

CONTRACTUAL ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OWNERSHIP SYSTEM UNDER ETHIOPIAN LAW

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ABSTRACTS

This study aims to examine the immovable property ownership transfer system in general and that of Ethiopia, as a civil law country, in particular. It attempts to bring forth the globally recognized French casual consensual model, German Abstract tradio model and the mixed systems of immovable property ownership transfer to the attention of readers. The article also tries to locate the Ethiopian system of immovable property ownership transfer into the perspective of the recognized models of immovable property ownership transfer for better understanding. For the transfer of ownership of Immovable property under Ethiopian law, two main cumulative conditions of valid underlying cause (contract) and Registration in the Registry of Immovable property are required to be met. The registration requirement under Article 2878 of the Ethiopian Civil Code along with some of the Supreme Court cassation decisions leads to the conclusion that Ethiopia adopted the French Model of casual consensual real property transfer system where ownership transfer upon consent only without further requirement of title transfer registration. Consequently, the registration requirement under these scenarios seems only for publicity purpose having only declarative effects with third party protection in mind. Considering the property law provisions of the same code and other legislations concerning real property registration, however, it appears that Ethiopia as a system adopts the mixed system of immovable property ownership transfer where both the valid contract, as a legal ground, and registration of title transfer as a mode of acquirement(not only for publicity purpose) are requirements. The Ethiopian system of immovable property transfer, being approached from the above seemingly contrasting views, appears to be ambivalently oscillates between the systems of casual consensual and casual tradition systems of immovable property ownership transfers. The paper, therefore, juxtaposes the contract and real property law provisions of Ethiopian law, on the one hand, and the Supreme Court Cassation Division decisions, on the other hand, in contending that Ethiopia adopted mixed model of immovable property ownership transfer.

Key Words: *Immovable Property, Ownership Transfer, Registration of Title Transfer; Mixed System of Property Transfer, Legal Ground for Transfer, Manner of Acquisition*

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1. INTRODUCTION

The origin of private property remains a mystery.¹ After one discovers the source of private property, one still must justify the rules governing its transfer.² Legal rules require owners to go through prescribed rituals, such as transferring possession of the property or noting one's interest in a public filing system.³ The various rules governing the transfer of ownership rights in property ensure that whoever owns a piece of property can dispose of it or its incidences readily and that who acquires an interest can be confident he is acquiring good title or rights to the property.⁴ Admittedly, the legal terminologies, "acquisition of ownership" and "transfer of ownership" carry different connotations in legal parlance. Given the derivative mode of acquisition of ownership, where the title of the transferee (new acquirer) is dependent on the validity of the title of the transferor (former acquirer), it can be said that the same rule regulates both acquisition and transfer modes.⁵ That means, the rule for one who transfers is the rule for one who acquires ownership in case of derivative acquisition of immovable property.⁶ Thus, it is in this context that this paper uses these terminologies throughout this paper.

Systems of acquisition and transfer of property in general and that of immovable property might be different across jurisdictions. Countries of continental civil law system and common law system adopt different systems

1Baird, Douglas, Thomas Jackson., Information, Uncertainty, and the Transfer of Property (Centre for the Economic Analysis of property Rights, Economics and Law Workshop Papers, 83 – 05, London, ON: Department of Economics, University of Western Ontario, 1983).

2*Ibid.*

3*Ibid.*

4*Ibid.*

5 For example, the Ethiopian Civil Code recognized four modes of acquiring property (See Arts.1151 – 1183). These are occupation, possession in good faith, accession and Usacaption. Whilst these are original modes of acquiring property, only the latter two modes apply in relation to immovable property. What is discernible from this is that the Ethiopian Civil Code does not regulate the derivative acquisition of immovable property ownership independently. Therefore, the same rules regulating transfer of ownership of immovable property (Article 1184, 1185, 1189 and 1190) apply in the derivative acquisition of immovable property.

6That is why transfer of ownership has been stipulated as a ground for extinguishment of ownership for the transferor and a base for acquisition for the transferee under Art.1189 of Civil Code of Ethiopia.

of acquisition and transfer. Some of the states within the continental civil law system, as will be seen here under, adopt French model of the casual consensual system of immovable property ownership transfer where the consent of the contracting parties is sufficient to transfer ownership without the requirement of registration as a constitutive element.⁷ Other countries follow the Germanic model of abstract tradition (formalism) system of immovable property ownership transfer. In this latter system, the consent only of the contracting parties at the time of conclusion of the contract does not suffice to transfer the ownership of immovable property. In this system, as will be explained later, both the dispositive or obligatory agreements and the real agreement are needed for immovable property to be transferred but subject to the principle of abstraction and differentiation where the real agreement has a separate existence. Besides, other civil law countries adopt a mixed system of immovable property ownership transfer via contract. In this system, both valid underlying cause as a legal ground for transfer and *titulus* (mode of transfer) are requirements to transfer the ownership of immovable property. The registration is mandatory as in the case of an abstract system.⁸ Contrasting to the abstraction model, however, this system does not recognize the independent existence of the real agreement.

The contractual immovable property ownership transfer system that Ethiopia adopted in this regard might be conceived to follow the French model of transfer system considering the status quo public and scholastic perception.⁹ Because; the Ethiopian Civil Code has been adapted from the law of those nations (Egypt, France, Greece, Italy, and Switzerland, and countries with modern codifications) with whom Ethiopia has "cultural, commercial and maritime connections among which French law played a general and

⁷The registration requirement in this system serves only the purpose of publicity for protection of third parties (for opposability purpose) as opposed to being constitutive element, where transfer cannot be effected, even between the contracting parties themselves without registration of transfer of title.

⁸This means that registration under this system serves not only the purpose of publication as in the case of the casual consensual model, but also plays the constitutive role between the transferor and the transferee.

⁹ Paul Brietzke, *Private Law in Ethiopia*, Journal of African Law (1974), Pp149 -167. Brietzke contends that the predominant flavor of the Ethiopian Codes is French-in approach, style and, to a large extent and substance.

pervasive role.¹⁰ The paper, relying on qualitative doctrinal method, has argued, despite the above perception, that most of the Ethiopian Civil Code and other property law provisions along with some practical court cases (case laws) have shown some deviations from the French consensual model of immovable property ownership transfer and registration system in its approach towards the underlying issue.

The main purpose of this paper, therefore, is to search out where the Ethiopian law on transferring immovable property lies from the two recognized models of immovable property ownership transfer. In doing so, comparative method has been adopted for better understanding of the Ethiopian system. Thus, South African, Armenian, and German legal systems as an abstract system, has been compared with the French legal system (also Portugal, Belgian and Italy). These countries have been chosen for being an example of a causal system, and the Netherlands, Serbia, Austria, Swiss, Spain and Kosovo systems, which can be described as a mixed system. The comparative method has been applied to help readers get better understanding of the Ethiopian system of immovable property ownership transfer.

This paper, therefore, is hoped to provide great help for property rights institutions, legal practitioners, and the general public in increasing their awareness as to the immovable property ownership transfer system that Ethiopia adopted so that they can play their own respective roles. It can also be used as a wakeup call for the Federal Supreme Court Cassation Bench and lower-level courts in the proper application of the rules regulating the transfer of real property ownership and the legal processes to that end in a consistent manner.

Accordingly, the following research questions will be addressed in due course. Firstly, what is the practical meaning and effect of the registration requirement under Article 2878 of the Civil Code of Ethiopia considering the system of contractual (derivative) transfer of immovable property ownership? The paper will examine whether it serves only the purpose of

10 Norman J. Singer, *Modernization of Law in Ethiopia: A Study in Process and Personal Values*, Harvard International Law Journal(1970), Vol. 11, Pp.73-125.

publicity as it appears to be so and understood so far. Secondly, do decisions of the Federal Supreme Court, as case laws, delivered so far regarding transfer and acquisition of immovable property based on this provision certainly discernible, predictable, and consistent? Thirdly, which model/system of immovable property ownership transfer that Ethiopia, as a civil law country, adopted? Fourthly, does the real property registration system that the country adopted have effect on the determination of immovable property ownership transfer system?

The paper is structured under four sections in order to address these research questions. Section one, as described hereinabove, presents the introductory discussion and the research questions to be addressed in this study. Section two of the paper discusses relevant global continental immovable property ownership transfer systems. It specifically, sheds light on the French and French-influenced model of casual consensual property transfer system, German and German-influenced abstract tradition (formalism) system of property transfer system and the mixed model of immovable property ownership transfer system. Section three discusses the immovable property ownership acquisition and transfer system currently in existence under Ethiopian law, by examining the provisions of the contract of sale of immovable and real property laws, on the one hand, and practical court cases dealing with immovable property ownership transfer on the other hand. It particularly, describes the registration requirement under Article 2878 of the Civil Code as one of the legal conditions that are required under Ethiopian law in order to successfully transfer ownership of immovable property. This section also touches upon the effect of the immovable registration system adopted by a country. The fourth and last section of the paper recaps the major issues discussed by the paper in the way of summary and recommendations.

2. SYSTEMS OF ACQUISITION AND TRANSFER OF OWNERSHIP OF IMMOVABLE PROPERTY

The rules of acquisition of ownership of immovable property differ in various legal systems of civilian (continental) legal tradition.¹¹

¹¹Milos Zivkovic, Acquisition of Ownership of Real Property in Serbian Law: Departing from the Titulus – Modus System? P.112

Understanding these differences, which are quite significant from the doctrinal point of view, is an excellent exercise for a better understanding of each particular national system.¹² A major manifestation of the distinction between the law of obligation and the law of property in Civil Law systems is the relationship between contract for sale and conveyance (property transfer).¹³ Different scholars followed different paths in classifying basic systems of property transfer in continental law system but with similar ends. Shusei, for instance classified two ways of acquiring property in modern continental law; consensualism and formalism.¹⁴ Lie also mentioned two major groups within the world systems that deal with the relationship between contract for sale and conveyance of property in civil law systems: Consensual System *Vs* *Traditio* system.¹⁵ Lie, further, divides the *Traditio* approach into causal and an abstract system depending on whether the property transfers is determined by the invalidity of the sale contract.¹⁶

Another categorization highly like that of Lie is the way Vliet classified the world's property transfer systems. According to *Vliet*, many of the world's legal systems for the transfer of property fit into one of the three types of transfer systems. These are the causal consensual system, the causal tradition system and the abstract tradition system.¹⁷ According to *Velencoso*, however, there are four basic systems of immovable property transfer especially in continental legal systems. French and French - influenced systems of *titulus adquirendi* system (purely causal consensual system), German and German - influenced abstract system (abstract *traditio*), *Titulus et modus* system (*Titulus modus adquirendi*(causal tradition system), and the common law system which uses a complicated process known as 'conveyance' to transfer ownership.¹⁸ This process consists of various stages, and in some countries

¹²*Ibid.*

¹³ Chen Lei, Land Registration System in China: Past Problems and Prospects, Pp 375 - 390

¹⁴ Ono Shusei, *A comparative Study of Transfer of Property Rights in Japanese Civil Law*, Htotsubashi Journal of Law and Politics, Vol.31, Pp1-22.

¹⁵ Chen Lei, *Supra* note 13, Pp375 – 390.

¹⁶*Ibid.*

¹⁷ Lars Van Vliet, *Transfer of Properties Inter Vivos* (Maastircht University, Maastircht European Private Law Institute, 2017), P7.

¹⁸Luz M. Martinez Velencoso, *Transfer of Immovable and Systems of Publicity in the Western World: An Economic Approach*, 6J. Civ.L. Stud. (2013). Available at: <https://digitalcommons.Law.I su.ed/JCLS/vol/6/iss1/5>, Pp142 – 176; Chen Lei, *Supra* note 13.

