

Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: the Case of Amhara Region

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Abstract

This article deals with the question of formal requirements and their relevance to the validity of transactions relating to immovable properties both in urban and rural settings. The article discovers that while some rules try to mention the types of formal requirements and their effect on the validity of legal transactions on immovable properties, there is still a problem of lack of coherence within each of the legislations as well as among the various legislations. Similarly, there are divergent interpretations of these rules. One cause, we argue, is the failure to demarcate the distinction among multiple existing formal requirements. In particular, legal professionals have been confused with the difference between authentication and registration requirements. This research aims to supplement the current discourse on the issue by critically identifying the different formal requirements described in various laws, both the long existing Civil Code and the relatively recent urban and rural land use and administration legislations, and advancing more comprehensive arguments on the issue. To do so, it provides a theoretical definition of the relevant concepts based on international standards and links these definitions to the definitions given under our law. In addition, it analyses a few sample court cases decided by the Amhara region Supreme Court as well as offering supplementary information from a few key informants and a focus group discussion.

Key Words: Formality Requirement, Authentication, Immovable Registration, Immovable Transaction, Validity

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1. Introduction

This article deals with the relationship between formal requirements to immovable transactions and their role in the validity of those transactions. To put the discussion in perspective, it is good to dispense few paragraphs on these terms. Under the Ethiopian legal system, an immovable property includes land and buildings which means that both have an equal, parallel status.¹ Land which is the typical example of an immovable property is a vital asset for peoples' livelihood in Ethiopia. As Pankhurst noted, land 'was of crucial importance to the country's economic and social life besides determining questions of social class; it was the basis of administration, taxation and military service'.² As land consists of various forms of rights, interests or benefits³ which are of high economic, social, and political significance, immovable transactions assume high importance in transferring these benefits from one person to the other in different ways.

Immovable transactions are the procedures that are necessary for owners or proprietors to dispose legally of their ownership or other immovable property rights and for a new person to acquire them. Immovable transaction is the process whereby rights in a unit of property are transferred between two or more parties such as sellers and buyers, lessors and lessees, mortgagors and mortgagees, testators and beneficiaries, donors and donees and so on. Because land and buildings are so important, society has constructed safeguards to regulate immovable property transactions, which

¹ The Civil Code of the Empire of Ethiopia Proclamation, 1960, Art. 1130, Proc. No. 165/1960, *Neg. Gaz.*, Extraordinary Issue, No. 2, (hereinafter 'ECC'). In fact, there is a possibility that a building could be considered as an 'intrinsic element' to the land to which it belongs according to the definition given under Art. 1132 of. In most other legal systems, a building is considered to be part of the land to which it is attached, or a fixture. Thus, the Swedish Land Code provides that '[a] property unit includes a building, conduit, fence and other facility constructed in or above ground for permanent use, standing trees and other vegetation, natural manure. *Land Code 1970* (Sweden) Ch 2 S 1 Par 1.

² Richard Pankhurst, *Land and Economic History of Ethiopia* (H.S.I. (Addis Ababa) University Press, 1968, p. 35 cited in Mekbeb Tsegaw, Contracts Relating to an Immovable and Questions of Form- Current Issues, *Ethiopian Bar Review*, 2007, Vol.2, No. 1, p. 158.

³ Immovable (real) property interests are the rights, restrictions and responsibilities recognised and regulated by law or custom. The Ethiopian law governs these interests mainly in the ECC and land holding and registration laws in both urban and rural areas adopted both at the national and regional level.

require that specific procedures be followed. Rules determine when immovable property rights are transferred, who may transfer them and to whom they are transferred. Legal and practical/conventional requirements vary considerably among different jurisdictions of the world and among smaller legal entities, as can also be seen from this research.

Immovable transactions require the fulfilment of different formalities usually referred to as requirements of form.⁴ According to Black, a form is defined as '[t]he legal and technical manner or order to be observed in legal instruments or in the construction of legal documents or processes.'⁵

The remainder of this article proceeds with the discussion of different formal requirements- written form that includes signature by parties and attestation by witnesses, authentication, and registration; this will be provided in section two. The third section addresses the effects of each of these requirements on validity of immovable transactions. The fourth section deals with the law and practice in the Amhara region and the last section furnish concluding remarks.

2. Requirements for Immovable Transactions

2.1 Written Form

Written form implies putting the terms of the transaction on paper or deed. This is contrasted with an oral form where the terms of the transaction are to be found in the minds and mouths of the parties to the transaction. A transaction made in written form is more secured and certain than the one undertaken in oral form⁶ as it indicates the seriousness of parties and is more inconvenient for them to revert.

⁴ See generally Workneh Alemnew, *Form of Contracts Relating to Immovables in Ethiopia: Analysis of the Position of the Federal Supreme Court Cassation Division* (LLM Thesis, Addis Ababa University College of Law and Governance School of Law Graduate Studies, 2014), p. 19-26. But some writers doubt whether requirements other than writing form are to be considered as requirements of form. See eg Mekbebe; supra note 2, p. 162.

⁵ Henry Campbell Black, *Black's Law Dictionary* (Revised Fourth Ed, 1968), p. 780 quoted in Mekbebe, supra note 2, p. 161.

⁶ William P Anson, *Principles of English Law of Contract* (Oxford University Press, 19th ed, 1945), p. 67 cited in Workneh, supra note 4, p. 19.

The matter of using either written form or verbal form is dependent on the choice of the parties just as entering into a transaction contract is entirely their choice at freedom. The ECC stipulates: '[u]nless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree.'⁷ Exceptionally, the law may stipulate that transactions of some sort need to follow a special, written form. 'Where a special form is expressly prescribed by law such form shall be observed.'⁸ Contracts relating to immovable properties,⁹ contracts made with a public administration, contracts of guarantee or suretyship, and contracts of insurance are expressly required to be made in written form in the ECC.¹⁰ Any other contract in respect of which a written form is required by any other special law shall also be in a deed form.¹¹

In addition, written form can also be agreed to be followed by the parties themselves regardless of the legal requirement for doing so.¹² Once this agreement is made, which can also be done orally or otherwise, the transaction with respect to which such agreement is made 'may not be deemed to be completed until it is made in the agreed form.'¹³

A written form comprises of two other formal requirements: signature of contracting parties, and attestation by witnesses. A signature is 'a formal device which indicates that some important legal consequences may follow from a document in which a signature is affixed.'¹⁴ It is 'a formal ground of legal liability as well as proof of contractual intention.'¹⁵ A signature binds

⁷ ECC, Art. 1719(1).

⁸ Id, Art. 1719(2).

⁹ Art. 1723(1) of the ECC provides that '[a] contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing'.

¹⁰ Id, Arts. 1723-25.

¹¹ Id, Art. 1725(c).

¹² Id, Art. 1719(3).

¹³ Id, Art. 1726.

¹⁴ P S Atiyah, *An Introduction to the Law of Contracts* (Oxford University Press, 4th ed, 1989), p. 193 quoted in Workeneh, *supra* note 4, p. 20.

¹⁵ Workeneh, *supra* note 4, p. 20.

the signatory and precludes him/her from pleading that he/she has no knowledge of the contract or the terms thereof.¹⁶

The ECC clearly stipulates that a contract required to be made in writing must be signed by all contracting parties and be attested by two witnesses.¹⁷ To this effect, the parties shall affix their handwritten signature.¹⁸ When a party cannot write, he may sign by putting his/her thumb-mark or finger print.¹⁹ A blind or illiterate person may not be bound by his signature or thumb-mark unless it is authenticated by a competent body.²⁰

The second component of written form is the need to be attested by witnesses.²¹ To attest means ‘to affirm to be true or genuine, to certify to the verity of a copy of a document formally by signature.’²² Even if the law does not define the meaning of ‘attest’, attestation is undertaken by affixing the signature of the witnesses.²³ A witness must be capable before the law, which is to say that he/she must be of age and not judicially interdicted;²⁴ but a witness is not required to be a citizen or to be of a certain sex.²⁵ The task or duty of witnesses is to certify that a contract is made and ascertain the terms of the contract.²⁶ This becomes more important when the document evidencing the contract has been destroyed, stolen or lost.²⁷

Formal requirements of property transaction have different consequences. The law stipulates that ‘[w]here a special form is prescribed by law and not

¹⁶ Atiyah, supra note 14, cited in Workeneh, supra note 4, p. 20.

¹⁷ ECC, Art. 1727.

¹⁸ Id, Art. 1728(1).

¹⁹ Id, Art. 1728(2); Rene David, *Preliminary Draft on the Ethiopian Civil Law* (translated by Michael Kindred, Haile Sellassie I University, Faculty of Law, 1973), p. 34 cited in Workeneh, supra note 4, p. 21.

²⁰ ECC, Art. 1728(3).

²¹ Id, Art. 1727(2).

²² Black, supra note 5, quoted in Workeneh, supra note 4, p. 22.

²³ Workeneh, supra note 4, p. 22.

²⁴ ECC, Art. 1729.

²⁵ Id, Art. 1729(2).

²⁶ Id, Art. 1730.

²⁷ Id, Art. 2003.

observed there shall be no contract but a mere draft of a contract.²⁸ This is provided in an even clearer manner with regard to a contract of sale of an immovable property when it is provided that '[a] contract of sale of an immovable shall be of no effect unless it is made in writing.'²⁹ It also provides that a contract required to be in writing shall be of no effect unless it is attested by two witnesses.³⁰ However, the effect of failure of signature is not so clearly provided as the case of 'witnesses'. The law merely states that a written contract must be signed without directly mentioning the effect of the failure to sign.³¹ But as a written form includes signature and witnesses, and failure to meet the written requirement results in the nullity of the contract, it follows that a contract not signed by the parties shall be of no effect.

