

**THE RIGHT AND OBLIGATION OF MORTGAGEE AND PLEDGEE  
UNDER ETHIOPIAN LAW, THE LAW AND THE PRACTICE**

**BY: ALEFE BEZA**

**ADVISOR: ADAMU SHIFERAW**

Submitted In Partial Fulfillment Of The Requirements  
For The Bachelor Of Degree Laws (LL.B) At The Faculty  
Of Law,

St. Mary's University College

ADDIS ABABA, ETHIOPIA

JULY 2009

**ST MARY'S UNIVERSITY COLLEGE  
FACULTY OF LAW**

**LL, B THESIS**

**THE RIGHT AND OBLIGATION OF MORTGAGEE AND PLEDGEE UNDER  
ETHIOPIA LAW THE LAW AND PRACTICE**

**BY: ALEFE BEZA  
ID NO 0109/98**

**ADDIS ABABA, ETHIOPIA  
JULY, 2009**

## **Acknowledgment**

Thanks to the Almighty God who is the provider of all my needs. My gratitude also extends to my advisor Ato Adamu Shiferaw for his insightful comments I would like to exploit this opportunity to thank my friend Ato Ashagre fentaw , a legal expert in justice and legal affairs bureau of the city government of Addis Ababa .

Also, I owe much for my sister ® who provide me all the necessary materials.

Thanks to all who wish my success!

## **Bibliography**

### **1. Books**

1. Honorable Mr justice G. P. Mathur Banking Law and practice Vol.1
2. Garner Black's law dictionary (8 edition )
3. American jurics prudence mortgage (2<sup>nd</sup> edition, 1971)
4. Deborah E. Bouchou, Business organization for para legal, (2<sup>nd</sup> Edition)
5. Gibson, Frank and others, Real Estate law( 3<sup>rd</sup> ed. 1992)
6. John W, Bagby, business Law concepts and analysis( 6<sup>th</sup> ed. 1986)
7. Kuchal, Mc, Mercantile Law( 2<sup>nd</sup> ed. New Dehli, 1978)
8. Lusk, Harold,Flusk, Business law Principles and cases( 2<sup>nd</sup> UCC ed 1970»

### **2. Laws**

1. Civil code of the Empire of Ethiopia, proclamation No. 165, Neg. Gaz., Year 19, No. 3
2. Civil procedure code of the empire of Ethiopia, Decree No. 52, Neg. Gaz., year 25 No.
3. Property pledged or Mortgaged with Banks proclamation, 1998, Proclamation, 2000, Proclamation No. 216 Neg. Gaz., Year 6, No. 46

### **3. Case**

1. Commercial bank of Ethiopia Vs Sofia Ali Federal high court civil case no 40434

### **4. Others bibliographical materials**

- 1 Memberetsehay Tadese, Mortgage a guarantee less guarantee law, 1998
- 2 Adamu Shiferaw share Company law unpublished materials

### **5. Interviews**

1. An interview with Ato Shiferaw, legale counelor legal service department, construction and business bank Addis Ababa
2. An interview Ato Ashagre Fentaw, a legal expert at Addis Ababa Justice bureau

## Table of Content

	<b>Page</b>
Acknowledgment .....	i
Introduction .....	1
<b>Chapter One</b>	
1. The right and obligation of mortgagee and pledge under Ethiopian law, the law and practice .....	2
Background of the Study .....	2
Statement of the problem .....	4
Objectives of the study.....	5
Significance of the study .....	5
Scope of the research .....	6
Methodology .....	6
Bibliography .....	6
<b>Chapter two</b>	
2. General overview of mortgage and pledge	
Definition of Mortgage .....	7
Nature of mortgage .....	7
Classification of Mortgage .....	8
Effects of Mortgage .....	11
Pledge .....	21
Definition of pledge .....	23
Nature of pledge .....	24
Effect of pledge .....	25
<b>Chapter Three</b>	
3. The right and obligation of mortgagee .....	27
Right of the Mortgagee .....	27
The right to receive his debt from the sale of the immovable when the mortgager fails to perform his obligation .....	27
Priority right/ preferential right .....	28
The right of per suit/right to follow the immovable .....	29
Right to demand new security.....	29
Obligation of the mortgagee .....	30
<b>Chapter Four</b>	
4. The right and obligation of pledgee under Ethiopia law	
The right of the pledgee .....	34
Duties (Obligation) of the pledgee .....	34
<b>Chapter Five</b>	
5. Conclusion and Recommendation	
Conclusion .....	41
Recommendation .....	44
Bibliography	

## Declaration

I here by declare that this paper is my original work and take full responsibility for any failure to observe the conventional rules of citation.

Name: Alefe Beza

Signature: \_\_\_\_\_

Date : \_\_\_\_\_

## **Introduction**

A loan of money may be obtained in various ways. The borrower may approach a friend who may stretch the loan without security or he may obtain a loan from banks which always insist security for payment of money lend. This security may be personal surety, pledge or mortgage.

When a borrower failed to pay the debt, the property pledged or mortgaged may be used to satisfy the debt.

It is the primary concern of this research paper to deal with the rights and obligations of pledgee and mortgagee under Ethiopian Law (Civil code, Commercial Code, Civil Procedure code and other proclamations.)

The paper is divided in to five chapters. The first chapter holds the brief research proposal that includes the background of the study why the writer is initiated to research on these areas, the statement of problems which are supposed to be solved by this research work, the delimitation i.e. the coverage of the study, in other terms, the scope of the study, the objects which are aimed to be achieved by the paper, the significance it gives as the writer researches for a vital value etc.

The second chapter deals with the general overview of pledge and mortgage laws including their different definitions, natures, categories for mortgage and there of. Next come the third chapter which covers the rights and obligations of the mortgagee, where as the 4<sup>th</sup> chapter deals with rights and obligation of the pledge.

Finally there are concluding remarks and attempt is made to forward recommendations which the writer supposed to solve the problems raised.

# **Chapter One**

## **THE RIGHT AND OBLIGATION OF MORTGAGEE AND PLEDGEE UNDER ETHIOPIA LAW, THE LAW AND PRACTICE**

### **1.1 Background of the Study**

Mortgage and pledge are among real security means. They are contractual relationships that come after a principal contract. That means the contract of mortgage and pledges are to give guarantee for the performance of the principal contract. The writer of this research paper is interested to show the Ethiopian courts in case of contract of mortgage are practicing against the clear provisions of the law. Art 3084/1/ stipulates that “He whose immovable is mortgaged shall retain the right to transfer the ownership there to” Even if the mortgager entered into an agreement contrary to this article that contract is void which has no legal effect. When the mortgager wants to transfer the immovable property mortgaged, the mortgagees instituted a charge before the court of law to give an order not to transfer such immovable practically the courts accepted such claim and give effect. This act is problematic as it makes the property in mortgaged out of market circulation where by the immovable is not an issue itself but the contract of mortgage. This has unwanted consequence to the economy. In fact the law gives many protections and rights to the mortgagees but to prohibit the mortgager to transfer the mortgaged immovable is not among those rights. So the courts practice that has negative impact to the country’s economy that makes mortgaged immovable out of market game has no legal ground.

Shortly, Art 3084 of the civil code didn’t prohibit the transfer of the immovable property mortgaged. Therefore, the right of the mortgagee is not limited with the mortgager with whom he concludes the contract of



mortgage but extends to any one who acquires the immovable mortgaged. That means the right follows with the property.

The second ground to may research is that our courts practically give effect for mortgage contracts that are not founded basing on formal requirements. The law under Art 3052 put clearly that to a mortgage contract to have legal effect, it has to be registered as a formal requirement. Without this compulsory requirement of the law no legal effects arises from the act. Therefore, so as the practical problem to be solved this paper covers such issue.