(such as England and Wales) the acquisition process is only achieved with the inscription of title in the land registry.¹⁹

2.1. CASUAL CONSENSUAL SYSTEM OF IMMOVABLE PROPERTY TRANSFER

In this system, it is basically contract that transfers ownership (also called *titulus adquirendi*). According to Velencosso, in legal systems that are French influenced such as Portugal, Belgian and Italy the agreement between the parties' transfers ownership.²⁰ Under this system, it does not differentiate the moment of conclusion of contract from the moment of conveying the ownership.²¹ In this system, ownership is conveyed directly by a contract which has an effect translative meaning "to sale is to alienate", reads the maxim in French, which is explained by the fact that the contract on conveyance is executed now it is formed.²²

According to the Code Napoleon, the property is acquired and transferred upon mere declaration of consent in the contractual obligation without the need of creating neither a system of registration of interest and delivery.²³ What is indeed important under this system is the intention at the moment the obligatory agreement comes in to being (at the time of conclusion of the contract) since the mutual intention to transfer and to receive real rights is already contained and is the essential stipulation in the obligatory agreement.²⁴ Since the party's consensus at the time of conclusion of a valid contract of sale itself is sufficient to pass ownership, intention at the stage when the thing is delivered (the *animus* or mental disposition which delivery is incidental to) is therefore irrelevant.²⁵ Thus, this latter act of delivery is no separate requirement for the transfer of real rights, and it is also no juridical

19M. Martinez Velencoso, *Supra* note 18.

20 Chen Lei, *Supra* note 13.

21 M. Zivkovich, *Supra* note 11.

22 *Ibid.*

23 Andrea Pradi, *Transfer of Immovable in a European Perspective*. Andrea P.(eds.), *From Contracts to Registration, An Overview of the Transfer of Immovable Property in Europe (Universita Degli Studi Di Trento(2015), Vol. 19. Pp1-13*; see also O. Shusei, *Supra* note 14.

24 Pjw Schutte, The Characteristics of an Abstract System for the Transfer of Property in South African Law as distinguished from A Causal System, PER/PELJ 2012(15)3. Pp.121/183, See also, Vliet, *supra* note 17, P13.

25 Schutte, *supra* note 24; See also, Vliet, *supra* note 17, P13; Art.1138 of the Code Napoleon of 1804; Lie, *supra* note 13.

act that can be construed as an independent real agreement that is detached from the obligatory agreement.²⁶ It is nothing more than a mere physical act utilizing which the transferee is placed in control of the thing so that he can exercise his power as owner.²⁷ The French causal consensual transfer system does not require a transfer of possession.²⁸ This system is derived from Articles 711²⁹ and Article 1138³⁰ of the French Civil Code of 1804.

In a consensual casual transfer system, it seems as if the transfer of ownership necessarily depends on the validity of the obligatory contract.³¹ It is valid and enforceable obligatory agreement that transfers real rights.³² That means the invalidity of the underlying contract directly affects the validity of the transfer. A valid cause (*iusta causa/causa traditio*) giving rise to the transfer is a *sine qua non* for the transfer of ownership in such system. The Causa is all-important; hence the term causal system and *iusta causa* is a requirement for the transfer of property.³³ It is this *iusta causa* in the sense of valid and enforceable obligatory agreement or another juridical fact that obliges the transferor to deliver the thing in a causal system. Should the agreement be null and void or avoided with retrospective effect, for the non-compliance of the formality requirements for instance, the transfer will be invalid for there is no legal basis (*causa*) for delivery; no real right or ownership will be transferred.³⁴ The seller then would be said to have an

26 PJW Schutte, *Supra* note 24.

27*Ibid.*

28 Van Vliet, *supra* note 17, P7.

29Under Book iii which deals with the modes of acquiring property, Article 711 of the French Civil Code Provides that" Ownership in goods is acquired and transmitted by succession, by donation between living parties, or by will, by the effect of obligations."

30*Ibid.* Article 1138 reads " The obligation to deliver the thing is perfect by the consent merely of the contracting parties. It renders the creditor proprietor, and puts the thing up on his risk from the instant at which it ought to have been delivered, although the delivery have not been actually made unless the debtor should have delayed delivering it; in which case the thing remains at the risk of the later. See also Article 1582 which provides that ' A sale is an agreement by which one person is bound to deliver a thing, and another to pay for it. It may be made by an authentic act, or under private signature. Article 1583 of the same provides that " It is complete between the parties, and the property is acquired in law by the purchaser with regard to the seller, as soon as the thing and the price are agreed on , though the thing have not been delivered nor the price paid.

31 Van Vliet, *supra* note 17, P7.

32 Pjw Schutte, *Supra* note 24.

33*Ibid.*

34*Ibid.*

action of revindication (claiming back the property based on ownership).³⁵ In a casual system, therefore, the transferor finds himself in a favourable position in relation to other parties while bona fide third parties undoubtedly get the worst of the deal since they have no protection against the disadvantageous consequences of delivery owing to a void obligation.³⁶ Legal system in which transfer system that needs a valid causa tradition where the validity of the transfer does depend on the valid causa traditions (the legal ground for the transfer, e.g. the contract of sale) is called a causal transfer system.³⁷

2.2. ABSTRACT (TRADITION) SYSTEM OF IMMOVABLE PROPERTY TRANSFER

This category of rules on acquiring ownership by contract with the existing owner, attached primarily to German Law, is the system upon which the ownership is transferred by a special kind of legal act, so called legal act of disposition, which comes as an act of fulfilment of the contract by which the transferor undertook the obligation to convey ownership, the legal act of obligation, irrespective of the validity of the latter.³⁸ This system dictates that although a contract creates obligations, the transfer of property requires an additional element, delivery or act of conveyance to transfer a property right.³⁹ Attempting to translate this into the language of the *titulus/modus* system, one could say that the *modus*, understood as a legal act (contract) of disposition, transfers the ownership, irrespective of the validity of the *titulus*.⁴⁰ In an abstract system, the obligatory agreement is not sufficient for the transfer of real rights as in consensual system, the thing should also be delivered and there should be a valid real agreement which consists merely of the mutual intention to transfer and to receive real rights.⁴¹ German law provides that a transfer of ownership requires the actual delivery and transfer of a title and it also sees delivery itself as a contract (distinct legal act), based upon which the ownership is conveyed (or in case of real property, which

35 Van Vliet, *supra* note 17, P7.

36Pjw Schutte, *Supra* note 24.

37 Van Vliet, *supra* note 17, P7. See also Lei, *supra* note 13. The Dutch, Swiss or Austrian transfer systems are called causal.

38 Martinez Velencoso, *supra* note 18.

39 Lei, *supra* note 13.

40 Martinez Velencoso, *supra* note 18.

41 Pjw Schutte, *Supra* note 24.

enables conveyance by registration).⁴² So, it can be said that there are two separate contracts, the one that forms the legal ground for conveyance (obligatory act), e.g. sale contract, and the other that conveys ownership (real agreement/dispositive act) in the narrower sense, and that is delivery (for movables) and registration (for immovable).⁴³

The obligatory agreement creates only an obligation which obliges the parties to perform, but it does not result in the transfer of real rights.⁴⁴ Thus, the buyer with the conclusion of the contract does not acquire ownership as a result of the obligatory agreement as in the case of French Model of consensual transfer system. Therefore, after the conclusion of this agreement, no vindictive claims against the seller arises as the buyer is not yet the owner of the property.⁴⁵

Dispositive Legal Acts (real agreement), on the other hand, involve extinguishing or encumbering rights.⁴⁶ This means that this legal act results in the acquisition of an existing right by another party.⁴⁷ The transfer of the title is defined as the mutual consent for the transfer of ownership at the time of conveying ownership.⁴⁸ It is not, therefore, a statement of intent, but an intention to transfer occurring at the time of transfer that transfers ownership in this system.⁴⁹ The essential elements of the real agreement, therefore, are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. To bring about the transfer, the transferee also must take control of the thing through act of delivery (*traditio*), or immovable need to be registered.⁵⁰ The principle of traditionalism, as opposed to the principle of consensualism, applies in

42 Martinez Velencoso, *supra* note 18; See also *Article 929 of BGB (German Civil Code)*.

43 *Ibid.*

44 Pjw Schutte, *Supra* note 24.

45 Kornel Sadowski, *The Abstraction Principle and the Separation Principle in German Law*; Adam Mickiewicz University Law Review, Pp.238-243

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 Pjw Schutte, *Supra* note 24.

this system.⁵¹ Under the formalism (tradition) system, the transfer of property is effective only after either delivery or registration of the interest.⁵²

Therefore, it can be said that this system of property transfer rests on two basic principles; the principle of differentiation and separation and the principle of abstraction.⁵³

2.2.1. Separation and Differentiation Principle

According to the separation principle, the contract creating obligation aiming at conveying ownership and the contract or legal acts that conveys it are differentiated and separated.⁵⁴ This means that the transfer of ownership requires not only sales, or donation agreement, but also an agreement on actual property transfer which is real agreement.⁵⁵ Then, according to this principle, a defect in an obligatory contract will not invalidate a contract on ownership transfer.⁵⁶ This means that the real agreement has an independent existence from the dispositive agreement in the abstract system of immovable property transfer.⁵⁷

2.2.2. Abstraction Principle

The abstraction principle provides that the obligatory act is abstract in the sense that its ineffectiveness does not affect the effectiveness of the dispositive act.⁵⁸ According to the abstraction principle, the validity of the conveyance contract is independent of the validity of the obligatory contract⁵⁹ and ownership can be transferred in the absence of a valid obligatory contract if there was a valid real agreement together with registration as required in the tradition systems.⁶⁰ It may therefore happen that after the conclusion of the two agreements, the obligatory contract is not

⁵¹*Ibid.*

⁵² Ono Shusei, *Supra* note 14.

⁵³ Martinez Velencoso, *supra* note 18.

⁵⁴ Sadowski, *supra* note 45.

⁵⁵ *Ibid.*

⁵⁶*Ibid.*

⁵⁷*Ibid.*

⁵⁸ Ono Shusei, *Supra* note 14.

⁵⁹ Martinez Velencoso, *supra* note 18.

⁶⁰ Chen Lei, *supra* note 13. See also Sadowski, *Supra* note 45. Although abstract theory does not require a valid underlying contract (e.g. sale), ownership will not pass -despite registration of transfer - if there is a defect in the real agreement.

valid, but this does not affect the validity of the contract which transferred the ownership and thus the purchaser becomes the owner of the property and the property remains on his hand based on the abstract real agreement.⁶¹ According to Sadowski, this in turn ensures the effectiveness of contracts on ownership transfer.⁶² This separation of the causal and real abstract agreement also contributes to the stabilization of the position of the purchaser.⁶³

A characteristic of abstract system in general and that of the German law in particular is that the contract on the actual transfer of ownership is disconnected casually (causa regarding obligatory agreement is not a substantive law requirement for the transfer of real rights) from the contract that details the obligations of the parties, in such a way that nullity of the contract detailing the contractual obligations does not affect the validity of the transfer of ownership.⁶⁴ The causa concept refers rather to the mutual intention to transfer and to receive real rights, which is nothing less than the real agreement.⁶⁵ The real agreements can avoid contractual defects, such as fraud, duress, or mistake since they are submitted to officials at the registry.⁶⁶

2.2.3. Requirements of Notarization and Registration in Germany

The German Law, in addition to the requirement of the real agreement, needs the contract of transfer of immovable property to be notarized. Under German law, the contract of sale or any other contract requiring a transfer of immovable property is in principle void if it is not laid down in a notarial deed.⁶⁷ Ownership of immovable property, however, cannot be acquired directly as a result of a notarised contract of sale between the seller and the buyer. A civil law notary is often required in the German model for a

61 Kornel Sadowski, *Supra* note 45.

62 *Ibid.*

63 Ono Shusei, *Supra* note 14.

64 Martinez Velencosso, *supra* note 18, P157.

65 Schutte, *Supra* note 24.

66 Ono Shusei, *Supra* note 14.

67 Van Vliet, *Supra* note 17, P20.

property right simply cannot exist without it being both notarized and registered.⁶⁸

If the title to the property effectively to transfer to the buyer, final registration of the transfer of ownership in the land registers, in addition to obligatory and real agreements, is a precondition for acquiring ownership of immovable property in Germany.⁶⁹ However, if such a contract is void only for want of a notarial deed and the contract has been followed by a transfer of ownership and registration in the land register, the contract will be affirmed.⁷⁰

Therefore, it can be concluded that, the conveyance, that is, the transfer of ownership, consists of two elements: the real agreement about the transfer⁷¹ and the entry in the land registry.⁷² The property transfer systems of South Africa⁷³ and Armenia⁷⁴ can be placed under this system.

