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CASE BRIEFS AND SUMMARIES ON FAMILY LAW

The case summary of *Abebawork* versus *Wagaye* (and *Wagaye* versus *Abebawork*), pp. 181– 186) involves issues for reflection.

N.B- Patronymics have been omitted in all cases.

*Elias N. Stebek**

1. Case Briefs

Case 1: Asmarech –vs- Mamite

Civil Appeal File No. 1564/73
Supreme Court, Third Bench, Addis Ababa

Judgment delivered on: Ginbot 2nd 1974 (Eth.)
Judges: Alemayehu Haile, Tilahun Haile, Liben Amede

Appellant..... *Asmarech*
Respondent..... *Mamite*

The case involved contestation as wife of the deceased, Ato Kebede. The Awraja court upheld the respondent's claim of having had marriage with the deceased and rejected the request of the appellant to produce her proof of marriage. The High Court confirmed the decision of the Awraja Court, and Woizero Asmarech lodged an appeal against this judgment.

Material Facts

1. The respondent got married to Ato Kebede in 1948 (Eth) and the couple have four children from this marriage. But they have not been living together for many years.
2. The appellant (Woizero Asmarech) cohabited with the deceased for some time and they were married in 1967 (Eth). Asmarech's name has been registered as wife on the pension form of the deceased. Moreover, the *Kebele* where they live and their *Idir* have registered Asmarech as wife of the deceased.
3. Asmarech submitted a petition to the Awraja court for verification of her status as wife of the deceased. But the respondent (Mamite) objected the petition and claimed that she was the only wife of the deceased on the

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ground that her marriage with the deceased had not been dissolved, and that bigamy shall have no effect.

4. The Awraja Court and then, the High Court upheld the respondent's claim and declared that Mamite is the wife of the deceased.

Issues

1. Whether a second marriage concluded before the dissolution of the former marriage brings about effects?
2. Who is entitled to receive pension benefits if both are considered as wives?
3. Whether both are entitled to shares upon the partition of common property?

Holding of the Supreme Court

The Supreme Court reversed the decision of the High Court and held that the latter marriage was formed while the former marriage had not yet been dissolved. Although the latter marriage was voidable on the ground of bigamy, it subsisted until it was dissolved by the death of the deceased. The court decided that the latter wife is entitled to pension benefits, and that both are entitled to receive their due shares upon partition of common property.

Reasoning of the Court

Although the respondent and the deceased didn't live together for many years, no proof of their divorce has been submitted to court. Thus their marriage can be presumed to have subsisted until it was dissolved upon Ato Kebede's death.

On the other hand, the deceased and the appellant were married in 1967 (Eth) and the couple lived together until Ato Kebede's death. Article 611 of the Civil Code prohibits bigamy, and the spouse of the bigamous person or the public prosecutor may require the dissolution of such marriages (612 CC). The respondent lived in a neighbouring *kebele*, a street across the deceased's residence. Yet, she never objected to nor petitioned against the marital life that the deceased had with the appellant. The latter marriage thus subsisted until it was dissolved upon Ato Kebede's death because no petition was lodged for its dissolution.

The respondent, who lives close to the deceased's residence, had never demanded maintenance. Moreover, according to her own statement to court, the form she filled at her *kebele* stated her occupation as "independent (*begil te-dadari*)", and she didn't live with the deceased since ten years. The rationale of pension benefits is to avail modest resources of maintenance to the

needy widow or widower by way of making up for some portion of the income lost due to the death of a spouse. In the case at hand, the respondent hasn't lost income due to the death of Ato Kebede. Thus, it is only the appellant who is entitled to receive pension benefits.

However, because the former and the latter marriages of the deceased were not dissolved until Kebede's death, both the appellant and the respondent are entitled to their due share upon partition of common property.