2.2 Authentication and Registration

Authentication and registration are the other fundamental requirements for the transfer of property rights from one person to the other. The two concepts are often confused with one another by lawyers and judges.³² The

²⁸ Id, Art. 1720(1). A 'special form' usually refers to a 'written form' as opposed to informally or orally made contracts. Yohannes Heroui, Registration of Immovables under the Ethiopian Civil Code: An Overview in Comparative Perspective, *Ethiopian Bar Review*, Vol.2, No.2, 2008, pp. 31, 71. The FDRE Supreme Court Cassation Division ('FSCCD') has also decided to the same effect. See eg ጎርፌ ገ/ሕይወት እና እነ አበራሽ ዱባርጌ (2 ሰዎች); የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት; መ.ቁ. 21448፣1998 ዓ.ም. (hereinafter 'Gorfe case'); መሰረት በቀለ እና ኤልሳ ሰሞኔላ; የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት; መ.ቁ. 57356፣2003 ዓ.ም.

²⁹ ECC, Art. 2877. The same is true of a 'contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable': at Art. 1723 (1). But the FSCCD has ruled that a contract of house rent is not required to be made in writing as it considered rent as not creating or assigning right in ownership, usufruct, servitude or mortgage on an immovable. የኪራይ ቤቶች አስተዳደር ድርጅት እና ሶስና አስፋው; የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት; መ.ቁ. 15992፣1997 ዓ.ም.

³⁰ ECC, Art. 1727(2).

³¹ Id, Art. 1727(1).

³² See eg Workeneh, supra note 4, pp. 36,77,87; Addisu Damte, *Form Under the Ethiopian Law of Contracts with Particular Emphasis on Transfer of Ownership of Immovables and Special Corporeal Chattels: the Law and Practice* (LLB Thesis, Addis Ababa University, Faculty of Law, Addis Ababa, Ethiopia, 2001), pp. 27–30. In his critique to the *Gorfe* case, Mekbebe confuses registration under Art 1723(1) of the ECC, i.e. authentication, with land register requirement under Art 2878 of the ECC. See Mekbebe; supra note 2, p. 165. Judge Ali also seems to confuse the two in the analysis of his dissenting opinion in a certain case. See መኳንንት ወረደ እና እነ መስከረም ዳኛው; የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት; መ.ቁ. 34803፣ 2001 ዓ.ም. Ato Berihun confuses registration of land rent with authentication of same. See Berihun Adugna Mihret, Contracts

central question of whether registration is a validity requirement for immovable transactions in Ethiopia will be addressed more easily once we establish clarification of the concepts. Thus, this section will elucidate the two concepts, their similarities and differences in thorough detail.

2.2.1 Authentication

Article 1723 (1) of the ECC provides that a contract relating to an immovable property, whether under rural setting or urban setting, must be in writing and registered with a court or notary.³³ The ECC mentions the term ‘notary’ and the equivalent term ‘public officer’ in a number of other provisions especially those relating to marriage contract and will.³⁴ This provision is of special concern for us because, as we noted, it has caused quite a lot of confusion among lawyers of all kinds and levels in Ethiopia and the Amhara region. The source of the confusion is the use of the term ‘registration’ in the English version of this provision.³⁵ The question is whether the term ‘registration’ in this provision refers to authentication or to immovable registration, a concept illustrated in later parts of this paper.³⁶

Article 1723 provides that the act of registration is to be undertaken by notary. Notaries are:

Relating to Rural Land Holding: Form, Registration and its Legal Effect in Amhara Region, *ANRS Justice Professionals Training and Legal Research Institute Law Journal*, Vol 2. No. 1, 2007, pp.186–7 (written in the Amharic language). Similarly, some courts argue that Art. 2878 of ECC on land registration prevails over Art. 1723 of the ECC on authentication, implying that the two requirements are synonymous. See the decision of the Federal Supreme Court in እነ ሙሉሸዋ ተፈራ እና እነ ሀብቱ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ ሙቁ. 21784 cited in Yohannes, *supra* note 28, p. 51. In Amhara region, discussion with judges has showed a prevalent existence of such confusion in the law and practice. Focus Group Discussion (‘FGD’) with Kegne Bezabeh, Getaye Admas, Kasahun Yehunie, and Solomon Goraw, Amhara National Regional State Supreme Court and High Court Judges (Asinua Hotel, Bahir Dar, 24 March 2016).

³³ It should be noted that authentication by the courts has no legal basis at all unlike authentication by notary offices. See below n 136. See also Addisu, *supra* note 32, pp. 46–49.

³⁴ See eg ECC, Arts. 630, 632, 891, 962, 964, 967. It should also be noted that the ECC is not the only law which mentions or deals with the institution of notary or equivalent institutions. See Bezawork Shimelash, The Legal Status of Our ‘Notaries’ in Addis Ababa, *Wonber: Alemayehu Haile Memorial Foundation’s Bulletin*, 15th Half Year, 2015, pp. 98, III-114.

³⁵ The Amharic version of this provision, which is a controlling version, does not use the term ‘registration’. It simply says that the act be made before a notary.

³⁶ See Section 2.2.2 below.

*public officials instituted for the purpose of receiving all acts and contracts to which the parties are required by law, or desire, to invest with the character of authenticity attaching to the acts of the public authority, of establishing the date thereof, of having the custody of the originals, and of furnishing copies.*³⁷

They are well known public officers worldwide who undertake the act of authentication who do so by a public seal and signature.³⁸ Consistent with the international practice,³⁹ in the absence of any contrary legal provision which provides for a different function of notaries in Ethiopia, we can argue that Article 1723 deals with authentication, and not immovable registration.⁴⁰

So why does the ECC under Article 1723 use the term ‘registration’? The reason is that, firstly, it is not unusual to use the term ‘registration’ in relation to authentication. As can be seen from the above definition given for ‘notaries’, one of the functions of notary is to have the custody of the originals of acts authenticated. In this sense, notarial acts are drawn up in originals and copies; the originals remain in the notary office, whereas certified copies are given to the parties.⁴¹ The notary is required to keep a daily journal or record of all the acts which are received.⁴² The acts are kept in chronological order, indicating whether the act is a sale, lease, will, etc.,

³⁷ Amos and Walton’s, *Introduction to French Law* (2nd ed, Clarendon Press, Oxford, 1963), p. 24 quoted in Yohannes, supra note 28, pp. 52–3. Cf Authentication and Registration of Documents’ Proclamation, 2015, Proclamation No. 922/2015, *Fed. Neg. Gaz*, Year 22, No. 39 (hereinafter ‘ARD’), Art. 2(5).

³⁸ Pothier, *A Treatise on the Law of Obligations, or Contracts* (Volume I, A Straham, London, 1806) cited in Yohannes, supra note 28, p. 54.

³⁹ For a comparative study of notary at an international level, see generally Thomas Gebreab, *The ‘Notariat’ in Ethiopia: Its Present Functions and Status in Comparative Perspective* (LLB Thesis, Addis Ababa University, Faculty of Law, 2000); Bezawork, supra note 34.

⁴⁰ The FSCCD has also claimed that Art 1723 of the ECC refers to authentication and not registration of immovables. See *Gorfe* case and the reasons given for its interpretation to this effect. But note that the ECC does not use the term ‘authentication’. Sileshi Gizaw, *Critical Analysis of Provisions of the Civil Code Pertaining to Proof in Relation to Contracts* (LLB Thesis, Addis Ababa University, Faculty of Law, 2004), p. 39. But there are other several provisions in the ECC which mention the word ‘authenticate’. See Arts. 2007, 2009, 2010, 1967, 1970, 1989.

⁴¹ Yohannes, supra note 28, p. 55.

⁴² *Id.*, p. 57 (citation omitted).

and bound into volumes.⁴³ This activity is much the same as the activity of registration per se as will be further elaborated below.⁴⁴ So it is not surprising, if not appropriate, that the term ‘registration’ is being used. In fact, the authentication laws use the term ‘registration’.⁴⁵ According to the ARD, ‘to register a document’ means ‘to register a document in a register prepared for the purpose by giving identification number or to register and deposit a document which is required by law to be deposited with authentication and registration institution’.⁴⁶ Secondly, the information kept in the notary has much similarity to that kept in a land registration office.⁴⁷ Yohannes has argued that this is the reason why Article 1723 of the ECC has used the term “registration” to refer to “authentication” although the latter may be a more appropriate term.⁴⁸

But what is the meaning of authentication? According to the ARD, ‘to authenticate a document’ means:

*to sign and affix a seal by witnessing the signing of a new document by the person who has prepared such document or the person it concern and after ascertaining that this formality is fulfilled; or to sign and affix a seal on an already signed document by ascertaining its authenticity through an affidavit or specimen signature and/or seal.*⁴⁹

Authentication is the way of ascertaining that a written instrument or document has a status of being genuine or trustworthy.⁵⁰ It involves administering and witnessing the conclusion of different types of contracts and other instruments.⁵¹ This implies that the terms of the instrument (rights and duties), signatures and identities of the parties to the contract and

⁴³ Ibid.

⁴⁴ See Section 2.2.2 below.

⁴⁵ See ARD, Art. 18. See also ECC Arts. 558(2), 891(2).

⁴⁶ ARD, Art. 2(3).

⁴⁷ Yohannes, supra note 28, pp. 57-8.

⁴⁸ Id, pp. 56, 64.

⁴⁹ ARD, Art. 2(2).

⁵⁰ Sileshi, supra note 40, p. 39. The term “authentic” means genuine, true, real, trustworthy, credible, etc: at Ibid (citation omitted).

