Review of Judgments under the Ethiopian Civil Procedure Code: Where Should Litigation Stop?

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Abstract

Review of judgments in civil litigation offers litigants a chance to have their cases re-examined either by the court of rendition or by a court found at a higher hierarchy than the court which rendered the judgment first hand. This undertaking tries to strike a delicate balance between the search for truth and the need to bring litigation to an end. In engaging in any kind of interpretation concerning review of judgments, courts are required to balance these competing interests. This article is a critical examination of the law on review of judgments against the various interpretations of the Cassation Division. Although the Cassation Division offers a novel approach in its efforts to bring consistency to our legal system, it has however overstepped its authority from a law interpreting organ to one of a law-making body in the binding interpretation it gave on review of judgments based on newly discovered evidence.

Key Terms: Review of judgments, Cassation power, Ethiopian Civil Procedure, newly discovered evidence

1. Introduction

It has now been almost half a century since the Civil Procedure Code of Ethiopia was promulgated and put to public use.[1] However, there is little scholarly work available concerning civil litigation in general. With the exception of the pioneering work on Ethiopian Civil Procedure by Robert Allen Sedler, academic contributions on the subject remain scarce. Having a

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[1] Civil Procedure Code, 1965, Decree 52/1965, *Neg. Gaz.* (Gazette Extraordinary), year 25, no. 3.

strong impetus, to the contrary, our courts have actively engaged in expanding the meaning, scope and dimensions of application of the various provisions of the Civil Procedure Code. However, this has been undertaken with little consistency and coherence at various levels of the judicial structure.

This development has brought about a lack of uniformity in the decisions of our courts that has undermined public reliance on the judiciary. This article is a modest attempt to shed light on the review of judgments in the area of civil litigation and, at the same time, to present an appraisal on the current stance of the Ethiopian Federal Supreme Court (FSC) on some aspects of this issue. The author engages the theoretical foundations of review of judgments as well as the practical application exhibited in binding interpretations of the FSC Cassation division.

The Ethiopian judicial system has taken a novel step towards bringing consistency and uniformity to judgments by making the interpretations of law rendered by five judges at the Cassation level of the FSC binding on the court rendering the initial decision and, subsequently, on all subordinate courts.[1] To date, the FSC has tackled the arduous task of publishing and distributing hundreds of binding decisions in fourteen volumes. These decisions have settled controversies and divisions that have long bedeviled the judiciary, providing long overdue resolution to many debates. Cognizant of the fact that certain binding interpretation might be found unsuitable at a later point in time, legislators of the proclamation empowering the Cassation Division to give binding interpretations of law has also empowered the same to make

[1] A Proclamation to Re-amend the Federal Courts Proclamation 25/1996, 2005, Article 2(4), Proc. No. 454/2005, *Fed. Neg. Gaz*., year 11, no. 42.

changes whenever it feels that the previous decision is tainted with errors.[1] Thus the Cassation Division has the power to reverse its own previous decisions and make new binding interpretations of law.

Review of judgments in civil litigation is one of the rare areas where the FSC Cassation Division has used its power to make changes to its own previous decisions. However, such a reversal of a binding interpretation of law should exhibit conclusiveness which would not warrant further re-reversal. This is simply because such an undertaking unduly erodes public confidence in the judicial system. In making such reversals, the bench should always take into account its role as a law-interpreting organ as opposed to a law-making one.

In spite of the criticism directed towards decisions rendered by the FSC Cassation division,[2] the bench has further blurred the separation of powers enshrined in the Constitution between the judiciary and the legislature. The Cassation Division brought this about in its decision knocking down its previous stand on the interpretation of Article 6 of the Civil Procedure Code (C.P.C.). As will be highlighted in the coming sections of this article, the court has overstepped its jurisdiction as a law-interpreting organ. It did so by visibly deviating from the clear words of the law in permitting a party to seek review of a judgment even after exercising the right of appeal under Article 6 of the C.P.C.

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[1] Ibid.

[2] See, e.g., the following case comments: Mehari Redae, Dissolution of Marriage by Disuse: A Legal Myth, *Journal of Ethiopian Law*, vol. 22, no. 1, December 2008, pp. 37-45; Beza Dessalegn, ቅን ልቦና ከቤተሰብ ህጉ አንፃር, *Mizan Law Review*, vol. 6, no. 1, June 2012, pp. 157-162.

This article is organized as follows. The next section provides preliminary notes on review of judgments in civil litigation in order to highlight the conjectural foundations of the principle. In doing so, it explains the differences between the various modes of reviewing judgments. The hierarchy of courts in which review of judgments are exercised is then elucidated. Afterwards, the discussion is narrowed to ~~a~~ review of ~~the~~ judgments undertaken by courts of rendition in the event of newly discovered evidence in which the stance of the FSC is examined. A case brief of the decisions and an analysis of the same are made in the context of examining the impact of the pronouncement in balancing the competing objectives of ensuring a speedy trial, uncovering the truth and bringing litigation to an end. Finally, the discussion is summarized and the piece ends with brief concluding remarks.

2. Review of Judgments: Understood and Distinguished

Review of judgment in civil litigation refers to situations in which a decision rendered is re-considered, inspected or re-examined and afterwards the reviewing body may affirm, reverse or modify the preceding decision.[3] Such a review may be sought at different levels of the judicial hierarchy. As per the C.P.C., review of a judgment may be made before the appellate courts, based on their appellate jurisdiction;~~,~~ before benches of Cassation, based on their power of Cassation; and before the court that rendered the first judgment.[4]

[3] Bryan Garner (ed.), *Black's Law Dictionary*, 7th ed., St. Paul, Minnl, 1999, p. 1320.

