Law of Successions

Teaching Material

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INTRODUCTION

BACKGROUND AND CONTEXT

Article 1 of the Civil Code - an overwhelmingly influential provision that lays the foundation for virtually the entire legal framework of the country – declares that "the human person is the subject of rights [and duties] from its birth to its ***death***". The message this exceptionally important article purports to convey is pretty clear: that a human person starts to hold rights and to assume duties as of birth and ceases to do so upon death. In the context of the purpose at hand, that means a human person will no longer have rights or duties as of death. The same - albeit with certain slight qualifications - goes also for an absentee, whom the law assimilates to the dead, at the time when he is duly declared absent.

The implication of the provision is that a person will permanently stop to have both rights and duties from the moment at which he is considered dead in terms of the language of the law. That does not, though, in any way mean that the rights and duties of such a person will die, or be disposed of with him – at least not in its modern sense. True enough, those rights and duties, such as an academic or military rank, that have strictly to do with the person of the dead - and thus do not form part of the inheritance - will terminate upon death.

The vast majority of the rights and duties that the dead had acquired while alive will, however, pass to other persons – usually his surviving next of kin. Nevertheless, the devolution does not happen arbitrarily. The law systematically regulates how a person's estate is disposed of upon death.

Speaking in rough general terms, the ***Law of Successions*** is that branch of law which governs the manner in which, and, of course, to whom, the rights and duties of a dead person, technically referred to as the deceased, should pass. What is at stake here is the devolution of private rights and duties. And the parties involved at both ends of the game are persons who act in an individual capacity representing private interests. It goes without saying,

therefore, that the Law of Successions belongs to the civil/private law category in the family tree of laws.

DESCRIPTION OF THE COURSE

The Course, hence its name, is a study of primarily how the Ethiopian Law of Successions regulates the devolution of the succession of a person. As a matter of rule, succession relates only to the disposition of the estate of a person who has died. It has nothing to do with the rights and obligations of a living person.

Those rights and duties that devolve by succession were acquired by the deceased during his lifetime. And they are generally of proprietary nature. Moreover, they devolve to persons validly designated by him or, in default of such designation, in accordance with the provisions of the law. The successors are mostly the deceased's next of kin, viz. people who are related to him pursuant to either of the lines of familial relationship stipulated by family law.

Consequently, the Law of Successions is inextricably intertwined with many other branches of law including, but not limited to, the laws of family, property, and contracts, not to mention the basic law – the constitution. Among the most striking instances of the intimate link the Ethiopian Law of Successions has with family law and, by extension, with the country's Constitution is that it promotes equality with respect to succession by, for example, providing for an identical treatment of men and women, as well as all children – irrespective of whether they are legitimate, illegitimate, or were adopted. What is more, taking a cue from property law, it recognizes the right of a person to dispose of his property however he likes after his death, on condition that he does so by a legally valid will.

We can make one simple inference from the mutual interrelation the Law of Successions has with various other branches of laws: That is, the Course presupposes cross-disciplinary knowledge. Naturally, this implies the indispensability of an interdisciplinary approach. But mainly because of the requirements of the level at which the Course is intended to be

administered, the approach employed here is chiefly specific. That is, it is largely confined to the study of the provisions of the Ethiopian Law of Successions.

Generally, the Course explores how the Ethiopian Law of Successions strives to strike a balance between its two apparently contradictory major objectives. On the one hand, the law goes to a great length to respect the right of the deceased to dispose of his property in whatever lawful way he thinks fit even after his death. And on the other, it tries to protect the interests of rightful successors and creditors, who have legitimate claims over the succession.

Specifically, in connection with what is technically called testate succession, the Course researches what, besides allowing the deceased power to stipulate the modalities of devolution of his own succession, the law has to say about the types, and the validity requirements of wills by which the deceased may dispose of his estate; his power of disherison and the scope thereof; whom he may or may not designate to receive his inheritance and the conditions he may or may not attach thereto; etc. It also assesses the manner in which the Law regulates intestate succession - the devolution of the succession of a person who has left no will at all, or that of a person a competent court of law has declared the will purportedly left by him not valid. The Course also examines possible scenarios of partly testate and partly intestate successions.

A succession, whether testate or intestate, consists in the gross rights and obligations of the deceased when it opens at the time of the death of the later. So, before any right or duty is exercised in connection with the inheritance, the net worth of the succession must be determined and persons who have legitimate claims over the succession must be screened out. In other words, there should be a winding up of the deceased's affairs in which the assets and claims owned are identified and collected, debts and taxes ascertained and paid, maintenance claims entertained, and singular legacies ordered by the deceased, if any, paid before any property or right of the inheritance is delivered to properly identified successors. The Course deals in a detailed fashion with how the law governs this winding up process, which is in the law of successions technically referred to as "liquidation" of a succession.

Furthermore, the Course looks into the prescriptions of the Law for the treatment of issues

that may arise subsequent to liquidation. It, among others, specifically dwells upon the manner of partition of the property of the inheritance remaining after the winding up of the liquidation process. It also considers the notion of collation, the right of creditors who appear after partition, and pacts in relation to succession.

GENERAL COURSE OBJECTIVES

Overall, the Course is designed to sufficiently equip students with the knowledge and skills they need to oversee the devolution of the succession of a dead person themselves, to give sound expert advice on succession-related issues, and to solve both real and hypothetical cases in the area of successions in accordance with the relevant provisions of the law.

Specifically, it is expected that after completing the Course, students will be able to, ***inter alia***:

- Discuss the meaning, time, place, and manner of opening of a succession;
- Identify those things that make up the inheritance of a dead person and those that do not;
- Enumerate the kinds of successions recognized by law;
- Elaborate the meaning of capacity to succeed and the conditions required therefor;
- Identify those persons who have the capacity to succeed a dead person and those that do not;
- Discuss the meaning of intestate succession, and enumerate, in order of their preference, the persons called to the succession of a person who had died intestate;
- Dissertate about the power of a person to dispose of his property after his death;
- Name the kinds of wills recognized by the Law, and discuss the validity requirements attached to each;
- State the available legal methods to prove the existence and contents of a will;
- elaborate the possible grounds for the partial or full invalidation of a will;
- Internalize the meaning of liquidation of a succession;

- Explain the modes of appointment, duties, liabilities, and scope of power of a liquidator;
- Identify the types, modes of payment, and the of the recipients of the debts of a succession;
- Discuss the meaning of partition and the manner it is lawfully conducted;
- Understand the nature of conventions relating to an inheritance and explain the rationale for the prohibition of pacts on future successions; and
- Fully appreciate and help enforce the rights of women and children with respect to succession.

GOALS AND SCOPE OF THE MATERIAL

Everyone is born. Everyone gets personality. Everyone acquires rights and duties upon birth through, among other countless different ways, succession. Conversely, everyone dies, and leaves behind all his lifetime estate to his successors. This is our daily experience. And we all are passing, or are bound to pass through this apparently endless human lifecycle.

But the lawyer stands apart from all others. What sets the lawyer apart is the fact that he is exceptionally interested in succession-related matters. Throughout his career, a lawyer is professionally enveloped in successions. His own inevitable individual humane fate aside, he grapples with issues of succession as a matter of career and occupation.

It is, unfortunately, remarkable how few books have been written to elaborate directly how lawyers – prospective or current – deal with successions. More so is the number of commentaries written to explain the rather general and often obscure governing legal rules. This problem is more pronounced and, so to say, compounded in our country.

Needless to say, ours is a nation where successions are more often than not carried out arbitrarily at worst, and in accordance with custom at best. At that, it is a country where, because of little or no legal awareness or by choice, people as of right tend to settle successions in extra-legal ways at the peril of violating the provisions of the applicable rules

of law. What is most depressing is the fact that due largely to a chronic lack of reference materials, law students find it so frustrating to learn how to "deal with successions like a lawyer".

To add insult to injury, the Ethiopian Law of Successions was promulgated some fifty years ago as part of the 1960 Civil Code of the Empire of Ethiopia. It is, therefore, only a small exaggeration to say that most of its provisions are virtually obsolete. As such, they require an arduous task of retuning and tweaking, as well as a great deal of commenting, to make them relevant to the present social conditions and constitutional order.

This material is a modest attempt to fill that void. It is directed to "legal succession", namely, the devolution of succession pursuant to all pertinent legal provisions. That is not just about the "Ethiopian Law of Successions" proper. The purpose is to explain the devolution of succession in accordance with not only the provisions of the Ethiopian Law of Successions, but also with the rules of all relevant laws, including the Constitution, as are currently in force.

The material is not intended to be a comprehensive survey of successions. Nor is it meant to be a lawyer's treatise on legal succession. Rather, it is a snapshot of the devolution of succession in compliance with all the pertinent rules of law effective today. It focuses only on certain issues that may be helpful to those who study and practice law. The intention here is to provide a detailed explanation of, among other matters, the manner of devolution, liquidation, and partition of succession.

CONTENTS AND ORGANIZATION

The material is organized as follows: The first Chapter, which is entitled "Devolution of Successions", is meant to introduce the student to the basics of lawful devolution of succession. The Chapter is divided into three Sections. The first Section is on general consideration of successions. It discusses the meaning, time, place, and manner of opening of succession; outlines the types of succession; and explains who may succeed and what.

The second Section takes a detailed look at intestate succession, which is one of the two kinds of successions. The third, and the last Section of the Chapter, on its part, examines the other type of succession - testate succession. It considers the law relating to wills; how a valid will may be made and revoked, the precise effect of gifts in wills, the manner of interpretation of the terms of a will, the powers of the deceased etc.

Whether testate or intestate, a succession should be liquidated. The second Chapter deals with the legal rules governing the liquidation of a succession. This Chapter is divided into six distinct Sections. The First Section is meant to introduce the essence of the process of liquidation, the contents of the Chapter and its general objectives. The Second, which is entitled "The Liquidator of a Succession", examines issues such as who the liquidator is, how he is appointed, and what his functions, powers and duties are. Section Three explores the procedure of determining the identity of the rightful heirs and legatees of a succession. Whereas, the Fourth Section looks into how a succession should be administered. And the Fifth Section examines the nature of debts that may be claimed from a succession, the order to be followed in paying such debts, and the manner of their payment. The Sixth, and the last, Section provides a brief overview of possible grounds for the closure of the liquidation process and matters precedent and subsequent thereto.

What follows after the winding up of the liquidation process is partition, which roughly means practically bestowing on properly identified heirs actual right over the inheritance. The third, and the final, Chapter looks into how the law handles issues related to partition. It also dwells upon the meaning and effects of collation, the recourse of creditors who appear after partition, and conventions made in connection with future successions.

CHAPTER ONE

DEVOLUTION OF SUCCESSIONS

INTRODUCTION

Devolution of successions is a key chapter in the law of successions. It is devoted to the study of many of the general rules and guiding principles of the law of successions. It deals with the issues like, what constitutes the inheritable property of the decedent (or the deceased), what rights and powers does the testator (will maker) have, what rights and obligations of the heirs and/legatees have, the mechanisms of devolution of succession (via intestate and testate ways), the formalities of making a will, mechanisms of revocation and lapse of will, etc.

The chapter is divided into three sections: ***General considerations of devolution of successions, intestate successions, and wills.***

Upon completion of this chapter, you will be expected to:

- Decide which rights of the deceased shall be transferred to the heirs upon the death of the deceased;
- Advise people the things that make up inheritance;
- Pass a judgment on which persons have capacity to succeed the deceased;
- Prepare a tree of relationship that elaborates intestate successions;
- Explain the importance of the concept of representation;
- Disqualify wills that are not made according to the requirements of the law;
- Evaluate whether the reasons given by the testator to disinherit his child/children are justifiable or not.

1.1. GENERAL CONSIDERATIONS OF THE DEVOLUTION OF A SUCCESSION

1.1.1. The Concept of Patrimony

The literal meaning of patrimony is the estate that descended from the father to his descendants. However, this does not exclude the estate that descends from the mother to her descendants and/or from other ancestors in the paternal as well as in the maternal line.[1]

In the law of property, patrimony may have a different meaning. As it is discussed in Marcel Planiol,[2] a person's rights and obligations appreciable in money looked upon as a whole are called his/her patrimony. There is a link between a person and patrimony. This link can be expressed in the following four ways:

A) Only persons have patrimony with the exclusion of other beings. Persons are beings that are capable of having rights or owing obligations.

B) Every person necessarily has a patrimony, irrespective of the fact that the person has no property at all. Patrimony is linked to the personality of the person.

C) Patrimony is a unit. All the property and all the charges of a person form a single mass. However, this principle of unity of patrimony is subject to exceptions. One example of the exceptions is — an heir seems to have two patrimonies.

D) Patrimony is inseparable from the person. Therefore, there can't be a total transfer of property of the person while he/she is still alive. A person can dispose only part of the constituent elements of his/her patrimony, one after the other. His/her patrimony, considered as a universality, is the consequence of his/her own personality and necessarily remains attached

1 Black's Law Dictionary, (6th Edition)
2 Marcel Planiol, Treatise on the Civil Code, Volume 1, Part II, pp 265ff.

to his/her personality. Transmission of patrimony in its totality takes place only after the person's death. At that moment, the deceased's patrimony is attributed to his/her successors.

Many legal experts argued, based on these principles of patrimony, that a person should not have the right to regulate his/her estate after his/her death, as death has brought a complete separation of the person and and patrimony. (See Wills below for details of discussion on this point)

1.1.2. Opening of Succession

As it is expressed in Article 826 of the Civil Code3, the succession of the person opens at the place he/she had his/her principal residence at the time of his/her death. (For detailed consideration of the concept of residence, refer your Law of Persons material.) According to Article 174 of the 1960 Civil Code, the residence of the person is the place where he normally resides. The normality of residence will show that the person's socio-economic life in the society. When a person has many residences, one of such residences may be considered as a principal residence of such person. For the purpose of opening of the succession of the deceased, it is appropriate to consider the principal residence of the deceased the place where he/she has most of his/her inheritable property.

Example
Ato Markos has his business in Jimma town. After he encountered a severe illness, he went to Addis Ababa for treatment. If Ato Markos died in Addis Ababa, even if his place of death is Addis Ababa, his succession shall open at Jimma.

The succession of the deceased shall open just at the time of his/her death. Assume that Ato Markos, in the above example, died on August 29th just at 3:00 O'clock in the

[3] Civil Code of 1960 the Empire of Ethiopia, Gazette Extraordinary, Proclamation № 165 of 1960.

afternoon; Ato Markos's succession has opened at the moment when his death occurred. That is, his succession has opened just at 3:00 O'clock. The deceased may have his/her societal ties at his/her principal residence.[4]

According to Article 1 of the Civil Code, the human person is subject of rights (and also duties) from its birth to its death. This means a dead person has no rights or duties. But there are certain rights and obligations of the deceased person that pass to the heirs and/or legatees of the deceased. There are also rights and obligations of the deceased that terminate with his/her death. Most of the rights and obligations that are associated with the person of the deceased shall extinguish with the death of the deceased. However, many of the rights or obligations that are related with the property and/or money of the deceased shall pass onto his/her heirs and/or legatees.