⁵¹ Sileshi, supra note 40, p. 41.

witnesses are ascertained.⁵² Authentication, therefore, conclusively establishes three things: namely, that an act was in fact so executed, that the recitals and agreements expressed in the act are accurate reports of the parties' intentions,⁵³ and that any fact that the act recites to have occurred, did occur.⁵⁴ The effect of authentication is fighting against fraudulent, that is illegal and immoral, activities.⁵⁵ Further, authentication proves the date of conclusion of the instrument.⁵⁶ When an instrument passes through the stage of authentication, it is referred to as an "authentic act".⁵⁷ Now, let us see the other term: immovable registration.

2.2.2 Registration

Registration, that is, land or immovable property registration is another formal requirement for immovable transactions in Ethiopia. The ECC is clear on this when it says '[a]n entry in the registers of immovable property shall be required for the purpose of transferring by contract or will the ownership of immovable property'.⁵⁸ This requirement is envisaged with regard to several other transactions and under different land registration and use laws both at national and regional levels. At the national level, the Urban Landholding Registration Proclamation⁵⁹ and the Rural Land Administration and Land Use Proclamation⁶⁰ provide for the requirement of registration. At the regional level, the Amhara Revised Rural Land

⁵² Ibid.

⁵³ The ARD states that a document authenticated and registered in accordance with the Proclamation shall be conclusive evidence of its contents which can be challenged only with the permission of a court for good cause: at Art 23.

⁵⁴ Yohnnes, supra note 28, p. 54.

⁵⁵ John M Mzauile, et al, *Evidence Cases and Materials* (5th Ed, Brooklyn the foundation press, Inc 1965) cited in Sileshi, supra note 40, p. 41. See also ARD, Art 13(1).

⁵⁶ See ECC, Art. 2015; Commercial Code of the Empire of Ethiopia, 1960, Proc. No. 166/1960, *Neg. Gaz.*, Gazette Extraordinary No. 3, Arts. 891(3), 761(2).

⁵⁷ See ECC, Art. 2010.

⁵⁸ See Id, Art. 1185.

⁵⁹ Urban Landholding Registration Proclamation, 2014, Proc. No.818/2014, *Fed. Neg. Gaz.*, Year 20, No. 25, Pt. V (hereinafter 'FULRP').

⁶⁰ Rural Land Administration and Land Use Proclamation, 2005, Proc. No. 456/2005, *Fed. Neg. Gaz.*, Year 11, No. 44, Art. 6 (hereinafter 'FRLAUP').

Administration and Use Proclamation⁶¹ provides for registration. After reading of the ECC and other recent laws, we can see that the formal requirement of registration may be required for many transactions such as sale, lease, will, etc.⁶² In order to better understand the term, let us see it from an international perspective first and then from an Ethiopian point of view.

2.2.2.1 The Meaning of Land Registration from an International Perspective

There are two well known land registration systems in the world, namely, ‘cadastre’ and ‘land register’.⁶³ The term ‘cadastre’ is used mainly in continental Europe (notably in France) where it was originally linked to taxation purposes (fiscal cadastre), as opposed to the Anglo-American world.⁶⁴ An authoritative definition of cadastre is given as follows:

*A Cadastre is normally a parcel based, and up-to-date land information system containing [a] record of interests in land ... It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, the ownership or control of those interests, and often the value of the parcel and its improvements. It may be established for fiscal purposes (e.g. valuation and equitable taxation), legal purposes (conveyancing), to assist in the management of land and land use (e.g. for planning and other administrative purposes), and enables Sustainable Development and environmental protection.*⁶⁵

⁶¹ Amhara National Regional State Revised Rural Land Administration and Use Determination Proclamation, 2006, Proc. No. 133/2006, Zikre Hig, Year 11, No. 18, Arts. 23 and 24 (hereinafter ‘ARLAUP’).

⁶² See Section 2.2.2.2 below.

⁶³ Other terms often used in the cadastral literature, sometimes interchangeably include land titling, land certification and formalisation. For a detailed discussion on the meaning of each of these terms, see Melkamu Belachew, *Modelling Legislation for a Sustainable Cadastral System* (PhD thesis, the University of Melbourne, Melbourne Law School, 2015), pp. 28–29.

⁶⁴ Gerhard Larsson, *Land Registration and Cadastral Systems: Tools for Land Information and Management* (Meddelande, 2nd ed, 2000), p. 24 cited in Melkamu, supra note 63, p. 24.

⁶⁵ The International Federation of Surveyors (FIG), *FIG Statement on the Cadastre* (Pub. No 11, 1995) quoted in Melkamu, supra note 63, p. 24.

This definition suggests three major components of a cadastre.⁶⁶ First, a cadastre contains information about a particular piece of land- parcels or lots, property units or legal land objects. Second, we see that cadastre contains a record of proprietor's or holder's interests in land and his/her identity.⁶⁷ These interests constitute the substantive components of a cadastral system and are best referred to by the generic compound term 'rights, restrictions and responsibilities', a term frequently used in the cadastral system literature and now in our legal system especially in the ULRP.⁶⁸ Third, a cadastre can be established to achieve a combination of purposes or functions. It may be established for fiscal purposes, land use planning, legal purposes (conveyancing) and so on. The cadastre established for legal purpose is also referred to as a juridical cadastre⁶⁹ or legal cadastre and serves as a legally recognized record of land tenure. It is closely related to land registration⁷⁰ (land register) and hence may be considered to be equivalent to the latter.

The term 'land register' (also sometimes referred to as 'land registration') is normally an up-to-date and ownership-based record system. The term is used more or less exclusively in the Anglo-American world (traditionally known as the common law world), although the German land registration

⁶⁶ See also Milt Reimers, "Stuck in No Man's Land": How Developing Countries Can Allocate Property Rights as a Means to Improve Their Citizens' Welfare and Grow Their Economies, *Loyola Journal of Public Interest Law*, Vol. 11, 2010, pp. 1,15-6 (citations omitted) cited in Melkamu, supra note 63, p. 24.

⁶⁷ The information with respect to the proprietor may include a name, as well as possibly the individual's date and place of birth. Reimers, supra note 66, p. 15 (citations omitted) cited in Melkamu, supra note 63, p. 24.

⁶⁸ See, eg FULRP, Art. 30.

⁶⁹ See generally Rohan Bennett, *Property Rights, Restrictions and Responsibilities: Their Nature, Design and Management* (PhD Thesis, University of Melbourne, 2007), pp. 71-5; Peter F Dale and John D McLaughlin, *Land Information Management: an Introduction with Special Reference to Cadastral Problems in Third World Countries* (Clarendon Press, 1988), p. 13; J D McLaughlin and S E Nichols, *Resource Management: The Land Administration and Cadastral Systems Component* (1989), p. 82 (citation omitted) all cited in Melkamu, supra note 63, p. 25.

⁷⁰ Jaap Zevenbergen, *Systems of Land Registration Aspects and Effects* (PhD Thesis, University of Melbourne, 2002), p. 28 cited in Melkamu, supra note 63, p. 25.

system (*Grundbuch*) also refers to the same concept.⁷¹ Henssen defines land register as:

*a process of official recording of rights in land through deeds or as title on properties. It means that there is an official record (land register) of rights on land or of deeds concerning changes in the legal situation of defined units of land. It gives an answer to the questions who and how.*⁷²

In light of the above definition, land registration (used in its narrow context or ‘land register’) can be considered as part of cadastre. However, there has been confusion regarding the relationship between the two and their use. This confusion arises because the registration of information about land parcels has traditionally been carried out separately from the registration of data about interest holders or proprietors. Along these lines, it was claimed that cadastre focuses on the question of ‘where’ and ‘how much’ whereas land registration focuses on the question of ‘who’ and ‘how’.⁷³ The ‘where’ refers to the location of the land parcel and its boundaries; and the ‘how much’ refers to the size of the land parcel. With respect to land registration, it answers the question ‘who’ because its main focus is the identification of the proprietor, and the question ‘how’ because it indicates the manner or mode of transaction by which the proprietorship is transferred from the previous proprietor to the new one, such as in a sale contract.

2.2.2.2 The Meaning of Land Registration from the Ethiopian Context

The concept was little understood under the Ethiopian legal system due to lack of settled and comprehensive legislative framework, absence of consistent and modern land registration practice and tradition, absence of appropriate law curricula on land registration and the consequent lack of trained professionals on land registration. But these circumstances began to rapidly change towards the end of the 20th century, following the adoption of new rural land registration and use laws and large scale launching of land

⁷¹ Zevenbergen, supra note 70, p. 27 cited in Melkamu, supra note 63, p. 26.

⁷² Jo Henssen, *Basic Principles of the Main Cadastral Systems in the World*, <http://www.fig.net/commission7/reports/events/delft_seminar_95/paper2.html> accessed on 08 August 2016.

⁷³ Id, p. 72.

registration or certification projects in various parts of the country.⁷⁴ Similar procedures were adopted with regard to urban land since the adoption of the ULRP in 2014.

In order to obtain a full picture of the manner in which our legal system defines the terms, let us first quote the definitions. According to the RLAUP, “[L]and registration” means the process whereby information on the expression of rural land use right and holding is gathered, and analysed’.⁷⁵ The ULRP states:

*“[R]egistration” means the process by which a landholding right, restriction, and responsibility is registered in the legal cadastre register.*⁷⁶

*“[L]egal cadastre” means an updated landholding information system containing a record of the rights, restrictions and responsibilities on a defined legal boundary for each landholding demarcated as parcel on map.*⁷⁷

The ARLAUP states that “[I]and registration” means an activity of registering the detailed information about location, area, boundaries, fertility grade, and the identity of the holder on the book concerning the rural land’.⁷⁸

Apart from ARLAUP, all the other land registration and use laws define land registration as a method of recording or registering, gathering and analysing relevant information about a landholding right, restriction, and responsibility. The former, however, provides a different definition. It provides that land registration is a method of recording information about ‘location, area, boundaries, fertility grade’ of a parcel of land. Even if it includes registering ‘the identity of the holder’ of land, this is not equivalent to ‘rights, restrictions and responsibilities’. But the practice of land registration in the Amhara region actually tends to the definitions given under the other laws as the land holding rights are registered. On the other

⁷⁴ These programs began following the coming into force of the Federal Rural Land Administration Proclamation No 89/1997 which was later replaced by the FRLAUP.