* * *

Case 2: Almaz –vs- Alganesh

Cassation Civil Appeal File No. 173/81

Supreme Court, Cassation Chilot, Addis Ababa

Judgment delivered on: Yekatit 20th 1982 (February 28th 1990)

Panel Judges: Assefa Liben, Tamiru Wondimagegnehu, Alemayehu Haile,
Daniel Zewdie, Getachew Afrasa

Appellant..... Almaz through opposition by the Procurator General
Respondent..... Alganesh

An appeal is made to the Cassation Chilot of the Supreme Court on issues of law. The appellant claimed that the decisions of the High Court and the Supreme Court violate the principle that a man cannot have two wives at the same time.

Material Facts

1. Woizero Alganesh married Ato Bekele on Tahsas 17th 1957 (December 1964), and they have two children. Alganesh claimed that her marriage with Bekele had not been dissolved until his death on Meskerem 8th 1978.
2. Woizero Almaz got married to Ato Bekele in 1971 (Eth.) and submitted to the court documents which she considered as proof of divorce between Alganesh and Bekele.
3. Woizero Almaz forwarded *four* points to prove the dissolution of Ato Bekele's former marriage with Alganesh. These points were, the fact that Alganesh and Bekele did not live together for many years, *secondly*, Ato Bekele's omission of Alganesh's name in his pension form; *thirdly*, a letter from Keftegna 10 Kebele 15 that states Bekele as single, and *fourthly*, the fact that Alganesh didn't oppose Ato Bekele's marriage with Almaz since 1971 (Eth) until he died in 1978 (Eth).
4. Woizero Alganesh, on the other hand, argued that she was sick for a long time, and had gone to her relatives in Gojam. She further stated that he hadn't had the opportunity to oppose Bekele's bigamous marriage because Bekele had been transferred to Asmara from 1972 to 1974 (Eth)

and had then gone to Italy for further training, and that he died soon after his return from Italy.

Issues

1. Whether the marriage between Alganesh and Bekele had been dissolved before Bekele's death, i.e. whether the arguments forwarded and the evidence produced by Almaz proved divorce?
2. Which party bears the burden of proving divorce?

Holding of the Supreme Court, Cassation Chilot

The Cassation Chilot of the Supreme Court confirmed the decision of the Supreme Court and held that the former marriage was not dissolved until Ato Bekele's death although the spouses lived separately for many years. It also held that the second marriage, although bigamous, shall have effects and it was not dissolved until Ato Bekele died.

Reasoning of the Cassation Chilot

The facts raised and the evidence submitted by Woizero Almaz with regard to the former marriage indicate the probability of divorce but do not conclusively prove divorce. Woizero Almaz who alleges that Bekele's marriage to Alganesh has been dissolved by divorce bears the burden of proving it.

The only evidence that can conclusively prove divorce is its pronouncement by family arbitrators in accordance with Articles 666 to 682 of the Civil Code, or in their default by court under the conditions stipulated in Article 737 CC. But Almaz has not produced conclusive proof of divorce pronounced by family arbitrators or court.

The written statement of the family council that assigned a tutor for the children of the deceased indicates the separation of Alganesh and Bekele. However, it is to be noted that '*family council*' is different from '*family arbitrators*' and it is the latter organ that can pronounce divorce. Moreover, the statement written by the family council stated the separation of the spouses and not their divorce. Separation of spouses (no matter how long) does not dissolve marriage and there is no period of limitation in the law which dissolves marriage if spouses don't live together for specified number of years.

Secondly, the omission of Alganesh's name from the pension form filled by the deceased doesn't prove divorce but merely serves as circumstantial evidence indicating the probability of divorce. Written remarks or such omissions by a spouse do not conclusively prove divorce. Thirdly, the letter written to the Municipality by the *kebele* merely proves that the deceased had no wife living with him at the time, and this letter cannot thus be considered as

conclusive proof of divorce. Nor does the fourth evidence (i.e. absence of opposition from Alganesh against Bekele's latter marriage) conclusively prove divorce; and in fact, the circumstances Alganesh was in during this period should be taken into account.

