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Mortgage on Immovable Property: The Law and the Practice in Ethiopia; with a Reference to East Gojame Zone Administration, Amhara Regional State, Ethiopia

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Abstract:

Mortgage is a means of securing claims that a person may have on another which may be created either by law, judicial decision or contractual agreements. In the event of giving loan, a number of creditors would like to assure that their loan must be repaid by a contractual security either by entering in to a separate mortgage agreement or by inserting a mortgage clause in their original loan agreement. The formal requirement of mortgage contract is deemed to be valid if and only if the mortgage agreement is made in writing and being registered by notary. In addition, for a practical purpose it is required to be registered in the municipality where the immovable property is located in order to maintain the rank for executing the right of priority on such mortgaged property where secured creditors are several.

Once the mortgage is registered, a mortgager has a legal right to retain the right of ownership on the mortgaged property which entitles him/her to transfer the right he or she had on such property including remortgage, servitude, usufruct or other rights as the clear provision of the legal regime in Ethiopia.

However, such bundle of rights owing to a mortgager seem inappropriately implemented by the municipality, court and other parties who may involve directly or indirectly in executing mortgage by whatever forms the mortgage is established. Though mortgage is a security device on immovable property or special movable that cannot be actually delivered to the mortgagee and the right over the mortgaged property is retained with the mortgager, the finding of the research proved that its practical applicability is not in line with the existing governing laws of the country under the Civil Code, 1960. Since the state machinery and the business community creates practical misperception about mortgage on immovable property, the effect is contrary to the purpose intended to achieve by the law-making body of the country. Having understood the practical problem in implementing the laws associated with mortgage, the author of this research has come up with a remedial actions and recommendations. Accordingly, attention shall be given to judges decide issues arising with mortgage based on the sprite of the law thereby ensure the correct implementation of the laws relating to mortgage. It is quite important to provide training and awareness for all administrative organs, legal community and the business men on the laws of mortgage, and on that would-be application of such laws. Ultimately, owners of mortgaged immovable property could exercise ownership rights on such property, such as remortgage, servitude, usufruct, even to dispose of the immovable property without inconvenient thereby people is left free to easily mobilize their liquid capital in a manner that facilitates the country's business transaction and economic mobility so as to achieve the legislators intended objective.

Keywords: mortgage, creditors & debtor's formation of mortgage, obligations of parties, mortgaged property

1. Introduction

1.1. Background

Commercial transaction is a momentous issue in the development of the country's economy. For carrying out commercial activities, a lender who may be either individuals, business organizations or cooperatives or other government institutions may grant loan to borrowers whereby the latter may be required to furnish securities with a view to ensure the repayment of the principal debt and payment of interest thereof with the other necessary costs. Hence, security (guarantee) with collaterals is an integral part of a business for the fact that it is used for securing the repayment of the main debts and incidental rights of creditor. It is with this point of view that borrowers give lenders a special kind of property interest (security) in some or all of his/her assets to be used as collateral. There are various forms of security including mortgage, pledge, lien anthicresis, each of them has its own particular feature that may vary one with the other.

In the history of mortgage, the term was derived from the two old French words 'mort, and gages' which in combination means 'deadpledge'. The notion behind the word is supposedly thatif the mortgager fails to repay the loan, the property pledged as security is lost, orbecomes 'dead', to him or her.

Originally, the mortgager gave the mortgagee ownership of the land on condition that the mortgage would return it once the mortgager's debt was paid off. Under early English and U.S. law, the mortgage was treated as a complete transfer of title from the borrower to the lender. The lender was entitled not only to payments of interest on the debt but also to the rents and profits of the real estate. This meant to the borrower, the real estate was of no value, that is, "dead," until the debt was paid in full. Overtime, however, it became the mortgager's right to remain in the possession of the land so long as there was no default on the debtor. In 1930s, the concept in fact got their start and it was the insurance companies that started the idea of mortgage loans.² The motive behind the insurance companies for starting this loan system was actually for gaining ownership of properties if the borrower failed to make the payments for it.

In the above discussion, the seller of the property in the old arrangement, or the lender who was holding the deed to the land had uneven absolute power over it and could do whatever he/she liked including selling it, and refusing payoff which caused major problems for the buyer.³ As time goes however the courts began to uphold more of the buyers' rights so that they had more to stand on when it came to owning their land. Eventually, they were allowed to demand the deed to be free and clear upon the payoff of the property.⁴ Still steps taken to ensure that the seller/lender should have enough rights to keep their interest safe and make sure that their money be paid. As mortgage laws traced from French, this is also true in Ethiopia.

In the ahead of time, a number of creditors would like to assure that their loan will be repaid by a contractual security either by entering in to a separate mortgage agreement or by inserting a mortgage clause in their loan (original) agreement. Where a secured creditor is not paid on due date, the law provides him the right to move the court to order the attachment of the property mortgaged with a view to causing it to be sold by auction or to sale the secured property privately when authorized by the law, like in the case of a commercial bank in Ethiopia because of its authorization to do so by law.

On the other hand, even if the mortgager has a legal right to retain the right of ownership on the mortgaged property which entitles him/her to transfer the right on such property by way of remortgage, servitude, usufruct or other rights while the mortgage is pending, implementing such right is not an easy task to implement. These rights seem inappropriately be implemented against a debtor

This study deals how mortgage laws on immovable property in Ethiopia are applicable by court of law and other government machineries with a particular focus in East Gojam, Amhara Regional State, Ethiopia it tries to ensure whether a set of rules under the proclamations and regulations are properly implemented in government organs or is conventionally amended by customary practice. In short, the legal framework of mortgage in Ethiopia and their application in the ground will be discerned.

1.2. Research Method, Population and Sampling Method

In conducting the research, the author does not focus only on the doctrinal research methodology but also on non-doctrinal legal research focusing on an empirical survey on the application of the law.

In relating to the research methodology, the study will be conducted based on both quantitative and qualitative research methods. It is qualitative by the fact that the study is based on thoughts, academic opinions, logical reasons, justifications, interpretation and analyzes of the laws based on the information obtained with structured and non-structured interviews and by employing narratives and/or documentary analyses.

The writer also employs quantitative method with the fact that the study depends on a statistical data collected by and through a sample survey. It is intended to apply such research method because the writer makes use of a data collecting tool by questionnaire to collect numerical or measurable statistical data from the target group. The sample survey is used in collecting data through a closed ended and an open-ended questionnaire set for this purpose.

The target groups in collecting data are mainly judges, experts in Municipality, lawyers and law instructors believing that they are directly involved in the application and enforcement of the existing laws and the business community for the reason that they are facing a practical problem with the associated issues under discussion so that the writer may get first hand/original/ information.

The data will be collected from towns of five woredas in East Gojam zone. In East Gojjam zone, there are 17 woredas among which 30% are selected by their convenience/proximity/ to the author so that he would get access for collecting data with less inconvenience than others. The selected woredas (towns) are Debre Markos, Amanuel, Dejen, Bichena, and Lumame. The method of selecting respondents in the above areas in each category of participants is by simple random sampling which is a type of probability sampling. The sample size is 10% of the population in each of the participants.

2. Literature Review

A security device such as mortgage is a way for creditors to their money back in case the borrower or debtor does not pay such money on the due date fixed in advance by the agreement of parties in the contract.⁵ Security is, therefore, gives a creditor /lender greater assurance that the loan will be repaid by way of foreclosure. Borrowed funds are both essential and honorable under the country's economic system. Viewed from this perspective, a person states that the absence of loans would severally restrict the availability of goods and services and would greatly limit consumers in the quantities they would be able to purchase.⁶ Therefore, the existence of loan facilitates business transaction which otherwise curtails money circulation and economic transaction.