2.3. CAUSAL TRADITION/MIXED SYSTEM OF IMMOVABLE PROPERTY TRANSFER

This system of transfer is the concept that requires both *iustus titulus* (a contract or other legal act aiming at transfer of ownership) and *modus acquirendi* (mode of the transfer itself).⁷⁵ In this system, the property transfers as a result of the causal agreement and *modus*, i.e., formalism.⁷⁶ The idea behind this system is that the contract itself is merely a legal ground, *iustus titulus*, for the acquisition of ownership, and that ownership is acquired, based on such contract, by a special act, called *modus acquirendi* or mode of acquisition in the strict sense.⁷⁷ The contract, as legal ground creates merely an obligation to convey the ownership, but the conveyance itself is carried out through a different act, *modus acquirendi* (delivery in

68 Lei, *Supra* note 13, P 379.

69 That means, it is also necessary for the two parties to conclude an agreement that ownership is to be transferred and for that transfer to be registered in the land register.

70 Van Vliet, *Supra* note 17, P20.

71 See Arts. 873 and 925 of BGB (German Civil Code).

72 German Civil Code, Art. 873.

73 Schutte, *Supra* note 24.

74 See Arts. 561 - 563 and Art. 568 of Civil Code of Republic of Armenia.

75 M. Zivkovich, *Supra* note 11.

76 Ono Shusei, *Supra* note 14.

77 M. Zivkovich, *Supra* note 11.

respect of movables and registration in respect of immovable property).⁷⁸ Both *titulus* and *modus* are required for the transfer of ownership in this system.⁷⁹ Otherwise, if the legal ground, e.g. a sale contract, is void or avoided, there would be no valid acquisition despite registration since registration without valid legal ground is itself invalid.⁸⁰ Therefore, it can be understood that the moment that the contract aiming at transfer of ownership is formed is different from the moment of acquisition of ownership, by a different act, the *modus*, which in case of real property is registration, where the validity of the underlying contract is a condition for the acquisition based on delivery, respectively registration.⁸¹ The purpose of the *modus* is making the conveyance public (visible to others), therefore the *modus* is required with third parties in mind.⁸²

Immovable property transfer systems of Spain and Netherland⁸³, Austria⁸⁴, Swiss⁸⁵, Serbia⁸⁶, Kosovo⁸⁷ and Finland can be categorized under this mixed system of the immovable property transfer system. The Spanish system requires the conclusion of a contract (a title) and tradition (the delivery of possession to pass the ownership, which is the *modo* or correct form).⁸⁸ A distinctive characteristic of the Spanish system is the causal relationship between the contract and the transfer of title and thus, if the contract is invalid, the transmission of ownership cannot be said to have taken place.⁸⁹

Austrian and Swiss Law also admit formalism system, but not the necessity of abstract real agreement unlike in Germany where formalism and necessity of the abstract real agreement in the separation theory are combined.⁹⁰ Only

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 *Id.* P114.

83 Martinez Velencoso, *Supra* note 18, P157.

84 Ono Shusei, *supra* note 14. See also *M. Zivkovic, Supra* note 11.

85 Ono Shusei, *Supra* note 14.

86 Zivkovich, *supra* note 11, P119.

87 Haxhi Gashi, *Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law*, *Hanse Law Review* (2013)

88 Martinez Velencoso, *Supra* note 18.

89 See Arts 605 - 608 of the Civil Code of Spain on the Registry of Property.

90 Ono Shusei, *Supra* note 14.

a causal agreement is required for the agreement of sale and, thus, no distinction is drawn between causal and abstract real agreements.⁹¹ This way of transfer of property, called *titulus et modus adquirendi* theory, is adopted also in Austrian Civil Code ABGB.⁹² The Austrian system is based upon differentiating the moment the contract aiming at ownership transfer is formed from the moment of acquisition of ownership by a different act, a *modus*, which in case of real property is registration.⁹³ The situation is the same in Swiss law. In Swiss, the property transfers as a result of the causal agreement and *modus*, i.e. formalism.⁹⁴ In relation to real property, the Swiss Civil Code requires registration to transfer property.⁹⁵

Serbia as a civil law country has also adopted this mixed system of the real property transfer system. *ZIVKOVICH*, in this regard, provides the following regarding the Serbian system of real property transfer.

In the area of regulation of matters of acquisition of ownership on the ground of a contract with previous owner, the Serbian law, traditionally, adopts a model the solution of the Austrian law (section 380 of the 1811 Austrian Civil Code - ABGB), providing that the right may be acquired from the predecessor, who is the owner, if two requirements are fulfilled i.e. that there exists a fully valid contract aimed at the conveyance of ownership (iustus titulus), that there is the act of handing over (delivery) for movable objects, and/or the act of filing the right into land books or the transfer of a title deed, for immovable property (modus adquirendi).⁹⁶

On the ground of legal transaction, in Serbia, the right of ownership over immovable object shall be acquired by means of filing it into a public book.⁹⁷

91 *Ibid.*

92 See Art.380 of the Austrian Civil Code (ABGB)

93 M. Zivkovich, *Supra* note 11.

94 Ono *Shusei*, *Supra* note 14.

95 *Ibid.*; See also Art 656(1) of Swiss Civil Code (ZBG).

96 M. Zivkovich, *Supra* note 11, P119.

97 *Ibid.*; See also Article 33 of ZOSPO (Law on Basic Ownership Relations).

3. THE ETHIOPIAN SYSTEM OF ACQUISITION AND TRANSFER OF OWNERSHIP OF IMMOVABLE PROPERTY

3.1. THE SOURCES OF PROPERTY RIGHTS UNDER THE ETHIOPIAN LAWS

In Ethiopia, property rights get legal protection mainly under the FDRE Constitution, the 1960 Civil Code, other Codes, some other pieces of legislation and laws that establish and define the powers and functions of judicial and administrative institutions.⁹⁸ FDRE Constitution provides that "every Ethiopian citizen has the right to the ownership of private property."⁹⁹ It defines private property as any tangible or intangible product which has value and is produced the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances specifically empowered by law to own property in common.¹⁰⁰ It further provides, regarding immovable property, that every Ethiopian shall have full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it which of its is to be determined by law.¹⁰¹

3.2. ACQUISITION OF IMMOVABLE PROPERTY RIGHTS UNDER ETHIOPIAN LAWS

The term immovable property includes parcels of land, and all things connected permanently to the land, such as the houses, apartment buildings, factories, stores, etc.¹⁰² Rights which people hold to the immovable property include the right to use, the right to get economic benefits from it, the right to subdivide it into smaller parcels or units and the right to transfer any of the

98 Elias N. Stebek, etal, Property Rights Protection and Private Sector Development in Ethiopia (PSD Hub publication No. 23, Property Rights Development Hub, Ethiopian Chamber of Commerce and Sectoral Associations, Addis Ababa, 2013), P14.

99 FDRE Constitution,Art.40(1).

100 FDRE Constitution,Art. 40 (2).

101 FDRE Constitution,Art. 40(7).

102 J. David Stanfield,Immovable Property Registration Systems: Hopes and Fears (*For Presentation to the Congreso Iberoa De Registro De Propiedad Lima, Peru, 3-7 November, 2003*), P1.

above rights to another person.¹⁰³ Likely, in Ethiopia, immovable property is defined both under the 1960 Civil Code and other legislations relating to immovable property registrations. Under the Civil Code, Objects of property or all goods in general have been defined as movable or immovable.¹⁰⁴ Accordingly, immovable comprises lands and buildings.¹⁰⁵ The Urban landholding adjudication and Registration Regulation also defined the term immovable property as ‘urban land and related properties and includes buildings and permanently planted perennial crops.’¹⁰⁶

In Ethiopia, land is owned by the state and the people of Ethiopia, and thus individuals do not have a private right greater than transferrable possession right for several years for a fee over land as opposed to other chattels and immovable properties.¹⁰⁷ In addition, individuals can privately own residential houses and apartments on the land (home ownership), albeit not the land on which the buildings are situated.

According to the norms of Civil Code, the grounds for the origin or acquisition of property rights in general and immovable are legal rights, or legal relationships. For systematic purposes, a distinction is made in civil law jurisdictions between original and derivative acquisition.¹⁰⁸

103 *Ibid.*

104 Civil Code of the Empire of Ethiopia, Proclamation Proc. No. 165/1960, Neg. Gaz., Extraordinary Issue, No.2, (hereinafter ‘ECC’), Art. 1126

105 BECC, Art.1130; See also the Addis Ababa City Government Immovable Property Registration and Information Agency Establishment Proclamation, No. 22/2002, Art. 2 (4). See also Federal Urban Real Property Registration and Information Agency Establishment Council of Ministers Regulation, No. 251/203, Art. 2(4). This regulation uses the term real property instead of immovable property. It provides that ‘‘ real property’’ means a parcel of land or a parcel of land together with immovable property on the land.

106 Federal Urban Landholding and Registration Council of Ministers Regulation. No. 324/2006, Art. 2 (9) (FURLR, hereinafter).

107 Article 40(3) of the FDRE Constitution provides that ‘‘The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the peoples of Ethiopia. Land is common property of the Nations, Nationalities and peoples of Ethiopia and shall not be subject to sale or to other means of exchange.’’

108 Fasil Alemayehu, Law of Property Teaching Material (Prepared under the Sponsorship of the Justice and Legal System Institute, 2009), P 63

3.2.1. Original Acquisition

Original acquisition mode involves the creation of a new property right, which is independent of any pre-existing rights over the same thing.¹⁰⁹ This mode of acquisition differs from the derivative acquisition of property rights in which an existing property right is transferred from the transferor to the transferee, and the latter's right depends on the right of the former.¹¹⁰ This mode of acquisition of ownership includes occupation,¹¹¹ possession in good faith,¹¹² accession¹¹³ and usucaption/acquisitive prescription.¹¹⁴ The first two modes solely apply for movables while the latter two apply to immovable.¹¹⁵ That means, immovable property can originally be acquired only through accession and usucaption under Ethiopian law.

3.2.2. Derivative Acquisition

Derivative acquisition refers to the mode of acquisition of right of ownership through transfer from one person to another.¹¹⁶ It is a mode of acquisition in which the right and title of the transferee (new acquirer) is dependent on the validity of the right (title) of the transferor.¹¹⁷ According to Article 1184 of the Ethiopian Civil Code, the title to derivative acquisition can be based up on a contract, *mortis causa* disposition (will), a court decision or an order by a law. However, the law requires the title being objectively valid. Hence, the governing principle here is that no one can transfer a better title or right than he himself has, and where the transferor is not an owner or of his right is defective, the transferee will not acquire right of ownership or will acquire a defective right.¹¹⁸ Given this, it can be said that the same rule regulates both acquisition and transfer considering the meaning of derivative acquisition of ownership of the real property as articulated in the preceding section of this

109 *Ibid.*

110 *Ibid.*

111 ECC, Arts 1151 and 1191.

112 ECC, Arts. 1161 - 1169.

113 ECC, Arts.1171 and 1183.

114 ECC, Arts. 1168 and 1150.

115Elias N.Stebek, *Conceptual Foundations of Property Rights: Rethinking De facto Rural Open Access to Common - Pool Access in Ethiopia*, Mizan Law Review (2011), Vol. 5, No.1. P. 6 .