With regard to the latter marriage, it is obviously bigamous and violates Article 585 of the Civil Code. Thus, this marriage could have been dissolved had Alganesh or the Public Prosecutor filed petition to court. The spouses in the latter marriage could have also been liable to punishment under Article 611 of the Penal Code if they knowingly entered into the bigamous marriage. But, because request for the dissolution of this marriage has never been lodged, the latter marriage subsisted until it was dissolved upon the death of Ato Bekele. Therefore, the latter marriage produces effects with regard to children and regarding the right of the latter spouse in partition of common property acquired during the marriage.

* * *

Case 3: Getenesh –versus- Genet

Civil Cases Appeal File No. 1768/88
Supreme Court, Addis Ababa

Judgment delivered on: Hedar 3rd 1993 Eth. (November, 2000)

Judges: Menberetsehai Tadesse, Fisseha workineh, Getachew Akkasa

Appellant: Getenesh

Respondent: Genet

The appeal was lodged against the decision of Addis Ababa Zonal Court. The appellant's requested that the lower court's decision be reversed and that the deceased Ato Kasahun be judicially declared as father of her daughter Fikirte.

Material Facts

1. The appellant claimed to have had repeated sexual relations with the deceased, Ato Kasahun. They were not married. Nor did they live in a relationship of irregular union, i.e. cohabitation without marriage.
2. The appellant's witnesses stated that the deceased had been coming to the appellant's residence and that he had sent her grain for porridge (*yegenfo ihil*) when she gave birth to a child. But the witnesses said that they don't know whether the deceased has lived in an irregular union (cohabitation without marriage) with the applicant.
3. The respondent Genet (the widow of the deceased Ato Kasahun) invoked Article 358 of the Civil Procedure Code for the reopening of the case,

and produced witnesses who testified that they know about the deceased's denial when he was asked whether Fikirte is his daughter.

4. The respondent had applied for and obtained judicial verification of Kasahun's paternity after having her request published in Addis Zemen newspaper and after having produced witnesses who were later re-summoned to testify at the Supreme Court.
5. The respondent (Genet) stated that the appellant's daughter (Fikirte) has been registered at school with the name of the appellant's ex-husband as her Fikirte's patronymic. In response, the appellant argued that her children (born from her ex-husband had their younger sister registered as under their patronymic, and that the child was registered as Fikirte Kasahun while she was being treated at a Clinic.
6. The respondent contended that paternity cannot be proved by witnesses in the absence of marriage or irregular union (cohabitation without marriage).

Issues

1. Whether possession of status as child can be proved by witnesses in this case?
2. Whether the acts of the deceased prove acknowledgment of paternity?
3. Whether the court can judicially declare the deceased as Fikirte's father?

Holding of the Supreme Court

The Supreme Court confirmed the decision of the Zonal Court. It rejected the appeal and held that paternity cannot be attributed to the deceased.

Reasoning of the court

Paternity is presumed (Arts. 740/1, 741, 745 CC) by virtue of being husband of the woman who gave birth to the child or in case of irregular union by virtue of living with the woman who gave birth. Secondly, paternity can be established where a man in writing acknowledges paternity (740/2, 746, 747 CC) or where ascendants of a deceased acknowledge paternity under the circumstances stated in Article 750 CC. Thirdly, paternity may be judicially declared (Art. 740/3, 750 CC) in the case of abduction or rape.

Articles 770 and 771 CC allow proof (of possession of status as child) by witnesses only where there is a legally recognized relationship between parents of the child. The appellant has not claimed to have had marital relations nor irregular union with the deceased. She hasn't also proved acknowledgment of paternity made by the deceased in writing. Moreover, she hasn't proved abduction or rape by the deceased that could have enabled judicial declaration of paternity.

Although the appellant has attempted to prove paternity by witnesses, Article 748 CC clearly stipulates that acknowledgment of paternity should be in writing and that it cannot be proved by witnesses. Thus, the appellant has not proved paternal filiation.