A debtor who intends to borrow money from either individuals, investors or financial institutions grants a security interest in his/her personal property to creditors with a view to secure the payment of the principal debt, interest, costs and other expenses incurred in the collection and enforcement process.⁷

Security may be categorized in to various devices such as mortgage, pledge, anthicresis, and lien. As my devotion goes on with a mortgage, the discussion focuses only on issues relating to mortgage. Mortgage is a transfer of an interest in property for the purpose of creating security of a debt.⁸ Since creditors may not trust solely on borrower's personal promise for payment, she/he often demands

a debtor to furnish his property in a view to ensure the repayment of her/his claim. Therefore, mortgage is an encumbrance (limitation) on the right to the property.⁹ The right to use the mortgaged property to recover a debt is called the creditor's security interest and the agreement that creates a security interest is known as security agreement.¹⁰

In order to enforce such security agreement, the mortgage contract must be reduced in writing by specifying the amount for which the mortgaged property is created and signed by the parties to the contract and the witnesses. In line with this, a provision under the Ethiopian Civil Code states that the contract creating mortgage shall be of no effect unless it is made in writing and specifies in the Ethiopian currency the amount of the claim secured by mortgage.¹¹ Furthermore the validity of the contract shall be completed only where the mortgaged property shall be registered in the registers of immovable property,¹² which is also true in foreign experiences. Here, issues whether a debtor retains his/her rights in the property mortgaged, and whether a creditor who caused first registration of such property may have the right to prevent from further transfer to third party; are some of the issues that further need to be substantiated in the main body of the research. In the author's knowledge, nothing is written on this particular issue. I read an article written by Dr. MenbereTsehay Tadesse, the former V/president of the federal Supreme Court, but focuses on the sources of mortgage laws in Ethiopia which shows that the Ethiopian mortgage rules has a strong civil law attachment and the Civil Code on mortgage of immovable property is closer to the French Civil Code¹³. By his discussion, many legal concepts of French origin and some rules such as mortgage in the Civil Code is a result of copied verbatim from the Code Civil,¹⁴ He did not raise issues whether the laws as such is practically implemented or not.

2.1. Some Conceptual Understanding of Mortgage Laws

Though we may not find a conclusive definition for the term mortgage, it may be essential to see the cMarcel planiol's comment on the definition of French Civil Code stated as:

*"mortgage is a real security which without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosever hand it is found and to get paid from the proceeds by preference to the other creditors".*¹⁵

From the above assertion, one may easily grasp an idea that the subject matter of mortgage is a real security that is property (may be immovable or movable) and it is used as a means to achieve its established purpose of paying back a debt of a creditor in priority to others where a debtor fails to pay the money at a stipulated term or fails to perform his commitment. Furthermore, it gives right to the creditor to follow the mortgaged property in case when it is transferred by the owner of such property who may be the debtor himself or third party on behalf of the debtor. This tells us that the mortgage entitles the creditor an exclusive real right on the property to prevent every other person in the world until he is paid off or the purpose it is created is performed. Be the mortgage is created by agreement or by any other means as provided by law, the creditor is assigned the right on that property without dispossession of the debtor from the property and give the right to the debtor to retain his right of ownership including disposing of the property mortgaged¹⁶. As a result, the debtor can have the right to use, enjoy, administer, even to dispose of the mortgaged property. Though there is no a clear indication whether the property is movable or immovable in the above definition, in the Ethiopian case it is clearly provided that the mortgage shall charge the mortgaged immovable property together with its intrinsic elements and accessory¹⁷. To summarize the point, mortgage has the purpose to secure the repayment of the money or to protect the interests of the creditor by way of realizing a guaranteed debt. By doing so, it encourages to facilitate money circulation for an ultimate effect of business transaction and contributes for economic development of the country. In the above definition, you may infer that there exist at least two parties; the mortgagee and the mortgager, whereas the mortgager is the person borrowing the loan by way of securing his right on the property mortgaged, the mortgagee is the person lending the loan by securing his claim by the real property of the debtor/third party.¹⁸ To describe it in a more comprehensible way, the borrower who offers the security is the *mortgager* and the lender who provides the money, is the *mortgagee*.

The Ethiopian Civil Code 1960, incorporated several provisions associated with Mortgage and its particular issues will be discussed in the forthcoming chapter.

The FDRE constitution 1995, as well, provides specific provisions as to the issues of private property in general and immovable property in particular which is purely associated with mortgage. Accordingly, every Ethiopian citizen has the right to the ownership of private property, to dispose of such property by sale or bequest or to transfer it otherwise so long as it is compatible with the rights of other citizens.¹⁹ This meant that every Ethiopian shall have the full right to build and to the permanent improvements on the land by his labor or capital and to alienate, bequeath, and where the right of use expires to remove his property, transfer of his title, or claim compensation when damage is caused up on it.²⁰ These all guarantee that transfer of immovable property, including in the form of mortgage, has got recognition in the Ethiopian constitution. In this study, mortgage of immovable property is only referring to houses for the reason that private ownership of land under the FDRE constitution is prohibited. As stated under Art. 40 of the constitution, land belongs to the state and the public property. As a result, one can only have the right of use on it and not to alienate it. Since security of land for loans has an ultimate effect of alienation when the debtor fails to repay the loan, it is not allowed to mortgage it ab initio. In summary, the Ethiopian legal frame works as expressly provided in the civil code and the commercial code, and impliedly in the constitution with a view to regulate the affairs governing mortgage of immovable property.

2.2. Types of Security Devices and Their Features

The two most commonly used types of security under the Ethiopian legal system are personal and real estate. However, since the study focuses on security of real property (immovable), it would be essential to discuss only on types of real security devices recognized under the Ethiopian laws.

Real security; refers to the security of mortgages or other liens or encumbrances upon land²¹ and collateral is the Property that is pledged as security against a debt; or it is the property subject to a security interest.²² Real security is the relationship that the creditor has with the thing or the property. Real property is of a permanent and immovable nature, and the owner has an estate therein at least for life. It is the property that includes land, buildings, and anything affixed to the land. For a business, real property would include warehouses, factories, offices, and other buildings owned by the business²³. Hence, it includes those structures that are affixed to the land but does not include equipment, furniture and fixtures. In the other source, real security also carries the same meaning which is referring to land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.²⁴

The definition above tells us that a guaranteed object (such as land, house, plants, etc.) is non-transferrable even if it is mortgaged for the debt of the creditor. However, for the purpose of this paper, real security is only attached with property that is subjected to mortgage on immovable which is limited on buildings or houses. Pledge and other liens in the essence of movable property is excluded to be used for immovable property as a result it is not included in the scope of this study.

2.2.1. Mortgage: Sources and Types

Though there are many provisions that govern mortgage in the Ethiopian Civil Code, we don't find any one that defines it. Resort to the introductory section, to understand more about its meaning

In all the definitions, you find mortgage as a security interest in real property held by a lender with a view to secure a right of a creditor, usually a loan of money for the performance/payment of a debt. If the debtor (borrower) does not pay the debt, the creditor seeks a court-ordered sale of the property or sell by himself/herself as in the Ethiopian case relating to bank as per the procl.No.97/98 governing mortgage foreclosure, and the debt is paid out of the proceeds. Similarly, where the immovable mortgaged is attached by the creditors of the mortgager, the mortgagee may demand to be paid, out of the proceeds of the sale of the immovable, in priority to any other creditor²⁵.