Example
Wro. Semira was employee in the National Bank of Ethiopia. She was head of one of the departments. Upon death of Wro. Semira, her successors cannot claim employment at the national Bank, as such rights which are specific to individuals cannot be transferred to heirs of the deceased.

Some obligations of the deceased could also pass to his heirs and/or legatees. For instance, if the deceased is a debtor, his heirs and/or legatees are bound to pay back his debts. As you will learn in the future, the heirs and/or legatees of the deceased will not be bound to pay the debts of the deceased from their own personal property. They are only bound to pay such debts from the property of the inheritance, according to the rules of the Ethiopian law of successions.

[4] You must not take opening of succession and opening of will (Article 965 of the Civil Code) as one and the same. Opening of a will is quite different in that it is usually made sometime after the death of the deceased. The succession of the deceased is opened just at the time of his/her death. If an heir dies after the opening of the succession, but before the opening of the will such an heir is said to have died after getting the right in the succession. In such circumstances, the succession will pass to the heir of the heir who died after opening of the succession, but before opening of the will.

1.1.3 Things making up a Succession

Generally speaking, what transfer from the deceased to his/her heirs and legatees are those rights and duties of the deceased which arise from various relations which the deceased had with third parties during his/her lifetime. It is possible to indicate some of the principal relations between the deceased and third parties which can serve as source of rights and duties of the deceased like: contractual relations the deceased had with third parties; contract of insurance between the deceased; rights which arise from court proceedings between the deceased and third parties; and those rights generally referred to as property rights – those rights we create and exercise against things, corporeal (movable or immovable) or incorporeal.

Under this sub-section, discussions will be made on the features of inheritable property of the deceased. As a matter of principle, all of the property which were owned or possessed by the deceased on the day of his/her death shall constitute his/her inheritance. All the inheritable property left by the deceased at the time of his/her death are called the hereditary estate. The hereditary estates are not limited to corporeal (tangible) things. They also include incorporeal (intangible) things such as the works of the mind or literary rights.

Sometimes it may be difficult to clearly identify the property of the deceased that constitute the inheritance.

Exercise

Identify the inheritable property from the following list

A) Life insurance
B) Pension allowance
C) Indemnity payments
D) Land
E) Personal chattels

A. LIFE INSURANCE

As prescribed in Article 827 of the Civil Code, life insurance could or could not constitute a hereditary estate.

Art. 827. — Things making up inheritance. — Life insurance

(1) Monies due in performance of a contract of life insurance to which the deceased was a party, shall form part of the inheritance where the deceased has not determined the beneficiary or the insurance is made to the benefit of the heirs of the deceased without any other indication.

(2) In other cases, they shall not form part of the inheritance.

Read also the following provision, which is taken from the Commercial Code of 1960.

Art 691. — Definition

A life insurance is a contract whereby the insurer undertakes against the p ayment of one or more premiums to pay to the subscriber or to the beneficiary a specified sum on certain conditions dependent upon the life or death of the subscriber or third party insured.

From the definition of life insurance it can be seen that:

A) Life insurance is a contract.

B) The contract is made between the insurer (insurance company e.g. the Ethiopian Insurance Corporation) and the subscriber (a person who buys the life insurance policy and makes a periodical payment of premiums to the insurer).

C) The insurer undertakes or commits itself to pay the agreed amount of money to the beneficiary upon death of the subscriber.

How life insurance would make up inheritance is an important question that deserves

discussion. Read the following example carefully.

Example

Assume Wro. Genet has bought a life insurance policy from the Ethiopian Insurance Corporation. The money to be collected from the insurer may or may not form part of the inheritance of Wro. Genet. The following conditions are important to make the insurance money to constitute the inheritance.

A) If she designates no beneficiary at all. In this case, she simply pays the premiums for the life insurance to the insurance company without indicating any beneficiary.

B) If she concludes the contract of life insurance to the benefit of her heirs without any other indication.

Only under the above two conditions that the money to be collected from the insurer upon death of the subscriber forms part of the inheritance. If the subscriber, Wro. Genet, designates her spouse or only one of her children, or any other person, the money to be collected upon death of the subscriber of the life shall not form part of the inheritance of the subscriber. In this case, the money will be available only to the designated beneficiaries. Read Art. 827 (2) of the Civil Code again.

Exercise

Art. 701 of the Commercial Code provides for the beneficiary of the life insurance as follows:

Art. 701.— Beneficiary of insurance policy

(1) An insurance policy for the event of death may be made to the benefit of specified beneficiaries.

(2) The following persons shall be deemed to be specified beneficiaries notwithstanding that they are not mentioned by name:

(a) The subscriber's spouse, even where the marriage took place after the policy was entered into.

(b) The subscriber's children, whether or not born at the time when the policy is entered.

How do you understand Art. 701(2) of the Commercial Code?

There is no unanimity in decisions of courts of various levels regarding the rule under Art. 701(2) is concerned. Some courts make this provision applicable to all cases. For instance, if Ato Kassa buys a life insurance policy to the benefit of his brother Gobena, some courts make his wife Wro. Chaltu and his children Meron and Abdissa beneficiary of the life insurance. These courts mainly base their arguments on the expression of the law that says the subscriber's spouse is beneficiary even if the marriage is concluded after the policy was entered and also the subscriber's children are beneficiaries even if they are not mentioned by name. Other courts do not accept this argument. The Federal Supreme Court usually rejects decisions on such arguments. According to the latter courts, it is only the person who is indicated as beneficiary who is going to collect the money. The spouse shall be beneficiary only when the subscriber makes her/him beneficiary, even the insurance is entered before the conclusion of the marriage. The subscriber must indicate that his wife or her husband shall be beneficiary of the life insurance. Likewise, he/she must indicate that the insurance is made to the benefit of his/her children without indicating their name. If a spouse or the children are not indicated in this manner and if another person is appointed as beneficiary, they have no chance of becoming beneficiaries.

Which line of argument do you favor?

For detailed information on this issue, read Journal of Ethiopian Law, Vol. 16, pp 67—80 and Ethiopian Bar Review, Vol. 1 № 1, pp 35—94

B. PENSIONS AND INDEMNITIES

In Ethiopia, pension is regulated by 'Public Servants' Pensions Proclamation № 345/2003 and the amendment Proclamation № 424/2004. The main purpose of pension scheme in Ethiopia is to support the person who was a public servan during the time when he/she is unable to work. In addition to this, the pension scheme has the purpose of supporting those persons who were maintained by the pensioner during his/her life time. Pension is money payable to the spouse, children or parents of the deceased person based on conditions specified under Proclamation № 345/2003. The mechanism of payment is regualted by Articles 34 — 39 of this Proclamation. According to Art 35(1) of this Proclamation, if a person who is a government employee dies, the widow or the widower would be entitled to receive 50% of the pension to which the deceased was or would have been entitled. The Proclamation also prescribes the amount of orphan's pension and parent's pension. Accordingly, each of the deceased's children would receive 20% of the pension to which the deceased was or would have been entitled. Orphans are entitled to receive this amount so long as they are less than 18 years of age. The money collected from pension allowance can be given to the persons who were supported by the pensioner. Pension money is not the estate left by the deceased at the time of his death. The purpose of pension is, as indicated above, to support the pensioner when he/she is unable to earn his/her livelihood through his/her work or to support those who were dependent on the pensioner (only spouse and very close relatives) upon his/her pension allowance. The spouse or the relative of the pensioner has no right to pass the pension allowance to which he/she is entitled to his/her heirs when he/she (the spouse or the relative) dies. Therefore, pension allowance does not constitute the hereditary estate of the deceased.

Indemnity is money to be paid to the spouse or relatives of the deceased person. Assume that a car hits Dawit and killed him. The driver or the owner of the car may be obliged to pay compensation to the spouse or relatives of Dawit. These persons sustained injury because of the death of Dawit. The one who caused the death of the person may pay compensation or indemnity to these persons. However, such money cannot form part of the inheritance of the deceased. For instance, if the person who is entitled to receive the indemnity payment dies, the money cannot go to his heirs.

Exercise

Urban lands and extra houses were nationalized by Proclamation № 47/1975. The owners of the extra houses were getting compensation from government. Are these compensations inheritable?

A person's succession may be conducted in one of the two types of successions. As it is prescribed in Art. 829, succession could be either testate or intestate. It could also be the combination of the two types. Testate succession is a succession in which the estate of the deceased person shall pass to his heirs and/or legatees according to the order of the deceased in the will he/she made. If the deceased made a valid will, his/her succession would be conducted in accordance with the will. A person who left a will is called a testator. The testator shall regulate as to what should happen to his property after his death. If the testator had no will at all, or his/her will is not valid, the succession of such person shall be conducted by the operation of the law. That is, in the case where there is no will, or where the will is invalid, the law shall distribute his estate among his heirs.

Sometimes it may happen that the succession is a combination of both intestate and testate. Many circumstances could lead to such a situation. For instance, property which was not included in the will may be discovered later; the will may be partially invalidated; the testator may appoint a universal legatee5 who is not a legal heir to take only some portion of the hereditary estate and with respect to the rest of the estate he/she may keep silent; etc.

1.1.4 Capacity to Succeed

The law requires someone who alleges to have a right in the succession of the deceased to fulfill some requirements. One is expected to have capacity to succeed. This is one of the most important requirements to succeed the deceased. The capacity to succeed depends

[5] Detailed discussion on universal legatees shall be made in Section 1.3 below.

mainly on two conditions. The first one is; the heir and/or legatee must survive the deceased person. The second requirement is such heir and/or legatee must not be unworthy. The first condition is an objective condition and the heir and/or legatee shall lose his right to succeed the deceased for reasons outside his volition. The second condition is a subjective condition which occurs with a willful act of the heir and/or legatee. (Read Articles 830 & 831 of the Civil Code)

A. THE CONDITION OF SURVIVORSHIP

This condition requires the heir to be alive at the time of the death of the deceased. To survive the deceased means, to be alive at the time of the death of the deceased. That is, when the deceased is dead, the heir and/or the legatee of the deceased must be a living person. If the heir lives even for a very short time after the death of the deceased, we believe that he/she has survived the deceased. (See Article 830)

If two or more persons who have a reciprocal right to succeed each other die together, say in an accident, how do we conduct the succession of these persons? That is, which person has survived the other?

B. COMMORIENTS

This Latin word signifies those who die at the same time, as, for example, by shipwreck. When several persons die by the same accident, and there is no evidence as to who survived, the presumption of law is, they all died at the same time. Consider that "Frewoyni" is a mother and "Senait" is her daughter. If "Frewoyini" and "Senait" die together, we may face some difficulties in conducting the successions of these persons.

After an accident, death may not occur immediately and some persons die before others. Death is usually considered as a process that may take longer time than we expect. When persons who have reciprocal rights to succeed each other (such as Frewoyni and Senait) die together, we could know by a post–mortem examination who survived whom. However, this examination is not always successful. It could be impossible to determine who died first and who died second by a post–mortem examination. As research works in the field of

forensic science reveal, determining the time of death through post mortem examination is one of the serious problems of the discipline. The law had to devise a mechanism for resolving the legal problems attached with commorients. That is, the law assumes that such persons have died simultaneously (at the same time) and hence no one has survived the other.

Exercise
What will be the effect of dying together?

Art. 832. — Persons dying simultaneously

Where two or more persons are dead and it is not possible to prove which of such persons survived the other, the succession of each one of such persons shall be regulated as if he had been the last survivor without, however, receiving anything from the succession of the other persons.

Exercise
Explain the contents of Art. 832 in your own words

According to Art. 832 of the Civil Code, if two or more persons with reciprocal rights to succeed each other die together and if it is not possible to determine the exact time of death of such persons, the law has devised an ingenious method to deal with the problem. That is, when the succession of each of these persons is considered, he/she will be seen as the last survivor. Assume that A & B (persons who have the reciprocal right to succeed each other) died in an accident and it was impossible to identify which of them died next to the other. Let's now consider the succession of A. In this case, A shall be seen as the last survivor. That is, B has died before A. Because B died before A, he did not survive A and has no capacity to succeed A. Let's again consider the succession of B now. At this time, B will

be considered as the last survivor. This means, A died before B. Therefore, A has no capacity to succeed B. As the final analysis, the effect of the assumption made by law is — these persons have not survived one another and they cannot succeed each other.

Example

Wro. Sania and her son Shemsu are living together in the same house. One night their house was inundated and they were taken by the flood. Their bodies were discovered seven days from the date where they were taken by the flood. Determine which person shall succeed the other!

It is not known which of these persons died first. It is simply presumed that they died simultaneously. Therefore, they cannot succeed each other.

This assumption is made by the Ethiopian law and in some other countries there are different assumptions. For instance, according to Australian law, the elder person is presumed to have died before the younger one. The same is true with England and Wales laws.

C. DEATH OF HEIR

If the heir is alive at the time of the death of the deceased (i.e., at the time of opening of his succession), then such an heir is said to have survived the deceased. If the heir survives the deceased, he/she fulfills the requirment of survivorship. Therefore, an heir who dies even after a short period from the death of the deceased will not lose his capacity to succeed. However, a problem arises if the heir himself/herself dies. What will happen to his/her share from the sucession of the deceased? According to Art. 833, all the rights of the heir in the succession of the deceased shall pass to the heirs of the heir. You can see the relevance of the time of opening of the succession clearly in this circumstance. Even if an heir dies sometime after death of the deceased, the heir is said to have died after getting the right to succeed the deceased.

Example
Ayele and Alemitu have lived in marriage for about two decades. They have three children namely; Tsegaye, Genet and Lombesso. The elder son Tsegaye died a week after death of Ato Ayele. In this case Tsegaye died after getting the rights to succeed his father Ayele. Tsegaye died after securing a right to succeed his father's inheritance. As Tsegaye is dead now, his heirs will take his portion from the succession of Ayele. By assuming Tsegaye has no descendants, his mother, Alemitu will take what should accrue to Tsegaye.

D. UNWORTHINESS

The second condition to succeed the deceased is related with unworthiness. That is, inorder to succeed the deceased, the heir and/or the legatee must not be an unworthy person. An heir and/or a legatee can become unworthy because of his criminal actions. The rationale behind this rule is that a person may not profit from his/her own crime. As you might have understood from your reading of Arts. 838 – 840, there are several factors that can make an heir and/or a legatee unworthy.