[4] See Robert A. Sedler, *Ethiopian Civil Procedure*, Haile Selassie I University and Oxford University Press, 1968, p. 212. It should be noted here that Sedler refers to His Imperial Majesty's *Chilot* in Lieu of the Cassation benches. However, it should be noted that this

From here on, review of judgments in the Ethiopian discourse relates to reviews undertaken at all the three levels mentioned above. However, one should not be confused by the C.P.C.'s use of the term 'review of judgment' only in Article 6. Whether a certain action undertaken by a court is review of judgment or not is to be determined by whether that court has made a re-examination of the decision it handed down earlier, and not by the nomenclature alone. To this end, the C.P.C. has inculcated various provisions which pave the way for courts to review what they have earlier stated in their decisions.

Under the current court structure, High Courts and Supreme Courts at both the federal and state levels may exercise power of review based on their appellate jurisdiction, while Cassation benches organized at both the federal and state levels may exercise power of review only in the exceptional circumstance of a fundamental error of law. Although the outcome of review by Cassation benches strongly resembles that of appellate courts, the Cassation Division should not be construed as a court of appeal. This is because they are organized as one division of the Supreme Court, within the same hierarchy but different in the sense that they are the proper venue for review undertaken where there is a fundamental infringement of law as opposed to a need for evidentiary scrutiny. What is more, unlike appellate courts, Cassation divisions may dismiss a case offhand where they find no fundamental error relating to the interpretation of law.

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hierarchy of court structure only existed under the Imperial Regime, and that the current structure of the judiciary differs from the imperial set-up.

Another important distinction between the two is the timing for submission of a petition or application for review. Under normal circumstances, an appeal must be lodged within 60 days. But a Cassation application may be submitted up to 90 days after a decision is handed down.[5] It is also interesting to note the effect of review when it is made by a state Cassation bench to the FSC Cassation bench, otherwise known as Cassation over Cassation. It will suffice to mention here that such an undertaking makes the distinction between review by appeal of the appellate courts and the power of review of the Cassation benches even more indistinct.[6]

Review of judgment in civil litigation tries to strike a balance between the search for truth and the need to end litigation.[7] Undue emphasis on either one of the two priorities would undoubtedly keep justice from being served. These competing interests are best explained by the expressions: "Justice delayed is justice denied" and "justice rushed is justice crushed". The search for truth has to be made and concluded within a reasonable period of time so that litigants can enjoy the fruits of the court's decision. An unduly prolonged search for truth and a system which allows review after review would only become inundated in a vicious cycle of litigation, without succeeding in delivering justice in due time. In addition, litigation which simply focuses on putting an end to the case at the earliest possible moment risks defeating the purpose of justice by overlooking the necessary evidence and arguments, and

[5] Federal Courts Proclamation, 1996, Article 22(4), Proc. No. 25/1996, *Fed. Neg. Gaz*., year 2, no. 13. Cassation divisions at the regional level have also endorsed the 90-day time limit adopted by the FSC Cassation division.

[6] For an analysis of the distinction between review by appellate courts and review by Cassation divisions, see infra, sections 2.1 and 2.2.

[7] See Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 214.

thereby crushing justice in favor of a speedy outcome. The final sections of this article focus on review of judgment undertaken by the court of rendition in light of decisions of the Cassation division. But for the purpose of clarity, let us now proceed with a succinct discussion of review by courts of appeal and benches of Cassation, sequentially.

2.1. Review by Courts of Appeal based on the Power of Appellate Jurisdiction

Review upon appeal is a mechanism for re-examining a decision rendered by a court[8] found at a lower level by a court of appeal placed at a higher level in the judicial hierarchy. This may involve the decision of a first instance court reviewed by a higher court in a situation of first appeal, or the decision of one appellate court reviewed by another appellate court (from the High Court to the Supreme Court) in circumstances of second appeal. Review by appeal is not the re-trial of a decided case by an appellate court; rather it is the review of a case based on the grounds of appeal, which may relate to errors of law or fact committed by subordinate courts.[9] It is important to note here that appeal only lies based on a final judgment rendered by a court, and not on interlocutory matters.[10] This extends to precluding an aggrieved party lodging an appeal where an appeal lies if a remedy is available in the court which

[8] It should however be noted here that review upon appeal may also come from a decision rendered by an arbitration tribunal against the arbitral award it has delivered to the parties. See the provisions of C.P.C. Articles 314-319.

[9] Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 218. The power of review of an appellate court is also the same for cross-objections, commonly known by practitioners as cross-appeals, as per C.P.C. Article 340.

[10] Article 320(3) of the C.P.C.

gave the judgment or order. In such scenarios, no appeal may be submitted unless all other remedies have been exhausted.[11]

When an appeal has been lodged, the appellate court has the power to confirm, vary or reverse the decree or order upon reviewing the decision of the subordinate court.[12] In exceptional circumstances, the appellate court also has the power to remand the case back to the lower court. Cases may be remanded in two situations: where the court from which an appeal is made has disposed of the suit based on a preliminary objection and the decree or order has been reversed upon appeal; and where the court from which an appeal is sought has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate court essential to the proper decision of the suit upon the merits, and the appellate court has reframed the issue.[13]

The appellate court, upon review, also has the power to dismiss the appeal without calling on the respondent if it sees fit and agrees with the judgment appealed from and where the appellant has stated in his memorandum of appeal that he bases his appeal entirely on the record of the original hearing and does not apply for permission to submit additional evidence.[14]

2.2. Review based on Power of Cassation

[11] See C.P.C. Article 320(2). This has also been confirmed by the FSC Cassation division in the case between Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C. The court reiterated that where procedural irregularities exist, an aggrieved party shall not be permitted to seek appeal before it has made a request to the court of rendition to correct the mistake.

[12] Article 348(1) of the C.P.C.

[13] Article 341(1) cumulative Article 343(1) of the C.P.C.

[14] Article 337 of the C.P.C.