The third area to study here as a ground of initiation is in relation to pledge. The subject matter being movable goods, one can give a share as a pledge to secure a debt. So there are gaps in the law which are to be addressed in legislations to be enacted futurity. Share is indivisible as its nature. In case of mortgage the owner can remortgage the same immovable as far as the value is enough to give guarantee for various loans. But in case of pledge of share there is no same chance from the indivisible nature. That means it is impossible to have a joint pledge. This is unfair to the pledger, because he may not get sufficient loan from one borrower. Therefore, a gap should be filled in a manner that as far as that share's monetary value covers many debts, a means has to be arranged to the pledger to have a chance like a mortgager mentioned above. The second gap in connection with a share is that Art 329(1) of the commercial code puts that a share can be a pledge. From the basic behavior of a pledge, only possessory right is transferred to the pledgee, not the ownership. The commercial code conflicts with this nature since it simply puts a share can be a pledged. There are two types of shares i.e. registered and bearer shares by virtue of Art 325 of the commercial code. In case of bearer share presented at Art 340 of the commercial code the holder is presumed the owner. Therefore, the law has to specify which type of shares are the subject matters for the contract of pledge; instead

of saying a share can be a pledge. The third problematic area, the gap in the law in the commercial code is that in relation to a vote made by written authorization i.e. a representative to vote in the name of the pledgee. This issue is called proxy in the term used by the commercial code. By virtue of Art 398 of the commercial code shareholders have right to vote by proxy. Again Art 329 puts that the pledgee can vote to the share he hold as a pledge. But there is no opportunity to vote by proxy. Article 398 (2) cross referred the issue to Art 329 of the commercial code. Yet, the cross referred article does not address the issue at hand.

## **1.2. Statement of the Problem**

1. The mortgager can transfer the immovable property mortgaged since he is the owner of it, the mortgagee can not prohibit the right of the former. The mortgagee has not a right to restrict the ownership right of the mortgager. Art 3084 (1). Here the issue is whether a property mortgaged can circulate in the market or not? OR can the mortgagee claim for attachment an immovable hold as a security of a loan?
2. The courts give order to the mortgager not to transfer the mortgaged immovable as the claim of the mortgagee. This comes from law knowledge of the mortgage law.
3. Whether the contract of mortgage established without fulfilling the formal requirements of the law will have legal effect or not.
4. From the indivisible nature of a share to be pledged, what if the pledger did not get sufficient loan from one borrower and wanted to go to another protected that the value of that share is enough to cover multiple debts that means what is the circumstance in the law to address joint pledge? As there is in case of mortgage.
5. Which type of share is the subject matter of pledge i.e. whether bearer share or registered share? Whether a bearer share could be a pledge or, otherwise, is not clearly addressed in the commercial code.

6. Whether or not the pledgee can exercise vote in proxy or not.

### **1.3. Objectives of the Study**

- ❖ To show that the mortgage law is forgotten by judges and lawyers.
- ❖ To show that the existence of confusion as to the proper application of mortgage and attachment.
- ❖ To show that the practice of courts obstacle to the economic circulation of mortgaged immovable.
- ❖ To indicate that mortgagees are disturbing the business because they did not know what their right is and what is not.
- ❖ To indicate that the existence of a gap in the commercial code in relation to a means to a share to secure multiple debts that comes from the indivisible nature of share.
- ❖ To discover the existence of a law gap in the commercial code whether which type of share (bearer or registered) is the subject matter of pledge.
- ❖ To address the gap in the commercial code about the right of the pledge to vote in proxy.
- ❖ To show that practically courts, gave legal effects to mortgage contracts where as, the formal requirement compulsory is not met.

### **1.4. Significance of the Study**

This research paper will influence the government to play a pivotal role through its organ of the judiciary to give life for the mortgage law. Besides the judiciary other lawyers have to take part to save the law in that to stop the existing practice which has had bad consequence to the country's economy. On top of that the mortgagees have to distinguish their rights in relation mortgage contracts recognized by the law. That means this research will teach them their rights whereby in any

circumstance it can not go further than asking the sale of the mortgaged immovable at the due date of the payment of the debt when the mortgager fails to discharge his contractual obligations.

As same times courts practically give effect to mortgage contracts without paying a full attention to the mandatory formal requirement of the law i.e. registration. The law under Art 3052 (2) of the civil code tells every one including courts that no legal effect; in any case, could arise if the mortgage is not registered. One can not avoid this article. So such a practice will be avoided after this research.

Besides the influence of the research the judiciary and other role occupants, it will give to the legislator an information how wide gaps there in the commercial code, and recommended a move to fill such gaps in future legislations. The gaps are mostly arisen from the very natures of a share and pledge it.

### **1.5. Scope of the Research**

This research paper is limited to the rights and obligation of mortgagee and pledgee under Ethiopian law, the law and practice and the gaps thereof.

### **1.6. Methodology**

- Interviews
- Observations
- Internet

### **1.7 Bibliography**

- Table of books
- Table of laws
- Table of cases.

## **Chapter Two**

### **2. General Over View of Mortgage and Pledge**

The Ethiopia civil code does not provide definitions for the term mortgage. The term mortgage has been defined differently from the point of view of various scholars. The writer of this paper here under lists some of the definitions.

#### **2.1 Definition of Mortgage**

Mortgage was defined as “the transfer of an interesting specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.<sup>1</sup> The transferor is the mortgagor, the transferee is the mortgagee, the principal money and interest of which payment is secured for the time being are called mortgage money, and the instrument by which the transfer effected is called mortgage deed.<sup>2</sup>

The following are the ingredients of mortgage:-

- There must be transfer of an interest;
- The transfer of interest must be made in specific immovable and;
- The transfer must be made to secure the payment of a present or future loan of money or existing of future debt or the performance of obligation which may give rise to a pecuniary liability.

---

<sup>1</sup> Banking law and practice, honible Mr. Justice. G.P Mathur, vol. 1 p. 677

<sup>2</sup> Ibid

Garner black's law dictionary has also defined mortgage as "a conveyance of title to property that is given as securing for the payment of debt or the performance of a duty and it will be come void up on payment or performance according to the stipulated terms."<sup>3</sup>

It is also defined as "the creation of securing on the immovable property for the purpose of securing the payment of money advance or to be advanced engagement which may give risk to pecuniary liability."<sup>4</sup> Thus, the transfer of interest in the immovable proper for the purpose of securing the pay mend of loan is called mortgage.<sup>5</sup>

## **2.2 Nature of Mortgage**

A mortgage is a security interest in real property that is given by the owner (the mortgagor) as security for debt owned to the creditor (the mortgagee). Because the real estate mortgage conveys an interest in real property, it must be executed with the same formality as a deed.<sup>6</sup> Unless it is executed with the required formalities, it will not be eligible for recording in the local land records. Recordation of mortgage does not affect its validity as between the mortgage and the mortgagee.<sup>7</sup> However, if it is not recorded, it will not be effective against subsequent purchasers of the property or creditors, including other mortgagees, who have no notice of the earlier mortgage. It is important to the mortgagee that the mortgage be recorded so that the world will be on notice on the mortgagee's interest in that property.<sup>8</sup> The owner of the property (the

---

<sup>3</sup> Garner Black's law dictionary (8<sup>th</sup> edition) P. 1031

<sup>4</sup> Ibid

<sup>5</sup> Mercantile law P.P.S GoGna (3<sup>rd</sup> edition) P. 242

<sup>6</sup> Business law and regulatory environment, Lusk, Hewitt, donnel, Barness, (5<sup>th</sup> edition) P. 918

<sup>7</sup> Ibid

<sup>8</sup> Law for Business A. James Barness, Morcheed Dworkin, Richard (7<sup>th</sup> edition) P. 783

mortgager) subject to a mortgage can sell the interest in the property without the consent of the mortgagee.<sup>9</sup>

However, the sale does not affect the mortgagee's interest in the property or claim against the mortgagor.<sup>10</sup>

Mortgage is a guarantee resting on immovable property; it is an encumbrance on an immovable property.<sup>11</sup> Mortgage is often used by traders, because it is used as collateral mainly to secure important loans from banks and the like, so as to get a big sum of money to develop a business.<sup>12</sup>

The Idea is simply that where the debtor has an ownership right over an immovable, he may offer that right to the creditor. Who is entitled to get paid from the price of this immovable is the main obligation.<sup>13</sup>

Mortgage is the transfer of interest to the creditor by way of security where the delivery of possession is not essential.<sup>14</sup> On the other hand to contract of mortgage delivery of possession is in no way compatible.<sup>15</sup>

A mortgage is an instrument of greater power. Not only could it be taken over any type of asset, whether currently owned by the debtor or to be acquired by him subsequently, but it could be utilized to secure future as well as existing indebtedness. It is a form of security widely used at the present time.<sup>16</sup>

---

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Commercial law Roy Goode (2<sup>nd</sup> edition) P. 644

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Ibid

In case of mortgage, a charge is created on the immovable property of one person in favor of another person, known as mortgagee, to secure the repayment of the loan taken from the mortgagor in this case, only the special interest in the property is transferred to the mortgagee, and the ownership of the property remains with the mortgagor i.e. the person to mortgage his property.<sup>17</sup>

The ownership of the property is not transferred from the mortgagor to the mortgagee.<sup>18</sup> On the repayment of the loan, the mortgaged property is freed from charge. However, the mortgagor defaults in paying the loan, the mortgagee may file a suit for the recovery of his dues.

