



WOLAITA SODO UNIVERSITY

SCHOOL OF LAW

LAW OF CIVIL PROCEDURE

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CHAPTER FIVE

PRE -TRIAL PROCEEDINGS

1. The First Hearing

I. Non-appearance of parties & its effects,
sufficient reason

II. Examination of Parties – if both parties
appeared examined by courts – to determine
positions of parties.

III. Ruling on preliminary objections

IV. Framing issues for trial

- ❖ Then the court sets a date for trial, at the trial evidences heard & then decided.
- ❖ Sometimes, cases adjudicated at first hearing, without full scale trial.

I. Non-appearance of parties &

II. Examination of Parties:

- Court read pleadings & ask parties (whether admit or denies allegations in the pleadings);
- parties given second chance to admit or deny;
- If admitted, then decided – Art. 242.
- If denied, issues framed -

❖ Important of Examination of Parties:

- Help the court clarify & develop issues;
- Plaintiff get opportunity to respond on SOD;
- Defendant might have raised affirmative defense like force majeure....

III. Ruling on Preliminary Objections

- Art. 244 & 245

- ✓ If preliminary objections raised, the other party must be heard and then decided; not merit of the case;
- *Court has no jurisdiction*
- *Subject matter of the suit Res Judicata*
- *Suit is pending in another court*
- *Other party is not qualified for acting in the proceedings;*
- *prior permission to sue has not been obtained, when this is required by law;*
- *Suit is barred by limitation; or*
- *Claim is to be settled by arbitration or has previously been made the subject of a compromise or scheme of arrangement .*

- The list under Art. 244(2) not exhaustive;
- any preliminary objection not raised at the earliest possible opportunity is deemed waived unless the ground of objection is due to reasons such as to prevent a valid judgment from being given eg., Material jurisdiction – Art. 244(3).
- ❖ Preliminary objection– **either accepted or rejected**
 - **If rejected**, issues framed & heard;
 - **If accepted, dismissal** (res-judicata, issue estoppel, etc.)

IV. Framing of Issues - Art. 246 - 248

- Court shall ascertain upon what **material propositions** of *fact or* of *law* the parties are a *variance*, and shall thereupon proceed to *frame and record the issues* on which the right decision of the case appears to depend.
- Framed based on the material proposition of fact or of law **affirmed by one party and denied by the other**;
- **Material propositions** are those propositions of fact or of law, which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense;

❖ **Issues are Framed from:-**

- Pleadings,
- Documents produced by parties,
- Oral allegations.... Art. 248.

❖ **Advantages of framing issues:**

- limit scope of litigation;
- expeditious proceeding;

2. Adjudication without Trial

- Agreement on issue – Art. 252
- Parties not at issue – when admitted – Art. 254
- Disposition of issues at first hearing – Art. 255

➤ **Examples:**

- ✓ 1. If issues framed can be determined by argument/evidence once produced by parties.
- ✓ 2. If only issues of law is framed – as no evidence will be produced;
- ✓ 3. If only documentary evidence is produced

3. Compromise and Withdrawal

- **Compromise** – agreement reached after the suit has been instituted & before decision – Art. 3307 civ.c, 274 – 276 cpc.

➤ **Valid agreement must contain: Art. 276**

- Name and place of the court in which the suit is pending
- Title of the action and the number of the suit
- Name, description, place of residence and address for service of the parties; and
- Matter to which the agreement relates

- **Withdrawal–** Plaintiff
discontinue/abandon a case;

❖ **Withdrawal with leave:** - if with court permission – Art. 278(2) (a) & (b) – court permits if there is good cause; (Vol. – 24, 161301).

➤ **Effects:**

- ✓ There is the right to institute fresh suit on the subject matter
- ✓ Period limitation should not be interrupted;

❖ **Withdrawal without leave:** - If without court permission;

➤ **May be due to 2 reasons:**

- ✓ When reason for withdrawal rejected by court;
- ✓ When no application for withdrawal submitted;

➤ **Effects:**

- ✓ Fresh suit is not allowed – Art. 279

CHAPTER SIX

THE TRIAL AND OTHER PROCEDURES

❖ **Trial** includes:

- **Production of evidence** – i.e. how witness and documentary evidence are brought before the court;
- **Conduct of trial**; and
- **Giving Judgment and Decree.**

❖ **Civil Proceedings: 3 types -**

- Ordinary Procedure;
- Summary Procedure and
- Accelerated Procedure

1. Ordinary Proceedings

- **Production of Evidences** - prove factual allegation/s that is/are affirmed by one party and denied by the other;
- **Purpose of production of evidence:**
 - Expedite trial process;
 - Exclude prejudicial & unreliable evidence;
 - Protects privacy of parties – privileged witnesses should be heard;
 - Witnesses listed (Art. 223(1)(a), 234(1)) may be replaced
 - Witnesses may be called by court – Art. 264
 - Calling party must cover costs of witness–Art. 112/1

Summon must specify: Art. 118

- Time & place witness required to attend;
- Production of documents/evidences in his possession.
 - Eg. Contract/Certificate of marriage, will...
- Non-attendance must be due to **good cause** like illness, unavailability of transportation.
- Non-attendance without good cause leads to criminal liability – Art. 120.