Power of Cassation is exercised by both federal and state courts. However, the FDRE Constitution has elevated the status of the FSC Cassation Division to exercise power of Cassation over final decisions of both federal and state courts when these decisions contain basic errors of law.[15] From the vantage point of parties to litigation, this elevates the status of review based on power of Cassation to a fundamental Constitutional right, as it is stipulated by the FDRE Constitution. The reference the Constitution makes to "final decisions" indicates that review by Cassation may only be sought after all rights of appeal are exhausted. However, in exceptional circumstances a Cassation over Cassation may be sought from state Cassation to federal Cassation without it being recognized as exhausting an appeal, although, such an undertaking has been a bone of contention among scholars.[16] A review of Cassation may also be sought over matters which are non-appealable when such are final decisions over that particular matter.[17]

Two points must be considered in seeking review by Cassation: the existence of fundamental errors of law and the finality of the decision over which Cassation appraisal is sought. Ascertaining whether a decision by the court is final is relatively easy, as this only requires a factual determination of

[15] A Proclamation to pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Article 80 (3) (a) Fed. Proc. 1/1995, *Fed. Neg. Gaz*., year 1, no. 1.

[16] See generally, Muradu Abdo, Review of Decision of State Courts over State Matters by the Federal Supreme Court, *Mizan Law Review*, vol. 1, no. 1, 2007, pp. 60-74.

[17] This could happen, for example, in circumstances where the court rejects an application for leave to appeal out of time. Decisions about such applications to regular courts are not appealable once the court rejects the plea as per Article 326(3). However, if there appears to be a fundamental error of law in dismissing the application, though the matter is non-appealable, it can be submitted for review to the Cassation division as it is a final decision of a court.

exhaustion of appeal or a legal ascertainment as to the non-appealability of the matter. However, whether or not a decision contains a basic error of law is a tricky determination to make, as there is no legal or working definition that helps to resolve this issue to date.

Pushing the issue further, it can be argued that the essence of fundamental error of law can be understood as varying in magnitude. For instance, a party seeking review in the Cassation Division could argue that the lower courts have not weighed the evidence as the law requires. It may be argued that weighing evidence is a task to be completed by subordinate courts reviewing a case based on either their appellate or first instance jurisdiction; this is not the job of the Cassation division. However, from another vantage point, it can also be argued that prima facie dismissal of such petitions overlooks situations in which the courts' weighing of evidence clearly contradicts the law, thereby constituting a fundamental breach of the law.

For instance, in the case of W/o Yergaleme Kebede vs. W/o Tsige Michael et al,[18] the FSC Cassation bench had to examine the presented evidence before affirming the lower court's decision. The issue involved a petition for review in the Cassation Division against a decision rendered by a federal first instance court rejecting an application for review as per Article 6 of the C.P.C. The petitioner alleged that the decision of the first instance court was based on a compromise agreement related to criminal activity and should be set aside. However, in validating the first instance court's judgment rejecting review, the Cassation Division stated that the compromise

[18] W/o Yergaleme Kebede vs. W/o Tsige Michael (et al.), File No. 45839, FSC Cassation division, Miazia 5, 2002 E.C.

agreement did not mention any fraudulent activity and could not be included within the meaning of Article 6 of the C.P.C. This is the place the Ethiopian judicial system is worst at ensuring the predictability of judicial outcomes.

2.3. Review by the Court of Rendition[19]

The Code of Civil Procedure has put forward a number of mechanisms which allow the court of rendition to once again review its own judgment. Review by the court of rendition may be warranted on a number of occasions. There may be instances where procedural irregularities exist, after which no appeal may be lodged before petitioning the same court to correct it.[20] And there may be instances where a party files opposition to setting aside a decree rendered ex-parte,[21] or where a party who was not a party to the suit is affected by the judgment nonetheless and seeks review of the decision.[22] There may also be circumstances of newly discovered evidence.[23]

2.3.1. Review on the basis of Procedural Irregularities

This is a scheme that allows the court to set aside its own judgment because of non-compliance with procedural requirements set forth in the code, where such irregularities have substantially affected the disposition of

[19] Review by the court of rendition is unique to civil litigation. In criminal litigation, the court of rendition does not have any procedural mechanism entrenched in the Criminal Procedure Code to review its own judgment if after declaring the ruling, the court subsequently discovers a mistake or a mistake is brought to its attention and it appears that the verdict relied on fraudulent evidence or improper conduct.
[20] See Articles 207, 209 and 211 of the C.P.C.
[21] Article 78 of the C.P.C.
[22] Article 358 of the C.P.C.
[23] Article 6 of the C.P.C.

the case to the detriment of one of the parties.[24] Such an irregularity may be remedied in two ways. If it has occurred prior to the taking of preliminary objections or during the course of the proceeding, the court may review it at that time upon the objection of the party affected by the irregularity.[25] Where the irregularity has occurred subsequently, the court may also refuse to give judgment, or if it has already rendered judgment, it may set the judgment aside.[26]

As stated above, the provisions of C.P.C. Articles 207 and 209 provide a remedy for the occurrence of procedural irregularities in two situations. The first situation involves irregularities occasioned during the course of the proceeding, before a judgment has been handed down. In the second situation, a judgment has been rendered but the judgment is marred by procedural irregularities. The first scenario is used to set right procedural irregularities that have occurred during the proceeding, such as undue denial of a request for adjournment, erroneous settlement of preliminary objections and non-payment of court fees. However, it is important to recall that where the error is of a nature such that it does not substantially affect the merits of the case, the proceeding may not be rectified even though procedural irregularities may exist.[27]

[24] Sedler, *Ethiopian Civil Procedure,* supra note 6, p. 212. The FSC Cassation division in the case of Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C., gave a binding interpretation of the scope of application of the provisions of Articles 207 and 209 of the C.P.C.
[25] Ibid. See also, Article 209(3) of the C.P.C.
[26] Ibid.
[27] Sedler, *Ethiopian Civil Procedure,* supra note 6, pp. 212-213.