However, if the mortgagor defaults in paying the loan, the mortgagee may have two options to get paid the loan. The first one is that the mortgagee can file a suit before the court for the recovery of his dues. Another way round the mortgagee may use his power known as sale under power. This sale under power is possible if a clause is inserted in the contract of mortgage for that effect. In fact, power of sale fore closure is a clause commonly inserted in mortgage contracts, giving the mortgagee the right and power, on default of the debtor, to sell the mortgaged property without going through a judicial proceeding, to satisfy the creditor out of the proceeds of sale, return the surplus, if any, to the mortgagor or such other persons as may be necessary.<sup>19</sup>

To this end, the power of sale must be expressly conferred on the mortgagee by the terms of the mortgage. Moreover, for the mortgagee to ask the sale of mortgaged property first there shall be a failure on the side of the debtor to meet his obligations according to the contract.

---

<sup>17</sup> Ibid

<sup>18</sup> Supra note 5, P. 296

<sup>19</sup> Harold flush, Business Law principles and cases (2<sup>nd</sup> edition Richard Irwin 1970) P. 731



In addition giving default notice to the mortgagor of the mortgagee's intent to exercise the power is a condition precedent that must be complied with and the sale must be by auction preceded by advertisement of sale.<sup>20</sup>

This method of foreclosure avoids the long and tire some stages in judicial foreclosure since it is an out of court proceeding. However, it fails to establish as stable title as does judicial sale,<sup>21</sup> since the title acquired is not based on a judicial proceeding; sanctioned by court order.

Power of sale foreclosure is introduced to our legal system in 1977 by proclamation No. 65/97 expressly allowing banks to enter into an agreement to sell collateral mortgaged without invoking the aid of court of law. Presently we observed this method of foreclosure in proclamation No. 97/98 which repealed the latter proclamation.

## **2.2 Classification of Mortgage**

There are three kinds of mortgage recognize by the Ethiopian Law. These are:

- I. Legal mortgage
- II. Judicial mortgage
- III. Contractual mortgage

Now let as briefly discus each in the following manner.

### **I. Legal Mortgage**

The civil code recognizes two kinds of legal mortgages. The first kind of legal mortgage recognized is a guarantee given to parties' sale their immovable in relation to unpaid amount of price and other related obligation expected to be discharged. A one who sale his immovable and

---

<sup>20</sup> American jurisprudence, Mortgage (2<sup>nd</sup> edition 971) V. 1 P. 55

<sup>21</sup> George Osorne, Handbook on the Law of Mortgages, (St. paul minn, west publishing co.) 1951 P. 27

not yet received full or part of the price of the immovable has a right over such property to mortgage.<sup>22</sup>

This kind of legal mortgage results from the conclusion of contract of sale of the immovable between the seller and the buyer. That means it is the effect of the Law.<sup>23</sup> The guarantee is for the one who sell his house to the buyer until the buyer fully discharged his obligation as stipulated in the contract of sale. From this perspective the civil code gives special protection to the seller of the immovable as it did for other movable.

From the indication of the law sometimes without agreement of a mortgager and a mortgagee encumbrance appears. After certain situations happen, one is assumed as a mortgager and the other taken as a mortgagee. Legal mortgage is so that a mortgage created by the law and not by the private will of the parties.

It is an automatic right given to category of person whom the law wants to protect and derived from simple existence of a given legal situations.

The second situation the civil code recognizes as a legal mortgage is in the case of co-partnership. This means a person who has a common immovable property with other persons has the right of mortgage over the share of these copartners.<sup>24</sup> Such kind of legal mortgage shall secure according to the law of any compensation in cash that may be due to him or shall other compensation as may be due by the co-practitioners where he is dispossessed of any property allotted to him. This mortgage is a protection to the co-partition.

---

<sup>22</sup> Civil code of the emperor of Ethiopia, 1960, Art 3042

<sup>23</sup> Menbertshay Tadesse Mortgage guarantee less guarantee law, 1998 unpublished, P. 5

<sup>24</sup> Supra Note 22, Art 3043(2)

## **II. Judicial Mortgage**

Judicial mortgage is a kind of mortgage that a court gives to execute its judgment. Except that this kind of mortgage is ordered by the court the nature is not different from the other mortgages.

However, the order of mortgage is given by the court it is for the protection of the judgment creditor of a particular litigation. But this kind of mortgage is quite different from attachment. A mortgager's right to transfer the mortgaged immovable should not be affected for the mere reason that the property is subject to mortgage. This is clearly stipulated in the law.<sup>25</sup> However, in practice the article is forgotten in Ethiopian courts. This makes mortgage a different concept from attachment. Why the courts seem forget this mortgage concept is that they practically confused with that of attachment of property. By the fact that judicial mortgage is given to certain immovable property it should not deprive the mortgager from the right of ownership of the property, specially the right to transfer such immovable. Therefore, judicial mortgage in no way be equated with the order of attachment. The scenario discussed above i.e the confusion between to the civil procedure and the civil code articles which talk the judicial mortgage put many immovable out of market transaction that means the practice conflicts face to face with the clear provisions of the law. This improper practice of the law is the backbone why the writer of this paper interested to research. On the other hand, judicial mortgage of an immovable property is that happens because of the judgment. After the judgment is acquired in his favor, the judgment creditor may demand that debtor's property to be encumbered with the mortgage charge the court may examine the situation and pass a judgment for the encumbrance.

---

<sup>25</sup> Supra Note 22, Art 3084

Attachment is a safeguard to the interest of the judgment creditor before the execution of the given judgment. The judgment debtor may avoid an immovable property by destroying it or do an act that would prejudice the interest of the judgment creditor. The judgment in his favor can demand the court that debtor's property to be mortgaged as a means for execution of the court's decision.<sup>26</sup> Therefore, judicial mortgage and attachment are different their nature and concepts.

To illustrate the issue with example A & B entered in to a contract of loan. The contract is validly formed. A conflict arises from that contract of loan. To resolve the conflict the court entertains that case and decided that the debtor B to pay the loan to A basing on their agreement. B has a house. After A, the creditor has got judgment in his favor can ask the court for judiciary mortgage of B's house such a claim has been granted by the law Art 3084. But no judge has given judicial mortgage, yet the law recognizes. The article is inserted, but has no life. Stake holders those who applying the law know Art.154 of the civil procedure i.e. to attach a property by giving an order not to transfer the immoveable. Because they don't know the existence of the means called judicial mortgage in the law which keeps both the interests of conflicting parties. The writer of this paper has made interviews to different professionals of law. From this interview one can conclude that judicial mortgage is put in the law having its golden purpose. If the house itself is the cause of litigation, it becomes mandatory to apply for attachment, whereas the cause of litigation is an other claim on the owner of immovable property attachment shouldn't be a means. The law has a way what is called judicial mortgage at its Art 3084 of the code. The judgment creditor after the principal claim is decided in his favor can ask the court to be given judicial mortgage on the immovable of the judgment debtor. This has its own purpose. First as the existing practice if an

---

<sup>26</sup> Civil procedure of the emperor of Ethiopia, 1958, Art 154

attachment is claimed it affects the right of judgment debtor. This attitude departs from the loan provision of the law. As all knows ownership is the widest right Art 1204 of the civil code. So the above scenario restricts unlawfully on right of ownership on the debtor. Judicial mortgage, therefore, is a means to this kind of issue. The courts are expected to apply the articles of the law. Yet there is no case decided based on judicial mortgage is for every dispute including out issue, they order attachment. The second thing that judicial mortgage should be applied is that didn't affect the market circulation of the immovable. When courts are applying attachment instead of judicial mortgage (when the code requires latter), that restricts on the circulation of the property. This make the immovable out of the economy. The article should be given a life especially through the instrumentality of the judiciary, lawyers, legal experts etc.

