

Period of Limitation Applicable to Claims over Immovable Property under the Ethiopian Law: Gateway to Hindsight Scrutiny of Legality of Nationalization of Immovables? Case Analysis

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Introduction

This commentary analyzes the decision of the Federal Supreme Court Cassation Division of Ethiopia relating to period of limitation applicable to ownership claims over immovable property in Cassation, Case No. 43600, involving applicant Dawit Mesfin and respondent Governmental Houses Agency, decided on January 05, 2002 (E.C).¹ This commentary argues that the court wrongly decided the case based on prescriptive limitation while the respondent's preliminary objection relates to a mere limitation of actions; in doing so, the court confused prescription with a mere limitation. The court also created unwarranted room for opportunistic claims challenging whether the act of nationalization of immovable things during the Dergue regime was conducted in strict observance of the then law.

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¹ Dawit Mesfin v Governmental Houses Agency, (Federal Supreme Court Cassation Division, January 5, 2002 (EC), Federal Supreme Court Cassation Division, Vol. 10 (2003 (EC)), pp. 225-29.

I. Background of the case

Brief account of the facts of the case is as follows. The above applicant filed a suit in Federal First Instance Court claiming ownership of a house (house no B-8/8008/30 found in former Wereda 18, Kebele 05, Addis Ababa) he alleged the respondent unlawfully occupied.² He invoked a title certificate No 18/31246 issued by Ministry of Urban Development and Housing on Tikmt 23, 1985 (E.C). Accordingly, he sought a judgment that, in recognition of his ownership right, compels the defendant to surrender the house he alleged it unlawfully occupied. The defendant, on its part, raised both preliminary objections and substantive defenses. The preliminary objection relates to period of limitation. It contended that the plaintiff's right of action was barred by period of limitation under Articles 1845 cum. 1677 (1). The Federal First Instance Court accepted the objection and ruled against the current petitioner. On appeal the Federal High Court confirmed the decision. As a result, the current petitioner filed application in the Federal Supreme Court Cassation division for review of the decision which is based on limitation. The Cassation Division reversed the lower courts' decisions based on the preliminary objection (i.e., limitation) and remanded the case for trial.

II. The Arguments of Parties

The petitioner urged the court to reverse the decisions of the lower courts which were based on limitation and raised several specific

² There is no doubt that the petitioner is alleging to have a better claim over the house than the agency (and hence inevitably challenging the decision/act that brought the government to control of the house, which is the act of nationalization).

arguments.³ First of all, he pointed out that since the dispute relates to (immovable) property it should be governed by provisions of property law. Accordingly, he insisted to be the owner of the house pointing that he had a valid title certificate as required under Article 1195 of the Civil Code and it was not nullified by any interested person under Article 1196. He also insisted that no one had acquired ownership under Article 1168 of the Civil Code (i.e., usucaption). Secondly, he contended that Article 1845 of the Civil Code is applicable only to disputes emanating from contractual relations and does not apply to the case at hand.

The respondent, on its part, emphatically argued on its defense based on the 10 years limitation under Article 1845 and turned down the petitioner's contention that Article 1845 is relevant only to contractual claims. It mentioned that provisions on contract law (title XII of Book IV of the Civil Code) are applicable to obligations which do not emanate from contract as provided under Article 1677 (1).

III. Holding of the Court

The Federal Supreme Court Cassation Division reversed the decisions of the lower courts arguing that the Ethiopian law does not provide limitation for some claims of ownership over immovable things like the one in the case at hand and that the ten years limitation under Article 1845 of the Civil Code is inapplicable to the case.

³ Dawit Mesfin v Governmental Houses Agency, cited above note 1, p.226 (para 2).

IV. Analysis of the Court Decision

The Cassation Division called attention to resolve whether there exists a period of limitation applicable to claims based on ownership of immovable property (i.e., petitory action under Article 1206 of the Civil Code) and proceeded to examining the relevant provisions of the law. It also proceeded to examining the applicability of Article 1845 to a dispute that emanates under Book III of the Civil Code (Title Six on Goods in General and Possession, and Title 7 on Individual Ownership).

At the beginning of its analysis, the Cassation Division recalled Article 40 (1) of the FDRE Constitution which recognizes every Ethiopian citizen's right to ownership of private property. More specifically, the Cassation Division referred to the second paragraph of the same provision which provides, "unless prescribed otherwise by law on account of public interest this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose such property by sale or bequest or to transfer it otherwise." As per the analysis of the Cassation Division, the Civil Code Articles 1126 and the following provisions provide for the manner of acquisition, transfer, extinction and proof of ownership. The Cassation Division noted that the rules that apply to movables vary from those that apply to immovable things. In this regard, the Cassation Division mentioned Articles 1168 (1) (usucaption) and 1184 (transfer-by law or agreement) that are relevant for acquisition of ownership of immovable things.⁴ In a bizarre manner, the

⁴ Dawit Mesfin v Governmental Houses Agency, cited above note 1, p. 227 (para 2).