⁷⁵ FRLAUP, Art. 2(15).

⁷⁶ Id, Art. 2(18).

⁷⁷ FULRP, Art. 2(5).

⁷⁸ ARLAUP, Art. 2(20).

hand, apart from ULRP, the other mentioned laws do not mention the word ‘cadastre’. The former does not use the term ‘cadastre’ but ‘legal cadastre’ which, as we mentioned earlier, refers to ‘land register’.

From the illustrative definitions provided above, it can be concluded that the trend in our legal system is towards a ‘multipurpose cadastre’ system whereby the two tasks, i.e. cadastre and land register, are designed to be undertaken in an integrated or uniform manner. From the reading of the letters of the law, there is no need to keep a separate record for land parcels, on the one hand, and proprietors, on the other hand. Instead, a simple and pragmatic approach whereby the different data are envisaged to be maintained at a same system, is being followed.

However, the definition given for each of the terms in question – cadastre and land register– under our legislation remains cloudy, at least at a theoretical or conceptual level. It is thus useful to stay in tune with international definitions delivered earlier until our laws become more precise.

With regard to the scope of registration, the law stipulates that all rights, restrictions, and responsibilities stipulated in contracts relating to immovable property shall be registered.⁷⁹ The contracts may be related to ‘total or partial sale, donation, inheritance, assignment of share, contribution in kind’, mortgage, lease, sub-lease, rent, property attachment, and ‘other act or event’ as may be permitted by law shall be registered.⁸⁰ In addition, ‘all decisions, orders rendered or contracts concluded by a legally authorized organ to extinguish, reduce, expand, modify or amend rights, restrictions or responsibilities’ shall be registered.⁸¹ The Amhara region laws also provide for the registration of rights, restrictions, and responsibilities.⁸²

⁷⁹ FULRP, Art. 30(1).

⁸⁰ Id, Art. 30(2) (4) (5); FRLAUP, Art. 6(5) (6).

⁸¹ FULRP, Art. 30(3).

⁸² See eg, ARLAUP, Arts. 23, 24. For a more detailed discussion on this matter, see Berihun, *supra* note 32, pp. 184–195

2.2.3 Comparison between Authentication and Registration

Both authentication and registration deal with transactions on immovable property. Both intend to bring certainty and security in transactions.⁸³ Authentication makes it more difficult for persons without capacity to create the semblance of a valid title.⁸⁴ Both engage in registration of documents as well as conserve the information. Especially in the case of deed registration, the deed or document or transaction is registered.⁸⁵ In this regard, Yohannes notes:

*[Deed] registration essentially means “transcription” or “recordation”. It is the copying of an act relating to the disposition of a right...by an official usually known as the Registrar or the Conservator of Registers. When an act (deed) is presented to him for registration, the conservator makes a summary of the deed and records it in the special register... [T]he system is essentially a registration of owners rather than a registration of land. The registers are kept according to the names of persons and it is the list of the names of owners that forms the index of the Registers.*⁸⁶

But the two formality requirements are quite different from each other, mainly in their focus in purpose and nature. Authentication certifies the authenticity of an act but registration keeps information on immovable property and property rights thereof. But since an act authenticated embodies information on immovable property rights, there is, to that extent, similarity. That is why Yohannes has claimed that ‘a visit at the notary’s

⁸³ See Yohannes, supra note 28, p. 59.

⁸⁴ Thomas, supra note 39, p. 20.

⁸⁵ ‘A deed is a record of a particular transaction and serves as evidence of this specific agreement, but it is not itself a proof of the legal right of the transacting parties to enter into and consummate the agreement’. United Nations (1973), *Report of the Ad Hoc Group of Experts on Cadastral Surveying and Mapping* cited in Larsson, supra note 64, p. 18. The other type of land registration is called title registration where the title/ownership itself is registered and is itself a proof of ownership and its correctness is secured or guaranteed by the state. UN, supra note 85. While deed registration focuses on the owner, the title system focuses on the land parcel and registers properties by presenting “what is owned by whom”. S Enemark, I Williamson and J Wallace, *Building Modern Land Administration Systems in Developed Economies*, *Spatial Science*, Vol 50, No.2, 2005, pp. 51, 53.

⁸⁶ Yohannes, supra note 28, p. 40.

office where the land is situated would yield, to the prospective purchaser, much the same information as a visit to the land registry would'.⁸⁷

In the case of land registration, the law stipulates that all rights, restrictions, and responsibilities stipulated in contracts relating to immovable property shall be registered.⁸⁸ The contracts may be related to 'total or partial sale, donation, inheritance, assignment of share, contribution in kind', mortgage, lease, sub-lease, rent, property attachment, and 'other act or event' as may be permitted by law shall be registered.⁸⁹ In addition, 'all decisions, orders rendered or contracts concluded by a legally authorized organ to extinguish, reduce, expand, modify or amend rights, restrictions or responsibilities' shall be registered.⁹⁰ The Amhara region laws also provide for the registration of rights, restrictions, and responsibilities.⁹¹

Similarly, authentication can normally be undertaken with respect to instruments relating to diverse types of rights, restrictions, and responsibilities. In this regard, Yohannes notes that it is not only contracts that affect title, or ownership, which have to be "registered" pursuant to Article 1723 of the ECC but also all registrable interests to land which are also indicated under Title X of the ECC in Articles 1568 to 1574 of the ECC.⁹²

Another difference between the two is that authentication information is private to the parties⁹³ in the contract whereas registration information is public in line with the principle of publicity.⁹⁴ The principle of publicity implies that the land registers are open for public inspection, and that the published facts can be upheld as being more or less correct by third parties in good faith so that they can be protected by law.⁹⁵

⁸⁷ Id, pp. 57–8.

⁸⁸ FULRP, Art. 30(1).

⁸⁹ Id, Art. 30(2)(4)(5); RLAUP, Art. 6(5)(6).

⁹⁰ FULRP, Art. 30(3).

⁹¹ See eg, ARLAUP, Arts. 23, 24.

⁹² Yohannes, supra note 28, p. 58; See also ARD, Art. 9(1)(a) cum. Art. 17.

⁹³ See ARD, Art. 21.

⁹⁴ Yohannes, supra note 28, p. 58.

⁹⁵ Henssen, supra note 72.

Depending on the specific jurisdiction, authentication may be a requirement or precondition for registration in a legal register institution. In many Civil Law countries, such as France, only documents drawn in authentic form are allowed to be registered in the land register as this assures the efficient operation of a registry system.⁹⁶

3. Effects of Formal Requirements on Validity of Immovable Transactions

What is the effect of registration and authentication on the validity of immovable transactions in Ethiopia in general and in the Amhara region in particular? The moment is now ripe to directly deal with this issue. However, the law is not very clear in regard to the effect of registration and authentication on validity although, as we have seen earlier, the effect with regard to non-fulfilment of the formal written requirement is clear enough.

3.1 Authentication vs. Validity

With regard to authentication, Article 1723(1) of the ECC stipulates that '[a] contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered with a court or notary'. But what if parties to a contract fail to meet this requirement? Unlike the written form requirements, the law does not mention the effect of this failure; it simply makes the requirement 'mandatory' which does not necessarily imply non-validity of non-fulfilment.⁹⁷ In the absence of clear provision, a gap is created and this is filled in by interpretation of the pertinent rules. This has certainly led to a difference among lawyers and judges. The FSCCD has reached different rulings on the issue.

Before the *Gorfe* case which was decided in 1999 E.C.,⁹⁸ the courts, especially the Federal Supreme Court, held that authentication by court or

⁹⁶ Rodolf B Schlesinger, *Comparative Law: Cases-Text-Materials* (5th ed, 1988) 20 cited in Thomas, supra note 39, pp. 19, 81. In contrast, Thomas notes that '[I]n the Anglo-American system of conveyancing, there is no requirement that the contract or deed be drawn by any particular person or official': at pp. 19, 20.

⁹⁷ But note that Judge Ali Mohammed says this is a directory, not mandatory provision. Workeneh, supra note 4, p. 68.

⁹⁸ *Gorfe* case, supra note 28.

notary was not necessary to validate contracts on immovable property.⁹⁹ The main relevant reasons given for this position were that Article 1723(1) does not put the consequence of failure to authenticate a contract, that the ECC under Article 2877 provides that failure to meet the written requirement invalidates a contract relating to immovable property while it fails to provide the same consequence for authentication,¹⁰⁰ and that Article 2877 which requires a written form requirement for validity prevails over Article 1723(1), a provision that renders neither written form nor authentication a validity requirement, according to the principle of legal interpretation- the special prevails over the general.¹⁰¹

In the *Gorfe* case, however, the FSCCD held that a contract of sale of an immovable can only be valid if both requirements of writing and authentication are fulfilled.¹⁰² This means that a contract of sale of immovable property will be deemed inexistent or null and void failing to meet these requirements.¹⁰³ According to the court, public policy demands that special protection be given to contracts relating to immovable properties.¹⁰⁴

In a later ruling, the same court ruled that non-fulfilment of Article 1723(1) does not result in the invalidation of a sale contract (of immovable property) provided that both parties admit the conclusion of the contract.¹⁰⁵ However,

⁹⁹ See, eg, ማሞ ደምሴ እና አያሌው ገ/አግዚአብሔር፣ ፌደራል ሰበር ሰሚ ችሎት፣ መ.ቁ.18380፣ 2000 ዓ.ም.