In Ethiopia, the source of mortgage is limited in three ways as provided under Art.3041 C.C. In consequence, mortgage may result from the law or a judgment or be created by a contract. Therefore; mortgage is created either by convention of parties to the contract or by law in case of sale of immovable with credit, and by judiciary where a court or arbitration tribunal secures the execution of its judgments, orders or awards granting to one of the parties a mortgage on one or more immovable the property of the other party²⁶. As to the issue which properties are subjected to mortgage, the world experience varies from country to country but for Ethiopia, mortgage is charged on immovable. However, the words of the Civil Code further states that nothing shall affect the provisions of the code or special laws whereby certain movables may be mortgaged²⁷ Not only the Civil Code but also the Commercial Code²⁸ and the Maritime Code²⁹ Provide that certain movable properties such as business, vehicle, airplane, ship, etc. are charged mortgage. For all these things, in order to transfer ownership right we find common formality requirements in that a contract shall be of no effect unless it is made in writing and registered with relevant authority. Hence; due to policy consideration, possession of them may not be presumed ownership; unless meeting extra procedures required by the law.

Accordingly, the three ways by which mortgage is created are: contractual, legal and judicial³⁰ of which their name is derived basically from the ways they are created.

2.2.2. Contractual Mortgage

Contractual mortgage also called conventional mortgage is a contract by which the person /creditor/ binds the whole of the mortgaged property in his favor with a view to secure execution of some obligations but without affecting the right of a debtor to have the possession, usufruct, servitude, etc.³¹ Contractual mortgage is therefore a common type of mortgage which often arises from an express agreement between the mortgager and the mortgagee by fulfilling all the requirements that the law so provides.

2.2.3. Legal Mortgage

Is a mortgage created by law secures an obligation without stipulated by the parties to the contract?³²

In the case of a Legal mortgage, rights of the creditor from the mortgaged property arise by the provisions of the law without any consensual agreement between the creditor and the debtor. The very purpose of legal mortgage is to provide a special protection to certain creditors which the law intends to safeguard an interest which is at stake by the business transaction. For instance, in French Civil Code, the wife's right on husband's property, ward's right on guardian's property, state, public community' and state-owned enterprise's right on tellers' and accountants' property, creditors right on debtor's property, and tax authority on tax payers' property have the legal mortgage right. As could be understood from the legal provisions, legal mortgage in the Ethiopian context arises from two sources³³ by way of sale transaction and from co-practitioners and the tax authority has legal mortgage under income tax proclamation³⁴.

The legislator in sale transaction seems to protect an owner of the property so that the latter who sells his immovable is entitled to legal security which we call it legal mortgage on the immovable he has sold as far as he is not paid the full price of the property. The rational might be that once he transferred his property to the buyer the full right of ownership, it would be unfair to leave the creditor who transferred his property without the full payment of the price, unprotected. If he is left unprotected, it will discourage the practice of selling the property with credit or payment of the price in the future which is a normal practice in the tradition of the society. Hence, the law stands on his favor so that he deserves to be paid full price as he has transferred the right of ownership on his property. Co-partitioners are the other source of legal mortgage. As per the Civil Code under Art.3042(1), Co-partitioners shall have a legal mortgage on the immovable as a security for the payment of the agreed price and for the performance of any other obligation laid

down in the contract of sale. The idea may be if one of the co partitioners spends expenses an excess of his/her share but is not paid by the co partitioners, he/she shall be guaranteed by the legal mortgage on the immovable of the co partitioners/building/ and so does for the other obligations. The law under the same code also provides that a co- partitioner shall have a legal mortgage on the immovable allotted to his co partitioners in accordance to the act of partition and shall secure the payment of any compensation in cash that may be due to him and such other compensation as may be due by the co partitioners where he is dispossessed of any property owing to him. In case of the right of tax authority, it has security on the property of tax payers' similar with French in order to safeguard interests of the public.

2.2.4. Judicial Mortgages

Judicial mortgage is a lien that secures a judgment debt and is created by filing a judgment with the recorder of mortgages.³⁵ This is the case where the right of mortgage for the creditor is provided by decision making organs, principally by Courts, arbitration and Administrative Tribunals. In the case of judicial mortgage, the purpose of the law seems to be ensuring the better enforcement of decisions rendered by courts or adjudicative tribunals. This happens because execution of judgment as a legal proceeding requires serious measure so as to enforce the requested remedy. Not only in time of judgment but also a temporary suspension³⁶ may be ordered before judgment by such authoritative bodies to protect the property from being wasted or from being wrongfully sold in execution of a decree or transferred or disposed by the person against whom the case is instituted. This is done for the assumption that the judgment-debtor evades the execution of judgment against his property by disposing it or transferring the ownership right into others. But this last remedy is a temporary injunction so that it may not be relevant for the issue under discussion for the main reason that it has the purpose different from judicial mortgage. Judicial mortgage is possibly applicable when a judgment which becomes irrevocable and against which recourse is not possible and entails condemnation in terms of cash or in kind.

As regards the issue of mortgage by decision making body, the law provides that courts or arbitral tribunals may ensure the execution of their decisions or awards by creating judicial mortgage against one or more of the immovable belonging to the judgment-debtor.³⁷ Therefore; the three types of mortgage are clearly recognized in the Ethiopian law.

2.3. Chapter Three: the Legal Framework and Effects of Mortgage in Ethiopia

In the previous discussion, the attempt is made to indicate the types of mortgage and the requirements to be fulfilled in the way they are created. Once the mortgage is validly established, parties assume their respective rights and obligations. Parties are therefore expected to conform to all terms of the mortgage provisions, and the violation of which results liability emanated from the mortgage itself.

2.3.1. Duties and Rights of the Mortgager

As you might remember in the preceding sections, the borrower who offers security is known as mortgager. The mortgager has the duty to pay the money loaned when it is due and refrain himself from deteriorating and reducing the value of the property mortgaged. This is because if the value of property mortgaged is reduced, the proceeds of the property would be insufficient at the time of sale when the debtor fails to pay

The mortgager on the other hand has numerous rights relating to the property mortgaged. The mortgager has the right of redemption which entitles him to make his property free of mortgage by paying the money loaned. This is said to be inviolable right in that parties may not allowed to add in the mortgage deed anything which enable the creditor to take away completely the mortgager's right to redeem, or which postpones it indefinitely.³⁸ The mortgager is not under obligation to transfer possession of the immovable mortgaged. As opposed to the case of pledge, the right of possession over the immovable remains with the mortgager.

The rationale for this protection is that lenders may impose any conditions that they choose on borrowers and unduly deprive them of all of their property. This is justifiable because a mortgager is the weaker party so that he might surrender his right by the mere fact that he is in need of the loan.

Hence, this right is prohibited to exempt by agreement but in time of execution, the debtor can agree with the creditor to take the secured property for the satisfaction of the debt. In Ethiopia, such prohibition under the civil code is repealed by the proclamation No.97/1998. According to Article 3 of this proclamation, any agreement whereby the debtor allows the creditor bank or other financial institutions to sell the mortgaged property by auction and transfer the ownership to the buyer is deemed valid notwithstanding Articles 2851 and 3060 of the Civil Code.