- The first crime that could make an heir unworthy is his intentional murder of:
    - The deceased himself,
    - The deceased's descendant,
    - The deceased's ascendant or
    - The deceased's spouse.

You must rememeber that the heir and/or the legatee must be sentenced for his crime before he is considered unworthy. Moreover, the murder must be made intentionally, not by negligence.

The second reason that makes a person unworthy is, his/her attempt to kill the persons enumerated under Article 838 (a). An attempt to kill a person is committing an act with the desire to kill a person but fail to do so because of an external cause. That is, the killing was

prevented not by the wish of the one who has planned to kill a person, but by an external factor, such as shooting with a gun which is not loaded, or he/she missed the target because he/she did not aim straight, etc.

Exercise

Ato Worku usually beats his wife Sosina. Wro. Sosina has suffered a lot with her husband's behavior. As time went by, his beating became more and more hard. Six months ago she went to her friend, Kedija's house together with her four kids. As Kedija's income was so littlie, she was unable to support her guests for more than few days. Sosina had no choice than going back to her husband. One night, Worku intimidated Sosina with a knife. While he was about to stub her, she threw a big stone and hit his head. Worku died of a severe bleeding within an hour. Assume that Sosina was beneficiary in the will made by Worku. Can She succeed or should she be declared unworthy? Give reasons.

The third reason that makes an heir or legatee unworthy is a false accusation against the persons enumerated under Art 838(a). To make the heir or legatee unworthy, the false accusation must entail the condemnation of any of such persons to capital punishment or rigorous imprisonment for more than ten years.

Ato Bisrat died of liver disease. Ato Bisrat and Ato Zewdie were good friends. Ato Zewdie's son, Tariku, and his wife, Wude (stepmother of Tariku), do not like each other. Tariku wanted to attribute the death of Bisrat to Wro Wude. Thus he instituted an accusation against Wro Wude saying that she murdered Bisrat. But Tariku was sentenced to a two year imprisonment for falsely accusing Wro Wude.

Tariku is guilty of a false accusation against his stepmother, who is a spouse of his father. His false accusation could result in the condemnation of his stepmother for more than 10 years of rigorous imprisonment. Therefore, he committed a crime that would render him unworthy.

The fourth reason that could make an heir or a legatee unworthy is perjury. Someone commits perjury when he/she stands as a false witness against somebody. As the result of the false testimony of an heir or legatee, if one of the persons enumerated under Art 838 (a) of the Civil Code is condemned to a capital punishment or rigorous imprisonment for more than ten years, the heir or the legatee will become unworthy to succeed the deceased.

The fifth reason relates to the interference with the right or power of the testator in making a will. The heir or the legatee in this case, by taking advantage of the physical state of the deceased, has prevented him from making, modifying or revoking a will. Such heir or legatee shall be condemned as unworthy. This latter crime made by the heir/legatee is a crime that affects the rights of the freedom of the testator as far as making, modifying and revoking his/her will is concerned. Infringing upon a legally recognized right of the testator would the heir/legatee to a condition of unworthiness.

Exercise
How do you understand the expression "by taking advantage of the physical state of the deceased?"

This could relate with his/her physical strength. The deceased might have been sick for a long time and very weak physically. The heir or legatee may take the advantage of this weak condition of the deceased to prevent him/her from making, modifying or revoking a will.

It must noted here that, in order to be condemned as unworthy, the heir or legatee must have committed this latter offence only within three months before death of the deceased. If the offence is committed before this time, the law will not condemn the heir or the legatee as unworthy. The law considers three months as sufficient time for the testator to think about the offence committed against his rights relating to making, or modifying or revoking a will and to act against the acts of the offender. If the testator keeps quiet for three months after the offence is committed, the law takes that as if the testator has

ratified the acts of the offender.

If an heir or a legatee commits any of the offences which are listed under Art. 838 after the death of the deceased (which means after opening of the succession), he/she will not be deprived of his/her rights to succeed the deceased. Because the heir has committed the crime after he/she is called to and got a right over the succession. It is said here that the crime has no connection with the succession.

It is the law that imposes a liability of unworthiness upon an offensive heir. The imposition of unworthiness has an exception. Although the heir has committed the offences prescribed under Arts. 838 and 840, he/she would not lose his/her capacity as unworthy, if the deceased had given such heir an amnesty, or if he had forgiven him/her. The pardon may be either an expressed or an implied one. A very common way of pardoning an heir is expressing the pardon in a will. If the deceased made a will after the offence was committed, he/she could express his/her forgiveness in the will, to make the heir beneficiary of the will. If the had given a legacy to the offender after the occurrence of the offence with full knowledge of the commission of the offence, that would taken as another way of pardoning the offender.

E. UNBORN CHILD

As it is indicated in Article 1 of the Civil Code, the human person is the subject of rights from its birth to its death. From this, it may appear to you that a merely conceived child has no right to succeed. However, this rule has an exception in that a merely conceived child could be considered born whenever his interest so requires. To attribute personality to a merely conceived child, it must be born alive and show its vigor for survival by its viability. "A child shall be deemed to be viable where he lives for forty-eight hours after his birth…" (Article 4(1) of the Civil Code)

When the father of a merely conceived child dies, the law considers that the interest of the child requires his consideration as a person. Such a child shall not be treated as a non–existent being. In such a case, his/her interest requires that he/she is a person subject to rights. Hence, although he/she is an unborn child, the law allows him/her to participate in

the succession. However, his rights in the succession shall be realized after his/her viability is proved.

F. CHILDREN BORN IN MARRIAGE, OUTSIDE MARRIAGE AND ADOPTED CHILDREN

The Ethiopian law of succession makes no distinction based on the status of a child whether such child is born in marriage, outside a wedlock marriage or he/she is an adopted child. Nevertheless, you should note here that the establishment of the paternity of an illegitimate child is duly obligatory before he claims to succeed the deceased, if the deceased is putative father.

An adopted child, for all intents and purposes, is assimilated to a natural child. The only exception for this rule is, as prescribed under Art. 182 of the Revised Family Law of 2000, (or the corresponding provisions in the Regional Revised Family Codes) adoption cannot be effective against the ascendants and collaterals of the adopter who opposed the adoption. Therefore, the Ethiopian law does not make any distinction among children of the deceased based on the fact that they are legitimate or otherwise.

G. SEX, AGE AND NATIONALITY OF HEIR[6]

In most of the customs in Ethiopia, male children are favored to succeed their parents. In some nationalities, female children are totally precluded from succeeding their parents. Particularly this was true as far as succeeding land was concerned. The FDRE Constitution has recognized the property rights of women. Art 35(7) of the FDRE Constitution provides as follows:

> "Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property."

Moreover, both the Federal and Regional land use and administration Proclamations have

[6] Article 837, Civil Code

specifically addressed the constitutionally guaranteed rights of women on land. Irrespective of these legal efforts, women's rights on land are not respected satisfactorily. There are still deep rooted beliefs in the many societies that women should not inherit land. However, there are encouraging reports in realizing these rights of women in almost all Regional States.

The Federal Rural Land Administration and Land Use Proclamation № 456 of 2005 has some provisions which recognize the rights of women on land. For instance, Art 5 (1)(c) prescribes that—"Women who want to engage in agriculture shall have the right to get and use rural land." Also Art 6(4) of the same Proclamation provides that—"Where land is jointly held by husband and wife or by other persons, the holding certificate shall be prepared in the name of all joint holders."

Similar rules have been adopted by the Regional States' land laws. For instance, the Southern Nations, Nationalities and Peoples Regional State's Rural Land Administration and Utilization Proclamation № 110 of 2007 in its preamble stated that:

> *WHEREAS, it is believed that ensuring women's land holding right is necessary for agricultural production and productivity and …"*

There are other important provisions which ensure the land rights of women in the Proclamation. From these efforts, it can be seen that there are some improvements in the recognition of land rights of women.

Exercise
What additional efforts, other than legal efforts, must be made so that women should enjoy their constitutionally guaranteed rights of land which in effect include also the right to inherit land?

With respect to age, it cannot be a ground to discriminate heirs. As long as there is no valid will left by the deceased that discriminates the heirs based on their ages, the rights of the heirs to inherit the deceased cannot be affected by their age. For example, if the deceased has a 50 year old son and a 5 year old daughter, both of them have the right to succeed

him. Moreover, there is no primogeniture right under the Ethiopian law. That is, the eldest child has no special privilege in the succession of parents. The same is true with respect to nationality of the heir. But this rule is subject to the provisions of the Civil Code which restrict ownership of immovable property by foreigners. (See Articles 390 — 393)

1.2 INTESTATE SUCCESSIONS

In Ethiopia, most of the successions are intestate. When the deceased leaves no will at all or a court for various reasons invalidates the will made by him, it is said that the succession is intestate. In such a case, the distribution of the estate will be in accordance with the operation of the law rather than the volition of the deceased. In the intestate succession, the law follows "the presumed will of the deceased." This type of succession is older and more historic than succession by will. (Read Articles 842 — 848 of the Civil Code)

1.2.1 Devolution according to the degree of relativity

The provisions of intestate succession are based on the idea that — had the deceased made a will he/she would have distributed his/her estate by following the degree of relationship. That is, he/she would give his/her estate to his/her closest relatives in the first place. In the second place, relatives who are situated at a relatively distant position when compared with the relatives of the first degree shall succeed the deceased. Accordingly, the law considers the children of a person are his/her closest relatives.

A. FIRST RELATIONSHIP

Children or other descendants are number one candidates to succeed a person (See Art. 842(1)). All children of the person who died intestate have equal rights in the succession irrespective of their age, sex, etc. differences. If one of the children of the deceased is a predeceased child, that is, if he/she died before the death of the deceased, he/she would lose his/her capacity to succeed, as discussed above. The reason is he did not fulfill one important requirement, which is surviving the deceased. Although a predeceased heir lost his/her capacity to succeed the deceased, his/her own descendants will represent him. Therefore, representation could be taken as an exception to the rule of survivorship.

A person who claims to have a right in a succession is expected to be alive at the time of death of the deceased. This is the requirement of survivorship. The idea is that an heir who did not survive the deceased should lose his/her right in the succession. That is, a predeceased heir has lost his/her capacity. However, his/her descendants, with the exclusion of all other heirs, shall represent a predeceased heir. As a rule a predeceased heir has no capacity to succeed the deceased. But his/her descendants can represent him/her. This situation makes representation an exceptional circumstance to the general rule.

B. SECOND RELATIONSHIP

If the deceased is not survived by his/her children or other descendants, the father and the mother of the deceased will be called to his/her succession. In the case where his/her descendants survive him/her, all other heirs of the deceased will be excluded from the succession according to the rules of the interstate succession. His/her father and his/her mother are in the second order in the queue of the relatives of the deceased. The father and mother of the deceased will take equal share of the whole estate of the deceased.

In the case where one of the parents has died before the deceased, such parent shall be represented by his/her children (or other descendants). Note that the children (first degree descendants) of the parents of the deceased are his/her brothers and sisters, of full or of half blood.

In the case where both parents have survived the deceased, half of the hereditary estate of the deceased goes to the father and the other half goes to the mother. This is based on the principle that heirs of the paternal line the maternal line shall have equal shares in the inheritance of the deceased, so long as they are at equal distance from the deceased. In the paternal line, we find the father of the deceased and his (the father's) descendants. In the maternal line, we get the mother of the deceased and her descendants.

In a situation where the father predeceased the deceased and where descendants do not survive him, there is nobody to take the estate of the deceased in the paternal line at that level. In this case, the heirs of the maternal line take the whole estate of the deceased.

Exercise

Daniel, who is a 35 year old merchant, died of leukemia. Daniel died intestate and he had no child. Daniel's parents had three children, including Daniel. His mother Wro. Banchu, his brother Wondimu and his sister Chaltu survived Daniel. Ato Ergano, Daniel's father died three years ago. A 15 year old boy, Sisay, claimed a right in the succession of Daniel. Sisay alleged that he is the son of Ato Ergano who was born in an extramarital relationship between Ato Ergano and his mother. He produced reliable evidence that shows his acknowledgment by Ato Ergano. Considering the estate left by Daniel is 1,200,000 (one million two hundred thousand) Birr, what amount shall be distributed to each heir?

C. THIRD RELATIONSHIP

A person has four grandparents, two on the paternal line and two on the maternal line. If the deceased is survived by all of the four grandparents, half of the hereditary estate shall be devolved on the paternal grandparents and the rest half will go to the maternal grandparents. Each of them shall be entitled to one-fourth of the hereditary estate. If one of them predeceased the deceased and is survived by descendants, he/she will be represented by such descendants.

If a predeceased grandparent is not survived by descendants, his/her portion shall devolve upon the other grandparent of the same line. For instance, if the paternal grandfather predeceased the deceased and if he is not survived by descendants, the property that was destined to him or to his representatives will now be transferred to the paternal grandmother. In this circumstance, the maternal grandmother, instead of taking only one-fourth of the hereditary estate, she is entitled to receive half of the hereditary estate (if she is alive). If this paternal grandmother also predeceased the deceased, her own descendants will represent her. If her descendants do not survive her, there is nobody to receive the property on the paternal line of third relationship. Therefore, the whole hereditary estate will devolve upon the maternal grandparents. There are two maternal grandparents and

each of them will be entitled to receive half of the hereditary estate.

D. FOURTH RELATIONSHIP

A person has eight great-grandparents, four on the paternal line and the other four on the maternal line. The distribution of the estate follows the same pattern as that of the case of parents and grandparents.

1.2.2 Paterna paternis-materna maternis[7]

Articles 842 to 848 describe the rule in which intestate succession is governed. That is, the closest relative of the deceased would succeed him/her. This rule has an exception. The exception is — although there are closer relatives of the deceased, a certain property may devolve upon far distant relatives. The law calls this exception as paterna paternis materna maternis.

The exceptional rule of paterna paternis materna maternis is designed to allocate an immovable property that is obtained by the deceased from one of the lines by way of donation or succession to the heirs of the line from which the property is obtained. For a better understanding, study the following example.

Example

Ato Tezera acquired a house from his paternal grandfather by way of succession. Tezera is a young unmarried man and he has no descendants. Tefera's father, Ato Todano, died on Tahsas 30, 1998 E. C. Ato Todano's only child was Tezera. Nearl a year after death of his father, Tezera Died on Tir 7, 1999 E. C. Wro. Haymi, Tezera's mother, has survived her son. As Tezera was not survived by descendants, his parents will be called to his succession. But, his father predeceased him and the predeceased heir (Tezera's father died without leaving other descendants. Therefore, the mother will be called to the succession. However, there immovable property which is originated from the paternal

[7] Articles 849 to 852, Civil Code

line. With respect to the chattels, Wro. Haymi can succeed her son. But she cannot succeed the house. Although Wro Haymi is a closer relative of her deceased son, the house will go to the heirs of the third relationship of the paternal line. Because the deceased obtained the house from the paternal line by way of succession.