Cassation Division also cited 1186 on acquisition of ownership of immovable things while in fact the provision primarily deals with transfer of corporeal chattels. The Cassation Division further noted the need for registration in a register of immovable property under Articles 1553-1646 for acquisition of title over immovable things through a contract or a will.

As regards extinction of ownership, the Cassation Division referred to Articles 1188-1192 of the Civil Code. The Cassation Division rightly observed that these provisions govern extinction of ownership of both movable and immovable things. Among these provisions the Cassation Division noted Articles 1189 and 1190 (acquisition by third parties) and Article 1192 (prescription) which it says are relevant to the preliminary objection raised by the respondent. The court stated that ownership over immovable things, as per these provisions, may be extinguished with or without the consent of the owner and Article 1190 provides such extinction will take effect where the entry relating to such immovable is struck off from the register of immovable property. The genesis of the logical jump in Cassation Division's analysis seems to trace its root here. The court is engaged in to such bewildering examination of rules affecting substantive ownership right while the objection of the respondent relates to limitation of action under Article 1845 of the Civil Code (that affects procedural right/right of action). We will return to this issue after a while.

The Cassation Division found it appropriate to examine if there exists limitations (based on time) in Book III of the Civil Code that affect (petitory) claims over immovable things. Accordingly, the Cassation Division found relevant Article 1192 which provides for 10 years limitation for extinction of ownership right over movables.⁵ The Cassation Division noted this provision does not extinguish ownership claim over immovable things (which includes the right to bring petitory action). That is, the Cassation Division opined that rules governing extinctive prescription relating to immovable property do not exist in the part of the Civil Code that deals with property as Article 1192 is applicable to only movables. At this juncture, we can see that the court confused prescription with limitation and Article 1192 was not a relevant provision in the first place; it failed to understand the nature of the objection raised by the respondent. The respondent's preliminary objection was not based on the contention that the plaintiff/petitioner has lost his ownership right rather it was based on the contention that the right to bring (petitory) action is limited by a period of limitation.

A. Understanding limitation

It is important to say a few words about the concept of limitation and the rationales underlying it to fully understand the effect of the Cassation Division's decision and the arguments in this analysis. Limitation is the time laid down by a statute within which legal and

⁵ Article 1192, under title prescription, provides that the owner of corporeal chattel shall lose his rights as an owner where he failed to exercise them for a period of 10 years by reason of his not knowing where such chattel was or that he was the owner thereof. Since this provision talks about prescriptive limitation while the preliminary objection of the respondent is based on mere limitation, one can notice, at this stage, that Article 1192 does not have relevance.

arbitral proceedings must be commenced; if proceedings are started outside the stipulated time, the plaintiff may be met with a plea from the defendant that it is time-barred and should consequently be struck out.⁶ In relation to majority of actions limitation is not prescriptive; it bars the remedies than extinguishing the right itself.⁷ In fact, there are some who contend that the distinction between mere limitation and prescriptive limitation is only academic and illusory. They argue that saying substantive right remains even though right of action is affected by limitation is self-refuting because once limitation has run against the plaintiff, there is no means to enforce the substantive right and, therefore, the substantive right itself will disappear. Yet, this is over-generalization and there are instances where the substantive right may be effective even after limitation. For instance, the plaintiff may be able to find an alternative method to enforce his rights (e.g., lien) against defendant.⁸ Such is the case, for example, under Article 1850 of the Civil Code that allows a creditor whose claim is secured by a pledge to exercise rights arising out of pledge notwithstanding that the claim is barred.⁹ More importantly, when an action is brought it is up to the defendant to plead limitation and not up to the court to invoke limitation.¹⁰ If the defendant fails to raise limitation as preliminary objection, he will not have the opportunity to raise it in the course of litigation and when the court enters judgment against him on substantive issues it will validly be enforced against him.

⁶ Ruth Redmond-Coper, *Limitations of Action*, (London, Sweet & Maxwell, 1992), p.1

⁷ Ibid

⁸ Ibid

⁹ In fact, questions remain as to how such pledge rights can be realized in view of Article 2851 and the following provisions of the Civil Code that require recourse to judicial procedure (except secured bank creditors under certain conditions).

¹⁰ Article 1856 (2) of the Civil Code cum Article 244 (f) of Civil Procedure code

Similarly, a debtor may voluntarily perform his obligations after period of limitation has run against the creditor and when he realizes the limitation subsequently, there is no way that he can claim back the payments since the plaintiff did not lose his substantive right to demand payment but right of action. This means, limitation does not primarily kill plaintiff's substantive right but affects right of action.