¹⁰⁰ እነ ሙሉሸዋ ተፈራ እና እነ ሀብቴ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ. 21784 cited in Mekbebe, supra note 2, p. 154.

¹⁰¹ Mekbebe, supra note 2, p. 166.

¹⁰² See *Gorfe* case cited in Yohannes, supra note 28, p. 51. See also መሰረት በቀለ እና ኤልሳ ሰሞኔላ፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 57356፣ 2003 ዓ.ም.; ሸፈራው ደጀኔ እና ጸሀይ ተስፋዬ እና ሲሳይ ከበደ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 78398. In another case, the FSCCD held that the authentication formality may not be required to validate sale of immovable provided that the authentication office does not exist in time or in place. See ቀይ አፈር ገዳሞች እና ኤርሚያስ ገሰሰ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 98079፣ 2006 ዓ.ም. cited in Berihun, supra note 32, p. 183.

¹⁰³ For discussion of the meaning of these concepts, see generally Yohannes, supra note 28, pp. 65-68.

¹⁰⁴ *Gorfe* case cited in Yohannes, supra note 28, p. 33.

¹⁰⁵ አልጋነሽ አበበ እና ገብሩ እሸቱ እና ወርቂቱ እሸቱ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 36887፣ 2001 ዓ.ም. In another case, the FSCCD ruled that any objection regarding authentication requirements under Art. 1723(I) of the ECC may not be raised by the court but by the parties to

this ruling sparks several concerns. Does it make a difference if it is proved that the parties have actually concluded the contract but either of them alleges that he/she has not concluded it? Is this to be considered as denial? That is, is denial or admission a matter of fact/proof or merely of party allegation? If it is a matter of fact or evidence, it will not be a problem as the law provides that the court may order verification by expert devices when a party to a contract denies the alleged handwriting and signature on a non-authenticated document (such as sale and will) established against him/her.¹⁰⁶ If we consider it as a matter of mere party allegation, it is inconceivable how a party may need to admit the conclusion of the contract and at the same time run to invalidate it. That is to say, if a party wants to invalidate a contract, he/she will most likely deny the very formation or conclusion of the contract even if the contract actually existed. On the other hand, if a contract is actually concluded (and this is proved) but one party simply alleges that it does not exist, i.e. he/she denies it, it is not sound for the court to run to invalidate it based on such mere allegation. It is not wise to make validity of contracts to immovable property be dependent on mere allegation of parties. We believe that the need to ensure security in immovable transactions warrants extraneous safeguards. So, it seems that this ruling has brought about more problems than it solves.

Some judges, do not agree with the position of the Federal Supreme Court in the *Gorfe* case. Thus, Judge Ali Mohammed, in his dissenting opinion, argues that the court’s interpretation and application of Article 1723 ECC is flawed.¹⁰⁷ He makes his argument on the basis of distinction between ‘mandatory’ and ‘directory’ provisions of the law. If a legal provision prescribes that a result such as one of invalidation will follow when a requirement is not met such as a requirement of authentication, then that provision is mandatory.¹⁰⁸ A directory provision, in contrast, is a ‘statutory

the suit. የህጻን ኮከቤ ተረፈ ሞግቢትና አስተዳዳሪና እነ አያሌው ካሳዬ (2 ሰዎች) ፣ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 43825፣2002 ዓ.ም. cited in Berihun, supra note 32, p.183. But this is not true for ‘void’ contracts: at p. 184.

¹⁰⁶ ECC, Art. 2007 cum. Art. 2008.

¹⁰⁷ See መሀዲን ፋሪስ እና እያሱ ብ/ማርያም፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 29233፣ መኳንንት ወረደ እና እነ መስከረም ዳኛው፣የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 34803፣ 2001 ዓ.ም.

¹⁰⁸ See Black, supra note 5 cited in Workeneh, supra note 4, p. 69.

provision which does not relate to the essence of things to be done, and as to which compliance is of convenience rather than substance'.¹⁰⁹ This means failure to observe a directory provision does not result in invalidation of a contract. In light of this, Article 1723 of the ECC is a directory provision, not a mandatory provision.¹¹⁰

Several other lawyers also do not consider the rulings of *Gorfe* case, and the like, appropriate.¹¹¹ They argue that the interpretation in *Gorfe* case has a negative impact on social, economical, political, cultural and moral affairs of the people and thus should be overruled.¹¹² In particular, it is feared that 'given the sky rocketing prices currently being witnessed in the housing market, the ruling of the Court may embolden unscrupulous sellers to renege on contracts already sealed and even disown transactions long considered closed'.¹¹³

Let us see the practice with respect to other transactions to further show the inconsistency between the law and the practice. With regard to house rent, the FSCCD decided that authentication was not required for its validity as, according to the court, it does not fall under the terms 'contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable' in Article 1723(1) of the ECC.¹¹⁴ In *Ato Alehegn G/Hiwot vs. Woizero Atenesh Bekele et al*, the court ruled that authentication is not a requirement for a donation contract as far as the fulfilment of the forms governing a public will is ensured as per Article 2443 of the ECC.¹¹⁵ Another exception is a contract of mortgage. In this regard, a law was issued which clearly cancelled the application of Article 1723, i.e. the authentication of mortgage instruments. This law states

¹⁰⁹ መኳንንት ወረደ እና እነ መስከረም ዳኛው፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 34803፣ 2001 ዓ.ም.

¹¹⁰ Ibid

¹¹¹ See eg, generally Mekbebe, supra note 2; Workeneh, supra note 4, pp. 102–104.

¹¹² See eg, Workeneh, supra note 4, p. 102.

¹¹³ Yohannes, supra note 28, p. 31; Mekbebe, supra note 2, p. 169.

¹¹⁴ የኪራይ ቤቶች አስተዳደር ድርጅት እና ሶስና አስፋው፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 15992፣ 1997 ዓ.ም.

¹¹⁵ አለኸኛ ገ/ሀይወት እና እነ አጤነሽ በቀለ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ. 39803. See also እነ ሲሳይ ካብትይመር እና እነ አበበች ታደሠ፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 17742.

that ‘a contract of mortgage concluded to provide security to loan extended by a bank or micro financing institution may not be required to be registered by a court or a notary’.¹¹⁶

Let us now see the essence of the ARD with regard to the issue at hand. The ARD clearly provides that authentication is a validity requirement in only three cases. These cases involve documents that shall be authenticated and registered in accordance with the appropriate law, a power of attorney or revocation of power of attorney, and memorandum and articles of association of business organizations and other associations, and amendments thereof.¹¹⁷

Other than these specified documents, the law clearly provides that the notary shall authenticate and register only if requested by the concerned parties.¹¹⁸ The term ‘documents that shall be authenticated and registered in accordance with the appropriate law’ is worth inquiring in relation to Article 1723 of the ECC. As Article 1723 provides, authentication shall be made to transactions on immovable property, can we consider that to be the ‘appropriate law’? Unfortunately, this does not seem to be the case because Article 9 of the ARD excludes transactions on immovable property from the list of the transactions that require authentication for their validity. In fact, these transactions are mentioned clearly but they are deemed to be ‘documents submitted for authentication and registration’¹¹⁹ which places them under the transactions to be authenticated ‘if requested by the concerned parties’. This is therefore the latest addition to the inconsistency as it contradicts the rulings of the court such as in the *Gorfe* case.

These authors believe that further investigations need to be made to suggest the most appropriate position to hold regarding the effect of authentication on immovable transactions. The current international standards need to be considered as well. The socio-economic importance of authentication needs

¹¹⁶ A Proclamation to Provide for the Amendment of the Civil Code, 2009, Proc. No. 639/2009, *Fed. Neg. Gaz*, Year 15, No. 46.

¹¹⁷ ARD, Art. 9(1).

¹¹⁸ Id, Art. 9(2).

¹¹⁹ Id, Art. 17(1).

to be measured properly before determining its effect especially given the other formality requirement of immovable registration.¹²⁰

3.2 Effect of Immovable Registration

While the effect of authentication is determined by the FSCCD, the effect of land registration is not. Like in the case of authentication, however, the law requires land registration in many immovable property transactions. In particular, Article 1185 of ECC states that '[a]n entry in the registers of immovable property shall be required for the purpose of transferring by contract or will the ownership of immovable property'. In addition to sale contracts and wills with regard to immovable property, other transactions also require this formality in one way or another although, as will be noted, not necessarily for their validity.

However, what is the effect of failure to register in a land registration authority? The general direction of our law is that land registration, although compulsory, is not a requirement for validity of transactions to immovable property.¹²¹ The active provisions of the ECC such as Article 1185 do not say anything about the effect of failure to register.¹²² But in the suspended part, the ECC provides that '[t]he keepers of registers of immovable property may not decide on the validity of acts which are presented to them for registration in the registers'.¹²³ Despite its suspension, municipalities

¹²⁰ In general, a formality requirement can be used for at least three consequences: to determine the validity of the transaction, to prove the existence of the transaction, and to protect the interest of third parties. Mulugeta M. Ayalew, Ethiopia, in International Encyclopedia of Laws: Contracts, in J. Herbots, Alphen aaden Rijn, NL (ed.); *Kluwer Law International*, 2010, p. 65 cited in Berihun, supra note 32, p. 167, 180. See also Fekadu Petros, Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia, *Ethiopian Journal of Legal Education*, Vol. 1, No.1, 2008, pp. 4–7; Franziska Elizabeth Mybrugh, *Statutory Formalities in South African Law* (Doctorate Degree Dissertation, Stellenbosch University, 2013), p. 21; Yoseph Aemro and Filipos Aynalem, *Form and Legal Interpretation of Contracts for the Transfer of Immovable Property* (Federal Justice Organ Professionals Training Center, 2003 E.C.), pp. 122-123 all cited in Berihun, supra note 32, p. 180.

