of a contract relating to an immovable is settled. Without stability, people would remain perpetually unsure of their rights and duties. The inconsistent decisions of the Cassation Division have created confusion on judges, lawyers, litigants and other stake holders to adopt the appropriate interpretation of the law. Many studies indicate that the less predictable the court decisions are, the more likely that individuals will transgress the decisions. Uncertain and unpredictable cassation decisions maximize the possibility that an inexperienced judge will fall into errors of injustice. The legitimacy of the court system as a whole depends on the public's belief that the courts are not composed of judges free to write their policy views into law.

The decisions of the FSCCD on form of a contract relating to an immovable have not stayed for long period of time without being overruled. Almost all of the inconsistent interpretations of the Cassation Division are rendered within two years time span, i.e. from 1999 to 2001 E.C. The FSCCD neither clearly follows nor overrules its own interpretation in Cassation File No. 21448 (the Gorfie Case) and this creates a conflict within its jurisdiction. In this case, the Cassation Division held that the requirement of registration before a court or a notary as embodied in Article 1723 of the Civil Code is binding thereby rendering unregistered contract of sale of an immovable a mere draft that is non enforceable. The judges in the FSCCD

state that this interpretation is the governing principle as to form of contracts relating to immovables so far. The debate that arises after this interpretation partly lies in the fact that the Cassation division has, in so ruling, chosen to depart from settled practices to enter into a contract relating to an immovable. The prevailing practices proved that contracts relating to an immovable were not registered with a court or a notary. In the opinion of the writer, registration is not a formal requirement (*ad validitatem*) for the validity of a contract relating to an immovable. The sole purpose of registration is publicity as envisaged under Articles 2877 and 2878 of the 1960 Ethiopian Civil Code.

Before the decision of the Cassation Division in the Gorfie Case, a contract relating to an immovable made in writing were taken to be valid and enforced by courts. Hence, the invalidation of such contract increases uncertainty in the housing market. The decision in the Gorfie Case enables unscrupulous sellers escape liability by claiming that they had no real intention to the contract. Given the sky rocketing prices currently being witnessed in the housing market, the unreasonable ruling of the Cassation Bench may encourage dishonest sellers to break their promise on contracts already made and even deny the existence of transactions long considered closed. The prevailing practices of Banks and Micro Financing Institutions also prove that contracts of mortgage are not registered with a court or a notary. The interpretation in the Gorfie Case, however, invalidated contracts of mortgage concluded under the prevailing practices for not being notarized. It left most of the loans unsecured with a serious threat to the existence of the Financing Institutions. The interpretation also negatively affected the country's economy since the importance attached to land by Ethiopians is very high.

In the Gorfie case, the question of registration with a court or notary was not raised as an issue in the court of first instance. The Cassation Bench invalidated the contract for not being registered with a court or notary by its own motion. It, however, rendered another contradictory interpretation in the Cassation File No.36887. It held that unregistered contract of sale of a house shall not be invalidated when contracting parties admitted the existence of the contract between them. Under Article 1808(2) of the Civil Code, the unregistered contract shall not be invalidated by the motion of the court. The Cassation Division also rendered another clashing interpretation with the Gorfie Case in Cassation File No. 39336 and ruled that acts done in performance of a contract shall not be invalidated where the invalidation of unregistered contract is not possible

and would involve serious disadvantages or inconveniences. The Cassation Division also rendered other conflicting interpretation in the Cassation File No. 38666. In this case, it held that a contract of mortgage concluded to provide security to a loan extended by a Bank may not require to be registered with a court or a notary. It rendered this interpretation without considering the appropriate law in this respect, i.e. Proclamation No. 639/2009, which amends Article 1723 of the Civil Code. It did not cite any provision from this proclamation.

The writer has not also observed a consistent approach in the other interpretations of the Cassation Division which he has examined as to Article 1723 (form of a contract relating to an immovable). As a result, trial courts, lawyers and other planners of transactions find themselves in untenable position where they are bound by conflicting decisions of the Cassation Division. Litigants, to the extent that they understand the situation at all, may believe that there is no equal protection of the law. Such inconsistent interpretations of laws, if allowed to persist, forfeit the benefits of certainty, stability and predictability of the law which the doctrine of precedent is intended to foster. Consequently, there is a need for further reform of the position of the FSCCD on form of a contract relating to an immovable.

There are, however, internal and external challenges which put their shadow on the FSCCD to achieve uniform interpretation of law. The basic problems may be classified as internal problems which are attributable to the Cassation Division itself. They relate to knowledge, skill and attitude of the cassation judges. The judges do not support their decisions with deep researches. There is a knowledge gap in the Cassation Division as the bench rendered various interpretations of laws that are conflicting with the intention of the legislature. The judges apply the doctrine of precedent selectively despite the existence of similar legal issue in prior interpretations. Of course, it is known that there is a caseload on the judges. And, the judges may lack ample time to support their decisions with deep researches.