On the other hand, prescriptive limitations affect substantive (ownership) right itself. In case of acquisitive prescription, a person acquires title to a property after a certain period of time stipulated by law. In case of extinctive prescription, a person loses (the substantive) ownership right after a period fixed by the law (like the case of Article 1192 of the Civil Code).

The above being the distinction between prescription and limitation, let's briefly see the rational for limitation in a given legal system. Why is the legislature interested in putting a period of limitation for one to bring legal actions to enforce his substantive rights?¹¹ First, limitations encourage plaintiffs to commence proceedings within reasonable time before evidence is lost. For instance, if the plaintiff delays action very long, he may loose documents, witnesses may disappear or die or lose their memories and even if he is allowed to bring legal action, he will not be able to win the case. In a country like Ethiopia keen to avoid court congestion, it becomes in the public interest to bar futile actions. Allowing legal action after long time will also make it difficult for the defendant to defend the case. Thus,

¹¹ In most countries, not only civil actions but also criminal actions, except grave crimes like genocide and crimes against humanity, are limited by time.

the law wants to limit time for which the defendant should calculate and keep records of accidents or proof of payments of debts as it will be unjust to subject the defendant to limitless action. Leaving the defendant in a limitless state of uncertainty also affects efficient conduct of his business.

In relation to the case at hand, the Cassation Division opened up a huge room for people affected by nationalization during the *Dergue* regime to challenge whether the act of nationalization was conducted in accordance with the then nationalization laws after such a long period of time. This places the Governmental Houses Agency in extremely difficult position to establish that the nationalization of each and every house was conducted in compliance with the substantive and procedural requirements of the law. The documents and other evidence may have been lost or may not have been retained in the first place, not to mention prejudicial effect of hindsight judicial analysis in today's ideologically transformed policy landscape.

One of the arguments raised by the petitioner is that the respondent has not established its title through a title deed or under Article 1168. However, such argument will not be tenable in view of Article 13 (1) of the Proclamation to Provide for Government Ownership of Urban Lands and Extra Urban Houses No 47/1975 that provides all extra houses within the boundaries of a municipality or town shall be government property. This means there is no need on the part of the government to acquire title certificate for the ownership of houses it acquired through the act of nationalization as required by the Civil

Code provisions. That is why the agency has not had processed the paper works leading to acquisition of title in accordance with the requirements of the Civil Code. However, allowing claims without time limit makes it difficult for the agency to litigate multitude of issues like whether a particular house was extra and whether the entire process that led to transfer of ownership to the state was in consonance with the requirements of the law. This simply opens up room for opportunistic claims that are intended to take advantage of the justice system.

Laws usually provide for different length of time limits for different actions taking into account different relevant factors. Generally, the limit should enable the plaintiff to properly appreciate the loss suffered, to collect evidence and make other preparations to institute legal action against the defendant. For instance, in case of bodily injury in the context of extra-contractual relation, the recollection of witnesses is essential and laws provide shorter limitation than claims established in written instruments. It will also make sense to provide longer limitation for claims regarding immovable things than movables as such claims are likely to be incorporated in instruments and the value/sentiment the society has towards immovable things is more important.

In view of the above, property law and contract law stipulate various limitations. For instance, article 1165 provides a period of three years (longer in the Amharic version) for a person whose property is stolen

to claim his movable from a good faith acquirer.¹² Article 1845 of the contract law provides 10 years limitation for enforcing claims resulting from contract in the absence of other (shorter) limitation by special laws. One obvious point regarding Article 1845 is that it is applicable to even claims relating to immovable property resulting from contractual context. For instance, invalidation of contract relating to immovable property due to defective formation relating to problem of form or object is governed by this provision as Article 1810 (1) governs arguably only defects relating to capacity or consent. This point disproves any assumption that the legislature wanted to entirely unlimit claims relating to immovable properties.