### **III. Contractual Mortgage**

This kind of mortgage is formed by mutual agreement of parties. The Ethiopian civil code when recognized 3 kinds of mortgages, contractual mortgage is the third category. Therefore, contractual mortgage is different from mortgages discussed so far. Unlike legal and judicial mortgages, contractual mortgage could not arise against the wish of the owner of the immovable property. The source is always the terms in the agreement of the contracting parties for the effect of mortgage. Contractual mortgage is a very common type of mortgage. As other mortgages it secures payment of loan. It is a special contract; the mortgager and mortgagee enter in to an agreement and willing to create the mortgage encumbrance.<sup>27</sup> For a contractual mortgage to have binding legal effect, has to follow fundamental formal requirements, which are compulsory where by the non-fulfillment shall result void effect having no legal effect. Such mortgage becomes a law between the contracting

---

<sup>27</sup> Supra Note 22, Art 3044

parties if and only if the contract is concluded according to the mandatory formal requirements. The following are the requirements.

In the case of contractual mortgage the researcher fully discussed above that to have a legal effect, the requirement of registration is a formality, otherwise, the contract becomes void.

But practically courts have seen to ignore the above mentioned formality. To illustrate by cases decided by courts let us see the following.

### **Facts of the case**

The federal democratic republic of Ethiopia – the federal high court

Decided on 11/10/98 Addis Ababa

Civil Case No 40434

Plaintiff – the commercial Bank of Ethiopia

Defendants- 1. W/ro Sofia Ali

2. Bole sub city land administration office

The plaintiff on 30/10/97 E.C pleads that the defendants bought the house locating in Addis higher 17 Keble 24 bought without searching the fact that the house is mortgaged and, the second defendant by knowing the house is mortgaged to the bank, transferred the title ,so after the plaintiff described the above fact claims 870,000 (eight hundred seventy thousand birr) that could be paid to the mortgagee ( the bank ) out of the proceed of sale of the house or the 1<sup>st</sup> defendant is claimed to deliver that house so as the bank to auction it basing its power on Proc.No 97/98

The plaintiff attached the following evidence

- A contract of loan and mortgage
- A letter written from Bole sub city

- The first defendant in his statement of defense tells to the court that as he obtained the house through a legal way from the mortgagor's heirs. The certificate of ownership issued based on Art 1195/1 of the civil code . In addition the above defense the 1<sup>st</sup> defendant said that she is the owner of the house which is the subject of this litigation by Art.1195, again pursuant to Art. 3052 of the civil code a contract of mortgaged to have a valid legal effect; it has to be registered in the registry of immovable. But the case at hand is not made by fulfilling the formal requirement put in the law. So it shouldn't have a legal effect as the first defendant rises. The second defendant on its parts defends that the contract of mortgage is not registered there but the plaintiff sues as it is registered with us a claim which has not a legal ground. The second defendant adds that it is its responsibility to take care and give guarantee to owners of a property to use it. After assessing the statement of claim and defenses of both opposing parties, the court framed these issues ;

1. “whether the house the 1<sup>st</sup> defendant bought be returned to the plaintiff or not?”

2. “whether the defendants are bound to pay the claimed value from the proceed of sale of the immovable mortgaged or not?”

then the court gives remedy to these issues in the following manner. For the 1<sup>st</sup> issue the court holds that the plaintiff claimed from the 1<sup>st</sup> defendant because she buy the house with out investigation whether the house is free from loan and attachment or not. The 1<sup>st</sup> defendant

answers that she bought legally and the organ of the government having the power to give the title deed, i.e. the 2<sup>nd</sup> defendant, executed it.

### **Holding and reasoning of the court**

As certified by Addis Ababa land administration authority on 5/6/95 E.C that the contract of mortgage is entered over the house and this is certified by the seal of the authority, again as ascertained on 4/12/89 E.C it is mortgage for 800,000. Being this the court understood that the 1<sup>st</sup> defendant has bought the house by a contract of sale concluded on 3/6/95 E.C for 335,000 birr. The title is transferred her name on 1/8/85 E.C this as ascertained by the concerned authority on 30/2/98 E.C, the court concluded that from evidences at hand and pursuant to Art 3085, the plaintiff has right to ask a court to be given an attachment on the property and can sell the house by auction

The judge jumped the second issue by saying that the issue was framed based on the alternative claim of the plaintiff. Therefore, the court decided to the plaintiff to take the house from the first defendant and sell it auction.

When one looks this judgment, it is not difficult to realize that the court committed an error in applying the clear provision of the law in Art 3052 of the civil code which puts that to a contract of mortgage to have legal effect has to be registered in the registry of immovable as a formality without which it loses legal effect. As understood from the above description the court holds its judgment in favor of the creditor bank i.e. the plaintiff so as to receive the immovable located woreda 17 Keble 24 House No 1684 which is the cause of litigation from the 1<sup>st</sup> defendant buying from the mortgager to satisfy the debt. To this judgment the judge bases his decision on this defective contract of mortgage which was



concluded concerning this house. However, according to the law first this contract has to be registered in the registry of immovable where the immovable is located. This is a compulsory requirement of the law which can't be ignored, if ignored that contract shall be void having no effect. The second defendant basing on its responsibility said that these contract of mortgage is not registered in the registry so that it transferred the ownership right to the buyer i.e. the first defendant legally issued the tilt deed basing on art 1195 of the civil code being this the court giving this judgment gave effect for a contract which is said to be void due to formal requirement of registration. This is a fatal mistake committed by the court since the mort page plaintiff bank should not be allowed to take the immovable from the first defendant and action. There is no right from void contract. To gain its right in such circumstance, the bank should inter in to contract of mortgage respecting the formality requirements laid down in the law which are to be discussed hereunder.

### **1. Contractual Mortgage Shall Be In Writing**

A mortgage contract since it involves an immovable property shall be in writing. From this the law wants more reliable formal requirements. From the cumulate reading of Articles 1725, 1723 and 3045 of the civil code for contractual mortgage legally to be formed and to have legal effect has to have written form. A mortgagee, who has mortgage contract non-complying written formality, shall not be considered as he has valid guarantee to that act, as it has no legal effect. Because when a law specifies a special formal requirement to establish a contract and parties failed to follow that compulsory form; no one can claim any thing from such act. In this case Art.1727 commands parties to conclude it in written form and shall be attested by two witnesses. When contracting parties ignore this, the law ignores them also.

### **2. The Amount of the Loan Guaranteed by the Mortgage Contract Shall Be Specified**

In addition to the written formal requirements, the mortgage contract to be valid has to specify in Ethiopian dollars the amount of the claim secured by mortgage. Unless this requirement is fulfilled, the mortgage shall not have any legal effect as to art 3045(2) of the civil code. The rationale behind this requirement arises from the very nature of the mortgage itself. That means, the mortgagee has right to follow the immovable property mortgage even it is transferred to third parties as the writer tried to discuss the issue earlier. Therefore, the third party who got the immovable has to know the amount of encumbrance he is going to be duty bound to pay.

### **3. A Contract Creating Mortgage Shall Be Registered**

A mortgage to have legal effect, in addition to the above basic requirements has to comply with the requirement of registration. Art 3052 reads as follows,

*A mortgage however created shall not produce any legal effects except from the day when it is entered in the registers of immovable property at the place where the immovable is situated.*

From the above article one can understand that registration is not only publication about the mortgage to third parties, but also a formal requirement where by the non-complying results the act null and void. Any legal effect arising from the mortgage shall be valid after registration. That means before registration the act would not have capacity to have binding effect. This mandatory requirement has to be respected. But, the practice in courts conflicts with this clear provision. By the sole reason, that, parties agreed without following registration requirement, courts should not give effects to such contracts contrary to the law. This requirement works to all kinds of mortgage contracts. Registration to bring result, that registration shall be before the transfer of the

immovable to third party or before a court order is given for attachment over the immovable property, pursuant to Art 3057(2).