Witness may be either:

- Observed the fact/accident or
- Expert witness.

❑ Examination of witness on commission:

- When witness may not be able to attend before court due to **physical incapacity**, far from court jurisdiction or other reasons – Art. 122-125
- ❑ Witness testimony by affidavit – Art. 204

Affidavits employed in 2 situations:

- Where party proved the facts to the best of his knowledge, and
- Where party believes that the facts are happening or will happen.
- ✓ Eg. Paupership – Article - 468
- ✓ Eg. Temporary injunction – waste of subject matter of a suit.
- So, no need of producing evidence, but it is rebuttable.

- Documentary evidence may be either:
 - ✓ **Admissible** – forms part of the record;
 - ✓ **Inadmissible** – returned to person who produced it;
- **Documentary evidence is classified as:**
 - real proof as opposed to oral testimony;
 - Real evidence includes written documents and demonstrative evidence.
 - Eg. Photographs, recordings, and tangible objects like the murder weapon or a broken glass....

2. Special rules that govern admissibility of documents:

- **Rule of authentication:** - Evidence that was signed or prepared by the person who is claimed to have signed or prepared it.
- **Best evidence rule:** - require production of **original** document - Art. 140, 223, 233(1), 234(1), 264(1).
- A Person ordered to produce document, may cause to produce without attendance - Art. 114, 115, 119, 145, 146

Procedure of admission of documentary evidence: The court endorses:

- *Number on it;*
- *title of the suit;*
- *name of the person producing it;*
- *Date of production.*
- ❖ Copy must be compared with the original & the latter returned;
- ❖ no document may be returned which by force of the decree has become void or useless.
- ❖ Exceptionally, court may order production of evidence on its own motion.

Conduct of The Trial

Order of proceeding:

- ❖ **Burden of proof:** - obligation to provide evidence necessary to establish a disputed fact or a degree of belief in the mind of the court.
- ❖ **It involves 2 concepts:**
 - **Burden of persuasion** - ultimate burden of **convincing** the court of an issue, and it does not shift during the trial; and

- But this burden may shift to the defendant if defendant admits the allegations of the statement of claim and has raised what we have called affirmative defenses.
- ❑ **General rule** - Party who has the burden of proof has the right to begin.
- ❑ Plaintiff has the burden of proving that he has a cause of action, and the defendant has the burden of proof on the question of whether he has a valid defence.
- ✓ Article 258

➤ **Example:-** if the defendant admitted the existence of a contract, his non-performance & the damages claimed, but contended that his non-performance was excused by **force majeure**, he would have the right to begin, since he has the burden of proof on the issue in the case.

➤ ***Preponderance of evidence:-*** If in a suit for breach of contract, the plaintiff fails to make out a case showing that there was a contract, there is no reason to proceed further: the burden is on the plaintiff to show that there was a contract, not on the defendant to show that there was not a contract.

✓ Art. 259, 260 Civ.p.c & Art. 2001 of Civil Code.

❑ The plaintiff has the right to begin & has the burden of proving the essential element of the suit. **Two options:**

- The plaintiff has opportunity to produce all his evidence on all the issues without waiting for the defendant to produce evidence on the issues he has the burden of proof - Art. 260(1) OR
- Reserve it by way of answer to the evidence produced by the other party.

Production of Evidence by the Parties

- ❖ **Examination of witnesses:** is the primary responsibility of parties,
- ❖ But the court is also given broad power with respect to the examination of witnesses.

Three stages/manners/ to examination of witnesses:

- **Examination-in-chief** – helps the proponent to develop the testimony of the witness in light most favorable to him.
- **Cross-examination** - the opponent tries to discredit that testimony.
- **Re-examination** -the proponent tries to minimize the effect of cross-examination.

- **Art. 261** - the witness first takes the oath and proceeds to answer the questions propounded by the proponent or his advocate.
- **Art. 263** - provide the form of questions:
- **Questions put in examination-in-chief**
 - ✓ Only relate to facts relevant to the issues to be decided;
 - ✓ Only to such facts of which the witness has direct or indirect knowledge; and
 - ✓ Leading question are not allowed unless with the permission of the court or on the preliminary issues.

➤ **Question put in cross-examination:**

- ✓ Aim to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in-chief; and
- ✓ Leading questions are allowed.

➤ **Questions put in re-examination:**

- ✓ For the purpose of clarifying matters, which have been raised in cross-examination.

➤ **Purpose of the rule forbidding leading questions:**

- ✓ is to prevent a witness who is quick to adopt the suggestion of the examiner from saying something that he would not say otherwise.
- ✓ testimony must be that of the witness and not the examiner; the examiner cannot put words in the mouth of the witness, so to speak.

➤ **But what constitutes leading question?**

- ✓ it could be determined by the **form** of the question and the **tone** in which it is asked-it is only where the question itself suggests the answer which the examiner wishes to receive that it is considered to be leading.
- ✓ **Example:** Where the examiner concludes with a positive suggestion such as “didn’t you?” or “weren’t you?”.