Furthermore, this proclamation allows creditor banks to sell a mortgaged property by itself by giving a notice of 30 days to the debtor. In such cases, the sale is deemed to have been executed on behalf of the debtor.³⁹ This amendment of course allows the debtor to make an agreement to transfer his/her ownership right even at the formation of contract. This amendment however seems to prejudice the debtor because in order to gain the loan he/she might lose power to negotiate and may feel him to accept without any further negotiation in his part. More significantly, this amendment is discriminatory in that it allows the debtor to make an agreement only with the bank and other financial institutions' creditors and does not extend such an act to any other creditor. Not only to sale the mortgaged property but also such institutions are allowed to buy and transfer the ownership right of the mortgaged property where no buyer appears at the second auction, at the price set for the first auction⁴⁰

In the Ethiopian laws and in the eyes of equity, mortgager remains the true owner of the property and as long as he remains in possession, he is entitled to appropriate the rents and profits to his own use even though he may be in default in the payment of the money to the mortgagee.

Moreover, the person who mortgages his immovable has an inviolable right to retain the right to **transfer** the ownership that he had on the mortgaged property⁴¹ However, transfer of the immovable mortgaged shall not bring change in the obligation of the original debtor unless otherwise he/she is released when the person who acquired in subsequent to the creation of the mortgage has undertaken to pay the debt of the previous creditor or the creditor informed the original debtor that he would continue in writing to hold the subsequent creditor liable⁴² The law still stands in favor of the debtor by further setting rules that ensures to protect his/her right. In this case, the person who mortgages the immovable property shall retain the right to charge it with a usufruct, servitude, mortgages or other right in rem.⁴³The terms “to create other right of rem” here above indicates the right to dispose of the mortgage. This can be inferred from the civil code in its provision “where the immovable has been sold by the mortgager, the mortgagee may attach it in the hands of the purchaser whose rights have been registered subsequently to the registration of the mortgage.”⁴⁴ This provision would have not been necessary had it been prohibited of the mortgager to sell/ transfer/ mortgaged property to third party after mortgage is being created.

Mercel planiol has also the same view as regards the rights of mortgager by his statement: “Mortgage has not, as has pledge, the inconvenience of dispossessing the debtor. By mortgage, the creditor acquires neither the ownership of nor even dispossession of the thing which is given to him as security; the latter remains entirely, in fact and in law, at the disposition of the debtor...”⁴⁵

Based on his clarification, it is possible to come up with the conclusion that mortgage is not only aimed to secure the creditor in an effective manner but also allows the economic utilization of the property by entitling the debtor to continue in the possession, use, enjoyment or utilization of the thing in the manner that he thinks fit.

This is not only for the Ethiopian laws; foreign laws also show the same experience. For instance, the mortgage laws describe bundles of rights where the mortgager could exercise after the mortgage has been placed: to keep the subject of mortgage in his/her possession, to use the subject of mortgage for its usual purpose, to reap the produce or take the income yielded by the subject of mortgage and to dispose of the subject of mortgage and transfer the right to the acquirer, in which case no changes are made in the mortgager’s duty and in the secured claim⁴⁶. Scholars have further

explained in favor of the above argument in that entitling the lenders to own mortgaged property would be contrary to the purpose of the mortgage itself and inconsistent with the law that permits a mortgager a right over the value of the property and not over the property itself.⁴⁷ The right of mortgager in business is also protected in the commercial code as indicated in the following provisions; the debtor may assign his business or let it out for hire notwithstanding any provision to the contrary.⁴⁸ Though it is not as clear as that provided under the civil code, it implies that a mortgager is still entitled the right to dispose of the mortgaged business. In addition, a secured creditor may claim the business from a third party, as the mortgage follows the business into whatever hands it may fall which implies that a mortgager can transfer the mortgaged business to 3rd party after it being mortgaged.⁴⁹

Accordingly, retain the right of transfer of ownership and the right to charge the property mortgaged are absolute rights in that the law gives a prohibition remark that it shall have no effect even to create an agreement inconsistent with the laws mentioned above. Here is the basic issue that the researcher would like to give emphasize because the application in practice is by far different from what is provided by the law above.

In practice, the above legal rights are totally violated and once the person mortgages his/her property, he/she does not have the right to transfer his ownership over the property or neither to retain the right to charge on the property mortgaged such as usufruct, servitude, and remortgage and also to create other rights of rem.

Now the issue that may trigger from the above right is, if a mortgager is allowed to retain such bundle of rights, could the interest of mortgagee who loans money with hope that it would be repaid easily at the end of the time fixed by the parties, not be affected

This will lead us to examine in a more detail in the next section.

2.3.2. Rights and Duties of Mortgagee

As you might remember in the preceding titles, mortgage also called secured creditor by immovable, is the person lending the loan to the borrower or the purchaser of the house with collateral? The mortgagee can have the right to demand the payment of the debt with in the agreed time. If the mortgager fails to pay on maturity date, he/she has a legal rights and remedies due to him in order to secure his interest.

For requesting non-performance, a mortgage is required to make a debtor in default unless points mentioned under Art.1775 C.C which put as exceptional situations for not to be bound to give notice are met. When the debtor fails to comply with the terms of the mortgage contract, or fails to discharge on the time fixed in the contract, notice shall be served on the mortgager that indicates the clear intention of the creditor for repayment.

The term of notice may vary from country to country based on its legislation of mortgage. In Ethiopia, there is no a special requirement of notice for mortgage rather the general rules of contract for notice of non-performance shall apply. Accordingly, so long as the notice clearly indicates the intention that the creditor demands performance, there is no any specific requirement⁵⁰

After giving notice, a creditor can take the case before the court to be sold the mortgaged property by public auction.

When the lender is a bank, the situation however changes. When a bank is the lender, it is entitled to sell by itself (foreclosure right) without recourse to court after giving a 30 days’ notice⁵¹. Once it sells, it becomes a trustee of the proceeds of sale and after paying off the outstanding debts due to itself it must hand the balance over to the next mortgagee, if there is any, or to the mortgager⁵². When he/she thinks important, a mortgagee may transfer his/her rights over the mortgage to the third party even without the consent of mortgager. However, the transferee must comply with all conditions of the mortgage agreement or relevant agreement between the transferor and the mortgager for him/her to bind the mortgager

The mortgagee has other manifold rights associated with mortgaged property such as the right to pursuit such property, the right to create attachment, creating the right of preference (priority right), etc. Our Civil Code incorporates the rights of mortgagee to pursue the property and the right of preference under Art. 3089 C.C. This is clear from such provision which says registered rights of rem on an immovable mortgaged property shall not affect the mortgage where such have been registered after the mortgagee registered his mortgage and the mortgagee may cause the immovable to be sold as though such rights had not been created. A provision on effects of mortgage also makes clear and avoids probable ambiguity on this issue by explicitly providing as where the immovable mortgaged is attached by the creditors of the mortgager, the mortgagee may demand to be paid out of the proceeds of the sale of the immovable, in priority to any other creditors⁵³.

Concerning to the issue of pursuit, the same code provides that he has the right to pursuit on whose hands the mortgaged property falls, even it is sold subsequent to the creation of the mortgage⁵⁴. Therefore, even if the mortgager has the right to retain the right to transfer ownership and to create a rem right on the immovable mortgaged, a mortgagee can follow such property at whatever hands it falls so long as the mortgagee has registered before the subsequent acquirer. This makes certain that the mortgagee's right is no longer be affected even if the mortgager is entitled to exercise his right of ownership. What is important in the event here is to meet the requirement of registration to be found registered in the immovable property? That is why the other provision of the same code provides the mortgagee who has registered his mortgage prior to the registration of the deed evidencing the transfer may attach the immovable in the hands of the person who acquired it⁵⁵.