You might have understood from the reading of Art. 850, that the heir who is the closer relative of the deceased and should have succeeded the deceased, but lost his right as a result of paterna paternis materna maternis, will have a usufruct right on the immovable. A usufruct right is a right to use a property or to derive a fruit from that property. For instance, if the property is a house, a person with a usufruct right can either live in the house (a use right) or he/she can rent the house and collect the rental money (deriving fruit of the house). Hence, a person with a usufruct right cannot sell the house nor can he transfer it by donation. Therefore, Wro Haymi will have a usufruct right and she is not obliged to pay any compensation to heirs of the paternal line from which the immovable (house) is obtained (See Art. 850 (2)).

According to Art 851, to apply the rule paterna paternis materna maternis, there has to be an heir in the line from which the immovable property is obtained, if the immovable property is obtained. If the immovable property is acquired from the paternal line, there has to be an heir in that line. In case of absence of any heir in the paternal line, the immovable property shall devolve upon the maternal line. The converse is also true.

To apply the rule paterna paternis materna maternis, the following five conditions must all exist together. If one of them is missing, it cannot be applicable. The five conditions are:

1. The deceased must die intestate. (The exceptional rule cannot be applied if there is a will)
2. His/her own descendants must not survive the deceased. (If there are descendants, Art. 842 shall apply)
3. The property must be an immovable one. (Art. 849 (1) & (2))
4. The property must be acquired by the deceased from either paternal or maternal lines by way of succession or donation. (Art. 849 (1) & (2))

5. There must be an heir in the line from which the property has originated. (Art. 851)

1.2.3 Escheat

When there are no heirs of the deceased up to the 4th relationship, the property shall devolve on the State. This condition is usually said to be Escheat. Escheat is reversion of property to the state in the absence of legal heirs or claimants. The State takes the property of the deceased not by way of succession, but because such property has no one to claim it. Property which is bona vacantia (ownerless or vacant property) belongs to the State and it is via this principle that the Government is taking the property of the deceased that has no heir up to the 4th relationship. (See Article 852)

1.2.4 Representation and renunciation

A. REPRESENTATION[8]

It can be said that there two modes of succession, succeeding directly and succeeding through representation. Heirs who are closest to the deceased are called to succeed directly and personally. However, the persons who are to be called to succeed directly and personally might have died before the opening of the succession, by leaving descendants behind them. In such a case, the law allows such descendants to be called to the succession. Representation is an exception to the requirement of surviving the deceased. As a rule, the heir must survive the deceased. But this rule is excepted by representation. According to this exceptional rule of representation, the descendants of a predeceased heir can take part in the succession by taking the foot of the predeceased heir. When representation is effected it is per stripes, not per capita. That is, the descendants of the predeceased heir shall take what would be taken by the predeceased heir, had he/she been alive.

Example
Ayantu died intestate and she left 90,000 Birr as a hereditary estate. She had three children, Brook, Ezana and Metti. Brook predeceased Ayantu. Brook himself was survived by three children; Meron, Akalu and Mike. As

[8] Article 853, Civil Code

Brook is survived by descendants, he shall be represented by them. Brook's children would receive what would have been taken by Brook. That is, they shall be entitled to 30,000 Birr and each of them has an equal share in the succession. Ayantu's grandchildren will only take proportionately among themselves the share that their deceased parent (Brook) would have taken if he were alive. This is a per stripes representation.

B. RENUNCIATION[9]

An heir who is a successor may not necessarily be willing to participate in the succession. In such a case, he could renounce the succession. Renunciation is a refusal to accept the succession. A person may renounce the succession for various reasons. If he/she is relatively in a better economic position, he may renounce the succession to the benefit of his co-heirs. The heir who has renounced the succession shall never be seen as the heir of the deceased. He/she has forfeited his/her right in the succession and hence he/she will not be represented by his/her descendants. The reason is the one who has no right in the succession shall not transfer to his/her descendants what he/she does not have. However, as it is prescribed in Art. 854(2), the person whose succession has been renounced may be represented. For better understanding of this provision, read the example below.

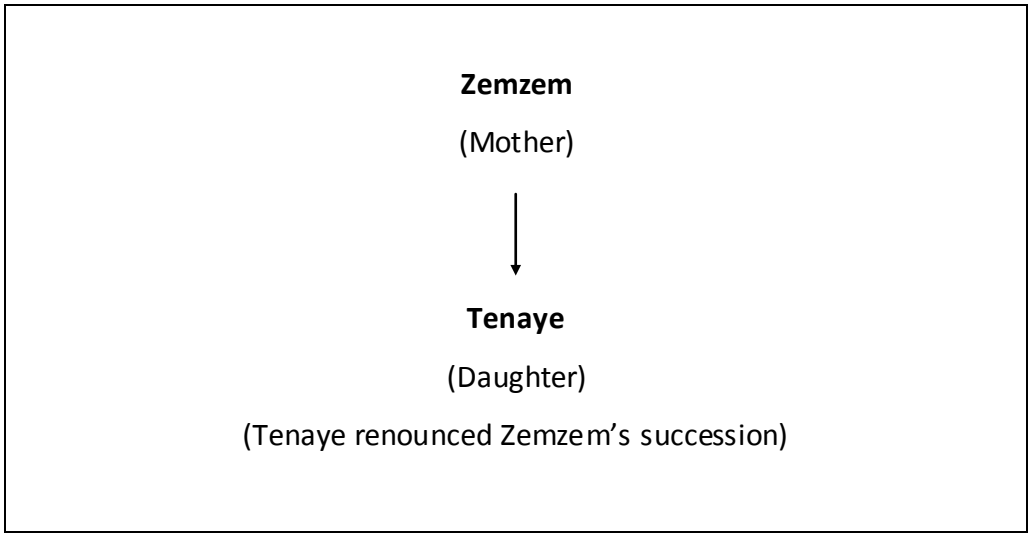
Example

Zemzem's mother W/ro Wude is a very rich woman. Zemzem has a daughter called Tenaye. Assume that Zemzem died on Meskerem 14th of 1999 E.C. Tenaye renounced Zemzem's succession. Just a year after the death of Zemenay, W/ro Wude died. Now Tenaye can succeed W/ro Wude by representing her mother Zemzem.

Wude

(Grandmother)

[9] Article 854, Civil Code



With the same logic as renunciation, the heir who is declared unworthy cannot be represented by his/her descendants, as such heir has already lost his/her right to succeed the deceased, he/she has nothing to transfer to his/her descendants. To succeed the deceased through representation, there has to be bond of legal relationship between the deceased and the one who claims to succeed the deceased. (See Arts 855 & 856) For instance, assume that Ato Omod adopts a child by name Neguse. Omod's father Ujulu opposed the adoption made by his son. Negusu cannot succeed Ujulu by representing his adoptive father, Omod.

1.3 WILLS

A will is the most satisfactory means of arranging for the devolution of a person's property after death. In Ethiopia many people do not make wills even if there is no comprehensive data on the percentage of wills and intestate successions. While making a will, the testator makes a disposition of his/her property through a unilateral declaration of intention which does not require receipt by another party to become complete. The valid execution of a will requires that the testator possessed testamentary capacity at the time of execution and that the formal legal requirements were observed. For the most part, the testator is free to make his/her own arrangements. The only requirement is that the instructions in the will not contravene legal prohibitions or public policy. A will is a juridical act that shall have a legal effect after the death of the testator or the will maker. It is an instrument by which a

person makes a disposition of his/her property to take effect after his/her deceased, and which in its nature is ambulatory[10] and revocable during his/her lifetime. A will is the instrument, which expresses the last wish of the testator. Some people say that a will remains only a draft during the testator's life, indicating its ambulatory nature.

There are different kinds of wills made by fulfilling the formal requirements that the law prescribes. The law is very strict with respect to the formality of making a will. A will that does not satisfy the required formalities is invalid by the court of law. Testamentary dispositions (wills) are declarations of intention. Thus, pursuant to the general provisions of the Civil Code, they can be invalidated or become ineffective.

It is believed that the Ethiopian society does not know much about the features of will and how to fulfill the formal requirements. This can be observed from the wills that are totally or partially invalidated by the courts due to failure to fulfill the formal requirements.

Will is different from donation in that donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee.[11] Will is a unilateral juridical act which is different from contract, in which the latter needs at least two parties. Since donation is a contract, it needs the acceptance by the donee.[12] The most significant difference, however, between donation and will is the time in which they are effected. Donation shall take place while both the donor and the donee are alive. As it has bees discussed above, will is ambulatory and hence becomes effective after death of the testator. Some similarities also exist between will and donation.[13]

1.3.1 Conditions for the validity of wills

The conditions prescribed by the law must be satisfied to make a will a valid document. The will becomes effective after its maker has died. The testator is not in a position to express

[10] Ambulatory means that the will is of no effect until the testator's death, and a competent testator may change or revoke it at any time before his/her death.

[11] Article 2427, Civil Code
[12] Article 2436, Civil Code
[13] See Civil Code Articles 2427-

his/her wish while the will is effective. Because of this, the law has opted to enumerate very stringent conditions and formal requirements for the validity of wills. Failure to observe these conditions set by the law would render the will ineffective. Because courts do not hesitate to invalidate a will if they feel that the will has not complied with the required conditions. A will is the only evidence for the expression of the true intention of the testator. To serve this important purpose, it needs to fulfill all the necessary conditions for its validity. The following sub-titles are some of the conditions.

A. PERSONAL NATURE OF A WILL[14]

The testator should seek the assistance of no one else. He/she should make the will by himself/herself. No any other person may take part in the making of a will on behalf of the testator or by way of assisting him/her. Nor the testator could appoint another person to represent him/her as far as making, modifying or revoking a will is concerned. Except for will and other specifically stipulated juridical acts, another person may represent the testator. The following definition illustrates well this condition.

Art. 2199 — Definition

> Agency is a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts.

Example
Abebe may authorize, by a contract of agency, Beletu to perform some juridical acts on his behalf. Based on this contract of agency, Beletu may administer the Abebe's property, or she may be authorized to sell the property. However, Abebe cannot in any case authorize Beletu to make a will on his behalf. Moreover, Beletu cannot alter a will made by Abebe nor can she revoke any will of Abebe.

[14] Article 857, Civil Code

The testator is not in a position to express his/her true wishes after his/her death. If someone is allowed to make a will on behalf of the testator, he/she can take advantage against the true intention of the testator very easily. For instance, Ayele, an indecent child of Ato Bekele may make a false will in the name of his father upon the death of Ato Bekele or even before his death. To narrow the occurrence of such situations the law lays down very strict formalities to make a will.

Another scenario of the personal nature of wills is the one stipulated in Article 858. According to Article 858 of the Civil Code, no two persons may make a will together using the same document. The law believes that the testator cannot express his/her free intention when he/she makes a joint will. That is, if the testator makes a joint will, such will could influence his/her free intention to some extent. A will is an instrument that the testator can repeatedly alter or revoke during his/her lifetime. It would be difficult for the testator to alter and revoke a will if he/she makes a will together with another person. This would definitely affect his/her freedom in making, altering and revoking a will. In some other jurisdictions, a will made by spouses jointly is valid. In Ethiopia, even spouses cannot make a will together irrespective of the fact that they have community of property in marriage.

A person may not bind himself/herself to make, to modify or to revoke a will to the advantage or disadvantage of any other person. That is, he/she cannot promise to make a will to the benefit of a relative, a friend or any other person. In addition, he/she cannot promise to make, modify or revoke a will to the disadvantage of any person. When it is said that the will maker cannot promise, it should not be taken in a sense that if he/she promises to make, modify or revoke a will, the testator may not be bound by such a promise. That is, notwithstanding the promise made, the testator can revoke the will at any time. See Art 859(2).

Exercise

W/ro Abebech is a 75 years old woman. Her only son Girma is a drunkard and is not looking after her and she had no one to support her. She promised to make a will to give her house to a neighbor, Workitu, if the latter maintains her until her death. Workitu

has happily accepted the proposition made by W/ro Abebech and started to maintain her.

Give your comments on this arrangement!

B. CAPACITY TO MAKE A WILL[15]

Testamentary capacity is a special form of legal capacity. According to the Revised Family Code, testamentary capacity commences upon the completion of the 16th year. Prior to this, the minor cannot make a will even with the consent of his/her legal representative. After the age of testamentary capacity has been reached, the minor does not require the consent of his/her legal representative. Persons lacking testamentary capacity are those who, due to a state of mental disturbance, mental deficiency or unsound mind, are unable to understand the meaning of the declaration of intention they have made or to act in accordance with this understanding in the execution of a will.

I) Minors

A Minor is a person of either sex who has not attained the full age of eighteen years. According to the Revised Family Code of the Federal Government and that of Regional States, a minor can make a will once he/she attains the age of 16 years. The following Art is taken from the Federal Government's Revised Family Code.

Art. 295 — Will.

1. The tutor may not make a will on behalf of the minor.
2. A minor may not make a will before he attains the age of sixteen years.
3. The will made before he has attained such age shall be of no effect, notwithstanding that the minor has not revoked it after having attained the age of sixteen years.

Even if the minor does not revoke a will, he/she made before the age of 16, after he/she

[15] Articles 860 to 864

has attained 16 years that cannot be a reason to maintain such a will.

II) Judicially interdicted persons

Judicially interdicted persons are those who are declared by a court of law not to perform juridical acts, such as making a will. One of the reasons for a judicial interdiction is a mental illness. You must derive the following important points from the reading of Arts 861, 368 and 862.

1. An interdicted person may not make a will after his interdiction.
2. A will made by the interdicted person before his interdiction is valid.
3. Although the will made by an interdicted person before his interdiction is valid, the court has the power to invalidate such will either totally or partially.
4. Although the will made by an interdicted person after his interdiction, is invalid, the court has the power to maintain such will either totally or partially.
5. When the court maintains a will made by the interdicted person after he/she is being interdicted, it shall consider the following points:
   i. A legacy (money or property given to somebody through a will) must not exceed five thousands Birr and;
   ii. The heirs-at-law of the interdicted person (the heirs- at–law could be descendants or other relatives)should get a minimum of three-fourths of the succession. That is, the outsiders (non-relatives) can take a maximum of only one-fourth of the succession.

Generally, the law considers that the person is healthy before his/her interdiction and his/her mental conditions will affect his/her will when the law takes such actions after his interdiction. In an actual situation, this may not always hold true.

Example

Consider that the court has interdicted Alemu on Meskerem 30th, 1999 E. C. Even if it is considered that his will made before this date is valid, his mental conditions during such period may be worse than the actual date of interdiction. Similarly, although a will made

after the interdiction is not valid, the health conditions of the interdicted person may have improved and such conditions may lead the court either to maintain or only partially invalidate the will.