Setting right such irregularities cannot objectively be termed a review of judgment, because the irregularities are corrected before a judgment is rendered. However, in circumstance where a judgment has been handed down but it is later discovered that the judgment suffers from procedural irregularities, then the court which rendered the judgment can subject the judgment to review.[28]

Where irregularities arise from non-compliance with procedural rules, the court may, *sua sponte,* or upon the application of either party, set aside the proceedings in whole or in part as irregular, amends them, or make another order as may be appropriate.[29] A procedural irregularity is distinct from a clerical or arithmetic error made by the court.[30] However, where the irregularity does not substantially affect the decision of the case on the merits, the proceedings may not be set aside. Moreover, where an application is made to the trial court to set aside the proceedings on grounds of irregularity, the

[28] Article 207 of the C.P.C. See also the case of Wazema Cloth and Garment PLC vs. School of Tomorrow S.C., File No. 17352, Hamle 28, 1997 E.C. In this matter the Cassation bench quashed the decision of both the Federal Supreme Court and the High Court which refused to give judgment to the plaintiff concerning arrears while entitling the plaintiff to the principal claim of the debt. The courts reasoned that as the plaintiff only paid court fees for the principal claim and not for the arrears, the plaintiff will not be entitled to the arrears and will only be awarded the principal claim. However, the Cassation bench opined that the court of rendition could have used the provisions of Articles 207 and 209 of the C.P.C. to review its own judgment as non-payment of court fee amounts only to a procedural irregularity that could have been rectified by the same.

[29] Articles 207 and 209(1) of the C.P.C.

[30] Article 208 of the C.P.C. states what constitutes a mistake as opposed to a procedural irregularity. The FSC Cassation division in the case of A.C.D.I Ethiopia vs. Hider Ali (et al.), File No. 37303, Tire 26, 2001, underscored the point that after judgment has been rendered the court cannot amend its own ruling as per Article 208 unless the mistake relates to clerical or arithmetic error or unintentional and unprecedented omission of words. Otherwise, the court cannot use this provision to amend the judgment, which substantially alters the issue in which judgment has been delivered upon.

occurrence of the irregularity may not be considered as grounds for appeal. It should also be emphasized that any irregularity is deemed to have been validated where no appeal is taken from the judgment or where the judgment is confirmed by the appellate court.[31] It is not difficult to understand the purpose of the law in barring review after an appeal has been entertained. The aim is to bring litigation to finality, by giving the parties space to exercise their freedom of choice, but not without limitations.

2.3.2. Review over Decisions rendered ex parte and on Absent Parties

The second type of review is available where one of the parties files a petition to set aside a judgment rendered ex parte, or a petition is filed by a party that was not a party to the suit but is affected by the judgment. These two situations are best served by Articles 78 and 358 of the C.P.C. respectively.

In the first state of affairs, a defendant against whom a decree is passed or order made ex-parte or in default of pleading may, within one month of the day when he became aware of such decree or order, apply to the court that passed the decree or made the order to set it aside.[32] In order to receive an order setting aside the decree or order rendered ex parte, the defendant must satisfy the court that either the summons were not duly served or that he was prevented by any sufficient cause from filing his defense or reply or from appearing when the suit was called for hearing.[33]

[31] Article 212 of the C.P.C.
[32] Article 78(1) of the C.P.C.
[33] Article 78(2) of the C.P.C.

This covers situations where the court has handed down a judgment against the defendant without his presence during the proceedings of the litigation. This implies that the defendant presented no arguments to counter the allegations made against him by the plaintiff. However, in order for the court to permit review of judgment in such instances, the defendant must prove to the court that his failure to appear and offer defense and arguments during the course of litigation was due to the fact that summons were not duly served or for any other cause deemed sufficient and acceptable by the court.

A point worth considering here is what happens to a party whose application for a review of judgment as per Article 78 is rejected by the court for lack of sufficient cause. Is the defendant entitled to lodge an appeal on the whole judgment or only on the part of the decision that rejected an application for review? The FSC Cassation Division has given a binding interpretation on this matter, stating that the party is at liberty to choose whether to lodge an appeal on the whole judgment or to seek rendition to the court for review.[34] If the party chooses to appeal the whole judgment, his right of appeal will be much narrower in this situation than under the normal circumstances of appeal. In this situation, the appellant in the appeal process is precluded from raising new arguments which have not been raised before the court which rendered the judgment.[35] However, the appellant can raise issues in which the court would have raised on its own motion even without the presence of a

[34] Tesfahune Wagnewe vs. Begyak Agro Commercial Enterprise, File No. 36412, FSC Cassation division, Tekemet 13, 2001 E.C.
[35] Article 329 of the C.P.C.

litigating party. These issues include relevance, admissibility, and the weighing of evidence for the proper disposition of the case.

The second variation on the above arrangement is addressed by article 358 of the C.P.C., which may be put into effect by a person who was not a party to the suit but is affected by the outcome of the judgment. There are three important preconditions for filing an opposition application. The applicant could or should have been made a party to the suit, his interests are affected by the judgment, and the application is filed prior to execution of the decree.[36] Here, a distinction should be made between opposition filed as per Article 358 and objection filed as per Article 418 of the C.P.C.[37] Although it may be argued that both mechanisms arrive at a similar remedy for the aggrieved party, the former is a review mechanism that can be exercised by a party before the judgment reaches the stage of execution, while the latter is to be exercised by a party as matter of last resort by petitioning the court of execution. In addition, the purpose of an objection filed as per Article 418 is

[36] Article 358 of the C.P.C. It is interesting to consider whether a person may file an opposition to the Cassation assuming he fulfills the requirements set forth in Article 358. The FSC Cassation division in the case of W/o Emebet Mekonenn vs. Woreda 20 Kebele 29 Administration office, File No. 31264, Hidar 6, 2004 E.C., rejected a petition from Ato Ayenadis Gedamu to file an opposition to be considered by the bench. In its argument, the Cassation division stated that considering an opposition as per Article 358 requires the court of rendition to examine evidence, and as the Cassation bench has no mandate to scrutinize evidence, except insofar as this is necessary in order to rectify fundamental errors of law. Hence, it stated, the petition to file an opposition could not be accepted.