### **Effects of Mortgage**

Mortgage may have different effects. One can look the effects of mortgage in to three perspectives. These angles are the following:

1. Effect on the mortgagee
2. Effect on the mortgager
3. Effect on third parties.

#### **1. Effect on the Mortgagee**

Where the immovable mortgage is attached by the creditors on the mortgagee may demand to be paid out of the proceeds of sale of the immovable, in priority to any others creditors.<sup>28</sup> This means a mortgage, being a security offers a preferential right to the mortgagee over other creditors of the debtors of the mortgager. The other effect of mortgage on the mortgagee that it gives a chance to follow-up the immovable mortgaged. That means even if the mortgaged immovable is transferred to other person after the creation of mortgage the right of the mortgagee follows that sold immovable property.<sup>29</sup>

#### **2. Effect on the Mortgager**

A mortgager has the right to transfer or sell immovable mortgaged. This concept is accepted by any other modern mortgage laws. In principle creating mortgagee on the immovable didn't much to prohibit

---

<sup>28</sup> Ibid Art 3059(1)

<sup>29</sup> Ibid Art. 3064

the mortgager's ownership right which is to be the widest of all right. The mortgager has the right to re-mortgage the immovable as much as the value of immovable can cover different debts.<sup>30</sup>

### **3. Effect on third parties**

Mortgage on third parties has two different effects. The first effect is on third parties those have not security right over the immovable. The mortgager may have many creditors; some may demand security while some may not do that, the second category of creditors may demand to be paid their debt from the property of the debtor.<sup>31</sup>

The practice shows that when these unsecured creditors demand the sale of the mortgaged immovable, courts prohibit such demand. But this bad practice is unlawful. The only thing the law accepted is that unsecured creditors may demand the sale of the immovable mortgaged, but their debt is to be paid after the secured in the priority. Unsecured creditors are to be paid the amount of the value of sale of the mortgaged kept the surplus.<sup>32</sup> The second kind of effect of mortgage on third parties is that to secure creditors. The fact that mortgage is created on the mortgager re-mortgaging the same immovable property, the payment of debt should be arranged in priority of registration of the mortgage.<sup>33</sup>

### **Pledge**

Pledge is one of special contracts interred to secure some kind of another contract. That means pledge is a subsidiary contract to secure the main agreement. It is a common form of security performed through delivery of a movable good.

---

<sup>30</sup> Ibid Art 3059(2)

<sup>31</sup> Ibid Art 1987

<sup>32</sup> Menbertsehay Tadesse, Mortgage Guaranteeless guarantee Law, 1998, P. 8

<sup>33</sup> Supra Note 22, Art 3076

## **Definition of Pledge**

Pledge can be defined from different ways.

A “Pledge is a delivery of goods by the owner to another person to makes the goods a security for a loan taken from the other. It is a special kind of bailment giving rise to some additional points for deliberation.<sup>34</sup>

It is also defined as” a special kind of bailment. It is a bailment of goods as security for payment of debt or for performance of a promise.<sup>35</sup> Thus, the pledge is a kind of bailment where by the goods are delivered one person to another as a security for the payment of debt or the fulfillment of a promise.

Garner Black’s Law dictionary has also defined pledge” It is a formal promise or under taking or the act of providing something as security for debtor’s obligation. Pledge is a security interest in personal property represented by an indispensable instrument, the interest being created by a bailment or other deposit of personal property for the purpose of the performance of some other duty.<sup>36</sup>

It is also defined as “A contract of pledge is a contract where by a debtor undertakes to deliver a thing, called the pledge, to his creditor as security for the performance of an obligation.<sup>37</sup> It is a common form of security where by a main contractual obligation is secured by the existence of movable goods. The agreement concluded between the pledger and the pledgee is called contract of pledge. The thing pledged is known as pledge. A movable property given for security will be possessed by the creditor until the obligation is discharged. If the obligation is

---

<sup>34</sup> Business law and industrial law sik aggarwelk, singhal 2008 (2<sup>nd</sup> edition) P. 188

<sup>35</sup> Supra note 5, P. 235

<sup>36</sup> Supra note 3, 1193

<sup>37</sup> Supra Note 22, Art 2825

discharged pursuant to the terms of the contract, the thing will be given back to the pledger. But if the debtor fails to discharge the obligation, the creditor will be paid out of sale of the thing. <sup>38</sup>

### **Nature of Pledge**

In case of pledge, the goods are delivered by one person to another, known as pledge, as security for the pledger. In this case, only the possession of the goods is transferred to the pledge, the ownership of the goods remains with the pledger (i.e. the persons delivering the goods).

The subject matter of pledge being a movable property, it is impossible to list all of these goods in a particular law or research. For the purpose of this paper the writer intended to focus on pledge of share. The following definition is taken from one unpublished material. It says

*“It is not easy to define the term share” It seems to be used in three ways. First, part of the definition of a share company provided by Art 304 is that it is a company in which the capital is fixed in advance” and divided in to shares in this sense “share” means the portion of the capital of the company, more specially, a portion of the capital contributed by the particular person who is the holder of that share. Second, “share is used to refer to the document which is evidence that a particular person is a “shareholder in the company; for example, in Art 330. Finally and more generally, “Share” is used in practice to refer to that bundle of rights and duties which make up the membership interest of the share holder in the company. <sup>39</sup>*

In case of mortgage the mortgagor can re mortgage the immovable as far as the value of that property can cover those multiple loans the same is true for pledge other than pledge of shares, but, when we came to pledge of share, it is indivisible. From this nature one can not use more than once even if the value of the share can cover more than one debt. Simply the Ethiopian law puts that any movable good can be a subject of pledge. But when one comes to share it has a complex nature. We can have two

---

<sup>38</sup> Ibid

<sup>39</sup> Adamu Shiferaw, share company law unpublished material

kinds of shares recognized by the law. These are as per Art 325 (1) of the commercial code registered and bearer shares. The law specifies under art 329 (1) a share could be given as a pledge. But it is not clear as which of the two kinds of shares are subject of pledge. The former article puts that bearer shares are assigned by delivery, without any other requirement and unless the contrary is proved, such shares shall be deemed to be the property of the holder for the purpose of payment of dividends, redemption and right of participation in general meetings. The commercial code articles are unclear and gap full in areas where shares in what circumstances be the subject of pledge. It failed to put which whether registered or bearer shares are proper to the issue at hand. The concept that bearer share could not be a pledge as it does not serve the purpose of pledge is not covered. Why? Upon delivery without further condition the holder gets ownership right over the share. But from the nature of pledge only the right of possession is to be transferred that the full ownership remained to the pledger. It departs from the real nature of pledge if it covers both types of shares. On the repayment of the loan, the pledge is bound to return the goods to the pledger.<sup>40</sup> However, if the pledger makes default in repaying the loan, the pledge may sell the goods after giving a notice to the pledger.<sup>41</sup> If the full amount of money is not received by the sale of the pledged goods, the pledge may file a suit for the recovery of the balance.

### **Effect of Pledge**

When valid contract of pledge is formed, then it brings legal effects both to the contracting parties and other third parties.

These effects are:-

- Transfer of possession/delivery of the pledger to the pledgee;

---

<sup>40</sup> Supra Note 22, Art 2849

<sup>41</sup> Ibid Art 2854

- It gives right to the pledgee to sell the movable pledged to get his debt from the sale, or the pledger failed to discharge the contractual obligation of the pledge has the right to take the movable property if equivalent value is estimated to the debt, i.e. not obligated to return the pledge.

In short when the due date for the performance of the obligation is ripe and the debtor fails to perform the obligation the pledgee may demand sale of the movable goods pledged. As a second option the pledgee may ask the ownership of the pledged goods be transferred to him because at the time of conclusion of a contract pledge as a security only the possession right was transferred not the ownership. In case of pledge auction sale is not always compulsory. Some times private sale is possible when the pledge is quoted for the current price of market. The private sale should be conducted by a neutral third party conferred that power.



## **Chapter Three**

### **The Rights and Obligation of Mortgagee**

Since mortgage is a special contract, it is concluded between mortgager and mortgagee. As a contract it creates rights and obligation to these parties. The right to one of the contracting parties turns to be a duty to the other.

#### **Right of the Mortgagee**

From the point of view of rights the mortgagee has rights in relation to the mortgage contract. He can claim from the mortgager of the immovable property. Most of this right is exercised when the mortgager fails to discharge the contractual duty stipulated in the contract of mortgage. To exercise the right against the mortgager, the failure to perform the duty, when the due date ripped is a pre-requisite. The widely known rights are the following. These are the right to receive his debt from the sale of the immovable property which is the subject of the mortgage contract, the right to get priority than other unsecured creditors of the mortgager and secured creditors having registered their mortgage security latter than him and the right of pursuit which means the right to follow the immovable even it is transferred to any other person after the conclusion of mortgage contract. Now, let as discuss each of the rights of the mortgagee.