116 Fassil Alemayehu, *Supra* note 108.

117*Ibid.*

118*Ibid.*

paper. The main purpose of this paper, therefore, is to critically examine the Ethiopian system of transfer of ownership of immovable property within the meaning of the derivative acquisition of ownership of immovable property.

3.3. TRANSFER OF OWNERSHIP OF IMMOVABLE PROPERTY UNDER ETHIOPIAN LAW

Pursuant to Article 1184 of the Civil Code of Ethiopia, right of ownership may be transferred from the owner to another person by a contract which may be contract of sale¹¹⁹, contract of donation¹²⁰ or contract of barter¹²¹ and will or by virtue of the law which may be through inheritance (intestate) or by court order. The principle, of "*nemo dat quod non habet*" applies here too. Therefore, for a person to transfer a perfect right of ownership, he/she must have a perfect right to ownership.¹²² That is, one must have a legally protected property right to transfer it to another person.¹²³

3.3.1. Conditions Required for Contractual Transfer of Immovable Property Ownership under Ethiopian Law

To have an accurate understanding regarding the conditions required for the valid contractual transfer of ownership of immovable properties in Ethiopia, one needs to have a comprehensive reading of the general and special parts of contract law relating to contract in general, sale of immovable,¹²⁴ the federal law of authentication and registration of documents,¹²⁵ property law (both in the Civil Code and other legislations together).¹²⁶ Accordingly, these legal conditions can be summarized, being put into the perspective of global

119 ECC, Arts. 2266 and 2875.

120 ECC, Arts. 2427ff.

121 ECC, Arts. 2408 and 2409.

122 Alemayehu, *supra* note 108, p77.

123 See also FSCCD, *Vol. 15, File No. 88084. The case between Wagayehu Tamiru Vs Askale Wasane et al. Date - November 19, 2006; See also Volume 20, File Number 112190. Amhara region, Aykal city Municipality Vs Shek Shamsu Mahammad, March 28, 2008.*

124 ECC, Art. 1723 and Arts. 2877 & 2878.

125 Authentication and Registration of Documents Proclamation No. 922/2008. Federal Negarit Gazette No. 39 (Hereinafter, ARDP). Art. 9(1).

126 That means, one needs to have an accurate understanding of Articles 1184, 1185 and 1190 and Article 1553 - 1646 of the Civil Code on the one hand and Federal urban Landholding and Registration Proclamation No. 818/2006 and Regulations and directives subsequent to this proclamation on the other hand.

continental immovable property ownership transfer system (casual consensual *Vs* abstract tradition system of property transfer), into two main ways of transfer of ownership. That is, for the acquisition of ownership of immovable property under Ethiopian law, two main conditions are required to be met. These are: valid underlying cause (valid contract/titulus) and registration in the registry of immovable property (mode of acquisition).

3.3.1.1. The Requirements of Valid Underlying Cause

This condition requires valid legal title (*ius tutulus/iusta causa*) in the meaning of an obligatory contract as the reason of transfer(cause). That is, there should be a cause, or legal ground for the transfer, meaning there must be the justification for the transfer of ownership as exemplified by a contract (contract of sale, donation, or a testament, or under law (an order made by a court of law following court attachment or winding up of intestate succession or an expropriation order).¹²⁷ This requirement of valid underlying cause (contract), under Ethiopian law, further, comprises two main validity requirements under itself.

A) Written Formality Requirement of the Underlying Cause

The cause of the transfer of ownership shall be reduced into writing in relation to immovable property under Ethiopian law.¹²⁸ Contracts relating to immovable properties and special movables, owing to their special nature and contribution to the economy are required to be made in writing in Ethiopia.¹²⁹ Muradu Abdo supports this assertion in relation to special movables *albeit* admitting that the requirement that contracts pertaining to special movables must be reduced in to writing is made no patent nowhere in the civil code.¹³⁰ He provided the following;

127 Muradu Abdo, *Transfer of Ownership over Motor Vehicles (Case Comment)*, Journal of Ethiopian Law (2001), Vol.23, No. 1. Pp.27-35. *Muradu praised the Federal Supreme Court, in the case between Habtab Tekle Vs Esayas Leke and Bezabeh Kelele(delivered on sene 22, 1980), for recognizing the rule that special movables are similar to immovable property and that the rules designed to regulate the latter may apply, with the necessary changes, to the transfer of the former for the purpose of transfer.*

128 ECC, Arts.1723 (1) and 2877, 1719(2), 1720(1), 1727(2) and ARDP, Art. 17(1).

129 See for instance, ECC, Arts. 1723 and 1186 (2) and Art. 6(1-4) of Proclamation No. 682/2002.

130 Muradu Abdo, *Supra* note 127.

In our contract law, form is an exception; written formality is required only if the law or the parties require so. Yet, there are reasons to argue that written contract is mandatory in relation to juridical acts pertaining to transfer of motor vehicles. First, reducing the transactions over motor vehicles among those who involve in such transactions has become a settled practice in the sense that it is followed by at least most of the community of car dealers and owners, which has been observed repeatedly and regularly over a long period of time. These features, I think, have elevated such practice to the status of customary rule. If this is the case, the making of the contract pertaining to transfer of motor vehicles in writing must be a term of such contract dictated by custom by virtue of Article 1713 of the Civil Code. In the second place, there is at least one occasion whereby administrative authorities require parties to a contract in connection with transfer of motor vehicles to produce a written contract. Contracts in connection with motor vehicles are required to be authenticated by law. Such act of authentication obviously requires the production of written documents. Thus, special law and custom require that the making of contracts conclude to transfer ownership over motor vehicles must be made in a written form.¹³¹

The contracts to transfer ownership of special movables do not only required to be made in writing but also need to be authenticated like that of immovable. Transfer of ownership in respect of special movables requires a cause, i.e. a contract of sale, or donation or a testament or a court order.¹³² The cause should be accompanied by registration and issuance of a certificate of title by a proper authority.¹³³ Possession of a special movable alone does not make one an owner thereof.¹³⁴ For the purpose of transfer, special movables are elevated to the status of immovable property.¹³⁵ This position has also been upheld by the Federal Supreme Court cassation bench

131 *Ibid.*

132 Muradu Abdo, *Subsidiary Classification of Goods under Ethiopian Property Law: A commentary*, Mizan Law Review (2008), Vol.2. No.1, Pp 53-91.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

in its decision of January 13, 2005.¹³⁶ The Supreme Court in this case decided that for one to claim a title transfer over special movables on the basis of contract of sale, should produce an authenticated contract of sale of the vehicle among other documents before the registering institution.¹³⁷ The court in this case particularly made clear that a transfer of title of an ownership on special movable from the seller to the buyer can only be validated if the contract is made in writing.

The formality requirement of written form can also be viewed in two aspects under Ethiopian law. One aspect of the written form is the requirement of attestation by two witnesses.¹³⁸ The term “attestation” means affirming to be true or genuine or certifying to the verity of a copy of a document formally by signature.¹³⁹ That means, it shall be signed before the relevant authentication institution by two witnesses.¹⁴⁰ Documents that are required to be made in writing, such as contracts of transfer of ownership of immovable properties by selling or donation; contracts of establishing collateral or guarantee right on immovable properties; and public will shall be signed before the relevant authentication and registration institution by two witnesses.¹⁴¹ A contract of sale of immovable property, for instance, is invalid unless it is signed by two witnesses despite its authentication with a notary.¹⁴²

The second aspect of the written formality requirement may be sought in such a way that certain contracts and the contracts made required to be made in a special form are required to be evidenced only in writing.¹⁴³ This aspect

136 FSCCD Vol.14. File No. 81406. The case between Ahmed Ibrahim Vs Said Hagerlawi, Decision delivered on January 13, 2005.

137 ECC, Arts. 1723 and 1186 (2) and Art. 6 (1-4) of Proclamation No. 682/2002.

138 See ECC, Arts. 1727(2) and ARDP, Art.17(2).

139 Henry Cambell Black, Black's Law Dictionary(Revised Fourth Ed, 1968), P.780 cited in Melkamu B. Moges and Alelegn W. Agneheu, *issues on the Role of Formal Requirements for validity of Immovable Transactions in Ethiopia: The case of Amhara Region* (Bahirdar University Journal of Law (2015),Vol. 6.No.1, P.53.

140 ECC, Art. 1727(2) and ARDP, Art. 17(1)(a).

141 ARDP, Arts. 17(1)(A), (b), and (c).

142 FSCCD Volume 12, File Number 57356, the case between Meseret Bekele Vs Elza Somonella. Decision delivered on February 23, 2003.

143 See ECC, Arts 2472 & 2003. Article 2003 provides that " Where the law requires written form for the completion of contract, such a contract may not be proved by witnesses or presumption unless it is established that the document evidencing the contract has been destroyed, stolen or lost.

of the written form is essential in the proving of the existence of the contract required to be in the special form. That means, in Ethiopia, the writing requirement performs an evidentiary and precautionary function.

In Ethiopia, unlike in France, the writing requirement is included in the Civil Code along with the provisions on general contracts and different special contracts. In France, the writing requirement is included along with the provisions on proof of obligations.¹⁴⁴ Contrarily, the writing requirement and proof of contracts are dealt with separately under Ethiopian Civil Code.¹⁴⁵ The provisions requiring authentic acts are placed with the provisions on proof of contracts under the Ethiopian Civil Code.¹⁴⁶ The writing formality requirement, however, is found among the substantive provisions governing various contracts. In contrast, in France, the provisions requiring authentic acts are not placed with the provisions on proof of obligations, but are found among the substantive provisions governing various contracts.¹⁴⁷ The failure to reduce a contract to writing where required by law renders the contract void and reduces the status of the contract to mere draft in Ethiopia.¹⁴⁸

B) Requirement of Authentication and Registration (Notarization) as Validity Requirement

The written form is not the final part of the formation of the contract pertaining to immovable property transaction under Ethiopian law.¹⁴⁹ Writing a contract is the first phase of the processes and not the end of it in relation to transferring the ownership of immovable property. Regarding authentication, Article 1723(1) of the Civil Code provides that ‘a contract creating or assigning rights in ownership or bare ownership on an immovable

144 French Civil Code, Arts.1322-48

145 See ECC, Articles 2001 - 2029 for proofs in relation to contracts.

146 See ECC, Arts.2007, 2010, 2011, 2014 & 2015.

147M. Thomas Arceneaux, *Writing Requirements and the Authentic Act in Louisiana Law: Civil Code Articles 2236, 2275, 2278*, 35 La. L. Rev. (1975) Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss4/4>

148 See ECC, Art. 1720(1).

149 Both substantive laws and the Supreme Court Cassation Division decisions urge contracts in relation to immovable must be in written form and authenticated to be valid and effective. The Ethiopian Federal Supreme Court Cassation Division has delivered many decisions which ought to be obeyed both by federal and regional courts of all levels as a law regarding the formality requirement that the contracts regarding immovable property should comply with to be valid.

or a usufruct, servitude or mortgage of an immovable shall be in writing and registered with a notary. Under this provision, authentication is provided as a prerequisite for the validation of the contract. As we see from this provision, authentication has equal binding force of law as writing does have; and as per this provision, both writing and authentication requirements are essential elements for the legal effects or validity of the contract pertaining to immovable. But, this provision does not provide for the effect of noncompliance with the requirement of authentication unlike in case of the effect of the non-fulfilment of the writing requirement on contract of sale of immovable under Article 2877 & 2878 of the Civil Code. This practically triggers debates among legal professionals and within courts as to whether the authentication requirement under article 1723(1) is for validity of the transactions on immovable.