[37] See Articles 358 and 418 of the C.P.C. See also, the binding interpretation given by the FSC Cassation division in the case of Ato Abera Hundae vs. Finfine Forestry Agency, File No. 67127, Sene 8, 2004 E.C.

to keep property from being the subject of execution without affecting the validity of the original judgment. Nonetheless, the outcome may be similar.[38]

2.3.3. Review on the basis of Newly Discovered Evidence

Review based on newly discovered evidence is the court of rendition's third mechanism for re-examining judgments. Article 6 of the C.P.C. stipulates clear tripartite preconditions for an aggrieved party seeking review.[39] First, no appeal should have been taken from the judgment or no appeal lies at all. Second, subsequent to the issuance of the judgment, the party seeking review discovers a new and important matter such as forgery,

[38] This could happen, for instance, in a situation where Mr. A sued Mr. B for a petitory action in which A alleges B has unlawfully occupied his house. If the court orders B to hand over the house to A, and upon A pursuing execution on B to recover the house, a litigant named Mr. C appears before the execution court and files an opposition as per Article 418 and succeeds in proving that he is the lawful owner of the house. In such a situation, the court has no option but to stop the order of execution. This in effect has the repercussion of implicitly overturning the original judgment in which execution is sought. However, if the suit between A and B was for a simple recovery of money, and after receiving a judgment in his favor A attaches the house of B with the aim of executing the judgment he has received, and later on C appears and alleges that the house belongs to him, the original judgment still remains valid. However, A is precluded from executing the judgment he received on the same house. To the contrary, he will only be required to find another property of B in order to execute the original judgment. This leaves the judgment intact, even though there is a successful objection as per Article 418.

[39] The relevant part of the provision is reproduced here so that the reader may appreciate the clear expression of the law. Art. 6. - *Review of judgments*

(1) Notwithstanding the provisions of Art. 5, any party considering himself aggrieved by a decree or order from which an appeal lies, but from which *no appeal has been preferred*, or by a decree or order from which no appeal lies, may, on payment of the prescribed court fee, apply for a review of judgment to the court which gave it where:

(a) *Subsequently to the judgment he discovers new and important matter, such as forgery, perjury or bribery*. Which after the exercise of due diligence, was not within his knowledge at the time of the giving of the judgment; and

(b) *Had such matter been known at the time of the giving of the judgment, it would have materially affected the substance of the decree or order the review of which is sought*…..(emphasis added)

perjury or bribery, which, after the exercise of due diligence, was not known to him at the time the judgment was given and warrants review. Third, had such matter been known at the time the judgment was given, it would have materially affected the substance of the decree or order for which review is sought.[40]

It is possible to gather from these prerequisites that review of judgment on the basis of newly discovered evidence is only permitted in a tightly controlled environment. Simple discovery of new evidence that is not a result of improper conduct, however relevant it might be, is not enough to merit review by the court of rendition. The FSC Cassation division, in the case of W/o Abebech Bejega vs. Dr. Tesfaye Akalu et al,[41] stated that even if there is conclusive proof that a certain document which has been submitted as evidence in litigation has been found to be fraudulent, that by itself is not enough to warrant review and reversal of a judgment already rendered. Rather, the document alleged to be a result of improper conduct must have the power to substantially affect the merits of the case. In this case the court stated that, as the contention was resolved based on issues of law and not issues of fact (evidence), the presence of a forged document was unlikely to affect the merits of the judgment. Therefore review would not be granted based on Article 6 of the C.P.C. Sedler underscores that the notion that litigation must at some point come to an end is the very purpose behind such a requirement.[42]

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[40] Article 6(1) of the C.P.C.

[41] W/o Abebech Bejega vs. Dr. Tesfaye Akalu (et al.), File No. 08751, FSC Cassation division, Ginbot 26, 2000 E.C.

[42] Sedler, *Ethiopian Civil Procedure*, supra note 6, p. 214.

The conviction that litigation should come to an end may also be deduced from the beginning statement of C.P.C. Article 6: "notwithstanding the provisions of Article 5…." This provision emphasizes that review is considered an exception to the rule of *res judicata,* which bars further litigation on matters that have already been made a subject of deliberation. This rule will only be superseded under exceptional circumstances. In such cases, the court of rendition will review on the basis of newly discovered evidence, upon the fulfillment of the requirements set forth in Article 6. With the link between the requirements and their practical application clearly established, there can be no illusion that exceptions shall be interpreted narrowly so that they will not erode or compromise the general principle.

Thus, two competing interests must be balanced in interpreting Article 6 of the C.P.C., namely the need to bring litigation to an end and the underlying search for truth. As stated earlier, an over-emphasis on either of the two will lead to the destruction of one by the other. Moreover, an interpretation giving primacy to one of the purposes of the provision alone would not represent the intention of the legislator.

In the simplest of terms, Article 6 is a case "where the law is clear". So one is tempted to ask why the Cassation Division has decided to re-interpret this provision and make a court of rendition's review tolerable even after appeal has been exercised. The next sections analyze the current stance of the FSC Cassation Division in an attempt to shed light on accepted conventions of interpretation relevant to the case at hand and scrutinize the standpoint of the Cassation division.

3. The Position of the FSC Cassation Division on Review based on Newly Discovered Evidence

As outlined above, the crux of the matter which warranted a reversal of interpretation by the FSC Cassation Division involved Article 6 of the C.P.C., which is implicated in two rulings. The first decision was given on Tikimit 18, 1998 E.C. in File No. 16624,[43] while the reversal was rendered on Tir 5, 2002 E.C. in File No. 43821.[44] In the first decision,[45] the Cassation Division ruled that a review of judgment requested by a party per Article 6 of the C.P.C. shall be made before an appeal has been sought on the same. Here, the case involved a petition by W/t Ejegayehu Teshome (petitioner) in which she argued that a 'will' which has been made the core of the court's decision and had also been a subject of dispute at the first instance level should allow her to seek review as she alleged that the document was a result of forgery. While the respondent insisted that the petitioner had lodged an appeal to the High court before seeking review by the court of rendition. Thus, he insisted that the petitioner could not seek review within the meaning of Article 6 of the C.P.C.