* * *

Case 4 : Tikikilua –vs- Debebe

Civil Appeal File No. 1562/78
Supreme Court, Fourth Civil Bench, Addis Ababa

Judgment delivered on: Tahsas 30th 1980 (Eth.)

Judges: Daniel Zewde, Eshete Demissie, Rahel Alemayehu

AppellantWoizero Tikikilua

Respondent..... Ato Debebe

The case mainly involved pronouncement of divorce and partition of common property after divorce. Family Arbitrators pronounced divorce by majority decision, and the decision was confirmed by the High Court. The Supreme Court reversed the High Court's decision with regard to conditions of divorce and confirmed the minority opinion of family arbitrators.

Material Facts

1. Woizero Tikikilua and Ato Debebe were married in 1956 Eth. Tikikilua claimed to have been neglected by her husband after her prolonged illness since 1968 (Eth) which rendered her bed-ridden and unable to walk. She claimed that he gives her only Birr 30 (Thirty) per month despite his monthly salary of Birr 1152 (One thousand one hundred and fifty two Birr). Medical evidence confirmed that she has no gynecological (*yemahtsen*) problem, but has severe ailments including deformities that have made her unable to walk and thus be in bed or use wheelchair.
2. Tikikilua did not demand divorce. In one of her petitions, she had requested that the case about the marriage and about her husband's duty to supply her maintenance be directed to Awraja Court. She claimed that her husband misconstrued this as petition for divorce. Tikikilua stated that she wants to stay married, and if she is given support and care, she might recover and lead a happy marital life again with her husband.
3. Ato Debebe argued that he had done all he could towards his wife's care and maintenance. He invoked the issue of the impossibility of having warm marriage with his wife and further raised the difficulties pertaining to intimate relations. Debebe demanded that "family arbitrators accept Tikikilua's demand for divorce."

4. After some interim period during which the family arbitrators had ordered the respondent to pay his wife a monthly maintenance allowance of Birr 300 (Three hundred Birr), family arbitrators, by majority decision pronounced divorce. The grounds of divorce stated in the majority decision of family arbitrators are the ones raised by the respondent.
5. Minority opinion of family arbitrators stated that the plaintiff has never demanded divorce, and that the party who sought the divorce is the respondent Ato Debebe. The minority opinion thus arrived at the conclusion that the respondent should be liable to unequal treatment in partition of common property as stipulated under Article 692 of the Civil Code.
6. The High Court upheld the majority decision of family arbitrators, and Woizero Tikikilua lodged an appeal to the Supreme Court against the decision of the High Court.

Issues

1. Whether divorce was requested by Woizero Tikikilua as held by the majority decision of family arbitrators, or whether the request for divorce was made by the respondent as stated in the minority opinion.
2. Whether the respondent is liable to the penalty of unequal treatment in partition of property as per Article 673 *cum* 692 and 694 of the Civil Code.

Holding of the Supreme Court

The Supreme Court reversed the decision of the High Court and held that the respondent is liable to the penalty of unequal treatment in partition of property as per Articles 692 and 694/1 of the Civil Code. The Court held that the appellant is entitled to receive one fourth of the respondent's share from their common property plus a provisional maintenance benefit of Birr 200 (Two hundred Birr) per month from the respondent until the partition of property is put into effect.

Reasoning of the court

The grounds of divorce under the Civil Code (other than cases of religious annulment -671CC) can be classified into three categories. *Primarily*, adultery or desertion for more than two years is serious ground of divorce as per Article 669 CC. These grounds of divorce are imputable to the culpable conduct of one of the spouses. *Secondly*, lunatic asylum for over two years or judicial declaration of absence is serious ground of divorce, and neither of them is regarded as fault imputable to one of the spouses (670). And *thirdly*, there are events that cause divorce, but are not regarded as serious grounds of divorce (673). In divorce cases of the *first category*, the spouse who is at

fault is liable to the penalties stated in Article 692, while no penalty is imposed in divorce cases that fall under the *second category* (693/1/2/3).