The FSCCD has also reached different rulings on the issue.¹⁵⁰ Before the Gorfe case,¹⁵¹ which was decided in 1999 E.C, the courts especially the Federal Supreme Court held that authentication by notary was not necessary to validate contracts on immovable property.¹⁵² The main relevant reasons given for this were that Article 1723(1) does not put the consequence of failure to authenticate the contract, that the Ethiopian Civil Code under Article 2877 provides that failure to meet the written requirement invalidates the contracts in relation to immovable property while it fails to provide the same consequence for authentication and that Article 2877 which requires a written form of 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.¹⁵³ 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.¹⁵⁴ This means that a contract of sale of immovable property will be deemed

150 Melkamu B. Moges & Alelegn W. Agegneh, *Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: the Case of Amhara Region* (Bahir Dar University Journal of Law, 2015), Vol. 6, No. 1. Pp 50 – 85.

151 FSCCDD, Volume 4, File No. 21448. The case between Gorfe Warqineh Vs Aberash Debarge et al (hereinafter, the 'Gorfe Case') delivered on April 30, 1999.

152 Melkamu B. Moges & Alelegn W. Agegneh, *Supra* note 150.

153 *Ibid.*

154 *Ibid.* See also *Supra* note 151, Gorfe Case.

inexistent or null and void failing to meet these requirements.¹⁵⁵ According to the court, public policy demands that special protection be given to contracts relating to immovable properties.¹⁵⁶

The Federal Supreme Court Cassation Division, in its other decision¹⁵⁷ has modified its decision in Gorfe case. The court held in this decision that the scope of interpretation given by the Court on Articles 1723 and 2878 in the Gorfe case does not include the situation where the parties to the contract admit the existence of the contract but provide objections on the basis of the fact that the contract has not been authenticated before notary. The purpose of authentication under Article 1723 according to the court in this volume is to evidence the existence of the contract of sale between the contracting parties. This means, the contract will not be invalidated for the mere fact that it has not been authenticated where the parties at suit have not denied the existence of the contract.

In another case, the FSCCD ruled that any objection regarding authentication requirements under Art. 1723(1) of the ECC may not be raised by the court but by the parties to the suit.¹⁵⁸ The court in this case reasoned from the perspective of the person who can invoke invalidity of the contract of transfer of immovable property based on noncompliance with the formal requirements. The court admits in this case, like in the Gorfe case, that the contract to transfer ownership of immovable property is invalid if not fulfilled the formal requirement under Article 1723(1). Therefore, it can be considered as an affirmation of the stand of the decision of the same court in the Gorfe case in relation to the validity requirement of authentication.

This author also argues that the authentication requirement under Article 1723(1) of the Civil Code is a validity requirement even between the contracting parties. It is worthy of enquiring the provision of the federal documents authentication and registration proclamation No. 922/2008 about the underlying issue. The proclamation clearly provides that authentication is

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ See the FSCCDD, F.No. 36887 delivered on October 18, 2001 E.C. The case between Alganesh Abebe Vs Gebru ishete Gebre and Warqit Ishetu Husen.

¹⁵⁸ See the FSCCDD, Vol.10. F.No.43825 delivered on December 6, 2002 E.C. The case the Guardian and Tutor of child Kokebe Tefera Vs Ato Ayalew Kasaye. *Et al.*

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.¹⁵⁹ It is very important here to shed a light on the scope of term ‘documents that shall be authenticated and registered in accordance with the appropriate law. This author argues that regarding the contracts on transfer of ownership on immovable therefore, it can be said that Article 1723(1) which requires every contract pertaining to immovable property to be authenticated and registered can be considered as an appropriate law, within the meaning of Article 9(1) of the document authentication and registration proclamation number 922/2008. Contrarily, Melkamu B. Moges & Alelegn W. Agegneh did not consider Article 1723(1) as appropriate law. They provided the following reasons:

Article 9 of the Authentication and Registration of Documents Proclamation 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 which places them under the transactions to be authenticated” if requested by the concerned parties.¹⁶⁰

Given the objective of authenticating documents is protecting citizens’ rights of producing private property, use and transfer through legal means and thereby supporting the justice system and ensuring the rule of law,¹⁶¹ the author argues that documents pertaining to immovable property transactions are included under the umbrella of the term “documents that shall be authenticated and registered in accordance with the appropriate law” under Article 9(1) (a) of the proclamation. Because the proclamation itself defines the term “document” as any contract, will, document of power of attorney or revocation, a document translated from one language into another by a licensed translator, copy of a document, document of vital event, education and professional certificate, memorandum or/and articles

159 See ARDP, Art. 9(1)(a, b, c).

160 Melkamu B. Moges & Alelegn W. Agegneh, *Supra* note 150, P.71.

161 See ARDP, Art.7(3).

of association, minutes or any written matter submitted for authentication and registration in accordance with this proclamation'¹⁶²

Therefore, it can be concluded that the written contract which is intended to transfer ownership of immovable property by sale or donation¹⁶³ shall be

162ARDP, Art. 2(1).

163There have been debates and controversies whether the contract of donation on immovable is required to be made in writing and must be authenticated to be valid under Ethiopian law. The Federal Supreme Court Cassation in the case between Makowanent Warrede Vs Meskerem Dagnaw et. al., in volume 8, File No. 34803 delivered on october 27, 2001 , has decided that the contract of donation is not required to be made in writing and be authenticated under Ethiopian Law. The main reason for the court to hold this position is the fact that the special law in the Civil Code regulating the contract of donation of immovable property does not clearly dictate the donation contract to be made in writing and be authenticated. Rather, Article 2443 of the Civil Code orders the contract to be made in the form governing the making of the public will (881_883) to be valid. The court goes on to saying that the provision of Article 1723(1) is a general provision of the law and the provisions of Article 2443 and 881 which deal with the form of the contract of donation are special provisions. If there is a discrepancy between the general provision of the law and special law, therefore, the provisions of the special law will prevail and applicable. Admittedly, Article 1723 regulates only the formality requirements that the contracts on immovable should follow without providing for the effect of non observance of the formalities. This does not, however, mean that some contracts in relation to immovable property can optionally avoid this formality requirement for the mere fact that the special laws regulating these specific kinds of contracts have not provided for the formality requirement of writing and authentication like in the case of contract of sale. The other thing misleadingly understood in this respect is that Article 1723(1) and other provisions of the special contracts like that of donation are contradictory and consequently applying the 'special law prevails over the general'' principle of interpretation. This author contends, however, that these provisions are not contradictory so that they can be applied without the need to recourse to the principle of interpretation. Therefore, considering the cumulative reading of Article, 1723(1) of the Civil Code, Article 9(1) (a) of proclamation number 922/2008 and Article 49(4) (b) of regulation number 324/2006, a contract of donation, among many other contracts on transfer of ownership of immovable, is one of the contracts that create rights of ownership over immovable property so that it is mandatory to be made in writing and be authenticated. Particularly in relation to the writing requirement, it can even be inferred from the cumulative readings of Article 2443 and 881 of the Civil Code that the contract of donation is required to be made in written form. Because, though the provision doesn't order the written form clearly, the public will is not valid if not made in writing. What is special with it is that it is only the testator who is allowed to write it. It can be inferred from this provision also that the contract of donation must be made in writing. In addition, it is provided in the federal urban landholding and registration regulation that the

authenticated and registered in the notary offices.¹⁶⁴ A document is notarized to protect persons from signing unimportant document. It assures the parties to an agreement that this document and no other is the authentic document which is intended to be given full force and effect.

Some of the justifications to have authentic acts are that they perform both evidentiary and cautionary functions.¹⁶⁵ When the formality is required for a particular act, it serves the cautionary purpose, and, if omitted, the act is null and void. In most of the developed world, most transfers are by written legal instrument.¹⁶⁶ In Louisiana, for instance, transfers are generally by the authentic act (i.e. signed and witnessed by a notary public and two witnesses) and signed by the seller and buyer.¹⁶⁷ Being in authentic form makes the instrument self-proving as to the parties signatures, property transferred and the consideration.¹⁶⁸ The authentic acts are presumed to be genuine for that they are conclusive of evidence of their contents. In Ethiopia too, properly authenticated, and registered documents are presumed to be genuine and conclusive evidence of their contents.¹⁶⁹ Consequently, they may be challenged only with the permission of the court, during proceedings, for good cause.¹⁷⁰ However, it has not been provided in the law explicitly regarding on what points that one can challenge the presumption of the conclusiveness of an authentic act. It is possible to imagine these points to be related to the insufficiencies of forms which have been held to vitiate an

property registering institution effects transfer of title over immovable property in case the cause of transfer is donation, if an authenticated donation contract is produced by the applicant. This also presupposes that the contract of donation to transfer ownership over immovable property should be authenticated by a notary.

164See ECC, Art.1723 (1) & ARDP, Art. 9(1)(a). Art. 2(2) of the Proclamation defines Authentication as 'to Authenticate a document' as an authorized public notary officer witnesses the signing of a document by the person who has prepared such a document and followed by signing of a document and affixing a seal by the same public notary officer signs and affixes a seal on the document signed in his absence by ascertaining its authenticity through an affidavit or specimen signature and/or seal.

165W. Riddick, *Economic Development and Private Ownership of Immovable Property: A Comparison of Louisiana and Haiti*, Electronic Journal of Comparative Law, P.7.

166*Ibid.*

167*Ibid.*

168*Ibid.*

169See ARDP, Art. 23(1).

170ARDP, Art.23 (2).

authentic act that are the failure of the notary and witnesses to sign the act, the failure to sign in the presence of the notary and witnesses, authentication by unauthorized organ and the failure to include the date of the act on its face. Therefore, the notary institutions play scrupulous role in the process of immovable property transfers in Ethiopia.

Therefore, it can be concluded from the holistic readings of Article 1723(1) of Civil Code, Article 9(1) (a) & article 17(1) of proclamation number 922/2008 and other cassation decisions of the supreme court like in the Gorfe case, which this author also adheres to, that contractual transfer of immovable property ownership has not any legal effect unless authenticated and registered in the notary public offices. That means, an authentication is a validity requirement for contracts pertaining to transfer of ownership of immovable under Article 1723(1) where non-observance of it results in nullity of the contract for all intents and purposes.¹⁷¹ It is reaffirmed by the cassation decision of the Federal Supreme Court that a contract to establish or transfer the right of ownership, usufruct, servitude, or mortgage on immovable property is not valid if not made in writing and be registered before the notary.¹⁷²

However, these requirements of writing and authentication formalities stipulated under Article 1723(1) of ECC and Article 9(1) of ARDP do not

171Fekadu Petros, *Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia*, Journal of Ethiopian Law (2008), Vol 1. , No.1, P7.