In its reasoning, the court outlined the final verdict and stated that a petition for review of judgment under Article 6 of the C.P.C. could not be

[43] W/t Ejegayehu Teshome vs. The guardian of Etenesh Bekele-W/o Etagne Zenebe, File No. 16624, Tikimit 18, 1998 E.C. The full version of the FSC Cassation decision is found in የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 2, ገጽ 51-57, ኅዳር 1998.

[44] W/o Terehase Fissehayae vs. W/o Zenebech Berihune, File No. 43821, Tir 5, 2002 E.C. The full version of the FSC Cassation decision is found in የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች፣ ቅጽ 9, ገጽ 295-300, ኅዳር 2003.

[45] The author will argue that the first decision is the one which is consistent with the words as well as spirit of the law. See *infra*, section 5.

requested, since the petitioner had lodged an appeal from the decision of the first instance court. As the court further elaborated, a petition for review in such circumstances cannot be lodged after an appeal has been made. In concluding, the court advanced its stance that the submission of a memorandum of appeal to the appellate court is sufficient to bar a petition for review. This is irrespective of the outcome of the decision of the appellate court.

However, the Cassation Division adhered to a different line of interpretation in the decision it rendered on Tir 5, 2002 E.C. as it is entitled to do under proclamation 454/97, Article 2(1). Simply stated, the court reversed its decision, clearly stating that a review of judgment based on Article 6 of the C.P.C. can be submitted to the court of rendition irrespective of whether an appeal has been preferred or not. Before embarking on an examination of the ruling, it is worth noting the successive arguments the bench has put forward to validate its reversal.

The facts of the case involved a petition for review by the court of rendition filed by W/o Tirhase Fissehayae (petitioner) after she had lodged an appeal that was rejected by the appellate courts.[46] In explaining its ruling, the

[46] The facts of the case involved an issue relating to the ascertainment of paternity, and the court has refrained from stating the facts in detail. It has also failed to state the type of fraudulent evidence that was presented to the lower courts, whereas its previous ruling stated which document was the subject of contention and why. One can only speculate from this that the FSC Cassation division has avoided an undertaking that might involve an examination of evidence that would obviously be outside its mandate. However, it is also worth noting that the bench has time and again stressed the need to get to the truth, which seems to suggest that the bench was convinced that reconsideration of the document would change the outcome of the case. Nevertheless, it remanded the case back to the lower court without any explicit statement to this effect.

Cassation Division reiterated that Article 6 of the C.P.C. is not a mechanism by which a fresh suit is to be entertained. Rather, it is a means by which retrial may be conducted under certain specific conditions. In mentioning those specific conditions, the court stated that the search for truth is the major and ultimate purpose of Article 6. It further consolidated its argument by stating that the search for truth can only be successfully accomplished if the path is supported by the necessary evidence. It noted that Articles 264, 137, 256 and 345 of the C.P.C. set out several procedures for gathering evidence that deviate from the normal rules of submission as per Articles 223 and 234 of the C.P.C. This, the court stated in its analysis, demonstrates a commitment to finding the truth in any civil case.

The court asserted that an argument that bars review of judgment on the sole ground that the judgment has been appealed ignores the law's interest in uncovering the truth. The court stated that there are two approaches to the problem. One approach follows the letter of the law, rejecting a request for review prima facie, as Article 6 does not allow for review once a judgment has been appealed, whether or not new evidence is likely to change the outcome of the case. Strict adherence to the positive law can be presumed to bring about a result that is congruent with the law.

The court opined that the phrase "before an appeal has been preferred" in Article 6(1) leads one to conclude that review of judgment will only be permitted before an appeal has been sought. Nonetheless, the court decided that the provision shall be interpreted cumulatively with Article 6(1) (a) and (b) as well as the purpose behind the provision. It stated that precluding review after appeal has been preferred might prevent the unnecessary

expenditure of time, money and energy, and might also avoid complicating the case in the judicial system. Yet, the court concluded that it is unwise to assert that the law precludes review of judgment if it is necessary after appeal has been preferred. This is because Article 6 (1) (a) of the C.P.C. indicates that the purpose of uncovering the truth shall be given primacy.

Article 6 from now on shall be interpreted in such a way that meaningful outcomes result, by entrenching a mechanism whereby a decision based on fraudulent and criminal acts can be put on hold. This can be achieved by allowing the provisions of Article 6 which permit review of judgments based on forgery, perjury and bribery to apply whether an appeal has been filed or not. By the power vested by proclamation 454/97 Article 2(1), the court reversed the previous binding interpretation given in File No. 16624.

The conviction of the Cassation Division triggers an inquiry into why the bench resorted to this line of interpretation and whether it is in line with settled principles and rules of interpretation of law.

4. When do we need to Interpret Laws?

Even though it is difficult to determine which tools of interpretation the FSC Cassation Division adhered to in reversing its previous decision on Article 6 of the C.P.C., it is helpful to analyze the ruling with settled rules and principles of statute interpretation in order to test the validity of what the Cassation Division did set as a precedent. As Daniel A. Farber rightly pointed out, when statutory language and legislative intent are unambiguous, courts may not take actions to the contrary. In other words, when legislation clearly

embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different.[47]

When exercising the power of statutory interpretation, the notion of legislative supremacy dictates that, courts are subordinate to the legislature.[48] As clear and sound this may seem, it is quite difficult to pin down the notion of legislative supremacy in statutory interpretations and the exact nature of the relationship between the judiciary's role of interpretation and the legislature's role of law-making. As Michael Herz notes,

> Separating interpretation from law making is both easy and impossible. The two ought to be different: law making is the process of devising and promulgating the rules; interpretation involves figuring out just what the rules mean, often as applied to particular circumstances. Yet under almost any theory of statutory interpretation, the two overlap.[49]

However, one of the grounds that legislative supremacy rests on is that "judges must be honest agents of the political branches. They carry out decisions they do not make".[50] Hence, the judges' role is to decipher and enforce the statute. Ignoring the legislator's understanding of statutes burdens the process of enactment with additional uncertainties. This in turn makes the process even more cumbersome and difficult.[51] Moreover, the legislator's