Under this provision, one can understand that the mortgager can have the right to create two or more mortgages in a similar period on a given immovable property of him, hence several creditors may secure their loan on a single property. If several creditors secured their claims on the same immovable, they shall rank according to the date on which they have registered their claims⁵⁶. That means the person whose claims are registered first gets paid first, and the second one gets paid second, and so on. Where creditors whose claims have been registered on the same date, it shall rank equally and be paid in proportion to the amount of their claim⁵⁷. The Commercial Code reinstates this provision by stating that secured creditors shall have a preferred right on the proceeds of the sale of a business. Therefore, when secured and unsecured creditors claim against the proceeds of the mortgaged immovable, the secured creditors shall prevail over the unsecured creditors. However, where the claims are raised among secured creditors, rights shall rank and determined in accordance with the date on which such rights have been registered. In case when the mortgages are registered on the same day, it shall rank concurrently. On the other hand, here the claims against the mortgaged immovable are the legal mortgage of the seller and the contractual mortgage, the legal mortgage ranks before contractual mortgage.

In the question of priority, any mortgagee may pay a creditor having priority with the consent of him or where the immovable mortgaged is attached at the request of the creditor without his/her consent and the creditor who has paid shall get the status of subrogation over the creditor to whom the payment has been made⁵⁸. That is to mean, if another person who may be a creditor fully pays the debt subject to a mortgagee, the latter shall transfer the rights arising from the mortgage along with its benefits effective from the registration date of the mortgage to that person.

2.4. Formal Requirements of Mortgage

The general principle under Art. 1678 C.C provides that any valid contract must meet basic elements to be enforceable. To this end, parties to the contract must be capable, give consent sustainable at law, the object of the contract must be sufficiently defined, possible, lawful and must not be immoral and must follow the form if the law requires so. Therefore; as any other contract, mortgage contract must fulfill such requirements in addition to the special form belonging to it. To remind some of its special formality, Art.3045 cumulative with Art. 1723 C.C and Art. 3052 respectively provides that the agreement creating mortgage shall be made in writing and shall registered in the registration of immovable property at the place where the mortgage property is located. The same is reinstated in the commercial code that a mortgage shall be formed in writing and registered during the month with in which the mortgage deed is drawn up⁵⁹. But such formal requirements may not seem to work for Banks, a revision of such strict formality took place by the parliament.

The registration of mortgage is important for in particular to protect the interests of third parties. That is why the law explicitly provides that mortgage has no legal effect against third parties unless registration is made. The assumption is to preserve the third party's registered interest that might have from the immovable mortgage, prior to such mortgage being created and registered⁶⁰. As to the issue who may have the right to secure a debt by mortgage, Art.3049 C.C provides a solution in that a debtor or a third person can secure the debt as far as he is entitled to dispose of the immovable property for consideration and gratuitously. Art 3045(2) and 3048 C.C also add some other criteria in that the claim secured by the agreement should specify in Ethiopian currency and the place in which the immovable is found and its boundaries together with the number of the cadastral survey if possible should be clearly specified. The other criterion set by the law to the validity of mortgage contract is that it requires specifying the amount of money secured by the immovable mortgage like the guarantee entered by the surety as provided in the other section of the law. As the criteria mentioned above are compulsorily required, failure to observe them shall have no effect.

From the above discussion, one can get in to a conclusion that a mortgage of real property can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property. Of course, what is the requirement for the grant of the real property may be understood to be in writing and registered by the relevant authority. It is this concept that is incorporated in Ethiopia hence, the contract or the other agreement creating a mortgage shall be of no effect unless it is made in writing and shall not produce any effect except from the day when it is entered in the registers of immovable property at the place where the immovable mortgaged is situate⁶¹. This criterion is in addition provided under Art.1723 C.C, stating as a "contract creating or assigning rights in ownership or bare ownership on an immovable or usufruct, servitude or mortgage of an immovable shall be in

writing and registered with a court or a notary". As it is stated plainly, the mere fact that the contract of mortgage or sale an immovable property shall be writing and shall not create any binding effect without registration in the court of law or notary. The Federal Court, cassation bench also held the same position in its interpretation on the case W/ro Gorfe Workineh Vs. Aberash Yitbarek et al.⁶². The two aforementioned criteria shall be cumulatively required to transfer the ownership of immovable property or otherwise it shall be of no effect by the mere fact that it is an incomplete contract as provided under Art, 1720 of the C.C. In contrast, however, in the case mortgage to Bank and other financial institutions, registration as a basic requirement has been excluded by an amendment proclamation.⁶³

The rationale for excluding registration as a formal requirement for the conclusion contract is believed exerting negative impact on the efficiency of loan provision service which is the day to day activity of banks and micro financing institutions. Had it not been corrected in such a way, there would have been a huge loss on public wealth as in the present practice most of the existing loans have been remained unsecured with a serious threat to the existence of the banks and the micro financing institutions and to the country's overall economy.

Accordingly, as provided in Art.2 of the amendment proclamation, Art.3 is added in Art.1723 of the C.C stated as "notwithstanding the provision of sub.Art. (1) of this Article, a contract of mortgage concluded to provide security to a loan extended by a bank or a micro financing institution may not require to be registered by a court or a notary." This amendment proclamation, even goes more to secure the debt given by bank and micro financial institution prior to the effective date of this proclamation. By so doing, it provides that the validity of any contract of mortgage concluded prior to the effective date this proclamation, to provide security to a loan extended by a bank or a micro financing institution, may not be challenged for not being registered by a court or notary in accordance with Art,1723 of the Civil Code.

Though it is a retroactive effect, the amendment proclamation also rejects court decision rendered prior to its date of effect. Consequently, a contract of mortgage concluded to provide security to a loan by a bank or a micro financing institution, shall have no effect for not being registered by a court or notary in accordance with Article 1723 of the Civil Code.

To sum up this section, no matter how the mortgage is created it shall have no effect unless the mortgage is registered, the amount secured is specified and the place of its location (its proper address) is clearly identified but this strict formality is believed not to be observed by banks for they are unable to manipulate it.

2.5. The Ethiopian Legal Framework and Practice

2.5.1. The Legal Framework of Mortgage in Ethiopia

As it is made clear in the previous chapter, mortgage is a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession, and includes a transfer of an interest in real property. As it is an interest in property created as a form of security for a loan or payment of a debt and terminated on payment of the loan, it is a policy consideration to regulate mortgage transactions. There are several governing legal provisions associated with the rights and duties of mortgager and mortgagee in both the Civil Code and the Commercial Code of Ethiopia as discussed in the preceding chapter. To make it plain, the law governing mortgage provides from Art.3041-3116 of the civil code and from Art.171 to Arts.193 of the commercial code. Presently, proclamation No. 454/2000 has also come in to existence in which the federal Supreme Court, cassation bench, is empowered to have passed a binding decision on the interpretation of the law with the same issue.

In the above laws, the rights of mortgagee and mortgager are clearly stated. As regards the rights of mortgagee, the civil code under various provisions such as Art.3059, 3076, 3085 and 3089 describe a series of rights. Mortgagee also has the right to assign his debt (obligation) to third parties. However, the issue that may be raised here is whether the mortgage is also secured an assignee where the claims under mortgage are assigned to third party. Though the Ethiopian law is silent about this issue, the other countries incorporate the idea in their laws that the assignment of a debt secured by a mortgage carries the security with it.⁶⁴

His rights are concerned; Art.3089 provides that registered rights in rem on an immovable mortgaged shall not affect the mortgagee where such rights have been registered after the mortgagee has registered his mortgage. In this case, the mortgagee may cause the immovable to be sold as though such rights had not been created.