#### **The right to receive his debt from the sale of the immovable when the mortgager fails to perform his obligation**

This right may be satisfied through two angles. The first one is that when the mortgager didn't comply with the stipulated contractual obligation at the due date the mortgagee may file to the court claiming

the loan from the sale of that immovable which is called a judicial sale. The second angle that the mortgagee can receive the loan is to effect the sale without the court procedure i.e. without the order of the court to the mortgager. This kind of procedure is called sale under power. Both means are ways to the mortgagee to exercise his right but the latter is possible to apply if there is a clear agreement in the mortgage contract. The fact that sale under power is a legal means to get the loan, the mortgagee who sells the mortgaged property, is precluded from buying the property himself, as a man can not sell him self either in his own person or in the person of another. The mortgagee selling under its power of sale the mortgaged property should take as much care as an owner would reasonably take in the sale of his own property. The property may be sold privately or by public auction. In the latter case, reasonable publicity of the sale should be given to the sale.<sup>42</sup> If the property purchased by the mortgagee himself, the sale will be void.<sup>43</sup> If the mortgagee exercises the power of sale in a wrong and improper manner contrary to the terms of the mortgaged deed, the mortgager may bring a suit for an injunction restraining the mortgagee from selling the property.<sup>44</sup>

### **3.1.2 Priority Right/Preferential Right**

The mortgagee is conferred with a real right. Persons having real right will have preference than the other persons. Thus, where a mortgaged property is sold, the mortgagee may exercise or can exercise priority in having payment. The priority may be either in reference to unsecured creditors or secured creditors. Unsecured creditors mean persons having a loan on the mortgager but they didn't ask security to re-payment of their loan. But even though, they have not security, they can ask the loan be paid.

---

<sup>42</sup> Supra note 1, P. 677

<sup>43</sup> Ibid

<sup>44</sup> Ibid

In this case this kinds of creditors have right to receive in property after all secured creditors i.e. all having mortgage contract with the mortgagor are paid, if, surplus money existed from the sale of the immovable. The issue of priority may also a rose in reference to secured creditors. Where there are several mortgagees, priority may be determined according to the date on which the contract of mortgage was registered.<sup>45</sup>

### **3.1.2The Right Of Pursuit/Right To Follow The Immovable**

The right of pursuit is a right that may be exercised by a person conferred with a real right. As a mortgage confers on the mortgagee a real right, he may follow the property mortgaged and attach it wherever it goes, if the debtor fails to discharge the debt guaranteed.<sup>46</sup> The owner of the property mortgaged retains all of the rights of an owner. Mortgage can not obstruct exercise of rights ownership. If a provision restricting or avoiding exercise of ownership right is incorporated in the contract of mortgage, it is not enforceable.<sup>47</sup> Transfer of a mortgaged property to a third party does not change position of the mortgagee. Where an immovable mortgaged is transferred to a third party acquirer and the debt matures, the mortgagee may attach the property and execute it to have paid.<sup>48</sup> Thus, sale of the mortgage brings no effect on the mortgagee. Where the debtor fails to pay the debt, the mortgagee can follow the property and attach it for the seller.

### **Right to Demand New Security**

Where the mortgaged property sold, the mortgagee may exercise priority in having payment. Where the thing mortgaged is sold or transferred by what ever reason a third party, and the third party

---

<sup>45</sup> Supra Note 22, Art 3084

<sup>46</sup> Ibid, Art 3088

<sup>47</sup> Ibid, Art 3085

<sup>48</sup> Ibid, Art. 3081

acquirer destroys or reduces the value of the mortgage, the mortgagee may demand new security or discharge of the debt mortgaged to the extent of distraction or reduction.<sup>49</sup> Where the mortgagee may be bound to furnish new securities because of the reduction and fails to do that, the mortgagee may demand the debt guaranteed to be paid to the extent of the reduction. Where the thing is destroyed by unforeseen cause, the pledgee loses his security to the extent of the loss or distraction.

### **3.2 Obligation of the Mortgagee**

The mortgagee when exercise the right discussed so far, has to comply the corresponding duties. To specify the few duties, the mortgagee has to respect the due date of the performance of the obligation of the mortgager. He is duty bound not to start to exercise any power before that time. This is called time precedent. The writer as discussed earlier one of the meanness to get the loan, the mortgagee may use sale under power. In this case, a power to sale contained in the mortgage contract, continues to exist during the life of mortgage. This does not, however, mean that the mortgagee holding securities are empowered to sale at any time. Until the debt secured is due according to the contract and the debtor is in default, the right to sale shall not enforce and it remains a suspense condition.

Giving default notice to the mortgager is the other duty of the mortgagee. Default notice is a legally required condition to be complied with by a creditor before invoking the non-performance of the obligation according to the contract.<sup>50</sup>

In mortgage or pledge contracts as these are also contract, the power of sale does not become exercisable until notice requiring the payment of debt secured has been served on the defaulter, and the

---

<sup>49</sup> Ibid, Art 1772

<sup>50</sup> Property pledge or mortgage with banks proclamation No. 97/98, Art. 3,

debtor has defaulted in payment of the debt or part thereof for at least thirty days after such service. Accordingly before selling the collateral mortgage or pledge, a bank shall call upon the debtor to discharge the obligation and give him due notice that upon default, it will sell the property.<sup>51</sup>

The minimum thirty days notice is arguable as it is unreasonable period the argument stems from the fact that since notice is required to be given to with a view to enable them to raise the money needed to discharge their obligation with the given period requiring payment of the debt has been served on the debtor and default has been made in payment of the debt or part thereof.<sup>52</sup>

Here there is another issue to be taken as a duty. This is to put a fair estimation of floor price of the mortgaged immovable. The other necessary prerequisite to exercise power under and sale is appraisal of the property to be sold when appraisal of the property is made all necessary care has to be taken so that a fair price may be obtained to prevent sacrificial sale of the debtor's property. Accordingly, before the first sale by auction, the property must have a priced value and there can not be sale for less than this value.<sup>53</sup> When ever the highest bid at the first auction does not reach the sum equal to the appraised value, a second auction will be held. By the second auction, however, any bid which is the highest is taken the saleable price of the property without reference to the appraised value.<sup>54</sup>

Although the law required that the property to be sold must have an appraised value, it is silent as to who should appraise it. While the proclamation allowed banks to sell by auction the property mortgaged

---

<sup>51</sup> John W. Bagby, Irwin's business law concepts analysis perspective, P. 2 61

<sup>52</sup> Supra Note Art 428(1)

<sup>53</sup> Ibid

<sup>54</sup> H.C Black's law dictionary, west publishing co. 1991, 6<sup>th</sup> edition, St. Paul. Minn, P.87.

with them, it neither provides as to who should appraise the property nor it for bid banks to appraise it. From this silence a reasonable inference that can be made is that banks are allowed to appraise the property. As not to affect the right of the pledgee a neutral disinterested third party has to make the appraisal.

But is it proper to give the banks the green light that they can appraise the property they are going to sell or acquired it by its appraised value should the first auction fails. If banks are allowed to appraise the property, they may be only concerned with their own interest and under estimate the value of the property with the consequence that the property of the debtor will be sacrificed.

In addition, banks may intentionally under estimate with the motive that, they themselves will acquire at the under estimate price if the two auctions failed.

Therefore, to properly protect the interest of the debtors it is necessary that appraisal be made by a disinterest third party other than banks.

In addition the above duties the mortgagee has to give notice of sale publicly. After the debtor is placed in default and the floor price is estimated, what follows is to advertise the auction sale.

The main rationale behind notice of sale by auction stems from advising the public as regards an auction to be conducted so that potential bidders may be present at the sale who may offer a good price there by protecting the debtor by guaranteeing him at least the true value of the property.

The advertisement shall not be restricted to only advising the public as to the sale, rather it should go beyond that, in that it should be

given in a manner designed to attract the public attention by making the property to be sold as attractive as fairness will permit.<sup>55</sup>

The proclamation does not describe the content and manner of advertisement but it does not refer to the civil procedure provisions. The proclamation requires that art 394-449 of the civil procedure code shall be applicable *mutantis mutandis* while the bank is exercising the power.<sup>56</sup>

Accordingly, the notice of sale shall specify the following elements:

- The property to be sold and the estimate value therefore,
- Any encumbrance for which the property is liable,
- The amount for the recovery of which the sale is to be conducted,
- The terms and conditions of sale and manner in which and time within which the purchaser need to pay the purchase price, and
- Every other thing which is material for the purchaser.<sup>57</sup>

The civil procedure code, while mentioning the above requirements, failed to say anything as regards the frequency of the publication of the advertisement. It simply suggests that while the bank is conducting the sale it shall cause the proclamation of sale to be made. In the absence of clear provision, the reasonable conclusion that can be drawn is that the bank is obligated to advertise the sale at least once.