❑ **Three situations where the court could permit asking leading questions - Art. 263(2):**

- **Introductory matters:** when asking name, age, occupation and address, and to save time, the examiner can simply start “your name is....., isn’t it?”.
- Where the **witness cannot remember** some or all of the matters as to which the testimony is sought.
- **Assisting child witnesses** who have difficulty in testifying.

❑ **Some of the methods of impeaching witness credibility:**

- That the witness is **biased** in favor of the **proponent** or against the **opponent**;
- That he has made **prior statements inconsistent** with his testimony in court;
- That he has a **poor reputation** for telling the **truth**;
- That he has been **convicted** of certain criminal offences reflecting on his **trustworthy**.

Documentary evidence:

- ❑ There are **no express provisions** of the Civil Procedure Code governing the introduction of documents into evidence. But according to **Art.138:**
- The court at **any stage of the suit rejects** any document, which it considers **irrelevant** or otherwise **inadmissible**, recording the grounds of such rejection.
- The court may rule on the **admissibility** of the documents at the **first hearing** or could wait until the **trial**.
- It has duty to exclude an **inadmissible document** even if no objection is made, and where a document has been admitted to incorporate it as part of the record - **Art.142.**

Power of Court during production of Evidence

- In **adversarial system**, which Ethiopia's system of litigation has adopted, the role of the court is minimal with regard to the examination of witnesses when it is compared with the **inquisitorial system** of litigation.
- But Ethiopian Civil Procedure Code give the courts **broad power** with respect to examination of witnesses & production of documents at the trial.

➤ This principle of party presentation is modified by giving the judge a **potential degree of control over the conduct** of the litigation.

Example: Court has power to:

- ✓ order amendment of pleadings on its own motion;
- ✓ frame issues for trial;
- ✓ put a question to a witness at any time during the examination;
- ✓ call a witness even though he has not been called by the parties & order any person to produce any document that he has with him;
- ✓ recall any witness who has been examined and may put to him such questions as it thinks fit - Art. 266

- Court may recall a witness to clarify points or matters.
- Only the court that examines the recalled witness & parties do not have a further opportunity to question him although they may request that he may be called.

- Where a party, without a lawful excuse, **refuses to give evidence/produce a document** in his power, court may **pronounce judgment against him** – Art. 267
- However, the court may decide not to take such a step & may issue the same kind of order as it would against any recalcitrant witness.
- If a person who is a party to a suit refuses to give evidence or to produce any document, the court may order, with or without a bail for the arrest of such person, as it considers the attendance of such person necessary - Art. 268 & 118(2)(b).

Interpretation of Disposition - Art. 262

- Every state is empowered to use its language as a working language of its courts. The Constitution also gives a right to individuals who do not know the language of the court to have an interpreter.
- Interpreter takes an oath & swears to interpret the evidence truthfully to achieve objective of justice;
- Interpreter must repeat the questions & answers exactly as they have been given & cannot summarize.
- An official interpreter should be used but if this is not possible, the court must be satisfied that the interpreter is fluent in both languages.

Recording evidence - Art. 269:

❑ *The evidence of each witness shall:*

- ✓ start with his name, age, occupation and address and an indication that he has been sworn or affirmed;
- ✓ be taken down in writing by the presiding judge or, if he is for some reason unable to record, by a judge or clerk under his personal direction and superintendence;
- ✓ be divided into examination-in-chief, cross-examination, and re-examination with a note as to where the cross-examination and re-examination begin and end;

- ✓ Ordinarily be taken down in the form of a narrative, but the presiding judge may in his discretion take down or cause to be taken down any particular question and answer;
- ✓ When completed, the record shall be signed by the court.
- Where there has been an objection to a question, which is overruled/sustained, the court must record the question, the answer, the objection, the name of the person making it and the courts ruling - Art. 270
- This is to enable the appellate court to

- If no objection to a particular question at the trial, it cannot be raised on appeal.
- Where, after evidence has been recorded, there is a change in the composition of the court. **Example:**
 - ✓ When one of the judges is replaced, the suit continues on the basis of the evidence that has been recorded, and it is not necessary to hear that evidence over again - Art. 271(1).

Court Inspection/View/

- It helps to ascertain what probably happened - to have a full-fledged understanding of the subject matter;
- It helps to avoid necessity of taking time at trial & is particularly important where complicated financial questions are involved.
- It is just like the property itself were brought into court & introduced as real evidence.
- Court may further appoint a commissioner to make a local investigation for the purpose of elucidating any matter in dispute - Art.132.

‘open’ and ‘in camera’ trial

- **Open trial** - witnesses must give their evidence in open court, unless the court otherwise directs, for good cause to be recorded - Art. 261(3);
- **In camera** - where the evidence is not to be given in open court, the judge will take evidence in chambers in the presence of parties/their advocates.

Evidences which are bases to court decision

- ❑ Court decision must base on the evidence that has been presented in open court or in camera and the evidence presented on commission in accordance with the provisions of the code. So:
- Court may not base its decision on secret evidence that has not been presented in the presence of the parties or their advocates.
- Court must base its decision on competent and relevant evidence.
- ❖ Court must reject irrelevant/inadmissible documents and testimony of oral evidence.

