

PERIOD OF LIMITATION, LAPSE OF A MORTGAGE v ART 3058 OF THE CIVIL CODE

በሚካኤል ተሾመ

In 2002, when I was doing my undergraduate degree, our contract law teacher started talking about period of limitation and its effect. I neither had a concept nor an argument about period of limitation under art 1845 of the civil code. I attended the whole class, tried to understand arguments, justifications and ration d'être of the period of limitation. Mulugeta Mengist, in his monograph says that period of limitation is used to ensure certainty and predictability in transactions.¹

Now, with some years of working experience and exposure, I feel like I have understood what period of limitation in a private contractual relationship. To restate what Mulugeta wrote unless there is a time limit after the lapse of which the right cannot be enforced, people do not feel secure to do whatever they like with respect to their property.²

A limitation period is the period of time within which a party to a contract must bring a claim. Limitation period starts counting when the contract is breached, or when the damage is suffered. Period of limitation is a period of time, the expiry of which extinguishes parties' legal remedies and also parties' legal right. This is an absolute defense beneficial to the debtor but the burden of proof of the statute of limitation is with the debtor.

However, one court decision still perplexes me: Development Bank of Ethiopia v. Mr. Tigabu Teferra, Cassation No 78444/2005, found in vol 14. In order to give a glimpse of the case, the respondent, Mr Tigabu, borrowed money from the bank against collateral, in which the immovable property was registered in *Megabit 23*,

¹ Ayalew. A. Mulugeta. *Contract Law in Ethiopia*. Unpublished.

² *Ibid.*

1989 E.C. After 14 years, it renewed the registration of the immovable property in the local registrar office, *Merab Wolega* Registration Office. The respondent argued that the renewal of the registration is against article 3058(2) of the civil code. On the other hand, the bank said that it had already given notice based on article 3 of proclamation 97/90.

At last, the cassation decided that art 3058(1) & (2) are not concerned with period of limitation but lapse of mortgage. Citing a precedent, Cassation Decision 44800/2002, Vol 10, it concluded that

ይህ የሰበር ችሎት ባንክ ማስጠንቀቂያ የሰጠው በፍ/ሕ/ቁ 3058(1) የተጠቀሰው ዐሥር ዓመት ሳያልፍ ከሆነ ማስጠንቀቂያ ከሰጠ በኋላ ቤቱ ሳይሸጥ 10ዓመት ያለፈ ቢሆንም እንኳ የቤቱ ሽያጭ ሳይጠናቀቅ የተጠቀሰው ጊዜ ማለፉ በመያዣው ላይ ያለውን መብት ቀሪ አያደርገውም፡፡... ባንኩ... በ18/09/1992 ማስጠንቀቂያ በመስጠት በመብቱ መገልገል ጀምሯል... ይህ ከሆነ በመብቱ መገልገል ከጀመረበት ጊዜ አንስቶ 12 ዓመት ያለፈው ቢሆንም እንኳን በመያዣው ላይ ያለው መብት ቀሪ አይሆንም፡፡

Case No 44800 affirms

ባንኩ ማስጠንቀቂያ ከሰጠ በኋላ ቤቱን ሳይሸጥ የ10 ዓመቱ ጊዜ አልፎ ሊሆን ይችላል፡፡ የቤቱ ሽያጭ ሳይጠናቀቅ 10 ዓመቱ ማለፉ ብቻውን ግን መያዣውን ቀሪ አያደርገውም፡፡ ሊታይ የሚገባው ተጠሪ በመብቱ መገልገል የጀመረበት ጊዜ ነው፡፡.... በአዋጅ ቁጥር 97/90 መሠረት ደግሞ ባንኩ በመብቱ መገልገል ጀምሯል የሚባለው በ3058 ላይ የተቀመጠው የ10ዓመት ጊዜ ሳያልፍ ማስጠንቀቂያ የሰጠ እንደሆነ ነው፡፡

Therefore, it would be logical to answer the effect of registration of an immovable under the civil code. I will also try to show why I think this line of construction has a flaw.