¹²¹ See also Berihun, supra n 32, p. 184.

¹²² As we noted earlier, these types of provisions are referred to as 'directory' provisions. See Section 3.1.

¹²³ ECC, Art. 1637.

have long been referring to the provisions in this part.¹²⁴ More clearly, the urban landholding registration law provides that ‘[t]he mere registration of any document annexed with the application for registration may not constitute proof of its validity’.¹²⁵

So, what is the effect of immovable registration in Ethiopia? The ECC provides that ‘[t]he sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate.’¹²⁶ This means that a sale contract relating to immovable property can be raised against any third person if the contract is already registered in the land registry. This is also interpreted to mean that as between the contracting parties, registration of a sale contract is not necessary to be raised against each other.¹²⁷ That is, non-registration does not affect validity of the contract of sale between the parties to the contract. The same applies with regard to other transactions namely lease¹²⁸ or rent, servitude, usufruct, pre-emption, promise of sale.¹²⁹

Mortgage registration seems to be an exception. Thus it is provided that ‘[a] mortgage, however created, shall not produce any effects except from the day when it is entered in the register of immovable property at the place where the immovable mortgaged is situated’.¹³⁰ This means that registration of the mortgage instrument is a requirement for the validity of that instrument between the mortgagor and mortgagee. Another exception is found in the Amhara region with regard to land exchange where it is

¹²⁴ See Zewditu Teferi, *Registration of Immovables in Ethiopia-Law and Practice* (LLB Thesis, AAU, Faculty of Law, 1993), pp. 37-8.

¹²⁵ FULRP, Art. 29(3).

¹²⁶ ECC, Art. 2878.

¹²⁷ See the decision of the Federal Supreme Court in እነ ሙሉሸዋ ተፈራ እና እነ ሀብቱ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ ሙ.ቁ. 21784 cited in Yohannes, supra note 28, p. 51; Mekbib, supra note 2.

¹²⁸ But note that Art. 2899 of the ECC on registration of lease is no more applicable as it is impliedly repealed by recent land registration laws dealing with the same matter.

¹²⁹ ARLAUP, Art. 23(1) and (4), 18(5), 17(6); FULRP, Art. 30; FRLAUP, Art. 6(6); Condominium Proclamation, 2003, Proc. No 370/2003, *Fed. Neg. Gaz.*, Year 9, No 95, Art. 4; ECC, Arts. 2899, 1364, 1310(1) cum. Art. 1185, 1422, 1423. In fact, Art. 1310 (1) refers to corporeal chattels. While this is logical given the fact that usufruct, unlike servitude, applies also to corporeal chattels, it is not unreasonable to extend registration requirement to usufruct of immovable property.

¹³⁰ ECC, Art. 3052.

provided that the exchange shall be effective only upon registration in the immovable registration office.¹³¹ In the case of donation, the enforcement directive of the land administration legislations (the ARLAUP and its enforcement regulation) requires registration for validity.¹³² But given the fact that the consequence of failure to meet this requirement is not indicated in the ARLAUP and the regulation, its applicability or validity is questionable.¹³³

That registration of a transaction is required to affect third parties implies that the purpose of land registration is publicity. All persons will be able to know all information kept in the land register. Thus, the ECC provides that '[t]he buyer shall be deemed to know all the rights and burdens affecting the immovable which have been registered in the registers of immovable property in the place where the immovable is situated'.¹³⁴ Publicity is one of the principles of land registration.¹³⁵ The principle of publicity implies that the land registers are open for public inspection, and that the published facts can be upheld as being more or less correct by third parties in good faith so that they can be protected by law.¹³⁶

As it is known, land registration is in its infancy stage in Ethiopia both in practice and law. Workneh Negatu et al note that '[m]ost of the land certification undertaken in Ethiopia is very recent or, if longer in duration (e.g. in Tigray), was too poorly implemented to bring about impacts'.¹³⁷ The land register system is not yet in a position to give true service especially due to factors such as institutional drawbacks and updating problems. Bad governance problems in land administration are rampant. Given these circumstances, the title certificate which the land register institutions give

¹³¹ The Rural Land Administration and Use System Implementation Regulation No 51/2007, *Zikre Hig*, Council of the Amhara National Regional State, Year 12, No 14, Art. 8 (hereinafter 'regulation').

¹³² Directive for the Implementation of the ANRS Rural Land Administration and Use Determination Proclamation No. 133/2006 and the Rural Land Administration and Use System Implementation Regulation No 51/2007, Art. 12(7).

¹³³ See also Berihun, *supra* note 32, p. 204.

¹³⁴ ECC, Art. 288I.

¹³⁵ Henssen, *supra* note 72.

¹³⁶ *Ibid.*

¹³⁷ Workneh Negatu et al, *Impact of Land Certification in Gerado Area, Amhara Region*, 2012, p. 5.

can only be little trusted. So, it is clearly inappropriate to use land registration to determine the validity of immovable transactions at the present time both in Ethiopia and, more specifically, in Amhara. The position the law has taken at present is good although the government needs to improve the land register practice and law continually to set up the more useful land registration system, i.e. title land registration.

4. The Practice in Amhara Region

Having previously seen the laws and the diverse interpretations of the laws, the authors need to see how the courts in the Amhara region perceive and interpret the formal requirements of authentication and immovable registration. In order to enhance a comprehensive understanding of the whole process with regard to the formal requirements, that is, their meaning and their operation, we first proceed with the analysis of their status in the region. Then, the authors proceed to discuss the practice with regard to the relationship between the formal requirements and their role on the validity of immovable transactions in the context of the case study region.

4.1 Authentication Practice

No law clearly regulated the powers and functions of notaries in Ethiopia until the adoption of the Authentication and Registration of Documents' Proclamation No 334/2003.¹³⁸ However, notarial practices existed long before this law in all parts of the country. Yohannes notes:

The institution of notary was first introduced into the country by the Italians during their brief period of intrusion (1935-1941). An Italian was commissioned as a notary for the city of Addis Ababa around the years 1939 or 1940. After the departure of the Italians, notarial services were discontinued for some time until around 1945 when the Registrar of the High Court commenced providing these services. Initially confined to Addis, the service was soon extended to other localities and, in remote areas, even Registrars of Awraja and Wereda courts began rendering such services. It is said that this was made possible by a circular issued by the Ministry of Justice which circular,

¹³⁸ This law together with its amending proclamation Authentication and Registration of Documents (Amendment) Proclamation, 2005, Proc. No 467/2005, *Fed. Neg. Gaz.*, Year II, No 57 is now repealed by ARD, Art. 39.

*in addition to conferring notarial powers upon registrars, also outlined the nature of the functions to be performed. This circular was soon superseded by the Civil Procedure Code which nowhere assigns to the courts or their officials functions akin to those of a notary. Nonetheless, registrars continued performing their previous functions as if nothing affecting their powers has happened.*¹³⁹

At present, a Federal Acts and Documents Registration Office is in charge of notarial services at the national level under the Ministry of Justice.¹⁴⁰ Different structural arrangements existed before this one was established.¹⁴¹ Hence, it is possible to argue that notarial offices existed long before the adoption of the Authentication and Registration of Documents' Proclamation No 334/2003 although their structure has been designed differently at different times and the source of their statutory authority was not clear.¹⁴² Regional states and the cities of Addis Ababa and Dire Dawa are authorized to issue regulations for the proper functioning of notaries in their sphere.¹⁴³

¹³⁹ Yohannes, supra note 28, pp. 59–60 (citations omitted).

¹⁴⁰ Authentication and Registration of Documents (Amendment) Proclamation, 2005, Proc. No 467/2005, *Fed. Neg. Gaz.*, Year 11, No 57, Art. 2(1) cum. Authentication and Registration of Documents' Proclamation, 2003, Proc. No 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54, Art. 20(2). But a different federal institution will be established under ARD, Art. 38(1) cum. Art. 4.

¹⁴¹ Yohannes, supra note 28, p. 60.

¹⁴² For example, a law called the Proclamation on Definition of Powers and Duties of the Government of Ethiopia Proclamation No 8/1987 authorised the Ministry of Justice to ensure the organization of notary offices and supervise their activities although this was not realised. Bezawork, supra note 34, p. 118; Thomas, supra note 39, p. 87. *Contra* Yohannes, supra note 28, pp. 59, 61, 62. Yohannes argued that the Authentication and Registration of Documents Proclamation, 2003, Proc. No 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54 established notarial offices in the country for the first time, that the Civil Code provisions on notary were dead law before the enforcement of this proclamation. He further argues that the provisions on registration or authentication with the courts such as Art. 1723 of the ECC are not effective laws as neither the Civil Procedure Code nor other special laws passed to date enable the courts to perform such functions: at p. 61.

¹⁴³ Authentication and Registration of Documents Proclamation, 2003, Proc. No. 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54, Arts. 19(1), 20(2) cum. ARD, Art. 38(1). But so far, the Amhara region has not adopted any laws on the subject; it applies the laws of the Federal government. Interview with Tarekegn Abebe, Head, Advocates, Acts and Documents Registration Division, ANRS Justice Bureau (23 September 2009 E C).