Judgment and Decree - Arts. 273, 259, 180

- Court shall pronounce judgment in open court either at once or, as soon after as may be practicable, on some future day to be fixed by the court.
- **Judgment** shall be:
 - ✓ reduced to writing;
 - ✓ signed by the judges except dissenting judge
 - ✓ pronounced by a judges or where there are more than one judge, by the presiding judge.

Pronouncement of judgment

- Where a case has been heard by more than one judge, decision should be made by majority &
- Any judge dissenting from the decision of the majority shall state in writing the decision which he thinks should be made together with the reasons - Art. 181(2).

Judgment must contain:

- Points for determination,
- Decision thereon &
- Reasons for such decision.
- If there are several issues, the decision must be given on each separate issue unless the decision on any one or more issues is sufficient for the decision of the case.

Contents of judgment & Decree

- **Judgment** - must be on matters specifically raised by the parties.
- **Exception:** court has the power to frame additional issues, and if it believes that there is an issue that has not been raised and should have, it may frame that issue, require the parties to give evidence on it, and render judgment in light of its decision on the issue.

Decree

- It is the operative part of the judgment.
- Judgment can not be executed, what is executed is the decree.
- **Decree must contain:**
 - ✓ Number of the suit;
 - ✓ Names and description of the parties;
 - ✓ Particulars of the claim;
 - ✓ A clear order to do or to abstain from doing something or to pay a definite sum of money or to deliver a particular thing or surrender or restore immovable property;

- ✓ The amount of costs incurred, and by whom or out of what property they are to be paid;
- ✓ Such particulars as are necessary to render the decree susceptible of execution; &
- ✓ Where the decree can be executed by the personal obedience of the judgment debtor, the time within which it shall be executed.
- ✓ If the judgment was for the defendant, it would seem that the decree should state matters (1), (2), (3) and (5) and that the judgment in the suit was for the defendant.

➤ Decree for **delivery of movable property** shall also state the amount of money to be paid as an alternative if the property cannot be delivered - **Art. 185** .

➤ Decree for **payment of money**, the court for sufficient reason, postpone the payment or permit payment to be made in installments, with or without interest.

➤ Decree for **recovery of immovable property** together with rent or mesne profits should be for the possession of the immovable together with the rent or mesne profits, which have accrued prior to the suit and until the delivery of possession to the decree holder - **Art. 187.**

How should the amount be determined?

➤ If an accounting or division of

➤ Where a set-off is allowed, decree shall state the amount due to each party & shall be for the recovery of any sum, which appears to be due to either party.

The right to get a copy of Judgment & Decree

➤ Certified copies of the judgment or decree or both shall be furnished to the parties on application to the registry of the court which passed it & the date be mentioned thereon - **Art. 184(1).**

Special Proceedings

- ❑ Are applicable for cases determined without full-scale trial.
These are:

- **Summary Procedure**
- **Accelerated procedure**

Summary procedure - Art. 284

- refers to a procedure by which the plaintiff may lodge his claim without the necessity of instituting a full-scale suit.

- Is available where plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant & arising:
- ✓ Upon a contract, express or implied such as on a bill of exchange, promissory note or other simple contract debt, or
 - ✓ On a bond or contract written for payment of a liquidated amount of money, or
 - ✓ On a guarantee where the claim against the principal is in respect of a debt or liquidated amount.

- Where summary procedure is available, the plaintiff has the option to employ it or ordinary procedure.
- Plaintiff must be entitled to recover a specific sum of money ascertained at the time of suit.
- **Example:** If the defendant accepted goods under a contract, but refused to pay the price, a summary suit for the price would be proper, since the amount claimed is liquidated.

➤ **Plaintiff must:**

- ✓ Employ the term “Summary Procedure”;
- ✓ Submit an affidavit;
- ✓ Swear positively to the facts, verifying his cause of action & amount claimed & stating that in his belief there is no defense to the suit.

- Defendant served with **special summon**.
- The summons advises him that he has been sued for a sum of money on a specified obligation & that he must obtain **leave to defend** the suit.
- He may not appear & defend unless he applies and obtains such leave from the court.

- If the defendant fails to make such an application within the time fixed by the summons, the plaintiff is entitled to a decree for an amount not exceeding the sum claimed in the statement of claim together with interest if any & costs against the defendant or such of the defendants as have failed to apply for leave to defend.
- The purpose of the procedure is to enable the plaintiff to avoid a full-scale suit & this has been accomplished.
- Once the judgment has been entered in favor of the plaintiff, the court should be able to pass the same kind of decree as in any other case.

- Application for **leave to appear and defend** is to be supported by an **affidavit**, which states whether the defense alleged goes to the **whole or part** only and, if so, to what part, of the plaintiff's claim. **Art. 286**
- Plaintiff must be served with notice of the application.
- Court will hold a hearing, at which time the defendant may be examined on oath & required to produce relevant deeds, books, documents & the like.