Therefore, we should not confuse prescription with limitation and article 1192 is prescription that kills the substantive ownership right over moveable things after 10 years time than a limitation for bringing legal action based on ownership. Thus, there is nothing we can infer from Article 1192 about the relevance of Article 1845 on limitation of action on ownership of immovable property. The fact that Article 1192 provides extinctive prescription only with respect to movable things cannot logically lead us to an inference that the legislature intended to avoid limitation on action relating to immovable properties (and exclude the application of Article 1845). This is specifically because Article 1192 is not limiting right of action relating to movable things rather extinguishing substantive right of ownership on movable things. Probably, if we have to seek the equivalent of Article 1192 in relation to immovable things, it

¹² There are also other provisions in property law that provide for a period of limitation for exercising the right of action.

should be Article 1168(1). This latter provision provides for a situation where a person who has been paying (ownership) tax relating to an immovable (which does not belong to him) in his name for consecutive 15 year period becomes an owner of the property. On its face, this provision is acquisitive prescription while Article 1192 is extinctive prescription. Yet, we can derive extinctive prescription dimension from Article 1168 (1) in that it extinguishes one's ownership right after a period of 15 years if taxes have been paid in other's name for the said period.¹³ Therefore, Article 1192 cannot logically impede reference to Article 1845 of the Civil Code in seeking applicable limitation to claims relating to immovable property.

In fact, the crux of the Cassation Division's argument lies on Article 1192;¹⁴ it says since the legislature provides for a period of 10 years for extinction of ownership of movable things and remains silent as to extinction of ownership of immovable things, it will not be justified to refer to 1845, i.e., the legislature wanted to avoid extinctive prescription with respect to ownership of immovable things. As pointed out earlier, this argument is flawed in two respects as far as the case at is concerned. First, it does not address respondent's objection based on limitation. While the respondent's preliminary objection relates to limitation (of actions), the Cassation Division went into analysis of prescription, i.e., whether or not the petitioner's ownership right is extinguished by prescription. In doing so, the Cassation Division improperly went it to substantive

¹³ Article 1189 of the Civil Code provides that ownership shall be extinguished where it is acquired by a third party in accordance with law.

¹⁴ Dawit Mesfin v Governmental Houses Agency, *supra* note 1, p. 228.

objections-not the subject of the petition as there was no decision on the issue. Secondly, the Cassation Division also erred by boldly asserting that ownership of immovable (petitory action) is not affected by passage of time.

The Cassation Division explained its finding that prescription is not applicable to immovable things (compared to movable things) because such things are of permanent nature and pass over from generation to generation. Rather, the Cassation Division should have applied this justification to limitation. The fact that claims based on immovable things are also subject to period of limitation is beyond controversy and ownership claims should also be seen in that context. When we see the significance and nature of immovable things, all we can say is that they should be subject to the longest possible limitation under the law, i.e., the 10 years under Article 1845 of the Civil Code. The Cassation Division argued that the fact that Article 1168 provides for longer period of 15 years compared to the ten years under Article 1845 is an indication that the legislature wanted to disregard the application of the latter provision in relation to immovable things. That is, the Cassation Division argued that the fact that Article 1168 stipulated a longer period of 15 years for a person who has been paying taxes to acquire ownership implies that the legislature did not intend to grant a shorter period of 10 years under Article 1845 to be invoked by a person who has not been paying taxes for such a long time. This argument is still unsound in that there cannot be comparison between Article 1168 which provides for acquisitive/extinctive prescription with Article 1845 which provides for mere limitation of actions. Under article 1168, a person loses his

substantive ownership right and such can be invoked by a court even though not pleaded by a defendant; whereas Article 1845 is a mere limitation that does not affect ownership right but the right of action to enforce ownership right and such cannot be invoked by a court unless pleaded by a defendant as a matter of preliminary objection.

The other instance of lack of logical coherence in the Cassation Division's analysis is that the Division conceded that claims related to ownership of immovable things resulting from transactions like marriage, succession, and sale are subject to (shorter) limitations stipulated under those special laws.¹⁵ If the legislature is prepared to limit certain claims of ownership arising from some contractual and extra contractual context, there is no satisfactory reason as to why the same legislature should not be prepared to limit claims of ownership resulting in other (extra) contractual context like the one under consideration.

In sum, we can say that the court failed to distinguish between prescriptive limitation (that affects substantive rights) and a mere limitation of action. As a result, the Cassation Division failed to give effect to acceptable preliminary objection based on limitation. Secondly, the court failed to appreciate the importance of limitation of action in a legal system and as a result exposed defendants to stale claims. After all, it defies common sense why the petitioner did not challenge the appropriateness of the act of (nationalization of) the state for more than a decade if he felt it was not conducted in

¹⁵ Dawit Mesfin v Governmental Houses Agency, *supra* note 1, p. 229

accordance with the law.¹⁶ Thirdly, the Cassation Division undermined the relevance Article 1677 (as invoked by the respondent) that extends application of contract law provisions (including Article 1845) to obligations that do not arise from contract.

¹⁶ In fact the petitioner does not seem to explicitly challenge the act based on which the state appropriated his property but simply asserted his ownership right as established by a title certificate and that no other person has obtained title to it under article 1168. However, there is no doubt that his action is petitory action than possessory action (which has even a very short limitation under article 1149 (2)).

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