172 FSCDD Vol.19, File No. 99124. *The case between Seble Mamo, Dawit Girma Vs Heirs of Tesfaye Bezabih and Tirunesh Hayilu, February 28, 2008. The court, in the belief of the author, erroneously stated in this decision that the contracting parties can optionally use an institution entrusted with the duty of registering (in the language of the court and article 1723) contracts on immovable property even after the coming into force of the proclamation regulating the authentication and registration of federal documents. The courts in Ethiopia have been believed to have a power of authentication along with the notary as alternative authenticating institution so far being stipulated in the Civil Code. Pursuant to the new Ethiopian Federal Documents Authentication and Registration Proclamation and Regulation, however, they have been snatched such a power albeit not clearly. That is, the courts cannot be taken as an alternative institution in charge of authentication of documents along with notaries today as before at least after the coming into force of the Proclamation. Now a day, the contracting parties cannot optionally go to the court therefore to get their contract authenticated according to the later proclamation. This means, this proclamation, in effect, has repealed Article 1723 of the Civil Code in relation to courts as an authentication institution.*

have application in relation to ownership of immovable property emanating from the law.¹⁷³ What the law requires in this case is registration of rights acquired by law in the immovable registry offices.¹⁷⁴

The function of authentication is performed pursuant to the federal document's authentication and registration proclamation before federal Document's Authentication and Registration Agency at federal level¹⁷⁵ and before different organs of the regions of the Ethiopian Federation. This proclamation dictates that regions constituting the Ethiopian federation should also establish corollary organs with the authority of authenticating documents in enforcing the proclamation.¹⁷⁶ Yet, regional states in Ethiopia haven't established agencies carrying out the task of authenticating documents up until now. In Oromia, this task is dispersed over different executive organs and the prosecution offices.¹⁷⁷ It is the justice office that carries out the function of authenticating documents in Amhara region.¹⁷⁸

3.3.2. THE REGISTRATION (MODUS ADQUIRENDI) REQUIREMENT

This requirement is the acquisition form (modus acquirendi) which is affected through the registration of title. Transfer of ownership right over

173FSCDD Volume 9, File No. 38666. *The case between the Ethiopian Development Bank Vs Balambaras Tasfaye G/yesus*

174 Federal Urban Land Landholding Registration Proclamation No. 818/2006, Federal Negarit Gazette.No. 25 (Hereinafter, 'FULRP). Art. 30(2).

175Federal Authentication and Registration of Documents Agency Establishment Council of Minister Regulation No.379/2008.

176 ARDP, Art.5(1).

177 *In Oromia regional state, the prosecution offices at different levels carries out the function of authentication of documents residually. That means, it conducts the task of notarization only after exhausting that the power to authenticate that particular legal act/document brought before it is not granted for other government organs. In Oromia, the transport authority notarizes documents in relation to vehicles(the author have a doubt on this(Proc.No. 213/20011 Art. 34(9)), Urban land administration offices, though legally subjected to argument, are practically understood to have such power in relation to immovable in towns(Proc.No. 213/2011 Art. 20(17)), the offices of workers and social affairs are empowered legally to authenticate the contract of employment between the employer and employee(Proc. No. 213/2011 ,Art. 31(17), Rural land administration offices are empowered to authenticate contracts in relation to rural land uses(Proc. No. 213/2011 Art. 26(7).*

178 *Melkamu B. Moges & Alelegn W. Agegneh, Supra note 150.*

immovable things and special movable things is effected by striking out the name of the transferor and entering the name of the transferee in the registers of immovable things and special movable things respectively and issuing a new title deed in the name of the transferee¹⁷⁹ as opposed to ordinary corporeal chattels where the right of ownership is transferred by possession.¹⁸⁰ This is what the law calls the registration step in the processes of acquiring and transferring immovable property rights in Ethiopia. In other words, the physical delivery of the immovable sold with all documents enabling the transfer of title to the transferee itself is not enough to transfer ownership of immovable property. Therefore, it is an entry in the register of an immovable property, where the property to be transferred is situated which completes the transfer process. This practically means the issuance of certificate of title by the relevant government property registering institution. The previous title certificate issued in the name of the transferor should be surrendered to the institution for cancellation by such institution and a new title certificate in the name of the transferee shall be issued and the property must subsequently be registered by the institution in the name of the transferee.¹⁸¹ The registering institution does this upon the submission of the appropriate documents with an application for registration.¹⁸² Notaries,

179Alemayehu, *supra* note 108, p 77; See also Arts 1185, 1189, 1190 of the Civil Code of Ethiopia.

180See ECC, Arts. 1186(1) & 1143 - 1145. In case of ordinary movable things, the Civil Code provides for different alternatives of delivery of possession. Accordingly, possession may be transferred by delivery or handing over of the thing, or by delivery of the documents representing the thing or constructively by declaration of the possessor of a thing that from that time on he will hold the thing in the name of the creditor who failed to refuse to take delivery. See also ECC Arts .2274 & 2324.

181Muradu Abdo, *Supra* note 127.

182Urban Landholding Adjudication and Registration Council of Ministers Regulation No. 324/2006(Hereinafter, 'ULARR'), Federal Negarit Gazette No. 83. Art. 49(4)(a - e). According to this provision, any person may transfer his rights on the registered landholding through inheritance, donation, sale or other legal means when, *inter alia*, the documents enabling the transfer of title, such as authenticated contractual agreement or sales agreement if the transfer is made by a contract or as a contribution in a share company, authenticated document of transfer if it is made by donation, authenticated contract of assignment if the transfer is made by assigning one's rights and other evidences entitling transfer of title given by appropriate organ, are submitted.

courts, financial institutions and revenue collecting bodies have to cooperate with the registering institution in this regard.¹⁸³

From all the above conditions of transfer of ownership of immovable properties in Ethiopia, one can conclude that, according to Ethiopian law, the transfer of ownership of an immovable property requires both valid (written and authenticated) contracts between the transferor and the transferee as a legal ground (*causa*)¹⁸⁴ and the registration of the change of ownership title in the immovable property rights Registry where the property is situated (*Titulus /modus system*).¹⁸⁵ Consequently, the registration requirement under Ethiopian law is a requirement not only to inform third parties (publicity) but also a requirement to transfer real property and as such plays a constitutive role.¹⁸⁶ The establishment, modification, transfer and lapse of right in real property, which is required to be registered, shall take effect upon being registered.¹⁸⁷ According to this requirement, third parties are made aware of property rights registered and not only a deed of ownership under Ethiopian law of immovable property registration. Regarding the seemingly confusing interpretations on the effect of authentication (Article 1723) and registration for publicity (Article 2878) of the Civil Code, Fekadu Petros says the following:

Under the Ethiopian Civil Code, contracts relating to immovable property are required to be written and registered. The effect of registration and publicity have sometimes been misleadingly interpreted as though these

183 See *FULRP, Art.53(2)*. This article provides that "Courts, financial institutions and revenue collecting bodies shall directly submit or allow access to the registering organ all documents they generate that have to do with the rights, restrictions and responsibilities subject to registration in connection with landholding.

184ECC, Art. 1723(1) & ARDP, Art. 9 (1).

185ECC, Art. 1185 and FURLP, Art. 30(2).

186 See *ECC, Art.*

187Urban Landholding Registration Proclamation, 2014, Proc. No.818/2014(*hereinafter, 'FULRP'*). *With regard to market transactions relating to immovable property, it is proclaimed under Par.4 of the preamble of the proclamation, that the proclamation is enacted to put in place legal framework which is up to date and efficient and to enhance the contribution of land and immovable property to the development of free market economic system and to certify land and immovable property right to the possessor, who develops on the land, and to ensure his possession security. Furthermore, the proclamation in its preamble paragraph 3 also appears to aspired to minimize disputes that may be arised in relation to land and immovable property and establish transparent and accountable working system and making government services efficient and enable the possessor to enjoy the property he develops.*

requirements were intended for the protection of the third parties' interest alone, as is often implied from Article 3089 (1) and 2878 of the Civil Code. The debate in this regard has recently been settled by the Cassation Panel of the Supreme Court in its decision of May 10, 2007. The Court has thus laid down a binding precedent to the effect that there are two registrations involved in the contracts for the transfer of immovable properties. The first type of registration (Article 1723) involves authentication of the contract at notary for the purpose of validity, while the second phase involves registration (Article 2878) in the registers of immovable properties for publicity and transfer of ownership. Non observance of the second does not render the contract ineffective as between the parties, while non observance of the first results in nullity of the contract for all intents and purposes.¹⁸⁸

The two terms ‘authentication and registration’ are often confused with one another by lawyers and judges under Article 1723 on the one hand and the registration under Article 2878 as well as under property right registration legislations on the other hand in relation to contracts pertaining to immovable¹⁸⁹ The nature and legal effects of authentication and registration in line with Article 1723(1) of the ECC and authentication and registration law on the one hand and the registration pursuant to Article 2878 of the Civil Code on the other hand has been clarified by the supreme court's decisions.¹⁹⁰ Accordingly, in both of the cases the court has made clear that, the purpose of authentication (not registration in the strict sense of the term), requirement under Art. 1723 is to make the contract valid between the contracting parties while the purpose of the registration requirement under Article 2878 is to raise the registration of the contract in the registry of immovable against third parties as a defence.

Therefore, it is understandable that the acts of authentication and registration are different in nature, purpose and as to the organ that carries out both tasks. The acts of authentication and registration are conducted at different levels, and institutions entrusted to perform the acts of registration and authentication thus differs accordingly. The act of authentication is carried out before notarial institutions empowered to do so. The act of registration,

188Fekadu Petros, *Supra* note 171.

189 Melkamu B. Moges & Alelegn W. Agegneh, *Supra* note 150.

190 See FSCCDD, Vol. 4; File No. 21448 (Gorfe Case). See also FSCCDD, Vol 8, File No. 34803.

however, is carried out by the property registration institutions in the immovable registry offices. The notarial institutions first authenticate the written contracts produced by the contracting parties and file it by giving the identification number in the institution. What the notary officer must do next is registering (in the sense of filing) the document it authenticates and deposit the copy of each document in the institution.¹⁹¹ Therefore, registration in the notary offices can be considered as part of the task of authentication. The public notary institution does not deposit the document it authenticates only but also register and deposit other documents where the law provides for the deposit of a document within the institution up on submission.¹⁹² It can be understood from this that the notary institution deposits these copies of documents for evidentiary purpose after authenticating validity. It shall also give the requested copy or evidence up on request by an interested person, or evidence about the document deposited in the institution.¹⁹³ The registration (not in the strict sense of the term) with the notary institutions serves the legal certainty and security for the purpose of the validity of the contract between the contracting parties.

The other type of registration is registration in the registry of immovable property to be made in accordance with Articles 1185 and 2878 of the Civil Code. This kind of registration is the registration of transfer of ownership for the purpose of publicity (for the protection of third parties) and transfer of the property from the former owner to the newer one. It is performed by the relevant government administrative authority with the power of issuing ownership title up on production of the relevant documents. This phase of registration is the step which completes the process of transfer of ownership.

3.3.2.1. The Effect of Registration System on the Transfer System

Understanding the immovable property registration system that one country adopted has a great help to understand the nature and characteristics of the transfer of immovable property ownership system that certain national jurisdiction adopted. The Real Property Registration System differs in

¹⁹¹See ARDP, Art.18(1).

¹⁹² ARDP, Art. 18(2).One of such scenarios is the document of public or holographic will which may be deposited with the notary offices in accordance with Article 89(1) of the Civil Code of Ethiopia.

¹⁹³ARDP, Art. 18(2).

contents of registration, in its organization, how registration is made, substantial effects of registration, the protection (non-protection) of the good faith and bad faith, and the effects towards third parties depending on the country and the legal families. According to how the registers are organized and the degree of the effectiveness attributed to them, it is possible to divide them into two main categories.¹⁹⁴ These are; the deeds registration system and the title registration systems.

A deed registration system; means that the deed itself, being a document which describes an isolated transaction, is registered.¹⁹⁵ The defining characteristic of this system is that documents are registered without the identification of the latest genuine title holder, that is to say the documents are not examined beforehand as part of a process to establish the identity of the titleholder, but merely have to comply with certain formal requisites.¹⁹⁶ This type of system is also termed the “opposability system” and is currently used in **France, Belgium, Portugal and Italy**.¹⁹⁷ Some scholars also call this the French model of the registration system.¹⁹⁸ The French Model, also called the casual consensual system, is characterized by the fact that the consent of the parties itself shall give effect to the sale contract in transferring land without the need of creating a system of registration.¹⁹⁹

In the so-called Latin legal systems believed to have been influenced by the Code Napoleon such as French, the Italian and Belgium, inscription in the land registry does not form the part of the mechanism of transfer, and the function of the land registry in these countries is primarily to give publicity to titles over the property.²⁰⁰ That is, the inscription of a right over an immovable is therefore only useful when a subject wishes to invoke that right against third party for the purpose of making the transaction effective against third parties (declarative effect - registration declares only a transfer that has already happened by the virtue of the contract) than against the

194Martinez Velencoso, *Supra* note 18.