III) Insanity

As indicated in Art. 863, a will made by an insane person is valid unless it is proved that the person was a notoriously insane person at the time of making the will. There are scarce conditions in Ethiopia that make a person notoriously insane. (Remember your Law of Persons course) Therefore, getting a judicial interdiction of an insane person is a wise step to make the will made by such person ineffective.

When a testator makes a will, he/she must be careful not to include provisions that are contrary to law or morality. Moreover, the provisions of the will must not be difficult or impossible to execute.

C. PROVISIONS DIFFICULT OR IMPOSSIBLE TO EXECUTE

Article 865 (1) tells us that a testamentary provision which fails to specify in a sufficiently clear manner its beneficiary or its object shall be of no effect. From this it is clear that the provisions of a will must clearly indicate who will be the beneficiary and what things or portion of things has been allocated to such beneficiary.

Example

In her will W/ro Kebebush expressed that: “Let somebody take my laptop computer.” It is impossible to determine who is that somebody. Therefore, the testator must clearly indicate the beneficiary of his/her will. Moreover, the testator needs to clearly indicate the beneficiary of his will. The word “object” refers to a property under the will. Hence, the testator should specify the property that he bequeathed to the beneficiary. If the testator says, “Let Ayele receive my something” in his/her will, it is also impossible to execute this will correctly. What thing should Ayele receive is not clear.

There is a similar problem in sub-art (2). In this case, the provision of a will is impossible or very difficult to execute or put it in practice. That is, if a provision of a will contains orders of the testator which cannot be put into action, such provisions shall be invalidated. For instance, Ato Ayalew, in his will, gave the building of the Ministry of Education to his friend Lemma. It is not possible to execute this will, as the building of the Ministry of Education is a public property, not an individual's asset. The testator can give by way of will property which belongs to him/her at the time of his/her death.

D. ILLICIT PROVISIONS

In Art 866 the word "object" is to mean the aim, purpose or goal of the will. If the purpose of the will is unlawful, its provision shall be of no legal effect. Moreover, the provisions of a will shall be of no effect if their purpose or aim is immoral. However, there is no standardized immorality. Something immoral in a certain area may not necessarily be immoral at another area. Hence, the judgment on immorality could be left to local conditions.

Example

Colonel Wubshet made the following testamentary disposition:

> My son Hailu married a woman who is a member of a political organization that I do not like. Although I insisted that he divorce that woman, he refused to obey my orders. If anyone, from among my family, causes the separation of my son from his wife, I bequeath him 10,000 Birr.

This will may be considered as immoral one. Because, marriage is a very respected social institution. Its dissolution must be initiated by the spouses themselves and by no one else. It is not proper to initiate the dissolution of someone's marriage and it is this conditions that makes the will immoral. Moreover, Colonel Wubshet's daughter-in-law has exercised one of her constitutionally guaranteed rights, as anyone has the right to be a member of his own will in a political organization… (See Art 38(2) of the FDRE Constitution)

E. VIOLENCE[16]

The testator has to make a will only by his/her free volition. That is, the testator should not make a will under a threat or under any condition that could affect his/her freedom in the making of a will. Violence vitiates the freedom of making, modifying and revoking a will. The violence may not necessarily be directed toward the testator. It may happen against one of the testator's descendants, ascendants or against the testator's spouse. In this case, the violence or the duress may put under threat the life, honor or property of the testator or one of the above persons. Articles 1706-1709 and 1808-1818 are the provisions of the general contracts and they shall apply by analogy to treat the cases of violence with respect to making, modifying and revoking a will.

F. UNDUE INFLUENCE[17]

According to the Ethiopian law of succession, undue influence is not a ground to invalidate a will. This is the rule. Undue influence is more of psychological than physical. Someone may exert an excessive influence on the testator to have a will made, modified or revoked to the benefit of oneself. Although such influence affects the mind of the testator, it is not considered as a serious threat. However, there are exceptional circumstances in which undue influence could be a ground to invalidate a will or reduce the amount indicated in the will. Especially, the exceptional circumstance is relevant when the one who exerts the undue influence has a special opportunity to exert pressure on the testator. Generally, the exceptional situations depend on two circumstances:

a) On the conditions of the testator; and,
b) On the identity of the person who exerts the undue influence on the testator.

The conditions of the testator put him in a weak position in that he/she needs the help or assistance of other persons. The conditions that force him to seek the assistance of other persons could be his being a minor, sick, etc.

[16] Article 867, Civil Code
[17] Articles 868 to 875, Civil Code

The identity of the person who is exerting the undue influence is the one who, by taking the advantage of the conditions of the testator, gets benefit from the will of the testator. This person could be the guardian or tutor of a minor testator, or he/she could be a physician who prescribes or applies a medical treatment to the testator or he/she could be a clergyman who prays for the testator or gives him a spiritual assistance. A person, who takes part in the making of the will as a witness, interpreter, etc., can effectively exert undue influence on the testator and this situation is an exceptional one.

According to Art 869 of the Civil Code, if a minor testator makes a will to the benefit of his/her guardian or tutor, the court may totally invalidate the will (the testamentary provision in relation to the undue influence) or may reduce the amount given to such guardian or tutor. A guardian or a tutor has a big opportunity to exert influence on a minor testator and get a benefit unduly. But this provision shall not be effective if the guardian or tutor is an ascendant of the testator.

Exercise

Why the will of the minor testator is maintained if the guardian or the tutor is an ascendant?

Likewise, the court may reduce the amount given to the beneficiary or invalidate the testamentary provision when the beneficiary is a physician who has given a medical treatment has exerted undue influence on the testator. For the purpose of applying the provisions of undue influence, it does not matter whether the physician is a professional or even he/she is a quack. Clergymen are persons who can easily influence the person who is, e.g., sick and needs prayer so that his/her soul would rest in the heavens. So the court may either reduce the amount given to such persons or invalidate the testamentary provision to the benefit of such persons. Irrespective of the undue influence exerted on the testator, if the one who has exerted the undue influence is a relative by consanguinity of by affinity to the testator or if such person is the spouse of the testator, the will which is made to the benefit of the one who exerted the influence shall not be affected, that is, it becomes effective. (Read Arts 870 and also 871—876)

G. FRAUD[18]

Fraud is a deceitful act. However, it is not a ground to invalidate a will, if the will benefits the fraudster (the person who commits fraud). Here you should distinguish between fraud and undue influence. In the case of undue influence, the testator seeks others' help. In the case of fraud, the testator may not necessarily be in a weak position. For instance, the fraudster may promise to do something to the testator, if the testator makes a will to the benefit of such a fraudster. The fraudster may have no ability or capacity to perform his/her promise. Although the promise of the fraudster deceives the testator, it is not possible to invalidate the will that benefits the fraudster. Another example could be — a man who is tied by the bond of a marriage may tell to a woman that he is a widower and married her on that ground. If the woman makes a will to the benefit of the man hoping that the man is only her husband, this may not be a ground to invalidate a will. But as we will see under section Revocation and Lapse of Wills below, a will made to a spouse shall lapse if the marriage is dissolved by way of divorce.

H. ERROR[19]

When a will is made as a result of error, the provisions of the Civil Code relating to invalidation of contracts shall apply. (Refer to the Civil Code provisions (Arts 1697 — 1705 and 1808 — 1818)) Generally, the mistake which led the testator to make the will in such a manner must be fundamental. That is, it is not logical to invalidate a will for every trivial or minor error. The error must be of a kind that, had the testator known the truth, he/she would not have made a will in such a manner. Moreover, the mistake must be clear from the wording of the will itself or from another document to which the will refers. The following example will illustrate this statement.

Only one or two of provisions of a will might have been affected by error and others may be good. The court may invalidate only such defective provisions by leaving others to be effective. The nullity of a certain defective provision cannot cause the nullity of other

[18] Article 876, Civil Code
[19] Article 877, Civil Code

provisions of the will, unless there is a necessary connection between the execution of the provision, which has to be nullified, and the execution of another provision. (Art 878)

The testator may make a legacy to depend on a certain condition. This means, the testator may impose certain condition or burden on the beneficiary of the succession. The beneficiary will receive the legacy when he/she accomplishes the burden or the condition imposed upon him by the testator. However, the law does not bind the beneficiary or the legatee to accomplish the burden if the condition is impossible to perform or it is illegal or immoral. That is, if there is an imposition of impossible, illegal or immoral condition or burden, the legatee can receive what is prescribed by the will to him/her without accomplishing what the testator ordered.

Example

The testator in his will disposes that the beneficiary of the will shall fly from the tip Mount Ras Dashen to the tip of Mount Tulu Walel without using any device. If the beneficiary accomplishes this task successfully, the testator wishes to give him a new car. This condition is impossible to accomplish. Therefore, the legatee can receive the new car without even trying the flight.

1.3.2 Form and proof of wills

There are three types of wills (See Art 880). All of them are required to be made by following the formal requirements prescribed by the law. Failure to fulfill these formal requirements may cause the invalidation of the will as a whole. The law is so strict as far as fulfillment of the formal requirements is concerned. As it is already indicated above, the testator is not in the position to defend him/her when the will is opened. Even if absolute protection of the intention of testator is not a possibility, the law tries to seal all the possible loopholes which might be created during the making of the will.

A. FORM OF WILLS

I) Public wills[20]

A public will is a will that is read in the presence of the testator and of four witnesses. The testator can write the will in the presence of the witnesses. He/she can also write the will in the absence any person. That is, the testator may write the will by himself/herself or he/she may get it written by another person under his/her dictation in the presence of witnesses or even in the absence of the latter. The most important thing, as far as a public will is concerned, is the will has to be read in the presence of the testator and of four witnesses. Reading the will in the presence of the testator and of four witnesses is not sufficient. There must be an indication of the fulfillment of this requirement in the will itself. It can be indicated in the following manner:

"...This will is read in the presence of the testator and of four witnesses."

If the will does not contain such an indication, it could be invalidated. The absence of such indication may cause the invalidation of the will. Therefore, utmost care should be taken when public will is made. Moreover, the testator and the four witnesses should put their signature immediately after the will is read. This is a very strict rule. Assume that one of the witnesses goes out after the completion of the reading but before the will is signed. If he/she comes back after a little while, and when he/she is back, the testator and the three witnesses have already signed the will, the will shall be of no effect and it is subject to invalidation.

Exercise
Why do you think the law is so strict in laying down such procedures in the making of a will?

[20] Articles 881 to 883, Civil Code

Read the following two cases and comment on the decisions of the courts at different levels.

ጠቅላይ ፍርድ ቤት

ሰበር ሰሚ ችሎት

አመልካች፡- እልፍነሽ ወልደ አማኑኤል

መልስ ሰ□ ፡- አቶ ዘውዴ አበበ

□ሰ.ች.ፍ.መ.ቁ 57/80

በግልጽ ስለሚደረግ ኑዛዜ ሊከተለው ስለሚገባ ፎርም፡- በተናዛዡና በምስክሮች ፊት መነበቡ በላይ አለመገለጹ ስለሚያስከትለው ውጤት፡- በተናዛዡና በምስክሮች «ወዲያውኑ» አለመፈረሙ ስለሚያስከትለው ውጤት፡- ቀደም ሲል የተሰጡ የፍርድ ውሳኔዎችን (precedent) ስለመከተል የ.ፍ.ብ.ቁ.881 ዕድሜን በምስክሮች ቃል ስለማረጋገጥ፡- የምስክሮችን ቃል ስለማሰስተካከል፡፡

አቤቱ□ □ቀረበው ኑዛዜ ተናዛዥ እየተናገሩ ከምስክሮች ባንዱ ከተጻፈ በኋላ በምስክሮቹና በተናዛዡ ፊት መነበብና መፈረሙ በምስክሮች ተረጋገጦ ሳለ ጠቅላይ ፍ/ቤት የህንን ሁሉ ሳያገናዝብ በኑዛዜው ላይ በተናዛዡና በምስክሮች ፊት መበነቡን የሚገልጥ ሐረግ ካልሠፈረበት መነበቡ በምስክሮች ቃለ መረጋገጡ ብቻውን በቂ ስላልሆነ ኑዛዜው ይፈርሳል በማለት የሰጠው ውሳኔ ከሕጉ ጋር የሚጋጭ በመሆኑ በሰበር ይታይልኝ በማለት ነው፡፡

ውሣኔ፡- □□ቅላይ ፍ/ቤት ውሳኔ ተሸሮአል፡፡

ለ «ግልጽ ኑዛዜ» በርከት ያሉ የኑዛዜ ፎርማሊቲዎች የተደነገጉት የሚች ትክክለኛና □ር□□ኛ ያልሆነ ኑዛዜ እንዳይጸድቅ ጥብቅ ቁጥጥር ለማድረግ እንዲያስችሉ ነው፡፡ ከእነዚህ ፎርማሊቲዎችም ውስጥ የበለጠ ክብደት ሊሰጣቸው የሚገቡ ፎርማሊቲዎች አሉ፡፡ ለምሳሌ በፍ.ቤ.ሕ.ቁ. 881(3) «ተናዛዡና ምስክሮች በኑዛዜው ላይ ወዲያውኑ ፊርማቸውን ወይም ያውራ ጣት ምልክታቸውን ካላደረጉበት ፈራሽ ነው» የሚለው ለኑዛዜ ወሳኝነት ያለው ፎርማሊቲ በመሆን ምን ጊዜም ሊ□ለ□ የሚችል አይደለም፡፡ እንዲሁም ኑዛዜው በተናዛዡና በምስክሮች ፊት መነበብ አለበት በማለት የተደነገገው ግልፅ የሆነ ኑዛዜ መሠረተ ሀሳብ □ንደ መሆኑ እንዲሁ ምን ጊዜም ሲታለፍ የማይችል ነው፡፡ ኑዛዜው በምስክሮች ፊት መነበቡ በላዩ ላይ መገለጽ አለበት በማለት በሕጉ የተመለከተው ግን የሥነ ሥርዓት ፎርማሊቲ እንደ መሆኑ ከላይ ከተገለጹት ፎርማሊቲዎች ጋር እኩል ክብደት የሚሰጠው አይሆንም፡፡

ውሳኔ

ዳኞች፡- አሰፋ ለበን፤ □ምሩ ወንድም አገኘሁ፤ □ለማ□ሁ □ጹሌ፤ ዮሐንስ □ሩጆ □ለማሁ ዓ ላጵ፡፡

በዚህ ነገር አቤቱታ የቀረበው የጠቅላይ ፍርድ ቤት 1ኛ ፍትሐ ብሔር ችሎት በፍትሐብሔር ይግባኝ መዝገብ ቁጥር 505/78 የካቲት 15 ቀን 1980 ዓ.ም. ኑዛዜ እንዲፈርስ የሰጠውን ውሣኔ በመቃወም ነው፡፡