Different Time Prescriptions

Under Ethiopian law, there are two types of time prescriptions: extinctive and acquisitive prescription. In property law, art 1168 says, “the possessor who has paid for 15 consecutive years the taxes relating to the ownership of an immovable will become the owner of the thing.” The time prescription under property law would enable a person to acquire the right of ownership.

On the other hand, the time period prescribed under art 1845 extinguishes obligations or can be invoked as a preliminary objection. Actions for performance, action for non-performance and action for invalidation will be barred if not brought within 10years. It would be worth mentioning art 1810 which prescribes only two years to bring action for invalidation of a contract.

It can be argued that art 1810 is about limitation of action and 1845 deals with limitation of right, i.e. after the expiration of the 10years, the right of the creditor will be absolutely barred, but 1810 allows the creditor to take self help measures, though the 2years period has lapsed.

Registration of Immovables under the civil code

1. It is prescribed that a mortgage will not have any effect unless it is registered (art 3052). Every immovable existing has to be registered in the register of immovables under its number in the cadastre, and a leaf be assigned to it (art 1575). The civil code also enjoins all acts purporting to create modify or extinguish a right of mortgage or antichresis ought to be

registered. A registration of an immovable property can be cancelled if “the right which formed its subject matter was created for a determinate period and such period has elapsed” (art 1632(1)). This includes, according to art 171(3) of the commercial code, a mortgaged business needs to be registered. Every mortgage has to be registered and given a cadastre number (art 1573 together with art 1575(1)).

2. Art 1723(1) also tells us that a contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable property shall be in writing and registered.
3. Art 2877 is another article that has to be mentioned: a contract of sale of an immovable will not have any effect unless it is made in writing. Not only this but also art 2878 articulate that the sale of an immovable will not have any kind of effect on third parties unless it is registered. At this juncture, it is understandable that art 1723(1) refers to the relationship between the parties; whereas, art 2878 tries to protect third parties in good faith. To this effect, art 1561 states that the register of an immovable are public.
4. Last but not least, art 3058, an article, which I think needs further construction or additional analysis, says the registration of a mortgage will be effective for 10years. A renewal of such registration will extend the period of time for the benefit of the mortgagee. This article also seeks to protect the mortgagee from possible loss of a claim or render their relationship effective for years to come.

Does it mean anything?

Bearing these articles in mind, would not the court's interpretation render art 3058 purposeless? How would it protect the interest of the debtor, whom is trying to justify that the mortgage right has lapsed? It is clear from 1845 and different period of limitation provisions, rights are subject to period of limitation.

Rene David articulates that at the end of 10years the possibility of raising the right as a defense to another action will be precluded. Eventually, the right created by the contract disappears by limitation and it cannot be asserted in any way.

The 10years period starts to run from the day when the obligation is due or the rights under the contract could be exercised (art 1846). Mulugeta says 1846 poses a problem:

This is because the due date and the date beginning from which a right under a contract could be enforced are different dates. A party can enforce his or her rights under the contract only after having given a default notice and a default notice can only be given only after the debt is due. This means there are two different starting points, and depending on at which point one has started counting, a party's action for invalidation of a contract, for enforcement of a contract, or the action based on the non-performance of a contract could or could not be barred.³

Coming back to the issue related with the interpretation of art 3058, I believe that the time prescription under art 3058 must be construed in a way to ensure certainty and predictability in transactions. A time limit is necessary to secure to engage in any kind of investment or do anything in respect of their property. The clear purpose of lapse of mortgage right is to protect the defendant. Until a person is given some kind of protection from the law, though inadvertently,

³ Ibid, pp 152.

investment will be adversely affected. Secondly, putting a time limit for using your contractually established right can allow the defendant to defend himself properly. Logically, unlimited time allows a party to bring court action at any time he pleases; yet, the defendant's right for meaningful defense, i.e. this is because as more time lapses credible evidence would be lost or its reliability may be significantly affected.

Therefore, it would be implausible to say that had the mortgagor been able to give notice before the expiry of the 10years period, even if 10years has lapsed, the mortgagor has the right to claim the mortgage. It will not fulfill the aforementioned purposes; the law would fail protecting the defendant. It will fall short of ensuring certainty and safe guarding investments, transactions.