Regarding the time after which the bank may exercise the power of sale the civil procedure code to which the proclamation makes reference, provides after publication, the sale may not be conducted until after the expiration of at least thirty days in case of immovable and of at least fifteen days in case of movable properties starting from the date of publication.<sup>58</sup>

---

<sup>55</sup> Supra note 48, Art 6

<sup>56</sup> Supra note 50, Art 423 (2)(e)

<sup>57</sup> Supra note 50 Art 423(2)(e)

<sup>58</sup> Ibid, Art. 426

## **Chapter Four**

### **4. The Right and Obligation of Pledgee under Ethiopia Law.**

#### **4.1 The Rights and Obligation of pledgee**

##### **4.1.1 Rights of the Pledgee**

As the pledge contract is entered merely for the benefit of the pledger, it confers the pledgee with enormous advantages. The pledge has the following rights available against the pledger and the goods pledged.

- I. Right to retain the thing until the debt is paid.
- II. Right of pursuit.
- III. Right of preference.
- IV. Right to sell the goods.
- V. Right to owner of fruits of pledged.
- VI. Right to vote

#### **1. Right To Retain The Thing Until The Debt Is Paid.**

It is the first and important right of the pledgee. He has a right to retain the pledged goods until his all dues are paid. No one would compel the pledgee to give the thing to the pledger until the debt is paid. Even if the thing does not belong to the pledger, the owner, if the pledgee accepted the thing innocently, without any negligence, can not be forced to return the thing to the owner before payment of the debt.<sup>59</sup> It will be interesting to know, that he may also retain the goods if the interest due on the debt is not paid. Moreover, he may also retain the goods for the payment of all necessary expenses incurred by him in respect of the possession or for the preservation of the pledge goods.<sup>60</sup> It may be noted that the pledgee can retain the goods only for the payment of that particular debt for which the goods were pledged. Thus, this right of pledgee is in the nature

---

<sup>59</sup> Supra Note 22, Art. 2843

<sup>60</sup> Supra Note 5, P. 236



of a particular lien. But the parties may agree to the effect that the pledgee can retain the goods for the payment of other debts also. However, when after the date of pledge, the pledgee lends money to the same pledger without any other security, then it is presumed that the right to retain the goods extends to the subsequent advances also.<sup>61</sup> Generally the creditor may not be compelled to return the pledge or part of it until he has been paid in full not with standing that the debt or pledge is divisible. Though the portion of the debt out standing is very small, the thing or things pledged may not be returned.

## **II. Right Pursuit**

Where a third party, without having any right to do so, possess the thing pledged, the pledgee may follow the thing and bring action for dispossession.<sup>62</sup> Until the debt is discharged if the pledge losses possession by a cause without his consent, he, may bring such action against any one including the pledger.

## **III. Right of Preference**

The pledger may pledge the thing to differed pledgees for different obligations at different names. He may also sell the thing while it was pledged if the contract of pledge is silent. The thing in which different interests with different capacities backed is sold at the request of any one of the persons, the proceed of sale may be shared among deferent creditors.<sup>63</sup> Creditors merely endowed with personal rights can not demand priority. That is to say, creditors whose debt is not secured can not compete with the secured creditors. Each category of creditors will compete for the priority of payment with in creditors in the similar category.<sup>64</sup>

---

<sup>61</sup> Supra Note 22, Art. 2844

<sup>62</sup> Ibid, Art. 2850

<sup>63</sup> Ibid, Art. 2842

<sup>64</sup> Ibid, Art. 2857

#### **IV. Right to Sell the Goods**

In case of default made by the pledger, the pledgee may also sell the goods pledged with him. However, he can do so only after giving a reasonable notice of sale. It may be noted that the requirement of giving reasonable notice is a statutory requirement i.e. legally compulsory and can not be excluded by a contract to the contrary. And any sale made without such notice is void.<sup>65</sup> Sometimes, the proceed of sale are less than the amount due from the pledger. In such cases, the pledger is till liable to pay the balance to the pledgee. And the pledgee can recover such balance by filling a suit. However, if the proceeds are greater than the amount due the pledgee shall pay the surplus to the pledger.<sup>66</sup> After giving a due notice of sales, the pledgee may also take the goods to himself. But if the pledgee gives a less value than the market price, then the pledger may make him liable for the loss suffered due to less value.

#### **V. Pledgee is Owner of Fruits of Pledge**

Fruits are things that may be born by the pledge. The thing pledged may be fruit bearing. In case of owning fruits of pledge the owner, the pledger can use proceeds of sale of fruits only to the payment of expense interest, and principal amount of money lent.<sup>67</sup> Though the pledgee is the owner of an offspring, he can't use it in any way he desires as all cases of ownership. His ownership right is restricted. The value of fruits produced by the pledge shall be applied successively to the expenses incurred for the custody and preservation of the pledge, to interest and to the capital of the debt secured.

---

<sup>65</sup> Supra Note 22, Art. 2860

<sup>66</sup> Supra Note 5, P. 238

<sup>67</sup> Elements of Business law for C.S. foundation course (2003). G.K varshney P. 187

### **4.1.2 Duties (Obligation) of a Pledgee**

The Pledgee may be compelled to observe certain obligations (duties). The following are some of the obligations of a pledgee he may be required to discharge

- I. Duty to take reasonable care of the goods pledged
- II. Duty not to use the pledge
- III. Duty to return the goods pledge

#### **I. Duty To Take Reasonable Care of The Goods Pledged**

It is the first and fore most duty of the pledge. According to this duty, the pledge is required to take reasonable care of the goods pledges him.<sup>68</sup> “Because of pledgee's failure, if the thing deteriorates of losses its value, the pledge is responsible for the destruction.<sup>69</sup> Thus, the pledge is bound to take care of the goods pledged to him. He must take as much care as an ordinary reasonable man would take under the similar circumstance, in respect of his own goods of the same type. However, if he has taken the required degree of care, then he is not liable for any loss or destruction of the goods pledged.<sup>70</sup>

All cases of loss, however, may not make the pledge liable. If the thing is destroyed without any fault on the part of the pledge or on the part of the persons to whom the pledgee is responsible, the pledge may not be compelled to make the loss or damage good.<sup>71</sup>

Thus, in the following cases of deterioration of pledge, the pledgee may not responsible:

- ❖ Where the pledge is deteriorated or lost because of unforeseen or unexpected event, the pledgee will not be responsible.

---

<sup>68</sup> Supra Note 22, Art. 2842/2

<sup>69</sup> Ibid, Art. 2841/3

<sup>70</sup> Supra Note 5, P.225

<sup>71</sup> Supra Note 22, Art. 2847

- ❖ Where the thing is lost or deteriorated because of its internal deficiency, the pledgee is not responsible.
- ❖ Where the thing pledged could be used, it may depreciate because of normal use. The pledgee, thus, will not be responsible for normal reduction of the thing pledged.

## **II. Duty Not To Use The Pledge**

The pledge holds the pledge merely as a security of performance of an obligation. Thus, unless otherwise agreed, he will hold the thing until it the obligation secured is discharged. The pledgee should preserve the thing until it is returned.

A pledge may exceptionally use the thing pledged if one of the following instances met.

- ❖ where the pledger consents the pledgee to use the thing pledged
- ❖ Where the use of the thing is taken as a preservative measure. A certain item may deteriorate or reduce its value if not used. To preserve the pledge, the pledgee may be compelled to use the thing.

## **III. Duty To Return The Goods Pledged**

The goods are pledged to the pledgee for some specified time or specific purpose. It is the duty of the pledgee on the expiry of the specified time of pledge. If the goods are pledged for some specific purpose, then the pledgee should return goods when the purpose of pledge is achieved.<sup>72</sup> But even after payment of the debt guaranteed, the pledgee may withhold the pledge. The pledgee to be forced to give back the pledge the whole debt including incidental costs and expenses should be discharged. Until all sums and debts are fully and adequately discharged, the pledgee may retain the thing pledged. It may be noted

---

<sup>72</sup> Ibid, Art. 2720

that, if the pledgee keep the thing with out the above points, he will take the risk and he will be liable for the loss and destruction of the good. The pledgee will be liable for the loss even it arises with out his negligence, or due to “act of God or inevitable incidents.»