ክሱ የተጀመረው በአዲስ አበባ አውራጃ ፍርድ ቤት ሲሆን የአሁን አመልካች በወይዘሮ ወርቅነሽ ገብረ መድህን የካቲት 21 ቀን 1975 ዓ.ም. የተደረገው ኑዛዜ እንዲጸድቅላቸው ከሌሎች ሶስት የኑዛዜ ተጠቃሚዎች ጋር ለፍርድ ቤቱ አመለከቱ፡፡

መልስ ሰጭ በጋዜጣ ጥሪ ተጮኅተው ያቀረቡት መቃወሚያ

«የሟች የወንድም ልጅና ቀዳሚ ወራሻቸው እኔ ነኝ ሟች ልጅ የላቸውም፤ አመልካቾችም የቤት ሠራተኛ ናቸው፡፡ ከሟች ጋር ዝምድና የላቸውም፡፡ ሟቿ ዕድሜያቸው ከመቶ ዓመት በላይ በመሆኑ ሰውነታቸው ደክሞ እንደበታቸውም የመናገር ኃይሉን ያቆመ ጆሮአቸው የማይሰማ ስለነበር ኑዛዜው አመልካቾች የአዘጋጁት ሀሰት ጽሑፍ □ንጂ የሟች ኑዛዜ ባለመሆኑ ኑዛዜው ተሽሮ የአመላካቾች ዓ ጸቁ □·□ቅ እንዲሆንልኝ... » የሚል ነበር፡፡

የአውራጃ ፍርድ ቤት የአመልካቾችንና የታቃዋሚን ምስክሮች ከሰማና ማስረጃቸውን ካየ በኋላ፣

> ***«... የአመልካች ምስክሮች ሟች ኑዛዜውን የአደረጉ መሆኑን ቢገልጹም □ተቃዋሚ ምስክሮች ሟች በኑዛዜው ጊዜና በፊትም መናገርና መንቀሳቀስ የማይችሉና ሰውን ለይተው የማያውቁ መሆናቸውን አረጋግጠው የመሰከሩ ስለሆነ ሟች መናገርና ሰው መለየት እስከአልቻሉ ድረስ በአመልካቾች በኩል የቀረበው ጽሑፍ ሟች የአደረጉት የኑዛዜ ቃል ነው ከማለት ይልቅ አመልካቾች ሀሰትን በመመርኮዝ አቀናበረው ያቀረቡት ጽሁፍ ነው ለማመት ስለሚደፍር ኑዛዜውን ሽረነ ኝል...»***

አመልካች ባቀረቡት ይግባኝ ከፍተኛው ፍርድ ቤት ሁለቱን ወገኖች አከራከሮ፤

ሀ. **ሟች ኑዛዜውን ባደረጉ ጊዜ መናገር ፣መስማትም፣መፈረም አለመቻላቸው በምስክሮችና በሐኪም ማስረጃ አልተረጋገጠም፡፡**

ለ. **በኑዛዜው ላይ የአለው ፊርማ በመልስ ሰጭ አልተካደም፡፡**

ሐ. **□ተቃዋሚ ምስክሮች ሟች መናገር አችይሉም ነበር ያሉት ጊዜያዊ ሕመም ሊሆን ስለሚችልና ይግባኝ ባይ ምስክሮች ኑዛዜው በተደረግበት ዕለት ሟች በጤናማ፣ ሁኔ□ የሰጡት ኑዛዜ መሆኑን ስላረጋገጡ ኑዛዜው ጉድለት የሌለው በመሆኑ ይፀናል...»**

ሲል የአውራጃ ፍርድ ቤት ውሣኔ ሽሯል፡፡

መልስ ሰጭ ውሣኔውን በመቃወም በአቀረበው ይግባኝ ጠቅላይ ፍርድ ቤት ባውራጃ ፍርድ ቤት

የተሰሙትን ምስክሮች እንደገና አስቀርቦ ካሰማና ከአከራከረ በኋላ በሰጠው ውሣኔ በፍትሐ ብሔር ሕግ ቁ 881(2) ድንጋጌ አስገዳጅ በመሆኑና በሕጉ እንዲፈፀም የታዘዘው ሥርዓት ካልተፈፀመ ኑዛዜው □ራሽ እንደሚሆን በዚህ ንዑስ አንቀጽ ስለተደነገገ ነው። በማለት ከፍተኛው ፍርድ ቤት የሰጠውን ውሣኔ በመሰረዝ ኑዛዜው እንዲፈርስ ወስኗል።

አመልካች ይህንን ውሳኔ በመቃወም ነው ጉዳዩ በሰበር እዲታይላቸው የአመለከቱት። ማመልከቻቸውም የያዘው ፍሬ ነገር፡-

«... ሟች የረጅም ጊዜ አገልግሎቴንና ከአጠገባችው ሳልለይ የአስታመምኳቸውን በማሰብ በሙሉ ፈቃደኝነት በ21/6/75 አራት ምስክሮች ባሉበት አንድ አባል ተጽፎ ለተናዛዥ ተነቦላቸው በፊርማቸው አረጋግጠውና በማህተማቸው አትመው የተናዘዙ መሆናቸውን ምስክሮች አረጋግጠዋል።

ጠቅላይ ፍርድ ቤት ይህን ሁሉ ሳያገናዝብ በፍትሐ ብሔር ሕግ ቁጥር 881(2) ውስጥ ካልተነበበላቸው የሚለውን አንድ ቃል ብቻ በመውሰድ ኑዛዜው ይፈርሳል በማለት የሰጠው ውሣኔ ከራሱ ከቁጥር 881(2) ጋር የሚጋጭ ነው። መነበቡን በሰው ማስረዳት አይቻልም ስለተባለው በሰው ማስረዳት አይቻልም የሚል ገደብ የለም። መነበቡን □ስመስ□ሬአለሁ። ቀድሞ የአስቻሉት የጠቅላይ ፍርድ ቤት ዳኞችም ምስክሮቹን ጠርተው ሰምተዋል። የመልስ ሰጭ ምስክሮች ግን ሁለቱ ከሟች ጠበኞች የነበሩና ሟች ቤት ገብተ□ □ማጸ□ቁ 3ኛ□ ምስክር በተቃዋሚነት ቀርበው የነበሩ፤ 1ኛ□ □□ሞ ሟቿን የማያውቁ ናቸው። ሟቿ በ1968 በሙሉ ጤናቸው ኢየሩሳሌም □□ም ሄ□□ በመመለሳቸው በ1972 ዘመዳቸው ወይዘሮ ወላንሳ ስለሞቱ ንፋስ ስልክ ሄደው በጤና የተመለሱ በመሆናቸው መልስ ሰጭ የአሉት ትክክል አይደለም። ከዚህም በቀር ይህንን አቤቱታ የአቀረብኩ ዕደሜዬ የገፋ አቅመ ደካማና በበሽታ በመሰቃየት ላይ የምገኝ እስከ ሕይወቴ መጨረሻ የምኖርበት ቤት የሌለኝ በመሆኑ ኑዛዜው የማያጠራጥር በመሆኑ እንዲፈረርስ የተሰጠው ውሣኔ ይሻርልኝ የሚል ነው።

መልስ ሰጭው ለአቤቱው □□□□ መልስ፡-

ሀ. □ይዘሮ ወርቅነሽ ገብረ መድህን ዕድሜያቸው ከ100 ዓመታት በላይ በመሆኑ ጆሮአቸው የመስማት፤ ዓይናቸው የማየት፤ እግራቸውም የመንቀሳቀስ ኃይል መቶ በመቶ አጥቶ አልጋ ላይ ውለዋል።

ለ. ከእርጅናም የተነሳ የሚሠሩትንና የሚናገሩትን አያውቁም ማናቸውንም የማኅበራዊ ኑሮ □ጻ ታቸውን ሁሉ ለማሟላት ተስኗቸዋል።

ሐ. ወይዘሮ ወርቅነሽ በሕይወት ዘመናቸው በጣት ፈርመው የማያውቁ መሆኑን፤ ማኅተማቸው ነው የተባለውን ወይዘሮ ወርቅነሽ በሕይወት እያሉና ከሞቱም በኋላ አመልካች አበል እንደሚቀበሉበት የቀበሌው ጽ/ቤት አረጋግጧል።

መ. ሌላ□ ዐብይ የክርክር ነጥብ የውርስ መብት የሚተላለፈው ለሕጋውያን ወራሾች ብቻ ነው። ወይዘሮ እልፍነሽ ለሟቿ በሥጋ አይወልዷቸውም፣ በሌላም ልማ□ዊ ሥርዓቶች

□ንደ ጉዲፈቻና የመሳሰሉት የውርስ መብት ሊያስገኝ የሚችሉ ሕጋዊ ግንኙነቶች የላቸውም፡፡

የሚል ሆኖ የጠቅይ ፍርድ ቤት ውሣኔ እንዲፀናለት ጠይቋል፡፡

□□ር□ሩ ፍሬ ነገር በአጭሩ ከዚህ በላይ የተገለጠው ሲሆን ሶስቱም ፍርድ ቤቶች ለውሣኔዎቻቸው መሠረት ያደረጓቸው ነጥቦች የተለያዩ ናቸው፡፡

የአውራጃው ፍርድ ቤት የአመልካች ምስክሮች ቃል □ምነት የማይጣልበትና ኑዛዜው በሀሰት የተቀነባበረ ነው ብሎ የመከላከያ ምስክሮችን ቃል በመቀበል ኑዛዜውን ሲሽር ከፍተኛው ፍርድ ቤት ደግሞ የአመልካች ምስክሮችን ቃል በመቀበል ኑዛዜውን ጉድለት የሌለው ነው ብሎ አፅንቶ□ል፡፡

ጠቅላይ ፍርድ ቤት ምስክሮቹን እንደገና በመጥራት ካስመሰከረ በኋላ በሁለቱም ወገን ለተሰሙት ምስክሮችና ስለኑዛዜው የበታች ፍርድ ቤቶች በሰፊው በመዘርዘር በትችት ላይ ምንም አስተያየት ሳይሰጥበት ኑዛዜው መነበቡ በኑዛዜው ላይ ስላልተገለጠ በፍትሐ ብሔር ሕግ ቁጥር 881(2) ፈራሽ ነው ሲል የወሰነው ይህንኑ የኑዛዜ ፎርም ብቻ መሠረት በማድረግ ነው፡፡

በበኩላችን እንደተመለከትነው አቤቱታ በቀረበበት ጉዳይ የተነሱት ጥያቄዎች፣

- ኑዛዜው በሀሰት የተዘጋጀ ኑዛዜ ነውን?
- ሟች ኑዛዜውን ባደረጉ ጊዜ በዕድሜ መግፋት ምክንያት መንቀሳቀስ ማናገርና ሀሳባቸውን በትክክል መግለጽ የማይችሉ ነበሩን?

- በፍትሐ ብሔር ሕግ ቁጥር 881(2)መሠረት በተናዛዥና በምስክሮቹ ፊት መነበቡ በኑዛዜው ላይ ባለመገለጹ ምክንያት ኑዛዜው መፍረስ ይገባዋልን? የሚሉ ናቸው፡፡

የግራ ቀኝ ምስክሮች ቃል እንደተመለከተው የአመልካች ምስክሮች ሟቿ የካቲት 15 ቀን 1975 ዓ.ም. ኑዛዜውን ሲያደርጉ አልጋ ላይ መቀመጣቸውን ጆሮአቸው የሚሰማና ዓይናቸውም ያይ □ንደነበረ □ኑዛዜውን ቃል ራሳቸው በትክክል እየተናገሩ አቶ ጥበቡ ውቤ ከጻፉት በኋላ ኑዛዜው ተነብቦ ሟ□ በ□ታቸውና በወርቅ ቀለበታቸው ማኅተም የተፈረመበት መሆኑን መስክረዋል፡፡ ይሄው በተናዛዥና በምስክሮቹ የተፈረመው ኑዛዜ ማስረጃ ሆኖ ቀርቧል፡፡

የመልስ ሰጭ ምስክሮች የሟች ዕድሜ በግምት ከ98 እስከ 100 ዓመት እንደሚደርሱ ቀና ብለው ለማየትና መልስ ለመስጠት የማይችሉ □ንደነበሩ የሞቱትም በእርጅና እና በሕመም ምክንያት ነው በማለት መስክረዋል፡፡ ነገር ግን የሟችን ዕድሜ በተመለከተ በሞቱ ጉዜ የኢትዮጵያ ምእመናን የኢየሩሳሌም መታሰቢያ ድርጅት የሟች ዕድሜ 77 ዓመት መሆኑን ከቤተሰቦቻቸው አረጋግጦ በመታሰቢያ ሀውልታቸው ላይ ማስቀረጹን ሰኔ 3 ቀን 1977 ዓ.ም. በቁጥር ኢመድ 287/77 ለፍርድ ቤቱ በ□□□ ደብዳቤ □ልጧል፡፡ ስለ□ህ ተናዛዥ በሞቱ ጊዜ ዕድሜያቸው 100 ዓመት ቀርቶ 80 እንኳ ያልደረሱ በመሆኑ የመልስ ሰጭ ምስክሮች ስለሟች ዕድሜ በግምት የሰጡት ቃል እምነት የሚጣልበት አይደለም፡፡ የመልስ ሰጭ ምስክሮች ሟቿ ቀና ብለው ማየትና መልስ መስጠት

አይችሉም ነበር በማለት የመሰከሩትም፤ ሟቿ ኑዛዜ ባደረጉ ዕለት ሳይሆን ከዚያ ቀደም ብሎ አይናቸው በሚያይበት ወቅት ነው። አንድ ሰው በ□መመ ጊዜ ሕመሙ በፀናበት ወቅት ቀና ባሉ ለማየትም ሆነ መልስ ለመስጠት በማይችልበት ሁኔታ ላይ ሊገኝ ይችላል። ስለዚህ የመልስ ሰጭ ምስክሮች ሟች ኑዛዜ ባደረጉ ጊዜ ያልነበሩ ከመሆናቸው በላይ ያመልካች ምስክሮች ሟ□ በጤናቸው አልጋ ላይ ተቀምጠው ራሳቸው እየተናገሩ መናዘዛቸውን ኑዛዜውም ተጽፎ መነበቡንና መፈረሙን መስክረዋል። ከምስክሮቹም አንዱ የሟቿ የንሰሐ አባት መሆናቸው ተረጋግጧል። ስለ□ህ በመልስ ሰጭ በኩል ሟቿ ኑዛዜውን በትክክል ለማዘዝ የማይችሉ ነበሩ የተባለው ትክክል አይደለም። ስለዚህ ኑዛዜው የሟቿ መሆኑ ተረጋግጧል።