The rule provided in Art.3085 C.C, also reinstated the above rule by stating, the mortgagee who has registered his mortgage prior to the registration of the deed evidencing the transfer may attach the immovable in the hands of the person who acquired it. Where several creditors have a registered claim on the same immovable, they shall rank according to the date on which they have registered their claim. More than the priority, one can infer from this rule that the law permits to mortgage a single immovable for several creditors so long as subsequent creditors are willing to agree. The issue is what if one of the creditors attaches the immovable mortgaged? Or the mortgager transferred his right of ownership on the mortgaged immovable? In such case, the law under Art. 3059 of the same code provides the answer. Accordingly, where the immovable mortgaged is attached by the creditors of the mortgager (be it, secured or unsecured), the mortgagee who registered his claim first may demand to be paid out of the proceeds of the sale of the immovable in priority to any other creditor. It also provides in paragraph two of the same provision that where the immovable has been sold by the mortgager, the mortgagee may attach it in the hands of the purchaser whose rights have been registered subsequently to the registration of the mortgagee.

The very essence of this provision indicates that the mortgager shall retain his right of transfer of ownership of the immovable even if he mortgaged it. It is this idea incorporated under Art.3084 C.C. In such a rule, "he whose immovable is mortgaged shall retain the rights to transfer the ownership thereof, and any contrary provision shall be of no effect." Be it intentionally or not, this rule is superfluously repeated by the other provision. Under it, it states that he whose immovable is mortgaged shall retain the right to charge

it with a usufruct, servitudes, mortgages or other rights in rem and prohibits any other agreement that contradicts it. This rule makes the mortgager to exercise his ownership right on the mortgaged property. In particular, the phrases '---other rights in rem' cumulative with the phrase '---retain to transfer ownership on the immovable mortgaged' under Art.3084, seem to go beyond, including sale of it. The idea under Art.3059 (2) C.C stated above '---where the immovable has been sold by the mortgager, the mortgagee may attach it in the hands of the purchaser' is a clear testimonial manifestation for the validity of this argument.

Before to end this section, let me raise one issue, is registration a compulsory criterion for the validity of mortgage contract? Let me begin my analysis from the general contract. As it reads: "a contracting creating or assigning rights in ownership or bare ownership on an immovable or a usufruct, servitude, or mortgage of an immovable shall be in writing and registered with a court or notary."⁶⁵ The special provision also provides a similar requirement that it must be produced in writing and registered⁶⁶

This issue brought a hot debate among lawyers and stake holders after the ruling in April 2007 by the Cassation Bench of the Federal Supreme Court was made.⁶⁷ According to the ruling, contract of sale/mortgage /of an immovable property can only be valid if both requirements as to writing and registration before a court or a notary are satisfied. This ruling started to make the law in to practice and established as a precedent to be binding on all courts of the country.

Therefore; as could be understood from the ruling made by the Supreme Court, cassation bench, a contract relating to an immovable property shall be invalidated on grounds that it was a mere draft as it had not complied with the above specified provision. According to the cassation ruling, a contract creating or assigning the rights to ownership of an immovable property is not valid unless it is in written form, and has been registered with a court or notary. Therefore, the legal formality for creating mortgage is writing and registration.

Such interpretation is therefore remains binding on other courts as any other law made by the law-making body. According to Proclamation 454/2005 article 2(1), "Interpretation of the law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council [courts] at all levels. The cassation division may however render a different interpretation of its interpretation some other time."

However, as the ruling creates a huge chaos on banks and micro finance institutions, it attracts the law-making body to make a draft on repealing the decision passed by the cassation bench. According to the application made by the Ethiopia Bankers Association and the National Bank of Ethiopia, the application of the law is disastrous as it would disrupt the financial system.⁶⁸ In their voice, "When banks give loans against collateral it is not a standard procedure that the contract is registered by a court or notary... And if [Article 1723] is to be applicable, in accordance with the decision of the Supreme Court, then it would mean that the entire loan had been extended as it had been given without collateral. Fundamentally, what is worse is that if banks possibly abide by such law, it would make delay and discourage the functions of banks and other financial institutions in those notaries have not been properly established in every region and woreda. In their statement, as it would also make the day-to-day activities of giving out loans cumbersome and time consuming," they suggested to amend the law.⁶⁹

This argumentative proposal attracts attention of the parliament so that Banks and micro finance institutions are now exempted to meet the criteria of the law in that they are not required by law to register their contracts of mortgage with a court or notary. This draft law is again subjected to criticism that it is discriminatory in that the criteria of registration are excluded for financial institutions and not for non-financial institutions.

The question again arises, if the immovable is mortgaged for banks and not for non-financial institutions/private persons, how the priority of execution of the loan is determined? That is to say who is paid first? To resolve such issue, however, Bank is to send a notice letter to the Municipality that a mortgage has been made on such a specified immovable since the date mentioned. As the date of the contract made between the Bank/other financial institutions and the mortgager is signed by the relevant authority in the municipality, it shall be considered as the date of registration.

The other issue that might be raised is whether there is a possibility to charge mortgage on the same immovable or whether there is a law that prohibits charging mortgage on the same immovable in a subsequent order or simultaneously? As far as the author knows, there is no any law that prohibits so. As a result, banks or other financial institutions may borrow loan on security of mortgage on the mortgaged immovable so long as they think that the remaining amount is adequate to secure their debt. This has an economic value to the country in that those who are in need of money for investment or commercial purpose can carry out without difficulty. This facilitates money circulation in the country and as a result the intended purpose may be achieved. The other scenario is that even if the immovable mortgaged has been registered by other creditor prior to the Bank, such Bank can have the right to subrogate the first creditor whose claim is secured after paying his claim when due so that it becomes the first secured creditor. Now let us see how the practice is going on with a reference to east Gojjam high court and woreda courts in the same zone.

2.5.2. The Rules of the Law and the Practice of Mortgage in East Gojjam

As regards to the practice in the application of mortgage of immovable property, empirical data has been collected from the relevant bodies: East Gojjam High Court, Commercial Bank, DebreMarkos Branch, DebreMarkos Municipality (town service in the present naming) and other legal practitioners such as a lawyer, law instructor. The data collected have been analyzed and interpreted in the following way.

In chapter two, the researcher tried to reveal rights and duties of mortgager and mortgagee in a mortgage contract. The issue which was raised thereof is, a mortgager is allowed to retain to transfer ownership rights that he has from the mortgaged property, and to retain rights to charge it with usufruct, servitude, mortgage, and other rights in rem which may be thought as bundle of rights. Some argue that if such rights on the mortgaged property are conferred to a mortgager, the interests of mortgagee who loans money with an expectation to be repaid at the end of the time fixed may be affected. Proponents of this argument, however, argue that it does not

affect the repayment of the money loaned. In their argument, the immovable property mortgaged has the purpose to facilitate execution at the time of maturity when the debtor is at default, In the maturity time the mortgage has the right to attach the immovable mortgage following at whatever hands such property may fall. Hence, entering into a mortgage contract does not have the effect of prohibiting the transfer of ownership of that mortgaged property. In consequence, a debtor in the mortgage remains the owner of the mortgaged property and he/she shall not be precluded the right to extract profits from it, to dispose of it, and to remortgage it.⁷⁰ This is what provided in the Ethiopian legal framework under the Civil Code.

The Ethiopian law governing rights of mortgage states that a person whose immovable is mortgaged shall retain the right to transfer ownership thereof.⁷¹ It in addition, incorporates other rights including to retain the right to charge it with a usufruct, servitude, and mortgage as provided with the same instrument. What if a debtor is deprived of the right title/owner of the property/ to his mortgaged property, and therefore, disqualified from benefits accruing from such property? Does the foreign experience support it? This is the issue that we bear in mind so as to find solution.