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[47] Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, *Geo. L.J.*, vol. 78, 1989-1990, p. 292.
[48] Id., p. 283.
[49] Michael Herz, Deference Running Riot: Separating Interpretation and Law Making Under Chevron, *Admin. L.J. Am. U.*, vol. 6, 1992-1993, p. 190.
[50] Frank Easterbrook, Foreword, The Court and the Economic System, *Harv.L.Rev.*, vol. 98, no. 4, 60 (1984), cited in Id, p. 284.
[51] Herz, *Deference Running Riot*, supra note 51, p. 291.

directives are entitled to the force of law because of their origins. To construe the text in a manner that is contrary to the collective understanding of the legislature weakens the judiciary's claim to legitimacy.[52]

Any violation of the notion of legislative supremacy by the judiciary under the guise of interpretation can only be construed as an assault on the social norm of democratic self-government, checks and balances, and the Constitutional structure itself.[53] However, this should not be understood as precluding courts from engaging in interpretation of laws when there are gaps in legislation. But this should only be done in areas where the legislator has left a certain law ambiguous, warranting judicial intervention. Under normal circumstances, the judiciary shall not over-reach and engulf the legislature.

It is a well-established principle of interpretation that if the meaning of a statute is plain, resort to extrinsic aids to construction, such as legislative history, should be avoided and the court should as much as possible interprets a statute in such a way as to promote the legislature's goals.[54] This is profoundly ascribed to another settled rule of interpretation, 'original intent'. Judges should look for and enforce the intent of the law maker.[55] Courts should also assume that legislatures use words in their ordinary, common senses unless the legislature expressly states otherwise.[56] This is also stated in

[52] Ibid.
[53] Ibid.
[54] Richard Posner, Legislation and Its Interpretation: A Primer, *Nebraska Law Review*, vol. 68, 1989, p. 442.
[55] Frank Easterbrook, Text, History, and Structure in Statutory Interpretation, *Harv.J.L. & Pub. Pol'y*., vol. 17, 1994, p. 64.
[56] Geoffrey Miller, Pragmatics and Maxims of Interpretation, *Wis. L. Rev*., 1990, pp. 1221-1222.

the 'plain meaning' maxim which expresses a strong preference for literal or conventional interpretations where the law is clear and unambiguous.[57] The court is also obliged to give effect, if possible, to every word used by the legislature.[58] The implication here is that all words used by a legislature are there for a reason and the judiciary shall take cognizance of such fact and should make those words have effect as much as possible.

In his evaluation of the rules of statutory interpretation, Quintin Johnstone points out basic objectives of statutory interpretation. He reiterates that courts should, first of all, recognize limitations on their powers. In interpreting statutes they should consider the distribution of power and responsibility between them and the legislature.[59] This is premised on the argument that courts should realize that the legislature is often better equipped than the courts to gather data and hear conflicting arguments on policy matters, especially when the rules that are being advocated involve persons quite differently situated from the litigants before the courts.

Creation of certainty in the law is a noteworthy objective of interpretation.[60] Certainty in the law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary.

5. Insight into the Decisions

[57] Ibid.
[58] Id., p. 1224.
[59] Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, *U.Kan. L. Rev*., vol. 3, pp. 7-9.
[60] Ibid.

Let us now once again return to the case at hand and scrutinize the decision of the Cassation Division in conjunction with the purpose behind Article 6 and the various interpretation techniques introduced in the preceding section. In validating its decision to reverse its earlier stand, the Cassation Division reiterated that the purpose behind Article 6 is uncovering the truth above any other priority. However, we have seen that the same provision is carved out by the legislator to serve two competing purposes, uncovering the truth and putting an end to litigation. As per the intention of the legislator, these two purposes shall be balanced, without one encroaching upon the other. The legislator makes sure of this by stating explicitly that review by a court of rendition shall not be sought after an appeal has been preferred, advocating for finality to litigation and allowing for a review of judgment under a limited set of conditions to be sought before the court of rendition in order to satisfy the need to uncover the truth.

Thus, one can see that the Cassation Division has given an interpretation that was never intended by the legislature. It is also not comprehensible from the decision why they opted to deviate from the plain meaning of the provision, which specifically states that review in such circumstances cannot be sought after an appeal has been preferred. Where the law is clear there is no need for interpretation. The law here cannot be any clearer. The Cassation Division has not justified its decision to interpret the plain language of the law to arrive at a conclusion that is neither written nor implied in the provision of the law. Mere expression in its judgment that this is the 'spirit and purpose' of the law does not make it so, nor does it rationalize an action at the level of a

final court of review. It is a pity that the Cassation Division reversed the decision simply by stating that the purpose of the law warrants such a reversal. The court here also bypasses the maxim that the judiciary shall give effect to every word the legislature has stated, as much as possible. What we witness is an intentional oversight by the judiciary.

One might be tempted to say that even though the interpretation is not in line with the law, it has brought about a desirable outcome in which the truth will triumph at last. However, such an argument is only wishful thinking and will not satisfy anyone besides the single litigant receiving the verdict. The decision has far more negative repercussions than its positive outcomes. This is because the decision keeps litigation from ending. This simply means that at any point of time, even after years of exhausting appeals, a litigant might reappear and open the litigation afresh under the guise of review of judgment.

It is obvious that Article 6 permits the application or petition for review of judgment without any period of limitation.[61] The timeline of one month provided under Article 6(2) shall only be applicable and start to run after the applicant's discovery of his grounds of application for review. This is not a limitation on the timeframe in which grounds for application of review might be discovered. This leads to an inextricable and vicious cycle in which both parties to the litigation can use review in their favor to re-open a dead file

[61] The FSC Cassation division in the case of W/o Abebech Begega vs. Dr. Tesfaye Akalu (et al.), File No. 08751, Ginbot 26, 2000 E.C. has given a binding interpretation in which it underscored that there is no period of limitation for discovering the evidence which could warrant review of judgment. However, after the discovery of the new evidence warranting review, a period of limitation of one month starts to run against a party wishing to seek review in the court of rendition.

time and again without ever reaching closure.[62] As stated earlier, this is not the interest Article 6 is trying to serve, nor is this the aim of any judicial remedy. This makes people lose confidence in the judicial system, as a decision simply opens the door to a never-ending legal battle, which might re-open at any time, even after the issue has been settled by the final court of the country. As a result, the judiciary may be perceived as an unreliable and unpredictable institution.