Grounds of divorce of the *third category* (Art. 673) are not serious causes of divorce, and in effect, efforts of reconciliation shall be made (676/1). If divorce is to be pronounced despite such efforts of reconciliation, the spouse who is unwilling to reconcile ought to bear the penalty of unequal treatment in the partition of common property (692, 694/1).

The major causes of divorce in this case are the ailment of the appellant and problems with regard to sexual intercourse. These do not, however, constitute serious grounds of divorce, but rather fall under other grounds of divorce stated in Article 673. In the case at hand, the spouse who insisted towards divorce is the respondent who has abandoned the appellant in the midst of her grave difficulties contrary to the apparent marital vows of every person to stand by and support one's spouse during sickness and hardships.

2. Case Reasoning Summaries

Case Reasoning Summary 1

(Supreme Court, Civil Cases Appeal No. 248/80)

Decision of the majority

There is the view that claims from creditors cannot be set up against income from pensions. On the other hand, there are lawyers who argue that an ex-spouse should be entitled to a certain portion of pensions because pension contribution is deducted from monthly salary which is the common property of the spouses.

According to the Pension Proclamation, 4% of an employee's salary is deducted while 6% of same is subsidized by government. The latter is not part of the employee's salary and can't thus be considered as the common property of the spouses.

Ato Tesfaye earns a pension of Birr 507 (Five Hundred and Seven). In light of the inputs towards this fund, we can hold that Birr 202.80 (Two Hundred Two Birr and Eighty Cents) arise from Ato Tesfaye's pension contributions. The remaining is paid from government subsidy, and Woizero Asefash cannot in effect claim a share from (the three-fifths) portion of the pension.

However, because the two-fifth of the pension (i.e. Birr 202.80) is paid out of deductions from Ato Tesfaye's salary (an income that was the common prop-

erty of the ex-spouses), woizero Asefash is entitled to share this portion equally with Ato Tesfaye.

Dissenting opinion

By virtue of Articles 652/1 and 689 of the Civil Code, salary of spouses is common property. However, deductions stipulated by the law, including pension deductions, are not part of the disposable income of the spouses. (The moment that amount is credited to another account, it doesn't belong to the spouses and no longer forms part of their common property). Pension deductions are made to be prospectively paid to persons who are entitled to receive pension benefits.

(Unlike saving), the 4% deduction from an employee's salary shall not be paid back with arithmetical precision. In fact, there are circumstances where pension may not be paid or where pension benefits exceed the aggregate deductions made during a person's years of employment. Moreover, arriving at conclusions based merely on the 4% and 6% dichotomy is unacceptable.

According to the majority decision, Woizero Asefash is entitled to receive monthly payment (of Birr 101.20) as long as Ato Tesfaye is alive. This substantiates the fact that the pension fund is not common property (because had it been so, it wouldn't have terminated upon the death of Ato Tesfaye).

(Ethiopian pension laws) clearly state the beneficiaries of pension and the conditions upon which there is no entitlement to pension benefits. Because neither pension laws nor law of contracts justify the allocation the pensioner's income into such portions as stated in the decision, I have dissented from the majority opinion.

Case Reasoning Summary 2

(Supreme Court Panel, Civil Cases Appeal No. 367/74)

The seller of a car invoked an issue that his wife disapproved the contract of sale he has entered into. The seller's wife (Woizero Abeba) intervened and claimed that the contract is invalid by virtue of Article 658 of the Civil Code.

The buyer (Ato Tesfaye), on the other hand argued that there has never been a precedence that required a spouse to conjointly sign on contracts for the sale of vehicles, and contended that this issue has been instigated by the seller himself, who wants to terminate the contract under the pretext of an opposition from his wife.