በዚህ ነገር የተነሳው የመጨረሻው ጥያቄ ኑዛዜው በፍትሐ ብሔር ሕግ ቁጥር 881(2) መሠረት በተናዛዥና በምስክሮቹ ፊት መነበቡ በኑዛዜው ላይ ባለመገለጹ ምክንያት ኑዛዜው መፍረስ ጀፋበዋልን? የሚለው ነው። በሟቿ በተደረገው ዓይነት «ግልጽ ኑዛዜ» ላይ የሚፈፀሙ በርካ□ ፎርማሊቲዎች ያሉ ሲሆን ከፎርማሊቲዎቹም አንዳንዶቹ በፍትሐ ብሔር ሕግ ቁጥር 881(2) «ኑዛዜው በተናዛዡና በአራት ምስክሮች ፊት ካልተነበበና ይኼም ሥርዓት (ፎርማሊቲ) መፈጸሙንና የተጻፈበትንም ቀን የሚያመለክት ካላሆነ በቀር ፈራሽ ነው» በሚለው የተዘረዘሩት ናቸው። በሟ□ ኑ□□ ላጁ በግልጽ ኑዛዜ የሚያስፈልጉት ፎርማሊቲዎች የተፈጸሙ ከመሆናቸው በላይ ከፍ ብሎ በተጠቀሰው አንቀጽ 881(2) ከተዘረዘሩትም ውስጥ «ኑዛዜው በተናዛዡና ምስክሮች ፊት መነበቡ ካልተመለከተ» ከሚለው በቀር ሌሎች ፎርማሊቲዎች ተፈጽመዋል።

ከፍተኛው ፍርድ ቤት የአውራጃውን ፍርድ ቤት ውሣኔ በመሻር ኑዛዜው የሟች ትክክለኛ ኑዛዜ ነው በማለት መወሰኑን ተመልክተናል። ጠቅላይ ፍርድ ቤትም የኑዛዜውን ምስክሮች እንደገና ካሰማ በኋላ ኑዛዜው እምነት በጣለባቸው ምስክሮች ፊት የተደረገ የሟቿ ትክክለኛ ቃል ነው በማለት በከፍተኛ ው ፍርድ ቤት የተሰጠውን ውሣኔ አልነቀፈውም።

□ቅላይ ፍርድ ቤት ኑዛዜውን ፍርስ ያደረገው ኑዛዜው በተናዛዥና በምስክሮቹ ፊት መነበቡ በኑዛዜው ውስጥ አልተመለከተም በማለት ብቻ ነ□።

«በግልጽ ኑዛዜ» በርከት ያሉ የኑዛዜ ፎርማሊቲዎች የተደነገጉት ትክክለኛና □ር□□ኛ ያልሆኑ ኑዛዜዎች እንዳይፀድቁ ዓ ብቅ ቁ ዓ ር ለማ□ረ□ እንዲያስችሉ ነው። ከእነዚሁ ፎርሊቲዎችም ውስጥ የበለጠ ክብደት ሊሰጣቸው የሚገቡ ፎርሊቲዎች አሉ። ለምሳሌ በፍትሐ ብሔር ሕግ ቁጥር 881(3) «ተናዛዡና ምስክሮቹ በኑዛዜው ላይ ወዲውኑ ፊርማቸውን ወይም ያውራ ጣት ምልክታቸወን ካላደረጉበት ፈራሽ ነው» የሚለው ለኑዛዜው ሕልውና ወሳኝነት ያለው ፎርማሊቲ በመሆኑ ምን □□ም ሊታለፍ የማችል አይደለም። እንዲሁም ኑዛዜው በተናዡና ምስክሮቹ ፊት መነበብ አለበት በማለት የተደነገገው ግልጽ የሆነ መሠረተ ሀሳብ እንደመሆኑ ምንጊዜም ሊታለፍ የማይችል ነው። ኑዛዜው በምስክሮቹ ፊት መነበቡ በላዩ ላይ መገለጽ አለበት በማለት በሕጉ የተመለከተው ግን የሥነ ሥርዓት □ርማሊቲ እንደመሆኑ ከላይ ከተገለፁት ፎርሊቲዎች ጋር ሲነፃር እኩል ክብደት የሚሰጠው አይሆንም።

በዚህ ነገር ክርክር የተደረገበትን ኑዛዜ እደተመለከትነው ሟቿ፤ አመልካቿ በስተርጅና ካጠገባቸው

ሳይለዩ ያደረጉላቸውን አገልግሎትና የዋሉላቸዉ ውለታ ባለመዘንጋት በሙሉ ጤንነታቸው በአራት ምስ□ሮች ፊት ከነዚህም አንዱ በአገራችን ባሕል □በለ□ እምነት በሚጣልበትና የምስክርነቱም ቃል ክብደት በሚሰጠው በንስሐ አባታቸው ፊት በሕግ ተደነገጉት ሌሎች ፎርማሊቲዎች ሁሉ በተፈጸመበት ኑዛዜው በሚቻና በምስክሮቹ ፊት መነበቡም ተመስክሯል። ኑዛዜው የሚች ትክክለኛ ኑዛዜ መሆኑ የሚጠራጥር አይደለም። ኑዛዜው ተነቢል የሚል ቃል በኑዛዜው ውስጥ ባለመጻፉ ብቻ ትክክለኛነቱ የተረጋገጠ የሚች ኑዛዜ ፍርስ እንዲሆን መወሰን ይገባዋልን?

ቀ□ም ሲል እንደተገለጠው ለ«ግልጽ ኑዛዜ» ፎርማሊቲዎች የተደነገጉ የሚች ትክክለኛና □ር□□ኛ ያልሆነ ኑዛዜ እንዳይፀድቅ ለመቆጣጠር ነው ፡ ትክክለኛ መሆኑ የተረጋገጠ ኑዛዜ ከኑዛዜው የሥነ ሥርዓት ፎርማሊቲዎች አንዱ በመጓደሉ ምክንያት የዚህም ፎርማሊቲ አለመሟላት በሚች ኑዛዜ ትክክለኛነትና □ር□□ኛነት ላይ አንዳችም አጠራጣሪ ሁኔ□ በማጅ□ጥርበት ጊዜ ያንድን ሚች ኑዛዜ ፍርስ ማድረግ ሕጋዊ ሆኖ አይታይም። ከዚህም በፊት በጠቅላይ ፍርድ ቤት በተመሳሳይ ሁኔታዎች ከንዐሳን ፎርማሊቶዎች አንዱ በመጓደሉ ምክንያት ትክክለኛነቱና □ር□□ኛነቱ የማያጠራጥረ□ የሚች ኑዛዜ አይፈርስም እየተባለ ውሣኔ የተሰጠባቸው ጉዳዮች ይገኛሉ።

ስለዚህ አቤቱታ በቀረበበት ጉዳይ ክርክር የተደረገበት ኑዛዜ ሌሎቹን ፎርማሊቲዎች የሟሟላ ከመሆኑም በላይ የሚቻ ትክክለኛ ኑዛዜ መሆኑ ስለተረጋገጠ ተጓደለ የተባለውም አንድ የሥነ ሥርዓት ፎርማሊቲ በሚቻ ኑዛዜ ትክክለኛነትና □ር□□ኛነት ላይ አንዳችም አጠራጣሪ ሁኔ□ በአለመፈጠሩ፤ ጠቅላይ ፍርድ ቤት የሚቻ ኑዛዜ እንዲፈርስ የሰጠውን ውሣኔ ሽረን ኑዛዜውን እንዲፀድቅ ወስነናል። ግራ ቀኙ ወጪና ኪሣራ ይቻቻሉ። ይጻ□። ታኅሣሥ 13 ቀን 1981 ዓ.ም.

ጠቅላይ ፍርድ ቤት

ፓናል ችሎት

ይግባኝ ባዮች፡-

1. ሸኸ□□ መርስዔ
2. ሀብተ ማርጸም መርስዔ
3. ይጥና ጋሻው መርስዔ

መልስ ሰ□ ፡-

1. □ማሆይ ፈለቀች ይ□□ሱ
2. የሃምሳ አለቃ ጌታሁን ግዛው
4. ወ/ሮ አረጋሽ መሸሻ

□□.ብ.ጁ.መ.807/73

ሚች ወደታች የሚቆጠር የትውልድ ሐረግ በሌለው ጊዜ ስለውርስ ክፍፍል □□.ብ.ሕ.ቁ. 844 እና 845 ወራሽነትን ለማላወቅ ስለሚቀርብ አቤቱታ፡፡ በኢትዮጵያ ፍ/ቤቶች የተሰጠን ፍርድ በውጭ አገር ለመስፈጸም እንዲረዳ ስለሚሰጥ ተጨማሪ ማብራሪያ፡፡

ይግባኝ ባዮችና መልስ ሰጭዎች ሁሉም በፈረንሳይ አገር በፓሪስ ከተማ የሞተው የአቶ ዘለሌ ሚካኤል ዘመዶች ሲሆኑ ሁሉቱም ወገኖች በየፊናቸው ወራሽነታቸው ታውቆ የማረጋገጫ ውሳኔወም ፈረንሳይ አገር ለሚ□ው ውርስ አጣሪ ሲላክለት ውርሱን ለማስፈጸም አሰቸጋሪ ሁኔታ የተፈጠረበት መሆኑን በመግለጽ ነገሩ እንደገና ወደ አውራጃው ፍ/ቤት ይመለሳል፡፡ የአውራጃው ፍ/ቤትም ውርሱን ለማስፈፀም መፍትሔ ይሆናል ብሎ በመገመት መጀመሪያ ፋይል የከፈቱት፤ የአሁኖቹ ይግባኝ ባዮች የሚችን ሀብት ይረከቡ፤ ባለጹዞታ ከሆኑም በኋላ መልስ ሰጭዎች በወራሽነት ማስረጃቸው መሠረት የውርስ ድርሻቸውን ከይግባኝ ባዮች ይጠይቁ በማለት ትዕ□□ ጁስ□ል፡፡ ከፍተኛው ፍ/ቤት የአወራጃወን ፍ/ቤት ትዕዛዝ ሽሮ ወነ ፡ ፡

<u>ውሣኔ፡-</u> የከፍተኛው ፍ/ቤት ውሳኔ ከማብራሪያ ጋር ፀንቷል፡፡

<u>ውሳኔ</u>

<u>ጻሮች፡-</u> አሰፋ ሊበን፤ አበበ ወርቁ፤ ቀ/ኛ እንዳለው መንገሻ፤ □ለማ□ሁ □ጁሌ፤ □ሳለኝ ዓለሙ፡፡

የሁለቱ ወገኖች ጠበቆች ቀርበዋል፡፡

ይግባኝ ባዮችና መልስ ሰጭዎች የሚከራከሩበት በፈረንሳይ አገር በፓሪስ ከተማ በሞቱት በአቶ ዘለሌ ሚካኤል የውርስ ሀብት ላይ ነው። ከመጀመሪያው አንስቶ ብንመለከተው የዚህ ብዙ ዓመታት የፈጀ የውርስ ክርክር ዝርዝር ሁኔ ባ ሩ የሚከተለው ነው።

የአሁን ይግባኝ ባዮች የእናታችን የእመት አስረሳሽ ዘመዱህ እህት የሆኑት የእመት ወለተ ማርያም ዘመዱህ ልጅ አቶ ዘለሌ ሚካኤል ልጅ ሳይወልዱ በፈረንሳይ አገር ስለሞቱ የሚች ወራሾች መሆነቸው ተረጋግጦ የምስክር ወረቀት ይሰጠን በማለት በሸዋ ክፍለ ሀገር በይፋትና ጥሙጋ አውራጃ ፍ/ቤት በፍትሐ ብሔር መ/ቁ/ 172/66 ጠየቁ። በቀጠሮው ቀን ተቃዋሚ ባለመቅረቡ የይግባኝ ባዮቹን ምስክሮች ሰምቶ ሚያዚያ 21 ቀን 1966 ዓ.ም. የአሁኑ ይግባኝ ባዮች የሚች የአቶ ዘለሌ ሚካኤል ወራሾች መሆናቸው በፍትሐ ብሔር ሕግ ቁጥር 826፣ 842 እና 999 መሠረት ውቆላቸዋል ሲል ወሰነ።

ወዲያውኑ የአሁኑ መልስ ሰጭዎች የዘለሌ ሚካኤል ወራሾች ይግባኝ ባዮቹ ብቻ አይደሉም፣ ኛ ም ወራሾች ነን ይግባኝ ባዮች ወራሾች መሆናችንን ሲያውቁ ለብቻቸው ጥያቄ አቅርበው ወራሽነታቻውን ያረጋገጡት አላግባብ ስለሆነ የእኛም ራሽነት ይረጋገጥልን በማለት ለዚያው ለይፋትና ጥሙጋ አውራጃ ፍ/ቤት ማመልከቻ አቀረቡ። ፍ/ቤቱም መልስ ሰጭዎቹ ኛም ወራሽነት ይረጋገጥልን የሚሉ እንጂ ይግባኝ በዮች ከዚህ በፊት ያረጋገጡትን ወራሽነት የማይቃወሙ ስለሆነ የራሳቸውን አዲስ መዝገብ አስከፍተው እንዲጠይቁ በማዘዙ መልስ ሰጭዎች የዘለሌ ሚካኤል ወራሾች መሆናቸው እንዲረጋገጥ በፍትሐ ብሔር መ.ቁ 71/67 ጥያቄ አቀረቡ። ጥያቄያቸውም ባጭሩ፡- እመት ወለተ ማርያምና አቶ ይታገሱ የአቶ አዝነህ ልጆች ናቸው ። እመት ለተ ማርጸም አዝነህ ሚቹን አቶ ዘለሌ ሚካኤልን ይወልዳሉ። አቶ ይታገሱ ደግሞ አንደኛዋን መልስ ሰ እማሆይ ፈለቀችንና ሁለተኛዋን መልስ ሰጭ የእመት አረጋሽን እናት እመት ወርቂትን ወልዷል። ስለዚህ የአንደኛ መልስ ሰጭ አባት፣ ሁለተኛዥር እና የሦስተኛዥር መልስ ሰጭዎች አያት አቶ ይታገሱና የዘለሌ ሚካኤል እናት እመት ወለተ ማርያም ወንድምና እህት ስለሆኑ ኛ የሚቹ አጎት ልጅና የልጅ ልጆች ስለሆንን የሚች ወራሾች ነን። ይህንኑ ዝምድናችንን ያረጋገጡ ምስክሮች ቀርበው ይመስክሩልን የሚል ነው።