In the Amhara region, like is the case in other regions,¹⁴⁴ the Justice Bureau is supposed to discharge this task. The Bureau derives this power from Proclamation No.230/2015.¹⁴⁵ Specifically, there is a separate unit under the Bureau called Advocates, Acts and Documents Registration Division which is supposed to undertake authentication of instruments relating to immovable property. The ARD provides that before authenticating documents relating to the transfer of properties for which title certificates are issued under the law, the notary shall ascertain that the transferor of the property has a title certificate for the property in accordance with the relevant law and that the property is not mortgaged or is not attached by a court order.¹⁴⁶ In addition, the notary shall ensure that ‘the person who has signed or is about to sign the document has legal or contractual right or authority to sign the document’.¹⁴⁷

However, scrutiny of the practice shows that authentication of transactions relating to immovable property has not been done in this way since 2001 E.C.¹⁴⁸ With respect urban areas, any immovable property transaction is processed in the Municipality during the land registration process, as will be noted below. So there is a big challenge here. The law, as we have already seen, promotes authentication by notary offices; the courts, as we shall see, also require authentication for transactions for them to be valid. On the other hand, our observations and field visits, as will also be seen in the subsequent section, demonstrate that there is no legal and practical ground to say that that the immovable registration offices and municipalities are undertaking authentication before they undertake immovable registration. The practice and the law are far apart from each other. To fill the gap created in this way, either the practice should come to terms of the law or

¹⁴⁴ Thomas, *supra* note 39, p. 94.

¹⁴⁵ Amhara National Regional State Executive Organs Re-establishment, Organization and Determination of Their Powers and Duties Proclamation, 2015, Proc. No 230/2015, *Zikre Hig*, Council of the Amhara National Regional State, Year 21, No 1, Art. 24(20).

¹⁴⁶ ARD, Art. 15(1), (2).

¹⁴⁷ *Id*, Art. 15(3).

¹⁴⁸ Interview with Tarekegn Abebe, Head, Advocates, Acts and Documents Registration Division, ANRS Justice Bureau (23 September 2009 E.C). According to him, only a will is authenticated or registered by the notary office.

vice versa. Otherwise, there will certainly be tremendous insecurity in immovable transactions.

4.2 Land Register Practice

4.2.1 Urban Land

Land registration is the responsibility of the Urban Works and Development.¹⁴⁹ The Bureau of Works and Urban Development is in charge of direct control or following up of the Municipality in this regard.¹⁵⁰ Though regulations to implement the national law, i.e. ULRP, are yet to come into force in the region, land registration in the regional cities has been handled by the Municipality in practice.¹⁵¹

The procedure of land registration is described below.¹⁵² In the case of sale and donation, the parties come to the land registration office with a written application for land registration. They submit the written contract signed by the parties and the witnesses, as evidence of ownership mainly through a priority issued title certificate given in first registration and all other necessary documents.¹⁵³ The land registration officer checks if there are any encumbrance or attachments to the land such as mortgage restrictions. A surveyor goes to the field and checks if the property is constructed according to plan and design and whether the property is really located in the place as mentioned in the sale contract. A notice is posted for 5 days for any possible third party objection. A property transfer expert also visits the

¹⁴⁹ The practice of land registration is the same throughout the country in that the Municipality or Urban Administration is in charge. For discussion with regard to the experience of Addis Ababa, see eg Wubetu Assefa, *Rights and Obligations of the Seller and the Buyer with Respect to Transfer of Ownership of Immovables and Special Movables in Ethiopia: the Law and the Practice* (LLB Thesis, Addis Ababa University, Law Faculty, 2000), p. 46, Addisu, supra note 32, pp. 45–52; Thomas, supra note 39, p. 105.

¹⁵⁰ Amhara National Regional State Executive Organs Re-establishment, Organization and Determination of Their Powers and Duties Proclamation, 2015, Proc. No. 230/2015, *Zikre Hig*, Council of the Amhara National Regional State, Year 21, No 1, Art. 16(10).

¹⁵¹ See Melkamu Belachew, *An Administrative Approach to the Need for Effective Real Estate Registration in Bahir Dar City: A Tool for Safeguarding Dwellers' Real Property Rights* (MSc Thesis, the Royal Institute of Technology (KTH), Stockholm, Sweden, 2008), p. 34.

¹⁵² These procedures are described to us during our interview with Ato Mehret Wale and Ato Derso Engedaw, Experts at Bahir Dar City Administration (Bahir Dar, 23 September 2009 E.C).

¹⁵³ Ibid, Interview.

site to estimate the value of the building. The value is sent to the Finance Office in a letter which charges a property tax of 5% for residential properties and 22% for other properties.¹⁵⁴ The property is then made to enter the lease system which means the buyer will make an additional lease payment according to the lease law. Finally, the Municipality approves the sale or donation contract and opens a file for the new owner which contains the contractual document, acquisition document, the parcel map, the design plan, and receipt for tax payment. That is, it undertakes land registration by transferring the title to the buyer or other new proprietors, as the case may be. The file of the transferor is considered as a dead file but is kept in the archive for any future reference.

With regard to mortgage, the party brings a letter from the loan provider requesting to check if the property is burdened by another encumbrance or court attachment and, if not, to put the mortgage restriction with regard to the property. The party also brings a mortgage and loan contract which has been entered with the loan provider. The land registration officer also checks the title certificate of the borrower. A transaction/service fee is paid to the finance office. The verified information is sent back to the loan provider/bank which finally approves the loan.

With regard to succession, the party brings the court judgement and asks the Municipality for title transfer. The beneficiary pays 3% of the estimated value as property tax. After checking all necessary matters, the title is transferred to the heir.

The House Valuation and Title Transfer Section of the Land Development and Management Office, under the Municipality, is in charge of land registration. The kinds of register are property register in a database, sale and donation transfer register, inheritance and court execution register, mortgage register, register of owners (file). Property rental transactions are not registered at all in the Municipality.

4.2.2 Rural Land

Land registration started with a renewed vigor in the late 1990s through out Ethiopia. Until these recent legal and practical breakthroughs, “customary

¹⁵⁴ In the case of succession, the charge is 3%.

rules” of land registration were applied despite various attempts at adopting statutory rules for land registration including the suspended rules of land registration under Title X of the ECC.¹⁵⁵ According to Yohannes Heroui, these customary rules refer to the “Rule of Ownership of Land in Addis Ababa of 1907” because, he argues, the drafter of the ECC cannot be deemed to be unaware of this rule.¹⁵⁶ While this is persuasive, it is not, however, correct to confine the application of customary rules to the 1907 rules. Customary rules may also relate to any other draft rules that were adopted at different times including the registration rules under Title X of the ECC and other attempts after 1960.¹⁵⁷

While there have been, as the authors noted, various attempts at introducing modern forms of land registration in Ethiopia since the landmark 1907 rules, it is astonishing to see the lack of a standardised national system of land registration after such long time in this ancient country.¹⁵⁸ The authors think the reason is lack of commitment on the part of the governments. As it is well known, land registration systems are public services which naturally demand a high level of commitment and good governance.¹⁵⁹

In the Amhara region, major steps began to be taken in 2000 for laying down a modern land registration system. This was when the ANRS first law on rural land administration was issued,¹⁶⁰ which was later replaced by a

¹⁵⁵ See Zewditu, *supra* note 124, pp. 36–38. Art. 3364 of the ECC provides that “[t]he customary rules relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable property may be set up against third parties shall apply.

¹⁵⁶ Yohannes, *supra* note 28, p. 49. For a summary of the main content of these rules: see at pp. 50–51.

¹⁵⁷ In 1972 a draft land registration proclamation was adopted. See Tarekegn Tefera, *The Requirement of Registration in the Transfer of Ownership under Contract of Sale* (LLB Thesis, Addis Ababa University, Faculty of Law, 1990), p. 30. Tarekegn also notes that the basis for the system of registration conducted by the Municipality of Addis Ababa for a long time was Legal Notice No 112/40 although he also admitted that the Municipality applied customary rules as that rule did not meet the needs of land registration: at pp. 31, 32.

¹⁵⁸ *Id.*, p. 39.

¹⁵⁹ Good governance is a critical success factor for having a sustainable land registration system in any modern nation. Melkamu, *supra* note 63, pp. 78–81.

¹⁶⁰ Its full title was the Amhara National Regional Rural Land Administration and Usage Determination No. 46/2000.

new law.¹⁶¹ In 2002, with the help of SIDA, the region launched a land certification program in two pilot field sites, Gerado area in Dessie Zuria *Woreda* in South Wollo and Addisse-na-Gulit *kebele* in Gozamen *woreda* in East Gojjam.¹⁶² At present, almost all rural land parcels in the region are certified under what is referred to as first level registration while second level registration is also in progress.¹⁶³

The practice of rural land registration is described below.¹⁶⁴ In the case of gift/donation and land exchange, the parties apply for land registration in the *Kebele* land registration office through a standard application form prepared by the land registration office. In this application, the party brings a book of title certificate. A notice is posted for any possible third party objection for 15 days. The parties fill in a standard contract form for the transaction. The *Kebele* land registration office sends the form which consists of the name and signature of the parties, witnesses and the views of the *Kebele* land committee members to the *Woreda* land registration office. The latter will verify if all aspects of the transaction procedure are done correctly. It requests the finance office to collect the necessary land fee. Finally, it transfers title by updating the information in the standard registration book and the land register data base called ISLA (Information System for Land Administration). The copy of the land registration book is also updated in the *Kebele* land register institution. In addition, the copies of the approved contract of transfer will be issued to both parties and the *Woreda* land registration office.

The procedure of registration of land rental contract is the same as the procedure in donation and land exchange. Upon approval of the contract, the *Woreda* land registration office shall enter a note of the rental information parallel to the corresponding parcel, the subject of rent. Registration of lease

¹⁶¹ This law is the ARLAUP.

¹⁶² Gebeyehu Belay et al, Lessons from Systematic Evaluation of Land Administration Systems. The Case of Amhara National Regional State of Ethiopia, *World Development*, Vol. 68, 2014, pp. 282-295.