It will be justifiable that a creditor in whose favor the mortgage is established is no longer be the owner of the thing, and the owner of the right to demand satisfaction of the debt from the mortgaged property in any case. However; upon default of the debtor, he is entitled to claim before the court, the property mortgaged to be sold and to be paid from the proceeds of the claim against the debtor.

Though disputable it may be, these rights are not only endorsed by the Ethiopian legal regime. It is incorporated as a legal principle in many countries of the world. For the obvious reason, since mortgage is created in order to give protection to a creditor (mortgagee), he/she can use the secured property for the satisfaction of the debt in case the debtor (mortgager) breaks his promise or fails to perform according to the agreement they entered in to.

However, the practice in East Gojjam is not in conformity to the laws prescribed in the Ethiopian Civil Code and the Commercial Code. Once, the debtor borrowed the money from the Bank branch of any type by guaranteeing his/her immovable property (house), the creditor bank (mortgagee) sends a written letter to Debre markos town service, where registration takes place that it must not transfer such mortgaged immovable property to any other person whatever reason it may be. The order of the letter sent by the mortgagee bank has an effect of prohibiting subsequent mortgage on that particular property and in the strict legal sense inconsistent with the Ethiopian mortgage law. Such inconsistent practice might arise either from the persistent practice applicable for a long period of time or from inadequate knowledge of experts and professionals in the clear understanding of the provisions and the practice on the ground of the domestic laws associated with mortgage. See the respondents of the questionnaire in the table below

S. No	Judges	Bank Experts	Municipality Experts	Lawyers	Law Teachers
No. population	50	30	35	40	20
Sample size	5	3	4	4	2

Table 1: Respondents and their sample size

s.no	Questionnaires'	Judges		Bank experts		Experts' from municipality		lawyers		Law teachers	
		yes	no	yes	no	yes	no	yes	no	yes	no
1.	Transfer of the title deed to the creditor is a valid requirement in contract of mortgage.	40	60	66.3	33.3	100	-	75	25	-	100
2	Are multiple mortgages on a single property at the same period legally allowed?	20	80	66.6	33.3	-	100	25	75	100	-
3	Is there a problem for the mortgager to remortgage his mortgaged property to 3rdparty without discharging the first guaranteed debt	20	80	66.6	33.3	100	-	25	75	-	100
4	If remortgage under no.3 is possible, may it not affect the rights of the mortgagee	80	20	33.3	66.6	-	100	75	25	100	-
5	If transfer of title deed is compulsory and caught by the 1st mortgagee, transfer of the mortgaged property to 3 rd party becomes impossible	20	80	33.3	66.6	100	-	50	50	-	100
6	Is the rules of the law on mortgage consistent with the practice of the court in rendering judgment	40	60	33.3	66.6	100	-	50	50	-	100

Table 2: shows statistical results of the respondents of the questionnaires

As could be seen in the table above, the data gathered from the respondents of the questionnaire attested the above hypothesis. The data collected from the concerned professionals have been summarized, interpreted and analyzed as follows.

The respondents of the questionnaires who are experts from the Ethiopian Commercial Bank, DebreMarkos Branch, law instructors, high court judges, expert from DebreMarkos town (municipality) and lawyers; have different perceptions as regards to the issues associated with mortgage, particularly about the issues relating to the rights and duties of contracting parties in mortgage contract,

For instance, for the issue whether a title deed transfer (showing ownership of the immovable property) to the creditor is a mandatory requirement in contract of mortgage, is quite opposite and inversely proportional(100%) for the experts in the municipality and law instructors. Whereas the law instructors disagree (100%) with its validity requirement, experts in the municipality believe that it is undeniably valid (100%). In the same way, whether mortgage of one immovable property is possible for several creditors (question no.2 in the table), the response by the same respondents above is inversely proportional the experts in municipality reject the right of mortgager to remortgage or to retain the right of ownership in the property under mortgage which is inconsistent to the clear provision of the law in the civil code (Art. 3084 and 3089). This is also true when one observes the responses of the questionnaire given by judges in that the majority of judges (70%) do not accept multiple mortgage on a given property. This is what could be observed in practice in East Gojjam courts and D/Markos Municipality which in turn is a clear indication for the violation of the law. Before an order of the house being attached, courts request the concerned municipality whether there is a prior encumbrance upon the property by way of mortgage. The reason for this and their responses might arise from their belief that remortgage and other juridical acts on the mortgaged property by the mortgager affects the rights of creditor/mortgagee/. Though insignificant it may be as compared to the above questionnaire, one can observe a different response of the questionnaires in all other respondents and interviewees, like Mr. Argachew, Bank Manager.

The bank manager⁷² attested in an interview that the practice in East Gojjam municipality is in contradictory to the law in the Civil Code. By continuing his opinion, he testified that though the practice has been doing against the law for many years, it is now becoming an end particularly where the mortgagee is commercial bank. Where the commercial Bank concluded a loan contract with a person requesting loan by guaranteeing mortgage on immovable property, the mortgager has the legal right to exercise the right he had on his mortgaged property as long as the subsequent creditor accepts and the value of the mortgaged property is adequate to cover the debt of the subsequent creditor(s).

According to his present experience, when the commercial bank is a creditor or a mortgagee, after completing the necessary requirements of the agreement, it often sends one copy of the agreement to the municipality with a view to be registered the agreed date so as to determine the issue of priority had there be several mortgagees with the same house. He further suggested that there is no prohibition to mortgage a single house for several mortgagees so long as the subsequent creditors/mortgagees are willing but the practice was against the law under the proclamation. An owner of a house has the right to mortgage his house as collaterals for more than one creditor and the municipality has no any authority to prohibit the owner from remortgage the house of the debtor if the creditors who come latter are willing to be secured for his loan next to the first registered mortgagee(s). According to him, the mortgage contract established with the Commercial Bank is referred to the municipality for the purpose of being registered the date of mortgage contract in order to exercise its priority right from among creditors that come later. In line with his opinion Art. 1573 C.C, provides that acts purporting to create, modify or extinguish a right of mortgage or antichresis; and to transfer a debt secured by a mortgage or a right of antichresis or purporting to assign the benefit of priority attributed to such right by the law shall be entered in the register of mortgages. Hence, the law does not authorize any other power to the authority of the register of immovable property /mortgage/. From the clear provision of the above law, one can understand that there is no any prohibition from remortgaging or exercising other rights of the debtor/mortgager. Contrary to this law, where a creditor entered in to a mortgage contract, and application is made to be registered, a municipality would give assurance through a written letter that the mortgaged property shall not be sold or transferred from the date of registration except being confirmed by the creditor the completion of the payment of the debt⁷³. Hence; preventing of the mortgager by the municipality from remortgage, servitude, usufruct and other rights which is conferred to him by the law⁷⁴ is a clear violation of the laws prescribed in various provisions relating to mortgage of immovable property.

2.5.3. The Rule of the Law and Its Application on Registration and Priority Right

The writer tried to analyze and interpret the data collected by the interview and questionnaire in the following ways.

To begin with the first question, it was designed to address issues whether the formal legal requirements are uniformly understood by experts in law. For the question, what requirements are required for mortgage in contract, almost all the respondents list out that it must be written and registered in municipality, which is town service, as it is currently used by the recent structural arrangement made by the government.