- If denied defendant leave to appear & defend the suit, plaintiff shall be entitled to judgment - **Art. 287**
- When there is judgment for part of the claim, the court should grant the leave, but should make it conditional - **Art. 288**
- If the defense applies only to part of the claim, judgment must be entered for that part suspending execution or the payment of any amount realized by attachment, or taxation

- Defendant then given leave to appear and defend as to the balance of the claim.
- In the case of multiple defendants, some/all of them may be entitled to leave to appear and defend; &
- Plaintiff is entitled to a decree against some defendants & obtain execution without prejudice to his right to proceed with the suit against the defendant or defendants given leave to appear and defend.

- Where leave is given, the court may make orders with respect to the filing of pleadings, framing of issues and the like, or may order the case to be heard immediately.
- If the issues are clear, it should order an immediate hearing.
- If leave to defend allowed, **summary proceeding** will be turned to **ordinary proceeding** & the case will be handled as any other ordinary cases.

- If entered judgment for plaintiff, but subsequently discovers that the service of the summons was not effective or that there is good cause for doing so, it may set aside the decree in favor of the plaintiff & give the defendant leave to appear & defend, if it seems reasonable to do so - Art. 292.
- The court may also stay or set aside execution and impose terms as it sees fit.

Accelerated procedure – Art. 300

- Provides for the immediate hearing of certain kinds of cases speedily and without a full-scale suit because the nature of the case requires so.
- A party entitled to have his case heard under accelerated procedure must file a written, dated and signed application.
- Application must be made within the period fixed by law for the making of such applications, or where no period is fixed, within 15 days from the occurrence of the facts on which the application is based. Art 301.

- **The application must specify:**
 - ✓ Capacity in which the applicant acts;
 - ✓ Provisions of the law under which it is made;
 - ✓ Affidavit stating the reason of it;
 - ✓ Required documentary evidences as the applicant wishes to submit.
- It is an **ex-parte proceeding**.

- **Application Dismissed:** If the applicant is not qualified or if it is not in the proper form or not filed within the prescribed time, or if the court considers that the subject matter of the application cannot be properly disposed of under the accelerated procedure.
- But **Dismissal does not** result in **res-judicata** as to the subject matter of the application, but a fresh application may not be made on the same ground to be dealt by & through accelerated procedure.

- There is no provision by which an interested party has the opportunity to appear and oppose the granting of the application.
- However, a number of cases in which an application is authorized involve only one party, and where another party would be interested, he could move the court to modify or set aside its order granting the application.
- Court may make a further order when necessary.

- **Art. 306** - Unless otherwise provided by the law under which the application is made, no appeal shall lie from any decision under this chapter other than a judgment under - Arts 309-311.
- Where an appeal lies from a judgment given, it shall be made within **10 days** from date judgment and such judgment shall not be enforced until the period for appeal has expired or the appeal has been decided.

➤ **It is applicable in particular in matters concerning:-**

- ✓ Change of name (Arts. 42 & 43 of Civil C.);
- ✓ Withdrawal of interdiction (Art. 377 Civ. C.);
- ✓ Opposition to marriage (Art. 592 Civil C.);
- ✓ Widowhood (Art. 596 Civil Code);
- ✓ To consult or to be issued with certain powers or documents or to be authorized to depart from certain instructions (Arts. 129, 209, 239, 287, 523, 528, 535 & 630 Civil C.)

- ✓ Where an application is made for the correction or cancellation of records or entries in the registers (Arts 121,127, 1623 and 1630 Civil Code) or
- ✓ For approval or confirmation (Arts 146, 628, 633, 749, 763, 766, 767 & 804 Civil Code and Art. 441 Commercial Code) or registration or certification;
- ✓ The court may, without further proceeding, but after having ordered such investigations as may be necessary, give such directions as are appropriate in the circumstances, or issue a certificate evidencing approval, registration or certification or endorse the fact of approval, registration or certification on the relevant document.

- It is designed to facilitate the disposition of cases where the claim is not likely to be disputed or where the nature of the claim is such that an immediate decision is required and feasible.
- They provide an expeditious remedy in appropriate cases & avoid full-scale proceedings where such proceedings are unnecessary & perhaps undesirable.

Other Procedural Matters

- They are not the major problems of procedure but consist of technical rules or special procedures.
- These procedures come when a proceeding is initiated by the parties when they demand a temporary relief until the case is disposed.
- The life of such relief depends on the original claim.
- It includes Arrest and attachment before judgment, Temporary injunctions, interlocutory orders, appointment of receiver.

Arrest and Attachment before Judgment

- It is different from arrest & attachment in the *execution proceeding*.
- It is arrest & attachment prior to judgment;

Arrest before judgment

- It is to secure appearance;
- It is only applicable to suits not involving immovable property.
- If the suit involves immovable property, the defendant's interest in such property may be considered sufficient security for his appearance.