¹⁶³ Interview with Abeba Yayneshet, expert, Bahir Dar Zuria *Woreda* Land Administration and Use Office (Bahir Dar, 23 September 2009 E.C.).

¹⁶⁴ These procedures are described to us during our interview with Abeba. Interview with Abeba Yayneshet, expert, Bahir Dar Zuria *Woreda* Land Administration and Use Office (Bahir Dar, 23 September 2009 E.C.).

for commercial purposes, however, is the task of the Investment Office, not the land registration office. Also mortgage of investment land is not registered in the land registry. The procedure in the case of land transfer by succession is also the same. After all the procedures are undertaken at the *Kebele* land registry level, the *Woreda* land registration office will transfer title to the party in whose favour the court has decided to be a beneficiary of inheritance, or in favour of beneficiary of a will, as the case may be.

4.3 Court Practice with Regard to the Effect on Validity

In the Amhara region, the discovery of court decisions reveals that their rulings on the question of the effect of immovable registration on validity of immovable transactions are not consistent.¹⁶⁵ However, our investigation shows that the courts usually decide in favour of a party who has presented an unchallenged evidence of registration in the land registration institutions with respect to both urban and rural lands.¹⁶⁶ Let us review a few sample cases to substantiate our argument. To begin with the case which shows the most common issue, let us consider the *Ibrahim Muhamud et al vs. Deboch Zewdie* case.¹⁶⁷ The petitioners wanted to reverse the decisions of the lower courts. The argument of the defendant in his original pleading was that the petitioners had unlawfully taken his land and planted eucalyptus trees. The petitioners denied the allegation. The Supreme Court framed the issue of who the land in dispute belonged to. It approved the decision of the lower courts which ruled in favour of the defendant based on the fact that the defendant had presented a title certificate issued by the land register institution. In the *Tiblet Tesfa vs. Abuhay Tadese* case,¹⁶⁸ the appellant required the return of the full rental money as the defendant failed to cause the registration of the rental contract. The court held that the defendant had to return the rental money paid equivalent to the one year period in which

¹⁶⁵ See Berihun, supra note 32, p. 197. For some more discussion on the effect of immovable registration on validity: see at pp. 197–204.

¹⁶⁶ This is, in fact, in line with ARLAUP which provides that '[t]he person who is granted the land holding certificate in his name shall, unless a contradictory written document is submitted, be considered legal holder of the land': at Art. 24(4).

¹⁶⁷ ኢብራሂም ሙሀመድ እና እነ ደቦቅ ደብረ-ጌታ፣ የአብዛኛው ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ ሙ.ቁ. 23764 ፣ 2005 ዓ.ም.

¹⁶⁸ ትብለጥ ተስፋ እና አቡሀይ ታደሰ፣ የአብዛኛው ጠቅላይ ፍርድ ቤት፣ ሙ.ቁ. 34089 ፣ 2005 ዓ.ም.

the appellant held the land out of the total rental period of 25 years. This means the court ruled that the rental contract was invalid due to failure of registration. In the *Lema Tekle vs. Kinfu Adisu* case,¹⁶⁹ the petitioner ran to reverse the decision of the lower courts which held that the petitioner must return the land to the defendant which he held through rent. The Supreme Court held that petitioner must return the land to the defendant because the rental contract he relied on was not registered in the land register institution. In the *Yezanu Motbaynor vs. Heirs of Getachew Abate* case,¹⁷⁰ the appellant requested that the defendants must return the lands they held to her as she was the lawful successor of a deceased woman due to her being a family member. The defendant argued that he got the lands through donation/gift contract allegedly registered in the land register institution. The ANRS Supreme Court held that defendant's claim was not tenable because there was no evidence to show that the donation contract was registered and that the donation contract did not embody the signature of the 'donor'. In the *Asrat Mekonen and Banchayehu Asres vs. Kinde Abera and Yektie Tarko* case,¹⁷¹ the appellants requested that the rental contract be cancelled because the defendants failed to discharge their obligation of paying the rent in kind (share-cropping). The defendants argued that they rented the land for 25 years and hence could not return the land before the expiration of the rental period. The court held that the rental contract cannot be invalidated as it was registered in the land register and hence the defendants may not return the land. In the *Mosit Anteneh vs. Checkol Alemu* case,¹⁷² the appellant appealed to reverse a decision of the lower High Court which ruled that the appellant must return to the defendant the land the appellant's deceased husband allegedly took through rent. The ANRS Supreme Court reversed the decision and held that appellant may not return the land to the defendant because the evidence from the land register institution showed that the land was registered in the name of the appellant's deceased husband during the first registration process and then passed to the appellant. This means had

¹⁶⁹ ለማ ተክሌ እና ክንፌ አዲሱ፣ የአብዛመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ ሙ.ቁ. 23770፣2005 ዓ.ም.

¹⁷⁰ ይዛኑ ሞትባይኖር እና የጌታቸው አባተ ወራሾች፣ የአብዛመ ጠቅላይ ፍርድ ቤት፣ ሙ.ቁ. 33427፣2005 ዓ.ም.

¹⁷¹ እነ አስራት መኮንን (2 ሰዎች) እና እነ አስረስ ክንዴ (2 ሰዎች)፣ የአብዛመ ጠቅላይ ፍርድ ቤት፣ ሙ.ቁ. 33666፣ 2005 ዓ.ም.

¹⁷² ሞሲት አንተነህ እና ቸኮል አለሙ፣ የአብዛመ ጠቅላይ ፍርድ ቤት፣ ሙ.ቁ. 32993፣2004 ዓ.ም.

the defendant presented evidence of a registered rental contract with the appellant; he could have gotten a remedy of payment of damages or perhaps the termination of the rent.

The defendant evidence may assume two forms. One is an attachment of a certified copy of a title certificate or land registration book with the copy of a pleading. Another form is a letter written by a land register institution to the effect that the land in dispute is registered in someone's name. The latter is used when the party has for some reason failed to attach the title certificate.

From the foregoing cases, the authors can see the common practice¹⁷³ that if land is registered in someone's name and if the land registration office proves this in an unchallenged manner, then that party has a conclusive evidence of his valid land holding right to the land.¹⁷⁴ This shows that the usual practice is in favour of title registration rather than deed registration. The registration is the sole source of title to land, i.e., land holding right. In other words, registration determines validity of the transaction which is the initial cause of transfer of title from one person to the other. This is in clear contradiction with the law, both the national and regional, which, at least by interpretation, provides that immovable registration is not a requirement for validity of immovable transactions.¹⁷⁵ While making land registration necessary and mandatory in relation to many transactions,¹⁷⁶ the Amhara land registration law provides that '[u]nless any activity concerned with the right and obligations related to land is submitted and registered in *Woreda* branch office of the Authority, it may not be an objection to the third

¹⁷³ However, in rare cases the courts may hold the opposite position that registration does not affect validity. See eg Berihun, supra note 32, pp. 197-204.

¹⁷⁴ But we should also note that an immovable transaction although registered may be rebutted in certain circumstances especially after the FSCCD's landmark ruling that land registration evidence given by a land registration office is not a conclusive evidence and may be rebutted by other evidences. See **ጥላውን ገበዜ እና እነ መከተ ኃይሉ (2 ሰዎች)፣ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 69821፣ 2004 ዓ.ም.** In another case, the court decided in favour of the appellant when it held that registration of a gift contract alone does not cure the other defects in the contract. The court saw that the contract does not fulfil the requirements under Art 881 cum. Art 2443 of the ECC, namely, that it was not read in the presence of the testator and of four witnesses. See **አባተ ካሣ እና ተሻለ ከፋሉ፣ የአብዛኛ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 24918.**

¹⁷⁵ See Section 3.2.

¹⁷⁶ See ARLAUP, Arts. 23(1), 17(6), 18(5).

parties'.¹⁷⁷ This implies that registration has nothing to do with the validity of the immovable transaction as between the parties to the transaction.¹⁷⁸ This contradiction between the court practice and the law will certainly continue to contribute to the existence of different decisions regarding the effect of immovable registration on the validity of transactions.

With regard to authentication requirement, the courts are trying to follow the FSCCD in relation to the question of validity. That is, authentication is a requirement of validity of the transaction concerned. The problem, in this regard, though, is the courts mostly confuse authentication with land registration.¹⁷⁹ To complicate matters more, we have already seen that authentication is not actually carried out by notary offices or immovable registration offices with respect to urban land and rural land. Most likely, this is the reason why the courts have wrongly, as we indicated above, made registration a validity requirement in most of their decisions. For most courts, when the FSCCD made authentication a validity requirement in the *Gorfe* case, that was the same as rendering immovable registration a requirement of validity of immovable property transactions.

5. Conclusion

The application of the formal requirements with regard to validity of immovable transactions is not well-settled in the Amhara region and in Ethiopia at large. Four problems have been observed. First, there is a considerable degree of misunderstanding regarding the relationship between authentication and immovable registration requirements among legal professionals. Second, there is lack of a comprehensive legal umbrella with regard to these requirements. The laws fail to unequivocally address the effect of these requirements on validity of various kinds of transactions both in rural and urban areas. Third, there is inconsistency between the essence of the laws and the court decisions on the relationship between the formal requirements and validity. Fourth, the practice of authentication with regard to immovable transactions is entirely neglected as the notary, as well as

¹⁷⁷ Id, Art. 23(4). The law also provides this in the case of mortgage in clear contradiction to what the ECC says. See Id, Art. 19(4).

¹⁷⁸ See Berihun, supra note 32, pp. 200-201.

¹⁷⁹ FGD, supra note 32.

immovable registration offices, never perform this task, particularly in the last a few years. The security of immovable property transactions is therefore at stake due to these unsettled and unpredictable practices.