The High Court decided that the seller is the only person registered as the owner of the car and buyers are not expected to investigate the marital status

of every seller by roaming through every corner of the city. The court held that Art. 658 of the Code doesn't impose such duty on buyers of vehicles.

Case Reasoning Summary 3

(Supreme Court Panel, Civil Cases Appeal No. 1354/1641/88)

Supreme Court, Addis Ababa

Judges: Menberetsehai Tadesse, Fisseha Workineh, Getachew Akkasa

In Etenesh –versus- Yeshe, the Addis Ababa Zonal Court decided that the deceased Ato Liwuye is the father of Woinshet and Tilahun. The court's decision was based on the arguments forwarded and the evidence produced by the mother of the children, Yeshe.

Yeshe claimed to have had sexual relations with the deceased without marriage, but she did not claim the existence of cohabitation (irregular union) with the deceased. Her key witness was Ato Liwuye's mother. This witness said that her deceased son is indeed the father of Yeshe's children.

While the deceased was alive, Yeshe had (in 1976 Eth.) filed a suit at Awraja Court (File No. 3476/76) claiming to be Ato Liwuye's wife and demanding entitlement to supply of maintenance to her children (Woinshet and Tilahun). But the deceased had then denied having had relations with Yeshe and had also denied his paternity to the children, other than being her neighbour. The pension form filled by the deceased in 1978 (Eth) only bears the name of Henok (the son of the appellant i.e., Woizero Etenesh). However, the respondent had forwarded various arguments to oppose the validity of the document as decisive proof.

a) Decision of the Zonal Court

The Zonal Court decided that Article 760/1 enables the deceased's mother to acknowledge the paternity of her son. The deceased's mother had earlier claimed to be the sole heir of her son claiming that he has no children. The Zonal Court stated that such change of position does not infringe the law because denial of paternal filiation can be withdrawn while, on the contrary, acknowledgment of paternity is irrevocable.

The Zonal Court thus decided that Ato Liwuye is the father of Woinshet and Tilahun and ruled that the acknowledgement made by Ato Liwuye's mother is acceptable in accordance with Articles 750/1 and 740/2 of the Civil Code.

b) Decision of the Supreme Court

Paternity can be established where legally recognized relations exist between the mother of the child and the alleged father as stipulated under Articles

740/1, 741 and 745/1 of the Civil Code. Secondly, it can be established where a man in writing (748/1 CC) acknowledges paternity (740/2, 746); and thirdly paternity may be established by judicial declaration of paternity (740/3, 758 CC) in case of abduction or rape.

The second ground of paternal filiation (i.e. acknowledgement) can be made by the parent of a deceased person (750/1 CC) where the latter is dead or not in a position of manifesting his will. The Supreme Court dismissed the respondent's claim because acknowledgement should be in writing and on the contrary, the deceased had (during an earlier litigation at Awraja Court) denied paternity and having had relations with the respondent aside from mere neighborhood.

With regard to the acknowledgement made by the deceased's mother, the Supreme Court held that Article 750/1 applies to cases where the deceased died without having given his volition regarding the issue, or where he is unable to manifest his will. The provision can be relevant to cases where a person accepts paternity but dies without having given acknowledgement in writing, or where there is valid ground to believe that the deceased would have acknowledged paternity had he been in a position to do so.

In the case at hand, however, the deceased had denied paternity in writing at court while he was alive. The Supreme Court ruled that acknowledgement of paternity by parents on behalf of the deceased should be made in conformity with and not contrary to the volition of the deceased, and concluded that the interpretation of Article 750/1 has been misconstrued. The Supreme Court thus reversed the decision of the Zonal Court and held that paternal filiation cannot be attributed to the deceased.

* * *

Points of Reflection:

- Detailed points of reflection on the case briefs and case reasoning summaries (under sections 1 and 2 above) have not been given.
- Readers are encouraged to reflect whether the decisions could have been different under the Revised Family Code.