Other Procedural Matters

- **Arrest before judgment:-** It is to secure appearance; It is only applicable to suits not involving immovable property – Art. 147-150
- **Attachment before judgment:-** to prevent the defendant from disposing of or removing his property so as to prevent execution - Art. 151 - 153
- **Temporary injunctions:-** an order restraining a party from doing a particular act or requiring him to do such an act – Art. 154 - 159



- **Interlocutory orders:-** any order that the court considers necessary or expedient to be made pending the determination of the suit – Art. 160-165
- ✓ **Example:-** interim sale, detention preservation or inspection of any property
- **Appointment of receiver:-** to preserve the subject matter of the suit pending a determination of the rights of the parties - Art. 166 - 169
- **Habeas Corpus:-** A Habeas Corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment – Art. 15(2)(i), 177-179
- **Arbitration and conciliation:- ADR mechanism - Art. 315 - 319**
- **Cost:- court discretion - Art. 462**

CHAPTER SEVEN

REVIEW OF JUDGMENTS

- Either of the parties may be dissatisfied by the decision of the court of first instance.
- 3 ways of reviewing a judgment:
 - **Review by court of rendition:-**
 - **Review by an appellate court and**
 - **Review by Cassation.**

1. Review by court of rendition

- Reviewing before the court which rendered the judgment;
- 3 Bases for review by court of rendition:
 - **Procedural Irregularity;**
 - **Newly Discovered Evidence and**
 - **Opposition**

1.1. Procedural Irregularity

- Is **non-compliance** with the **provisions of the Code**, and such irregularities have ***substantially affected*** the disposition of the case to the determinant of one of the parties;
- The court on its own motion or on motion of either party, set aside the proceedings in whole or in part as irregular, amend them, or make such other order as may be appropriate;
- **Procedural irregularity** is different from **mistake**.
- **Mistakes:-** *are* any clerical or arithmetical in the summons, judgment, decree or order or any errors.

1.2. Newly Discovered Evidence - Art. 6

- Judgment may be reviewed ground of newly discovered evidence.
- the evidence must be discovered *after the judgment is rendered*,
 - the newly discovered evidence *must affect the decision*, and
 - the evidence *must be of such nature as to suggest improper conduct*, which tainted the judgment with fraud. i.e., forgery, perjury, bribery or the like.

1.3. Opposition - Art. 358

- Any person who *should or could have been made a party to a suit* and whose *interests are affected* by a judgment in the suit may, if he was not a party to the suit, file opposition to the judgment before the judgment is executed.
- **3 requirements are:**
 - He/she should or could have been made a **party**;
 - His/her interests are **affected** by the judgment rendered in his absence; and
 - He/she is filed **prior to execution**.

3 classes of persons who able to file opposition:

- *Indispensable parties;*
- Persons who are the *real parties in interest*, and
- Persons who, as a result of the decree, will be *liable for contribution or indemnity* to the unsuccessful party.

2. Review by an appellate court

- **Appeal:-** is an application by a party to a higher, or as it is called, an appellate court, asking that court to set aside or revise a decision of a subordinate court.
- It is a review of the case and *not a retrial* of the case by the appellate court, as a rule not hear additional evidences.
- Its aim is to correct errors made by subordinate court.

Right of Appeal

- Either/both party/parties may appeal against any final judgment rendered by the subordinate court.
- **Appellant:-** the party taking the appeal.
- **Respondent:-** the party against whom the appeal is lodged.
- **Cross-appeal:-** *When both parties appeal.*
- **Cross-Objection:-** *If a party appeals after served with summon of the other party's appeal.*
- There is one appeal as of right.

Types of Appeal

- An application to appellate court may be of 2 types:
 - **Appeal on Judgment:-** appeal on the final decision
 - **Appeal on Orders (Interlocutory Appeal):-** In principle, not allowed to appeal on orders;
 - **Exception:-** *appeal from order directing arrest/detention, transferring property from one party to another or refusing to*

Grounds of Appeal - Art. 327

- Grounds on which the appellant objects to the judgment from which the appeal must be stated in the memorandum of appeal concisely & without argument,
- If there are more than one grounds, each ground shall be set separately and numbered consecutively.
- Appellate court, in deciding the appeal, is not confined to the grounds of objection set forth in the memorandum of appeal or argued by leave of court.
- New facts, objections and evidences are not allowed on appeal as a rule.

Memorandum of appeal

- The memorandum of appeal must contain, the requirements stated under Art. 327.
- must fulfill the technical and substantial requirements otherwise rejected to be amended;

Time for appeal - Art. 323(2)

- The memorandum must be filed within 60 days from the time of the delivery of judgment.
- **Exception:-** some substantive laws may fix the period of limitation even less than 60 days.
- **Example:-** Labor proclamation - 30 days

Effects of failure to appeal no time:

- **Rejection:-** memorandum of appeal must be rejected by registrar & he will inform the appellant that he may within 10 days file an application for leave to appeal out of time - article 324(1)
- **Application for leave to appeal out of time must:**
 - be in **writing**;
 - show the **cause** why the appellant did not appeal within the prescribed period & evidences to prove the same.
- An application may be:-
 - **Dismissed:-** if no good cause & no appeal on dismissal.
 - **Accepted** – if court convinced by the reason & appellant allowed to appeal within 10 days from the order.

Additional Parties

- Where appellate court concludes that such a person is interested in the result of the appeal, it may direct that he be made a respondent Art. 40(5).

Stay of execution

- Appeal by itself does not operate to stay the proceedings or to prevent execution of the decree.
- Ordered only upon a showing that substantial loss will result if the stay is not granted and that appellant's furnishing security for the performance of the decree.
- may be ordered by the **appellate court** or by the president of the court of rendition.