195Jaap Zevenbergen, *Systems of Land Registration Aspects and Effects (PhD Thesis, University of Melbourne, 2002)*, Netherlands Geodetic Commission, Delft, the Netherland, P.48.

196Martinez Velencoso, *Supra* note 18.

197*Ibid.*

198 *Chen Lie, supra* note 13, P379.

199 *Ibid*; See also Andrea Pradi, *Supra* note 23.

200Martinez Velencoso, *Supra* note 18.

person whose property is encumbered.²⁰¹ Therefore, it is fair to conclude that, in French, the contract conveys the ownership only between the parties, and that registration (inscription) is required for it to produce contra omnes effect.²⁰²

The title registration system, on the other hand, means that not the deed, describing e.g. the transfer of rights is registered, but the legal consequence of that transaction, i.e., the right itself (title).²⁰³ That means, rights are inscribed in the registry, and it does not consist of a collection of original documentation on the property, as does the registration of deeds system.²⁰⁴ So, the right itself together with the name of the rightful claimant and the object of that right with its restrictions and charges are registered.²⁰⁵ With this registration, the title or the right is created and one can, therefore, immediately see who the owner of certain property is.²⁰⁶ This system is called German Model Registration System (also constitutive system)²⁰⁷ which is currently in place in Germany, Austria, Switzerland, Spain and England.²⁰⁸ Each time a legal fact occurs that aims at changing the right holder to a parcel, it is not the documentary evidence ('deed') of that fact as such that is registered but a right.²⁰⁹ A deed or form saying who is giving up rights and who is gaining them is presented to the registrar.²¹⁰ The registrar will, after thorough checks, change the name of the right holder listed with the parcel, dispossessing the previous right holder.²¹¹ The title registration

201 Martinez Velencoso, P164. See also Chen Lei, *Supra* note 13. See A. Pradi, *supra* note 23 (2015). Registration, according to this system, does not have a constitutive effect rather a declarative effect, i.e, it declares the fact of transfer between the seller and the buyer and nothing more.

202 M. Zivkovich, *Supra* note 11; See also Art.33 of ZOSPO (*Law on Basic Ownership Relations*).

203 J. Zevenbergen, *Supra* note 195.

204 Martinez Velencoso, *Supra* note 18.

205 J. Zevenbergen, *Supra* note 165.

206 *Ibid.*

207 Chen Lie, *Supra* note 13, P.379.

208 Martinez Velencoso, *Supra* note 18.

209 J. Zevenbergen, *Supra* note 195.

210 *Ibid.*

211 *Ibid.*

system, therefore, plays constitutive role without which ownership of immovable property cannot be passed successfully.²¹²

Coming to Ethiopia, the Ethiopian immovable property registration system appears to adopt constitutive (title registration) system on the fact that the proclamation stipulates that a change of certain property rights will take effect when they are duly registered.²¹³ It seems that, like the German and Torrens System, registration is of the essence for conveyance of a property interest in Ethiopia. It is logical, therefore, to conclude that the type of land registration system in Ethiopia is the title registration system in which parcel based and unique identification code approaches have been adopted. The preamble of the proclamation²¹⁴ also bears a witness that the principles of legal cadastre such as registration of possession, getting the consent of the possessor during transaction, making registration of possession open to public, clearly identifying the possession and the possessor through unique identification codes, which are basic characteristics of the title registration system, have been recognized under Ethiopian law.²¹⁵

3.3.2.2. The Effect of Non-registration Requirement under Ethiopian Law

The relation between registration requirements under Ethiopian contract law and property law provisions need to be analysed to understand the effect that the registration system has on the property transfer system under Ethiopian law. In Ethiopia, the effect of non-registration under the proclamation²¹⁶ compared with the effect of non-registration under the Civil Code provisions of the contract law seems different.²¹⁷ As to the effect of registration, Article 2878 of the Civil Code provides that ‘the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate.’ This means that a

212 *In this system, the rights of the new buyer are interred in the registry of immovable not only for the purpose of publicity, but also to practically generate an ownership right for the new buyer.*

213 FULRP, Art. 30.

214 FULRP.No. 818/2006.

215 FULRP., Preamble Para 5

216 FULRP.

217 ECC, Art.2878 Provides that "the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable property sold is situated."

sale contract relating to immovable property can be raised against any third person if the contract is already registered in the land registry. Non-registration does not, however, affect validity of the contract of sale between the parties to the contract. The effect of non-registration under urban land registration laws deviates from that of the Civil Code. Under these laws, non-registration can be raised as a defence against any person.²¹⁸ Under the Civil Code non-registration cannot be raised as a defence between the contracting parties.

D) Article 2878 of Ethiopian Civil Code

The Ethiopian Civil Code, under the title regulating contract of sale of immovable property, particularly Article 2878, does not seem to require registration as a requirement to transfer ownership of immovable property.²¹⁹ It rather, seems to require registration for publicity of the fact of the transaction that took place in relation to certain immovable property to third parties. It appears, under this provision, that registration is not a mandatory and constitutive element as regards the contracting parties.²²⁰ Although some of the provisions of the Code appear to provide for registration as a requirement for transfer of ownership, these provisions do not dictate mandatorily, albeit as publicity requirement, the registration as a constitutive element of transfer of ownership of immovable property.²²¹ What seems to be registered under Article 2878, therefore, is only the contract deed without effecting the title transfer. This means, simply, registering the contract deed (as in the case of the French model with only declaratory effect) is thought to

218 See FULRP, Art. 47.

219 The provision reads “the sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate.”

220 Because, under Art.2878 of the Civil Code, the requirement of registration seems only for the purpose of publicity to make third parties know or aware that the transaction took place on certain immovable property concerned

221ECC, Arts. 2879, 2875 & 2281. According to these provisions of the Code, the seller has the duty to furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the registers of immovable property and such obligation shall be deemed to be an essential stipulation of the contract of sale. It is also provided under the Code that the seller shall take the necessary steps for transferring to the buyer unassailable rights over the thing. See ECC, Article 2281. The provisions of the title of the code regulating contracts relating to the assignment of rights are applicable on contracts of sale of immovable as per Article 2875 of the same code.

be enough to publicize the fact that an owner of certain immovable property has sold (transacted with) his property with another, to third parties.²²²

Some of the decisions of the Federal Supreme Court Cassation division also affirm this position of the provision of the Civil Code. The Federal Supreme Court in trying to explicate the difference between the registration requirements under Article 1723 and that of Article 2878 held that the purpose of registration requirement under Article 2878 is to raise the registration of the contract in the registry of immovable against third parties as a defence.²²³ The court also reaffirmed this in its other related decision.²²⁴ According to the court's decision, in this case, the contract of sale to transfer ownership of immovable property from one person to another should be registered under the law before the relevant body to have effects on third parties. The court further held that it should be invalid in case of non-compliance and the seller should repay what he has received because of the contract. Furthermore, it is made clear in this decision that for one to raise the contract of sale as a defence against third parties, he/she has the burden of proving that the contract of sale is registered in accordance with the law.

The Supreme Court Cassation bench in the case between Kebede Arragaw Vs Commercial Bank of Ethiopia upheld the above position too.²²⁵ The high court, in this case, held the correct position that registration is not complete without title transfer. According to high court, the contract of sale cannot be raised against third parties unless title transfer is registered in the registry of immovable. That means, the registration or attachment only of the contract without transferring title is not enough to constitute the act of registration. The author of this paper argues in support of the position of the high court in

222 It may happen most of the time that the possibility where the seller of immovable property has already delivered the physical possession of an immovable property retaining the title to the property with himself.

223 See FSCDD Vol. 8, File No. 34803 and Vol. 4 File No. 21448.

224 See FSCDD Vol.23, File No. 153664; *The case between Asha Farah Vs Abdurrahman Tahir et a, Decision delivered on September 29, 2011. Semantically, the language that the court employed is "registration of contract on the registry on which the contract is registered" in its reasoning as opposed to "registration of transfer of title of ownership". The court has not differentiated which stage of registration renders the contract invalid in that decision.*

225 See FSCDD, Vol. 4, File No. 16109 *The case between Kebede Arragaw Vs Commercial Bank of Ethiopia. April 12, 1999.*

this case. The cassation bench, however, reasoned that Article 2878 of the Civil Code requires only the attachment of the deed of contract of sale to the registry of immovable serves the purpose of publicity sought for the protection of third parties without registration of title transfer being affected. Thus, according to the Supreme Court in this case, the protection of third parties commences from this date of attachment of the deed of contract to the registry of immovable without the need to waiting for the title transfer.²²⁶ These decisions of the Supreme Court and Article 2878 of the Civil Code leads to the conclusion that the Ethiopian system of immovable property transfer is consensual, like in France, where ownership is transferred at the moment of conclusion of valid contract and registration in the immovable registry serves only the purpose of publicity.

Therefore, considering the stipulation of Article 2878 and the decisions of the Supreme Court delivered so far buttressing this provision, which stubbornly continued in limiting the application of the registration requirement under Article 2878 only to the protection of third parties, one may conclude that ownership of immovable property, under Ethiopian law, can be passed by concluding only a valid contract of transfer of ownership and registration of documents of contracts without registration of rights acquired (registration of transfer of title) in the immovable registry which is the characteristics of the causal consensual system of French model.

The author of this paper submits, however, that the court is wrong in holding this position. The author strongly argues that the attachment only of the contractual document to the registry of immovable property without registration of title transfer does not constitute registration in its full and practical meaning under Article 2878 of the ECC.²²⁷ In contrast to the above

²²⁶ It can be understood from this that the date of attachment of the contract and the date of registration of title transfer may be different. Sometimes, the contract which must accompany the application for registration of transfer of ownership may be attached to the file of the seller without his title cancelled and replaced with the new buyer.

²²⁷ The court in the above decision cited Articles 1613 and 1614 of the Civil Code to strengthen its position in its reasoning in the cases. The cited legal provisions, however, are related to accompanying documents that an applicant should produce with his application for the registration of transfer of rights. It is to support this that documents of deeds are to be produced. The Registration under article 2878 also includes the attachment of the contract to the registry of immovable.

decisions, it has been made clear, in another decision of the cassation bench, that it is the registration of the right of ownership acquired as a result of the contract of sale, not only of the contractual document, that has to be registered so that it has the legal force of banning the first buyer to raise the contract of sale against the third party who has registered his rights preceding the first buyer in the case between Enani Tesema Vs .Gebramariam Demeqe et al.²²⁸ Though the supreme court's use of terminologies like registration of sale, registration of contractual deed and registration of transfer of title, seemingly confusing, the whole message of the decision in this case is that it is the right acquired as a result of the contract that is to be registered in accordance with Article 2878 of the Civil Code to be raised against third parties as a defense. The author believes that further investigations need to be made to suggest more clarity in the usage of the terminologies such as registration of sale, registration of contractual deed and registration of transfer of title in relation to transactions pertaining to immovable property.