## **VI. Voting Rights**

Shareholders exercise their limited role in the conduct and operation of the corporation primary through voting, either for election or removal of directors or relating to some structural change in the corporation.<sup>73</sup> A shareholder may participate by himself or by means of an agent, who is called a “proxy”. His right to participate is not measured by the number of shares he owns or the proportion of capital they represent. The right extends to any general meeting of shareholders and to any special meeting concerning the class of shares of which he is an owner.<sup>74</sup>

A proxy is a written authorization instructing another person to vote one’s share on one’s behalf. The closest analogy to a proxy is an absentee ballot, Voters who are unable to be present for voting on Election Day may vote by absentee ballot. Similarly, share holders who can not attend share holder meeting may vote by proxy.

The proxy creates an agent principal relationship between the parties. The shareholder, in principle, authorizes another, the agent, to vote his or her shares. The proxy may be specific and authorized agent (proxy holder) to vote a certain way on specific issues.

If such specific instructions are given, the proxy holder must so vote. This type of proxy is referred to as a limited proxy. Alternatively the proxy may authorize the proxy holder to cast the share holder’s vote in the proxy holder’s discretion on any issue properly arising at the meeting. This type of proxy is referred to as a general proxy.

---

<sup>73</sup> Adamu Sheferaw, Share Company Law unpublished material

<sup>74</sup> Business organization for paralegals, Deborah. E. Bouchou 2<sup>ed</sup> P. 255

Proxies may generally be revoked by the share holders at any time before they are voted. If the proxy does not state its duration, it will automatically expire 11 months after it is received by the corporation. This means share holders grant new proxies for each annual share holder's meeting. One type of proxy that is irrevocable is that granted to an individual who has purchased the shareholder's shares has agreed to do so. Thus, in the event a share holder sells shares after the record date and grants the new owner a proxy, this proxy can not be revoked.

Proxies are revoked by delivering a written revocation of proxy to the secretary of the corporation or by attending the meeting and voting in person.

Proxies are most often used and needed for large corporations with numerous share holders.

Proxies may be solicited by corporate management's state of directors. In some cases, insurgent shareholders will also solicit shareholders for proxies to elect candidates favored by the insurgents or changes in corporate policy desired by them.

When a shareholder pledged his share the pledge has given legal right to exercise voting. Art 329 (1) of the commercial codes, reads

*"Where a share is pledged or subject to a usufruct, the right to vote at meetings shall, unless otherwise agreed, be exercised by the pledge or usufructs".*

But there is a gap in the law that how such pledgee can exercise vote in proxy. The code under Article 398 (1) of the commercial code allows proxy for only shareholders. As Article 398 (2) to pledge it leads to Article 329. But the cross referred does not solve the issue. Article 329 (1) allows the pledgee to vote over the share pledged but does not say anything about the application of proxy to the pledgee.

## Chapter 5

### Conclusion and Recommendation

#### 5.1 Conclusion

In this research paper 3 kinds of mortgage which have got recognition by Ethiopian law are discussed. A wide coverage is given to judicial mortgage and contractual mortgage. There are a practical problems in our courts concerning the application of contractual mortgage and Ignored Judicial mortgage at all, yet it is provided in the civil code Art 3044. When the legislation was enacted Art 3044 is inserted for purpose, not for nothing. For every litigation, even, judicial mortgage is proper the court is claimed for giving an attachment and gives it. Since the law is existed a case has to be decided based on it, when an issue at hand concerns it. The researcher has interviewed many legal professionals about why this article has not get its life for this long age of the code. I can say all have no memory about judicial mortgage. For the question the researcher asked Judicial mortgage shall be claimed, they told had a case faced them, they would have ask the court for attachment pursuant to Art 154 of the civil procedure code. This is a bad attitude. Because there is a safe means to such conflict called the judicial mortgage. Why? Please look at the following civil code articles and judge it.

#### Art. 30.44 - Judicial Mortgage

- 1. A court or an arbitration tribunal may secure the execution its judgments, orders or awards by granting one party mortgage on one or more immovable the property of the other party.*
- 2. The judgment or award shall specify the amount of the claim secured by mortgage and immovable to which such mortgage applies.*

Art. 3084- Right to transfer ownership of mortgaged immovable

*He whose immovable is mortgaged shall retain the right to transfer the ownership*

*1. Any provision to the contrary shall be of no effect.*

From these articles, one can conclude that if the cause of litigation is not the immovable itself but another claim on the owner of the immovable judicial mortgage is a right means than attachment. Because attachment didn't allow transfer so that narrows the widest right namely ownership. A one whose immovable mortgaged can sell it, but what is lawful is that the judgment creditor can receive the debt from the sale of the immovable mortgaged. Once judicial mortgage is given, no fear about the payment of the loan due to the transfer of that immovable because the judgment creditor has right of pursuit as madly covered by this research.

The other point concerning contractual mortgage is that, to a mortgage contract to have legal effect it should be concluded fulfilling formal requirements. The formal requirements laid down by the law are the following:

- By virtue of article 3043/2 the amount of the claim secured by mortgage has to be specified in Ethiopian currency.
- The mortgage contract has to follow written form (Arts 3045/1725/1723 of the civil code.)
- The contract of mortgage has to be registered in the registry of immovable where such immovable situates(Art 3052)

When the contract is defective to one or some of the above formalities, by the words of the law 'it shall have no effect'. The practical problem in this area is that courts give effect to defective contracts which have no effect by law. The problem at hand in case of registration, without registration,



it will have no effect. No right or obligation be claimed based on such contracts.

The other way category of this research goes to the very gap full area of law i.e. the commercial code concerning pledge of shares. To securities other than share, for example, mortgage the mortgager can remortgage the same immovable for multiple debts. Shares are indivisible from their nature. If the loan supplied by one party borrower is not sufficient, and a share pledged which is delivered by less the full value, it couldn't serve to the owner. In short no opportunity is laid down for a joint pledge over a share as for as enough value equal to the share holder needs to borrow is covered in the share,.

The other gap of the law in case of pledge, the pledgee has the right of possession. The shareholder has right to vote in proxy 398/1 of commercial code. The other article 329 stipulates that the pledgee can vote but this right whether possible in proxy like the shareholder is not addressed by the law. Therefore, it affects the rights of the pledgee in circumstances to delegate proxy that he couldn't present in meeting.

The commercial code is again capful as art 329 indicates that a share can be pledged. But which sort share can be a pledge. Registered or Bearer? It problematic because bearer share couldn't serve the purpose of pledge since the holder is presumed the owner of it. The law has to say only registered share be a subject of pledge. The two have to be distinguish sufficiently for the purpose of pledge security.

## **Recommendations**

In view of the problems raised, the writer forwards the following recommendation

- ✓ Lawyers/advocates shall not be advised to run to attach every case when following their court cases. They have to raise the safe way put by the law known as judicial mortgage since; it keeps both the rights of judgment creditors and judgment debtor.
- ✓ Courts have to give the life for art 3044 of the civil code in circumstance where attachment is improper to a particular case, when the immovable is not cause of claim, but another relation. By such a way they can accommodate both sides' interests without restriction on ownership, the widest right by the way of attachment.
- ✓ Organs of the government concerned for that matter has to advertise the existence of such golden law by Medias, journals, pamphlets etc as to aware the public and others needy.
- ✓ Professionals of the law have to get training to avoid such shortcomings as my interviews gave me lack knowledge of this article.
- ✓ In addition to improper use of attachment instead of judicial mortgage our courts have been observed when gave effect to mortgage contracts which are not established based on the formal requirements of the law; to my issue they gave effect the contract that didn't satisfy registration. Such a practice shall be stopped right now.
- ✓ In case of pledge security to properly protected rights and obligations of pledger and pledgee the legislature has to fill the gaps as there concerning pledge of share. The followings need such legislative remedies.
- ✓ The means in a way joint pledge possible should be arranged by avoiding the problem raised from the indivisible nature of a share.

- ✓ The subject matter of pledge whether registered share or bearer share has to be identified clearly, since the discussed problem is existed through the presumption of ownership to bearer shares.
- ✓ We know that the share holder has right to vote in meetings either himself or in proxy. But once the share is delivered to the pledgee the right to vote is given when it performed oneself but a chance to vote in proxy to the pledgee is not addressed by the law. This has to be filled by the legislature.