Procedure on appeal

- Filing Memorandum of appeal –
Hearing appellant/his pleader –
Dismissal of appeal without calling
the respondent or Acceptance &
calling the respondent;
- If not dismissed respondent will be
summoned;
- On the day of appeal: – appellant
heard – respondent respond – and
appellant reply.
- It may be orally or in written.

Framing of Issues- Art. 343

- Appellate court may frame issues if the subordinate court has omitted to frame issues necessary for decision & refer them to the subordinate court, which is to take the evidence on those issues.
- The subordinate court does not review its decision, it merely takes the evidence, makes findings, & submits the evidence & finding to appellate court.

Additional Evidences

- **Principle:-** parties are not permitted to produce additional evidences.
- **Exception:-** 3 situations where the introduction of new evidence on appeal is authorized: Art. 345
 - the subordinate court refused to admit evidence that ought to have
 - e been admitted;
 - the appellate court requires & document to be or any witness to be examined to enable it to pronounce judgment; or
 - there is 'substantial cause,' justifying the production of the evidence.

Review of Findings of Fact

- 2 approaches on review of fact finding:
 - The appellate court will be dependent on the findings of fact made by the subordinate court.
 - The appellate court may determine on the findings of facts.
- In Ethiopia, the appellate court is not bound to accept all findings of fact made by the subordinate court.
- But appeal is not retrial of the case.

Judgment on Appeal

- After hearing of appeal – Judgment rendered.
- The judgment on appeal may **confirm**, **vary** or **reverse** the decree or order of subordinate court - Art. - 348

1. Confirm

- If no error or the error is a mere irregularity – simply it will be corrected & no need of reversal/variation.

2. Reversal/Variation for substantial error

- If the error is **substantial error** - if it **prevent a valid judgment from being given** - Art. 211.

3. Remand – Art. 341

- = **"to send back."**
- It is an action by an appellate court in which it remands, or sends back, a case to the trial court or lower appellate court for action.
- **Example:** If a party is prevented from introducing admissible evidence, retrial may be ordered.
- if the subordinate court disposed of the case on a **preliminary point** & its decision on that point is

4. Powers of Appellate Court - Art. 342

- The appellate court is given broad powers with respect to its disposition of case.
- If the record of subordinate court is sufficient, appellate court pronounce judgment on **different basis**.
- In case of multiple parties, persons who failed to appeal also will benefit from the appellate decision

❑ Limitation on the power of the appellate court:

- it cannot take away from a party relief which he was granted by the subordinate court & which is not challenged on appeal & inconsistent with the final decree to be rendered.

Pronouncing of judgment

- The provisions Chapter 2 are also applicable to the judgment of the appellate court.
- Judgment of appeal must contain:
 - ✓ Grounds of appeal & further questions, if any, developed by the appellate court;
 - ✓ Decision & reasons for the decision;
 - ✓ Decree;
 - ✓ Order as to the costs;
 - ✓ Order regarding execution;
 - ✓ Copy of judgment & Decree given to parties & sent to lower court.

The Second Appeal

- Is available when the decision of the subordinate court is **varied or reversed**.
- is a **review** of the decision of the **first appellate court** varying the judgment appealed from, not a review of the decision of the trial court.
- is limited on the scope of first appellate court.
- If the judgment of lower court is **confirmed, there** will be no second appeal.
- The provisions applicable to the first appeal are also applicable to the second appeal.

Restitution

- The successful appellant is entitled to restitution;
- Application must be made for restitution in the court of first instance in principle.
- **Exception:** where the appellate court has required the respondent to post security for restitution, it would seem that the application for restitution should be made to the appellate court.
- That court must cause such restitution based on the decision of the appellate court – Art. 349.
- The court must give any appropriate order to effect restitution.

3. Review by Cassation Court/Bench

- Federal Supreme Court & State Supreme Courts have the highest & final judicial power over Federal and State matters, respectively - Art. 80 (1) & (2) of FDRE Constitution.
- Federal Supreme Court to exercise *power of Cassation* over any final court decision containing a basic error of law.
- State Supreme Courts also have given the same power on State matters.

❑ **Cassation is applicable:**

- after exhausting all rights of appeal;
- if there is basic error of law, not fact;
- **Parties:** Applicant & Respondent

❑ **Procedure in Cassation:**

- Cassation application submission (if fulfilled all requirements, payment of court fee, file no, date for hearing adjourned) – hearing the applicant – dismissing without calling the respondent/ calling the respondent – hearing both parties/ written response/ – Judgment (Confirm, Vary or Reverse).

CHAPTER EIGHT

EXECUTION OF DECREES

- **Judgment** – creates judgment creditor (beneficiary of the decision) and judgment debtor (affected by the decision);
- Both parties have different interests following the judgment:-
 - **Judgment debtor** - wishes to review the judgment by way of appeal.
 - **Judgment creditor** - interested to execute the judgment, if any.