As regards the issue who may be the relevant body to register mortgage, all respondents replied that it is by town service (municipality). This is inconsistent with the law under Art.1723 C.C which says that acts associated with immovable property must be registered before the notary and court. As it is interpreted by the Federal Supreme Court, cessation chilot, a contract relating to the immovable property such as sale and mortgage of house shall be registered in notary or court in order to ascertain the validity of the contract or whether the contract is made with full knowledge and consent, whereas, the registration in municipality according to 2878 E.C.is made in order to protect the interest of 3rd parties. Hence, the requirement for registration in the above two institutions are for the different purposes. As a result, the practice of registration of immovable property has been made in municipality as it was used before the enactment of the law. Inconsequence, the customary practice which was in operation before the coming in to existence of the civil code has been continued Therefore; the contract for the transfer of ownership of immovable property and mortgage of it must be registered in the notary/court for the purpose of authenticated the validity of the contract and in the municipality for the transfer of the same rights to make it known to third parties. The formal requirements of writing and registration that the law intends to maintain for any contract relating to immovable property is therefore mandatory as interpreted by the Federal Supreme Court cessation, chi lot, in its decision.⁷⁵ However, if the mortgager wishes to remortgage it for an additional loan, the creditor, say the bank, may not be willing to be secured for any other creditor. That is, before concluding a contract of mortgage; the bank requests the municipality to assure whether the said house has not been secured by any other person. Even once the contract is concluded, the creditor (Bank) often

sends a letter to the municipality that it must be kept intact (not to allow) to transfer of the mortgaged immovable (house). So, you can recognize that not only a creditor refuses but also a municipality will not be voluntary to register for the second time. This shows that the practice is not in conformity with the law that provides the right to retain ownership or remortgage the mortgaged immovable⁷⁶ For the issue whether there is a rule to remortgage immovable property before completing the debt, there is a clearly stated law which does not require interpretation. The problem in this issue is that the practice is incompatible with the law. Accordingly, we can come to the conclusion that there is a legal ground for a mortgager to retain ownership on the mortgaged property so that he/she can either to remortgage or to transfer the property in any way until the value of the mortgaged immovable ends. Though the historic evidence for the emergence of it cannot be ascertained, the continuation of such practice after the enactment of the civil code has a legal base. The law governing registration provides that customary practice of registration of immovable property shall continue to be applicable in the way that have had prior to the issuance of the law.⁷⁷ With this concept in mind the practice of registration has been taking place in municipality. What is remarkable under this point however is not the place of registration because where ever the place of registration or the authority to register may be, it does not affect the issue. The preliminary issue under discussion is whether subsequent registration is allowed or whether a mortgager has the right to remortgage his/her mortgaged immovable for another creditor or not. As regards the authority to register, the law provides to be the notary or court of law as provided under Article 1723 C.C.

However, the law relating to registration was suspended until an organ for registration is being established by the law as prescribed above. Therefore, until the issue is settled by the issuance of new law, registration will be carried out by municipality as in the previous customary practice.

2.5.4. The Rule of the Law and Its Application on Priority Right

Given the application of registration to the immovable mortgage, it is now time to raise the issue of priority right from the proceeds of the immovable under mortgage. Before this issue however, it would be indispensable to say something whether a mortgager has the legal ground to remortgage or transfer the mortgaged immovable to the other person. If this is so, does it not affect the interests of a mortgagee who first registered in the satisfaction of the payment of his/her money with the agreed time? The answer is no, it cannot affect because once a mortgage is validly created; the mortgagee can have the right to pursuit of it and attach on whose hands the mortgaged property may be found.⁷⁸ The respondents of the questionnaire in this issue gave a different answer which indicates a different understanding among legal practitioners. Therefore; where the mortgager is in default that he/she failed to discharge his obligation on the fixed date, a mortgagee can attach on the hands of the person who acquired subsequent to his/her registration. If a mortgagee has such right, one can conclude that whether the mortgaged property remains with the mortgager or not, the mortgagee's right to require attachment and to be sold in order to take the proceeds of the value of such mortgaged property is an exclusive right of the mortgagee who registered first. Therefore; the priority right that the mortgagee has on the mortgaged immovable shall not be affected wherever the property is found or whether the mortgaged property is on the possession of the mortgager, the 3rd parties, unsecured creditors or secured creditors who registered subsequently.

The other issue that might be raised here is, if the first registered creditor is entitled to possess the title deed of the mortgager, how the subsequent mortgagee be certain that he/she has been secured and developed trust that he/she shall have the right to claim attachment of such immovable property in time of default of the mortgager? As described above, the formality required for a valid creation of mortgage is that it must be written and registered in the register of immovable property. I found no any provision that orders the transfer of title deed of the mortgaged property to the mortgagee. Therefore; the legal requirement and expectation of the mortgagee is not to possess the title deed but to have been registered by the municipality and to have got priority right. To this end, the non-possession of title deed by the creditor/mortgagee may not be the criteria to require priority right over the property of the mortgaged property.

3. Conclusion and Recommendation

3.1. Conclusion

Mortgage may be defined as a contract by which specific real property capable of being transferred is hypothecated /mortgaged/ for the performance of an act without requiring a change in possession, and includes a transfer of an interest in real property. It can be created, renewed, or extended only by writing, executed with the formalities required for a grant of real property. As could be understood from the main body of the study, mortgage is a security device on immovable property or special movable that cannot be actually delivered to the mortgagee and the right over the mortgaged property is retained with the mortgager. However, at the time of default in payment as fixed by the agreement of parties, the mortgagee may be given the right to claim attachment of the immovable to be sold in satisfaction of the payment from the proceeds of the immovable property to the extent of his (mortgagee) claim. Since the full right over the mortgaged property is retained by the mortgager, the latter may not be prohibited from the transfer of such mortgaged immovable property to third parties either in the form of remortgage, usufruct, or by any other means as explicitly provided by law. These rights are legally guaranteed by the civil and commercial laws of the country. There is no any legal provision to hand over the title deed to the mortgagee during mortgage and neither any prohibition to remortgage or to exercise other rights thereon.

In practice, however, such legal rights have not been implemented/ changed in to practice/ for unknown reasons, as a result, owners' right to transfer the right they had on their mortgaged property to third parties when needed, is violated by both the judiciary and executive organs of the government knowingly and unknowingly as could be observed from the questionnaires filled by the judges themselves. This does not only affect the rights of the debtor (mortgager) but also curtails the economic movement (circulation) of the

country. More significantly, it creates unhealthy relationship between the creditors (those who are supposed to lend money) and debtors (those who wish to have borrowed money). The ultimate effect will be violation of the legal regimes of the country and domination of customary practices over the laws of the country. The Implied conclusion may be that judges who are supposed to know and abide to follow the rules of the law are not in the strict sense applying the law as provided under the laws of the country. Hence; based on the finding one come up with conclusion that courts are either lack the knowledge of the law associated with mortgaged property or knowingly fall under the customary practices of the country.

3.2. Recommendations

- Judges should render judgments relating to mortgage solely based on laws in general and mortgage provisions in particular so as to ensure the correct implementation of the laws.
- Training and awareness must be administered for all enforcement organs of the government and the business man as regard to the laws on mortgage and the would-be application of such laws.
- Experts in charge of register of mortgage on immovable property shall be equipped with legal knowledge so that the laws associated with mortgage shall be appropriately implemented. Ultimately, owners of mortgaged immovable property can exercise ownership rights such as remortgage, servitude, usufruct, even to dispose of the immovable property without inconvenient thereby people can easily mobilize their liquid capital in the manner that facilitates the country's business transaction and economic development thereby achieves the intended objective.
- The customary practices developed in the country shall be avoided forever in a manner that ensures rules of law and avoids inconsistent application of the laws.
- Public awareness need to be offered to the public, in particular to the business persons.

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