One of the external problems is that some of the Ethiopian laws are not adopted from developed legal systems based on the context of the Ethiopian society. Hence, there are many provisions of laws which depart from settled practices such as Article 1723 of the Civil Code. Further more; the judges in Ethiopia are not well familiar with the doctrine of precedent since the doctrine is new to the country. Besides, the academic communities in Ethiopia do not write

persistent critiques against the unqualified rulings of the Cassation Division. This paper also finds that Proclamation No. 639/2009, which amends Article 1723 of the Civil Code, violates the constitutional principles of independence of judiciary, equal protection of the law and non-retroactivity of laws. Article 1723 governs any party who concludes a contract relating to an immovable. However, the proclamation provides that a contract of mortgage concluded to provide security to a loan extended by a bank or a micro financing institution may not require to be registered by a court or a notary. It creates, thus, rule and outcome inequality between the litigations of financial institutions and other persons as to registration of a contract relating to an immovable. The proclamation has also a retroactive effect on cases decided prior to the effective date of the proclamation. Consequently, it erodes the judicial independence of courts since it has terminated previous decisions of courts including the decisions of the FSCCD which is a court of last resort in Ethiopia.

## **5.2. Recommendations**

- The FSCCD should clearly overrule its blameful interpretation rendered in the Cassation File No. 21448 (the Gorfie Case) since the interpretation has departed from settled practices to enter into a contract relating to an immovable. It shall hold that a registration requirement is not a decisive factor in rendering a contract relating an immovable void as long as the contract is made in writing and the performance of both parties is based on the terms of the contract and the material circumstances prove its formation. The sole purpose of registration is publicity which helps to have a complete record of all rights existing over a particular immovable.
- The writer did not see a consistent approach in the decisions which he has analyzed as to form of a contract relating to an immovable. Every ruling of the FSCCD on a specific legal issue has far reaching implications on the legal system of the country. Hence, the cassation judges should critically consider the impacts of their interpretation on social, economical, political, cultural and moral contexts of the people. They have to make sure that their decision would exist and applicable relatively for a long period of time. Even though Proclamation No.454/2005 empowers the FSCCD to render a different interpretation of law in the future on cases involving similar theme with a prior case, the Cassation Division is expected to uphold its interpretation for

reasonable long period of time. The cassation judges should not only limit their decisions in interpreting proclaimed laws but they should also support their decisions with deep researches. They should resolve similar legal issues through similar legal rules so as to provide uniform, certain and predictable decisions. Cases involving similar legal issues as to form of a contract relating to an immovable should have similar outcome in all courts. When the Cassation Division tries to adhere to its decisions of prior cases, its trustworthiness will increase and the people would remain perpetually sure of their rights and duties.

- The FSCCD should follow one fairly reasoned position as to form of a contract relating to an immovable and clearly overrule other contradictory decisions. Every interpretation has to be made in accordance with the concept of horizontal *stare decisis* that the Cassation Division should refrain from creating conflicting interpretation of laws. The Cassation Division should consider its precedents seriously. Having a uniform interpretation of laws throughout the country is not only about ensuring certainty and predictability of court decisions; it is also about basic constitutional rights-equality before the law. Where a decision is to be departed, however, it should be made clearly and deliberately with an appreciation of the consequences.
- Each interpretation of law as to form of a contract relating to an immovable should be rendered by experienced cassation judges who have a deep knowledge in contract law. The judges are expected to be specialists in civil matters in general and contract law in particular. Thus, it will be easy to bring uniformity of decisions as to form of a contract relating to an immovable.
- The decisions of Cassation Division should be clear and self explanatory rather than putting in a few paragraphs or one page which are becoming source of unnecessary contention between litigants. Delay of publication of the decisions of the FSCCD has been and is still continuing to be one of the major setbacks for the proper application of the rule of precedent in Ethiopia. There is also a controversy as to whether the decisions are binding before the time of publication or not. Therefore, all decisions of cassation division should be published with out delay irrespective of any screening criteria since the use of precedent results in the publication of cassation decisions.
- The FSCCD is expected to adopt the best experiences of Supreme Courts of developed legal systems. It may adopt the experiences of USA and UK in which the interpretations rendered by

the Supreme Courts as to similar legal issues are uniform, certain and predictable. The Ethiopian Cassation Division did not cite previous decisions involving similar legal issue to support its arguments in most of the cases. It should persistently cite previous decisions involving similar legal issue to support its arguments or sometimes to point out controversies or to argue against previous opinions, or to overturn past decisions. It may also learn from the experience of Italy in which the Court of Cassation ensures the proper application of precedents in the lower and appellate courts. It can adopt the experience of the Cassation Court of Netherlands as to composition of judges. In Ethiopia, however, all of the interpretations on form of contracts relating to an immovable are rendered by judges who have also presided in criminal, tax and other subject matters. Hence, the FSCCD should organize the cassation benches based on the specializations of judges. The Ethiopian cassation judges may adopt the experience of the French Legal Research Department which is placed under the authority of the court of cassation. The research department groups together proceedings involving identical or related issues by creating database of laws which helps to reduce any conflict in the case law of the court of cassation.

- The writer would suggest that Article 1723 of the 1960 Civil Code of Ethiopia should be amended in a way that “a contract creating or assigning rights in ownership or bare ownership on an immovable or usufruct, servitude or mortgage of an immovable shall be in writing and it *may be registered* with a court or a notary.” So that, it could not confuse judges, lawyers, academicians and others as to form of a contract relating to an immovable.

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7. Ato Dememew Shiferaw, Judge, Federal First Instance Court, Addis Ketema Division, May 21, 2012, at his office.
8. Ato Kibatu Tadesse, Judge, Federal First Instance Court, Nefas Silk Division, May 22, 2012, at his office.
9. Ato Mieso Arbessa, Judge, Federal First Instance Court, Nefas Silk Division, May 22, 2012, at his office.
10. Ato Getachew Lemma, Assistant Judge, Federal First Instance Court, Akaki-Kaliti Division, May 14, 2012, at his office.

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