228Federal Supreme Court Cassation Decision Vol. 22, File No. 12371. The case between Enani Tesema Vs G/mariyam Demeqe et al p. 33, September 25, 2010. This case was about contract of sale of a house concluded (on 01/06/2003) between the contracting parties. In this contract, the sellers (spouses) has sold their residential house to the buyer and handed over all documents relating to the house they sold as required by Article 2879(1) of the Civil Code. This first contract, however, is not registered (transfer of title not effective). The sellers resold the same house to another buyer (on 22/10/2003) and transferred the ownership of the house to this new buyer (Ownership transfer is registered). This new buyer precedes the first buyer in making his rights registered in the registry of immovable property. The administrative authority that is in charge of power of registration of transfer of ownership of the property is also sued, in the case, for not taking the necessary precaution in effecting the transfer of ownership of the property in this case. The appellant (the first buyer) took his claim to the court claiming that the second contract of sale of the house should be made invalid and asked for the validity of the first contract of sale of the house. The creditors of the second buyer bought this same house on auction and the transfer in the name of this new buyer is effective, too. The court has reasoned in this decision citing article 2878 that a contract of sale of an immovable property has to be registered in the registry of immovable to be raised as a defense against third parties. Therefore, the first buyer cannot challenge the legal transaction over the same house as far as he didn't make registration of contract of sale of the house which is transferred to another third party. Therefore, the one who bought an immovable property by contract cannot raise the contract of sale against third party who bought the same property and precedes in getting transfer of title over the property.

Therefore, given the above cases, the court's decisions are not consistent and predictable regarding the underlying issue of immovable property ownership transfer. This lack of certainty, consistency and predictability in the decisions of the Supreme Court indisputably creates a problem on lower level courts and practitioner judges in light of taking of judicial notes when they face similar legal cases.

II) Property Law Provisions of the Civil Code and Other Legislations

The effect of registration under the provisions of property law, on the other hand, seems to resemble German model and other Germany influenced civil law countries where registration is the requirement as between the parties themselves so that it has a constitutive effect to transfer ownership of immovable, i.e, registration in the immovable registry serves not only for third party protection, but actually transfer ownership title to the acquirer. In other words, the transfer is not complete up until the right acquired as a result of transaction is entered into the registry of immovable property. In Ethiopia, to effectively transfer immovable, property law provisions of the Civil Code²²⁹ and urban landholding registration laws²³⁰ relating to property rights need further requirement of registration which is traditional system of *titulus et modus acquirendi* (mode of acquisition). According to these provisions of the law, the sale of immovable property is only completed by registration of the transfer of ownership in the registry of immovable property.²³¹ This, practically, means, to transfer title of the property to a new owner, the former title must be cancelled and it is this act that constitutes registration.²³² According to the proclamation and the regulation, therefore, it

229 See ECC, Art. 1185, 1189, 1190, 1613 &1614.

230 FULRP & URLARR, Art.47 of this proclamation, for example, provides deviating from the effect of non registration under the Civil Code, that non registration cannot be set up against any person.

231 ECC, Art. 1185 provides that "An entry in the registers of immovable property shall be required for the purpose of transferring by contract or will the ownership of immovable property." This and urban landholding proclamation provisions require an entry into the registry of immovable property as a requirement of transfer of ownership of immovable property.

232 Accordingly, an applicant for registration of rights that he has acquired has to produce authenticated deeds among other things to be registered. See also Muradu Abdo, Supra note 127.

is the right that is to be registered and the contracts are simply accompanying documents. The registering institutions carry out the task of registration in relation to transfer of ownership title over immovable up on production of authenticated cause of transfer (contracts).²³³ This means, for the property registering institution to register the transfer of title on immovable property, authenticated cause (contract) of transfer is a requirement. Therefore, it can be said that authentic acts are essential requirement for the registration of property rights on immovable in immovable registries in Ethiopia.

Under the Ethiopian legislations, ownership right over immovable property is transferred to the buyer now of registration of rights in the legal cadastres in the name of the buyer upon payment of stamp duty and registration fee unlike the French consensual model where the moment of conclusion of the contract transfers the ownership.

Furthermore, it is provided under the law that, since ownership right can only be represented by the certificate, any transfer or assignment of ownership shall be effective only after registration.²³⁴ Where, in default of registration of an act in the registers of immovable property, the right of a person may not be set up against third parties, no person may acquire from such person a right which may be set up against third parties.²³⁵ The person, who has acquired a right under such conditions, shall before entering in the register, the act by which he holds his right, register the act by which his transferor held his right.²³⁶

233 See also Article 49(4)(a,b,c) of Regulation No. 324/2006. Under these provisions any person may transfer his rights on the registered landholding through inheritance, donation, sale, or other legal means: when the documents enabling the transfer of title such as authenticated contractual agreement or sales agreement if the transfer is made by contract or as a contribution in a share company; authenticated document of transfer if it is made by donation; authenticated contract of assignment, if the transfer is made by assigning one's right; among other documents that must accompany the application for the transfer of title. See also oromia urban land administration service directive number 06/2008. Which provides that the property registering institution can only effect the title transfer on urban landholding if the applicant produce an authenticated contract of sale and contract of donation if the transfer is on the basis of sale and donation contracts under Article 18.3(1) . It also adds that if the transfer is on the basis of will, the certificate of heir shall be issued from the court.

234 FULRP, Article 30.

235 ECC, Art. 1645(1).

236 ECC, Art. 1645(2).

It seems, therefore, from the cumulative reading of Article 2878 and 1185 of the Civil Code on the one hand and provisions of urban landholding registration proclamation and regulation on the other hand, that an entry in the immovable registry, is not merely a declaratory act which serves only the purpose of publicity but also mandatory and an essential condition (constitutive) for effectuating a change in a legal position in relation to transfer of immovable property ownership under Ethiopian law though not of validity.²³⁷ This reveals that the Ethiopian system of immovable property transfer, being approached from the vantage point of the above court cases and relevant provisions of the law, ambivalently switches and oscillates between the systems of casual consensual and casual tradition systems of immovable property ownership transfer. This in effect means that the Ethiopian system of immovable property transfer resembles the characteristics of both casual systems of property transfer and abstract tradition system of property transfer.

It resembles the characteristics of the casual system of property transfer in that the validity of the underlying contract is very important for the property to be transferred. This means that the ownership transfer is effective as long as there are no defects that can invalidate the effectiveness of the parties' agreement. Consequently, in case the title is void or it becomes ineffective due to enforcement of one of the causes of annulment provided by the Civil Code, the transfer is deemed to have been invalid since the beginning. Any delivery of the goods to the transferee would be ineffective and the return of the property to the transferor would be required (revindication). The main difference from the French model of transfer, however, is that unlike the system in France and French-influenced causal consensual system (Belgium, Italy and Greece) where the moment of transfer is the moment of conclusion of the contract, the moment of transfer of ownership of immovable property in Ethiopia is the moment of entry of rights into the registry of immovable property (not the moment of physical delivery of the thing).

237 The effect of registration under article 2878 of the civil code dealing with Registration requirement may be called opposability principle (with declaratory effect) whereas that of under the proclamation and other property law provisions of the code are requiring a further element of constituting.

It can also be said that the Ethiopian system of immovable property transfer displays the Germanic tradition model of immovable property transfer in only some respects that in both systems, the registration has a constitutive effect, i.e, transfer is complete only upon registration of the transfer in the registry of immovable property. The basic difference, however, is that the Ethiopian system does not differentiate the underlying contract/obligatory act from the real agreement/dispositive agreement. The Ethiopian system does not also recognize the principle of abstraction where the validity of the real agreement is independent of the validity of the underlying contract. The real agreement cannot exist independent of the underlying contract in Ethiopia. In Ethiopia, like systems of immovable property transfer in Germany, Finland, Austria, Dutch, Spain, Serbia and Kosovo, ownership of immovable property cannot be acquired by virtue of contract only if there was no registration in respect of the registered real property. Therefore, it can be concluded that Ethiopia, at least, legislatively adopted a mixed system of property transfer which combines elements and qualities of both systems selectively.

4.CONCLUSIONS

This paper attempted to shed a light on the existing systems of immovable property ownership transfer. In doing so, the paper has shown the readers the existing global systems of property transfer in a comparative way. It has also discussed that the property transfer system differs across jurisdictions and even within the countries of same legal families. While some countries adopted the French model of the casual consensual property transfer system, in which the ownership transfer only by the contract without the need to the registration of title transfer, some others have adopted the Germanic model of abstract tradio property transfer system under which the abstraction and differentiation principles have been recognized. The paper has also shown that there are also still other countries adopting the mixed model of immovable property ownership transfer system under which, both the valid underlying cause for the transfer and registration, as a mode of transfer, are required for the immovable property to be transferred effectively. The paper has also attempted to decipher the main differences under the three models of real property transfer. Under the French and French-influenced system of property transfer, registration has only the declaratory effect and thus serves only the purpose of publicizing the fact of property transfer since only the

consent of the contracting parties transfer ownership of the property. The real agreement does not have a separate existence from the obligatory agreement under this system and thus, the invalidity of the obligatory agreement has a direct effect on the transfer of ownership.

In the Second and Germanic system of property transfer, however, the obligatory/dispositive agreement only does not transfer ownership of property in the absence of real agreement and registration in the land registry. The real agreement has a separate existence so that the invalidity in the obligatory agreement does not affect the real agreement. That is, the property can be transferred successfully, in the absence of valid obligatory agreement if the real agreement is valid.

Under the third and mixed model of immovable property transfer system, it has been shown that both the underlying cause and registration are the requirements for the property to be transferred but falling short of the separate existence of the real agreement. The main difference of this system from the above two systems is that registration under this system, unlike in the consensual system, is the requirement for the property to be transferred. That is, the registration plays not only the role of publicity but also transfers ownership (constitutive element).

Regarding the immovable property transfer system that Ethiopia, as a civil law country, adopted, the paper has tried to discuss the matter considering the contract and property law provisions of the Civil Code and other relevant legislation as well as the decisions of the Federal Supreme Court Cassation Division decisions. Some of our Supreme Court case laws and practices, as well as some provisions of the Civil Code, seem to be inspired by the French consensual model of immovable property transfer system under which the contract itself conveys ownership without further requirement of title registration in the immovable registry offices. Under this system as discussed in the preceding sections, ownership is transferred merely by the consent of the contracting parties as soon as the contract is signed. The paper has revealed that the reading of Article 2878 of the Civil Code of Ethiopia on the one hand and the decisions of Federal Supreme Court Cassation decisions delivered buttressing this provision, on the other hand, seem to suggest that Ethiopia adopted the French model of consensual immovable property transfer.

The author strongly contended, considering other cassation decisions of the Supreme Court and property law provisions of the Civil Code and the urban landholding registration laws, that the Ethiopian system requires both valid title(as a legal ground for transfer) and registration as a *modus acquirendi* (as a mode of acquiring). That means, both valid underlying contract (*ius titulus*) and registration, as a mode of transfer, are requirements under Ethiopia law to transfer ownership of immovable property. This is to mean that registration does not serve the purpose of publicity only as Article 2878 of the Civil Code and some of the decisions of the Federal Supreme Court cassation seem to suggest. The registration requirement under the Ethiopian law, therefore, does have a constitutive effect without which effective transfer of immovable property transfer cannot be completed successfully. It has also been shown in this paper that the Ethiopian law does not recognize the independent existence of the real agreement as in the case of Germanic abstract system of immovable property transfer. As argued in this paper that the practice of the Supreme Court in relation to the requirement of validity of the underlying contract to transfer ownership is not consistent. It has also been discussed that the immovable property registration system that a certain country adopted can be considered as a determinant factor in the determination of the immovable property ownership transfer system of that legal system. Therefore, the paper has argued on this basis that Ethiopia adopted the mixed system of immovable property ownership transfer.

Therefore, considering the acute practical problems with the court practices and that the owners of immovable property are encountering in the enjoyment of their constitutionally guaranteed property rights, the author recommends swift legislative intervention to reconsider and clearly state the rules regulating transfer of ownership of immovable properties by drawing lessons, where relevant, from the systems of countries described in this paper. Taking into account the fact that the decisions of the Federal Supreme Court cassation decisions are laws that have to be complied with by the lower level courts and the judges' obligation to take judicial notice of them, the author suggests Ethiopian courts in general and the Federal Supreme Court Cassation bench, in particular, to make their decisions, predictable, consistent and concordant with the existing rules on the transfer and registration of immovable property.