Execution

- Is the process by which a *decree* is enforced against a person who has failed to comply with its terms.
- **Decree includes a clear order:**
 - ✓ to do or refrain from doing something or
 - ✓ pay a definite sum of money or
 - ✓ deliver a particular thing or
 - ✓ surrender or restore immovable property.
- Such order is enforced in the execution proceedings.
- **The main points are:**
 - ✓ Jurisdiction in execution,
 - ✓ Procedure in execution,
 - ✓ Attachment & sale of property.

Jurisdiction in Execution

- Execution is a separate proceeding.
- A decree can be executed either by the good will of the judgment debtor or by the order of the court.
- A court which has jurisdiction must be determined.
- **Principle:-** the court, which passed the decree, has a jurisdiction to execute such decree.
- **Exception:-** execution may be transferred to another court.

Individual Assignment - 2

Answer the following questions

1. What are the bases to classify laws in to substantive and procedural? Why we need the civil procedure law?
2. What are your critics against the 1960 civil procedure code of Ethiopia?
3. Explain the purpose of public hearing of a suit.
4. How do you relate service of summon with fundamental procedural principles?
5. How can we implement the accountability of judges while there is judicial independence?

Individual Assignment - 3

Answer the following questions

1. Discuss the constitutionality of Woreda, Sharia and Kebele Social Courts.
2. The judicial and local jurisdictions are waivable but the material jurisdiction is not. Why?
3. What necessitates transfer of suit while there is withdrawal of judge?
4. Is vested interest a requirement to be defendant? Why? Why not?
5. Compare and contrast permissive and mandatory joinder of parties

Transfer of execution is authorized where - Art. 372

- Judgment-debtor resides, carries on business or personally works for gain within transferee court;
- Judgment-debtor has sufficient property to satisfy the decree within the local limits of the transferee court, but not within the transferring court;
- Decree directs the sale or delivery of immovable property situated within the local limits of the jurisdiction of the transferee court; or

Transferor court must:

- Send a copy of the decree,
- Certificate stating that “satisfaction of the decree has not been obtained by execution within its jurisdiction, or the extent of partial satisfaction.”
- ❖ Transfer may be made without notice to the judgment-debtor, since he will be notified of the execution proceedings by the transferee court.

- ❖ Transferee court cannot alter, vary or add to the terms of the decree.
- ❖ But transferee court can resolve the ambiguity.
- ❖ If the decree has been modified by the appellate court, the transferee court can execute it as modified by the appellate court.
- ❖ Transferee court will have same power with the transferor.
- ❖ Transferee court can not retransfer it.

Powers of the Court

- Application for execution must be filed by the decree-holder
- After application is made, the executing court has complete control over the proceedings.
- Decisions on execution is appealable.
- Stay of execution order may be given if it is pending in another court

Proceedings in Execution

➤ **Application for execution - Accepted/rejected(if lacks the required content & amended-Art. 378) - judgment-debtor served with summon & execution application to show why the decree should not be executed(orally-Art. 386) - non-appearance of judgment-debtor/response not accepted - execution order - if appeared & response accepted - necessary orders.**

Who should execute?

- **Principle:-** judgment-debtor;
- **Exception:-**
 - ✓ legal representative of the deceased person – Art. 383;
 - ✓ Surety – Art 375.

Payment of Money

- If execution related to payment of money - attachment & sale of property - arrest of judgment-debtor ordered to examine his source of income - Art. 394, 386(3) & (4).
- Value of attached property must correspond to debt.
- If he has no source of income/means to pay - the burden shifted to judgment-holder to prove such means.
- Arrest of judgment-debtor ordered(not more than 6months) if he is unwilling to execute - Art. 389
- Execution may be paid into court or out of court - Art. 395.

Recovery of movable property:

- is to be executed by the seizure of the property or share thereof & delivery to the decree-holder or such person as he appoints to receive delivery on his behalf - Article 399.
- If the property is in the possession of someone else, the decree-holder must proceed to attach that property.

Recovery of immovable property

- Possession is to be delivered by the execution officer to the decree-holder or such person as he may appoint to receive delivery on his behalf.
- Execution officer may remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession – Art. 402.

- Where the decree is for the joint possession of immovable property, a copy of the decree is affixed in some conspicuous part of the property & substance of the decree is proclaimed.
- Necessary orders as to costs, attachment, sale, arrest....

Execution of cross-decrees

Conditions to be fulfilled for cross-decrees:

- Both applications must be made to the same court;
- Decrees must be obtained in separate suits;
- Both decrees must be for the payment of definite sums of money;
- Parties must be the same/assigned/ and
- Decrees are capable of execution at the same time.

➤ Execution may be transferred from one person to another by agreement or by operation of law.

➤ Where assignee applies for execution, notice of the application shall be given to the original decree-

Decree transferred by law where:

- Decree-holder has died & decree has passed by devolution/succession;
- Decree-holder has become insolvent & decree has passed to the assignee/receiver;
- Judgment has been entered against the decree-holder in another suit & decree has been transferred in execution

Period of Limitation

➤ 10 years – Art. 384

❑ **Reading Assignment:**

➤ **Attachment** (Art. 404 – 421) &

➤ **Sale** of movable & immovable property for execution (Art. 422)