Some may still sympathize with the decision of the Cassation division, reasoning that what we want is the truth and the decision is at least morally correct. But it should be emphasized here that if what we aspire to is setting aside the positive law, we should have kept the *Zufan Chilot* of the imperial regime running. In presiding over the *Zufan Chilot*, the emperor is not bound by existing positive laws in reviewing the judgment of courts, because he is considered to be the fountain of justice and his decision supersedes that of any court.[63] However, we now have a system in which judicial decisions are

[62] Nevertheless, Article 6(4) of the C.P.C. states that *"no appeal shall lie from any decision of the court granting or rejecting an application for review."* As this provision indicates, review of judgment is an exception to the general rule, and as much as possible litigation should come to an end. Thus parties are precluded from exercising their right of appeal where a judgment is rendered based on review by the court of rendition. However, the existence of cassation benches dilutes the purpose behind this assertion, as parties can seek review of the already reviewed judgment in cassation benches because they are not structured as courts of appeal. Especially in circumstances of cassation over cassation, the task becomes so tedious that timely disposition of cases under review by the court of rendition is still extended. The FSC Cassation division in the case of Former Woreda 07 Kebele 32 Administration Office vs. W/o Joro Wakjera, File No. 42871, Tir 12, 2002 E.C. further affirmed that even though Article 6(4) of the C.P.C. precludes appeal once a decision on granting or rejecting review has been reversed. But this is no bar to seeking re-review of the judgment by courts of cassation if a fundamental error of law exists.

[63] See, Sedler, *Ethiopian Civil Procedure*, supra note 6, pp. 12-18.

valued in terms of their legal validity and compatibility with the positive law and not on the basis of individual moral standards. It is obvious that nobody wants the FSC Cassation Division to act as the modern *Zufan Chilot*.

Another drawback to the judgment permitting review after an appeal has been sought is that the decision does not in any way indicate which techniques of interpretation the court used or where they derived the purpose of the law stated in their conclusion from. Especially when setting a new precedent, judicial pronouncements require a great deal of doctrinal and non-doctrinal research to assess both the legal compatibility of the ruling and its impact upon society. However, our courts do not meet this standard, and they are yet to win the hearts of every litigant and public confidence in general.[64]

Nevertheless, it should be stated here that if the preclusion Article 6 makes in seeking review of judgment for those who have sought an appeal is not in the interest of justice then such a matter shall be a subject of deliberation by the legislature. It is no wonder that our Civil Procedure Code needs various amendments after nearly half a century to make it compatible with the current circumstances. This being the case, Article 6 could be taken as one area needing amendment. But rather than going through the normal procedure of law making, the judiciary shall not put together laws for society under the guise of interpretation.

[64] At times one is left to wonder whether the FSC sets the precedent first and then amends mistakes after looking at the public's reaction. This was the case in the binding interpretation it gave on Article 1723 and the various amendments it made later to the same ruling without overturning the first judgment as invalid, but instead eroding it to the farthest possible extent and making it inapplicable. See, Yoseph Aemero, የፍትሐብሔር ክርክሮች ሂደት፡ፈተናዎች እና ተስፋው, in Yazachew Belew (ed.), *The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication*? Ethiopian Business Law Series, vol. V, December 2012, pp. 15-18.

Without having the mandate to make laws, the FSC Cassation Division has overstepped its authority and undermined the power of the legislature in lawmaking. The interpretation it gave on Tikimit 18, 1998 E.C., File No. 16624, was in accordance with the spirit and purpose of the law as it was interpreted based on the clear wording of the statute. But the decision it rendered on Tir 5, 2002 E.C., File No. 43821, was not in line with the law, to say the least, and has further eroded public confidence in the division itself and in the judicial system as a whole by encroaching on the supremacy of the legislator in law making.

Concluding Remarks

The incorporation of review of judgments by the Code of Civil Procedure, whether through the court of rendition, courts of appeal or cassation benches, targets the parallel purposes of uncovering the truth and bringing litigation to closure. Litigants get a second chance and freedom of choice to have their cases reviewed by the same court or by a court found at a higher level on the hierarchy than the court that rendered the judgment. At the same time, mechanisms are entrenched that ensure review will not be applied viciously and indefinitely, even for the purpose of uncovering the truth.

The FSC Cassation Division's binding decision on Article 6 of the C.P.C., which permits a party to seek review of judgment in the court of rendition even after exhausting appeal, opens a door for litigants to live in a constant state of fear. This is because even litigation closed by the final court of the state might be re-opened if a review is sought as per Article 6. This line of interpretation not only keeps parties in a steady state of tension but also

undermines the purpose of speedy justice and finality of litigation, as it allows litigants to continue to battle in the courts of law indefinitely.

The foregoing discussions have explained that judges in the FSC Cassation Division should be constrained by statutory language and legislative intent. It is not controversial to state that judges are always subordinate when it comes to the making of laws. Judges who interpret statutes should at the same time refrain from implementing their own notions of public policy under the guise of interpretation.

In interpreting the clear language of Article 6 of the C.P.C., the Cassation Division has arrived at a conclusion that was neither intended nor set as a goal by the law maker. This undertaking is far from the accepted principles of interpretation, and it undermines the separation of powers that exists between the judiciary and the legislature.

Nonetheless, one thing is worth noting and commending. The Cassation Division has demonstrated that it is not rigidly averse to amending erroneous previous interpretations, nor is it unduly attached to its own binding precedent. However, only to show its conviction on an interpretation which does not need amends.