የአውራጃው ፍ/ቤት ይግባኝ ባዮች በተቃዋሚነት እንዲቀርቡ ካደረገና ሌላም ተቃዋሚ ቢኖር በፋ ማስታወቂያ እንዲጠራ ካደረገ በኋላ ነገሩን አይቷል። የአሁን ይግባኝ ባዮች፡- ለሌ ሚካኤል እናት እመት ወለተማርያምና እህታቸው የእኛ እናት እመት አስረሳሽ ስለሞቱ በነርሱ ተተክተን የዘለሌ ሚካኤል ወራሾች መሆናችንን በዚሁ ፍ/ቤት አረጋግጠናል፡ ለተ ማርያም የዘመዱህ ልጅ እንጂ መልስ ሰጭዎች እንደሚሉት የአዝነህ ልጅ አይደለችም በማለት ተቃመቻል።

ከዚህ በኋላ ፍ/ቤቱ የአሁን መልስ ሰጭዎችን ምስክሮች ይግባኝ ባዮች በተቃዋሚነት በተገኙበት ሰምቷል። የመልስ ሰጭዎች ምስክሮች ያረጋገጡት ባጭሩ የሚከተለውን ነው። ሁለቱም ወገኖች ማለት መልስ ሰጭዎችና ይግባኝ ባዮች የአንድ አያት ልጆች ናቸው። በትውልድ የሚያገናኛቸውም አያት አዝነህ ይባላል። የአዝነህም ልጆች፡- አንደኛ እመት ይታገሱ፣ ሁለተኛ እመት አተኩን፣ ሶስተኛ እመት ወለተማርያም ይባላሉ። አቶ ይታገሱ አንደኛዋን መልስ ሰጭ እማሆይ ፈለቀችን፣ ሁለተኛ

ወን መልስ ሰጭ የሃምሣ አለቃ ጌታሁንን አባት አቶ ግዛውን፣ □ኾስተኛዋን መልስ ሰ□ የ□መት አረጋሽ መሸሻን እናት እመት ወርቂትን ይወልዳል፡፡ እመት ወለተማርያም ዘለሌ ሚካኤልን ትወልዳለች፡፡ እመት አስረሳሽ ዘመዴነህ ይግባኝ ባዮቹን፡- ማለት አቶ ሽዋንግዛው መርስዔን አቶ ሀብተማርጸም መርስዔን አቶ ይጥናጋሻው መርስዔን ትወልዳለች፡፡ በዚህ መሠረት መልስ ሰጭዎች የዘለሌ ሚካኤል እናት እህት እመት አትኩን አዘነህ ልጅ ናት፡፡ ይግባኝ ባዮች የአትኩን የልጅ ልጆች ናቸው፡፡ አቶ ዘመዴነህ የእመት አትኩን ባል ስለሆኑ የዘለሌ ሚካኤል እናት ለእመት ወለተማርያም □እህቷ ባል አማቿ አንጂ አባቷ አይደለም በማለት መስክረዋል፡፡

የአውራጃው ፍ/ቤት የመልስ ሰጭዎቹ ምስክሮች ቃል ከተሰማ በኋላ ይግባኝ ባዮች መከላከያ ማስረጃ ጸቀርቡ እንደሆነ ጠይቋቸው ይግባኝ ባዮቹ መከላከያ ማስረጃ አናቀርብም ብለዋል፡፡ ከዚህ በኋላ የአውራጃው ፍ/ቤት በጉዳዩ ላይ በሰፊው ተችቶ ሐምሌ 28 ቀን 1967 ዓ.ም. ውሳኔ ሰጥቷል፡፡ ውሳኔውም ለአቤቱታው መነሻ የሆነው ወደታች የሚቆጠር ዘር ስለሌለው የእመት ወለተማርያም አዘነህ ልጅ አቶ ዘለሌ ሚካኤል ውርስ ለ□ኛም ይገባል የሚል ሲሆን የመልስ ሰጭዎች ምስክሮች መልስ ሰጭዎችና የይግባኝ አያት ልጆች መሆናቸውን ይግባኝ ባዮቹ ደግሞ የእመት አትኩን ልጅ የአስረሳሽ ዘመዴነህ ልጆች መሆናቸውን □መት አትኩን አዘነህ የይ□□ኑ አዘነህ እና የወለተማርያም አዘነህ እህት መሆኗን ዘመዴነህ አትኩንን አግብቶ ለወለተማርያም አማች እንጂ አባት አለመሆኑን አረጋግጠዋል፡፡ ይግባኝ ባዮች ይህንን የሚያፈርስ መከላከያ እንዳላቸው ተጠይቀው አላቀረቡም፡፡ ስለዚህ ፍ/ቤቱ የመልስ ሰጭዎቹ አቤቱታና ያቀረቡትን ማስረጃ አምኖ ተቀብሎታል፡፡ በዚህም መሠረት መልስ ሰጭዎቹ – አንደኛ □ማሆጁ □ለቀች የአቶ ይታገሱ አዘነህ ልጅ መሆናቸውን፣ ሁለተኛ የሃምሳ አለቃ ጌታሁን ግዛው የአቶ ግዛው ይታገሱ ልጅ መሆኑን፣ ሶስተኛ እመት አረጋሽ መሸሻ □እመት ወርቂት ይታገሱ ልጅ መሆናቸውን፣ አቶ ዘለሌ ሚካኤል የአቶ ይታገሱ አዘነህ □ህት የእመት ወለተማርያም አዘነህ ልጅ በመሆናቸው በዝምድናው አወራረድ ደረጃ መልስ ሰጪዎች የዘለሌ ሚካኤል ወራሾች መሆናቸውን ብፍትሐ ብሔር ሕግ ቁጥር 826/840 መሠረት አውቀንላቸው ወስነናል የወራሽነት ማስረጃ ይሰጣቸው የሚል ነው፡፡

ይግባኝ ባዮች መልስ ሰጭዎችም ከይግባኝ ባዮች ጋር በእኩልነት የዘለሌ ሚካኤል ወራሾች ናቸው፡፡ የሁለቱም ወገኖች አያት አዘነህ እንጂ ዘመዴነህ አይደለም ዘመዴነህ የወለተማርያም አማች እንጂ አባት አይደለም በማለት የአውራጃው ፍ/ቤት ቁ.መ.ቁ 71/67 በሰጠው ከዚህ በላይ በተጠቀሰው ውሳኔ ላይ ይግባኝ አላሉም፡፡ ሁለቱም ወገኖች በመ.ቁ. 127/66 እና በመ.ቁ 71/66 የተሰጡትን ውሳኔዎችን ፈረንሳይ አገር ለሚገኘው ውርስ አጣሪ በማቅረባቸውና ውርስ አጣሪውም ውርሱን ለማ□□ም አስቸጋሪ ሁኔታ የተፈጠረበት በመሆኑ ነገሩ እንደገና ወደ አውራጃው ፍ/ቤት ተመልሶ የአውራጃው ፍ/ቤትም በመ.ቁ. 71/67 ሁለቱም እኩል ወራሾች ናቸው የሚል ውሳኔ በተሰጠ በአምስተኛ ዓመት ውርሱን ለማስፈፀም መፍትሔ ይሆናል በማለት የገመተውን አስተያየት በማሳደር ሚያዚያ 20 ቀን 1972 ዓ.ም. ትዕዛዝ ሰጥቷል፡፡ የትዕዛዙም ቃል በሁለቱም ወገኖች በኩል ያለው የወራሽነት ማስረጃ እንደተጠበቀ ሆኖ በመጀመሪያ በመ.ቁ. 71/66 ወራሽነታቸውን ያረጋገጡት የአሁኑ ይግባኝ ባዮች የዘለሌ ሚካኤልን ሀብት የተረከቡ፡፡ ይግባኝ ባዮች ባለ ይዞታ ከሆኑ በኋላ የአሁኑ መልስ ሰጪውዎች በወራሽነት ማስረጃቸው መሠረት የውርስ ድርሻቸውን ከይግባኝ ባዮች ይጠይቁ የሚል ነው፡፡

በውርሱ ጥያቄ ላይ በሁለቱ ወገኖች መካከል የተነሳው ክርክር ባጭሩ ከዚህ በላይ የተገለጠው ሲሆን

ይግባኝ ሰሚው ፍ/ቤትም የመዝገቡን ግልባጭና ሁለቱ ወገኖች በጽሑፍ ያቀረቡትን ክርክር መርምሯል በቃልም እየተጠየቁ አብራርተዋል፡፡ ይህንኑ መሠረተ በማድረግም ለጉዳዩ የሚከተለውን ውሳኔ ሰጥተናል፡፡

<u>ውሣኔ</u>

የአውራጃው ፍ/ቤት የሁለቱንንም ወገኖች እኩል ወረሽነት አረጋግጦ ከወሰነ በኋላ በውርሱ አፈጻጸም አጋጥሟል ለተባለው ችግር መፍተሔ ይሆናል በማለት ይግባኝ በዮች በቅድሚያ ጠቅላላውን የውርስ ሀበት ከተቀበሉ በኋላ መልስ ሰጭዎች ድርሻቸውን ከይግባኝ ባዮች ይጠይቁ በማለት የሰጠው ትዕዛዝ በውርሱ አፈጻጸም አጋጥሟል የተባለውን ችግር የሚያስ□□□ መ□ትሔ ስለመሆኑ አንድም አጥጋቢ ምክንያት ካለማቅረቡም በላይ የመልስ ሰጭዎችን የወራሽነት መብት የሚቀንስ በሕግ የማይደገፍ ትዕዛዝ በመሆኑ በፍትሐ ብሔር ሥነ ሥርዓት ቁጥር 348(1) መሠረት ከፍተኛ□ ፍ/ቤት ትዕዛዙን የሻረበትን ውሳኔ በሚከተለው ሁኔታ እንደተብራራው አጽንተን የይግባኝ ባዮችን ጥያቄ አጽድቀናል፡፡

ለ□ህ ሁሉ ውጣ ወረድ ምክንያት የሆነውን ክርክር እንደተመለከትነው ይግባኝ ባዮች የዘለሌ ሚካኤል ወራሾች □ኛ ነን በማለት በአውራጃው ፍ/ቤት ጥያቄ አቅርበው መልስ ሰጭዎች ለመቃ□ም ዕድል ከማግኘታቸው በፊት የወራሾቹን የትውልድ ሐረግ አስተካክለው በማያውቁ ምስክሮች አስመስክረው በፍትሐ ብሔር መ.ቁ. 172/66 ሚያዚያ 21 1972 ዓ.ም. የወራሽነት የምስክር ወረቀት እንደተቀበሉ መልስ ሰጭዎች እኛም ወራሾች ነን ይግባኝ ባዮች ብቻ ነን ወራሾች በማለት የወራሽነት የምስክር ወረቀት የተቀበሉት ከሕግ ወጭ ነውና የ□ኛም ወራሽነት □□ቆ የምስክር ወረቀት ይሰጠን በማለት በመቃወሚያ ጥያቄ አቅርበው ይግባኝ ባዮችም ቀርበው ተከራክረው መልስ ሰጭዎች ያስመሰከሯቸው ምስክሮች ሁለቱም ወገኖች ከዘለሌ ሚካኤል ጋር ያላቸውን ዝምድና አስተካክለው የሚያውቁ በመ.ቁ. 172/66 ይግባኝ ባዮች ያስመሰከሯቸው ምስክሮች ቃል ስሕተት ያለበት መሆኑን አራጋግጠው መስክሩ፡፡ ይግባኝ ባዮች ይህንን የሚያፈርስ አንድም ማስረጃ ማቅረብ ባለመቻላቸው የአውራጃው ፍ/ቤት መልስ ሰጭዎችና የይግባኝ ባዮች እኩል □ለሌ ሚካኤል ወራሾች መሆናቸውን እኩል ወራሾች የሆኑትም የሁለቱም አያት አዝነህ በመሆኑ አዝነህ የመልስ ሰጭዎችን አያት ይታገሱን፤ የይግባኝ ባዮችን አያት አትኩንን፤ እና የዘለሌ ሚካኤልን እናት ወለተማርምያን የሚወልድ በመሆኑ፣ ይግባኝ ባዮች ዘመዱነህ የወለተ ማርያም አባት ነው የሚሉት ስህተት መሆኑን፣ ዘመዱነህ የወለተ ማርያም እህት የአትኩን ባል የይግባኝ ባዮች እናት አስረሳሽ አባት መሆኑን አረጋግጦ ይግባኝ ባዮችና መልስ ሰጭዎች የዘለሌ ሚካኤል እኩል ወራሾች መሆናቸውን በመ.ቁ 71/67 ሐምሌ 28 ቀን 1967 ዓ/ም ውሰኗል፡፡ ይህ ውሳኔ ይግባኝ ባዮች እንደ ብቸኛ □ሪሾች የወራሽነት የምስክር ወረቀት ያገኙበት በመ.ቁ 127/66 ሚያዚያ 21 ቀን 1966 የተሰጠውን ውሳኔ የሚሰርዝ ነው፡፡ የአውራጃው ፍርድ ቤት ይህንን በመ.ቁ. 172/66 ለይግባኝ ባዮች የተሰጠውን የወራሽነት የምስክር ወረቀት በግልጽ ሰርዞ በመ.ቁ.71/67 በሰጠው ውሳኔ መሠረት ለይግባኝ ባዮችና ለመልስ ሰጭዎች በአንድነት የወራሽነት የምስክር ወረቀት እንዲሰጥ ማዘዝ ነበረበት፡፡ በውርሱ አፈጻጸም ችግር የተፈጠረው ይህንን ባለማድረጉ ነው፡፡ ይግባኝ ባዮች ግን በ.መ.ቁ 172/66 ጸሰወሰኑት በመ.ቁ. 71/67 በተሰጠው ውሳኔ መለወጡን ወይም መሻሻሉን ስለሚያውቁ

በዚያው መሠረት ቢያስፈጽሙ ይህንን ተጨማሪ ውጣ ውረድ ባላስከተለ ነበር፡፡

ከዚህ በላይ እንደተገለጸው ስለ ይግባኝ ባዮችና ስለ መልስ ሰጭዎች እኩል ወራሽነት አውራጃ ፍ/ቤት በመ.ቁ 71/67 ሐምሌ 18 ቀን 1967 የተሰጠው ውሳኔ የዘለሌ ሚካኤል ወራሾችን በሚመለከት ይግባኝ ያልተባለበት የመጨረሻ ውሳኔ ነው፡፡ ስለዚህ ለውርሱ አፈጻጸም ከማስቀመጥ በቀር በዚህ ነገር □ቅላይ ፍ/ቤት የሚሰጠው አዲስ ውሳኔ አይኖርም፡፡

የአውራጃ ፍ/ቤት በመ/ቁ 71/67 ይግባኝ ባዮችና መልስ ሰጭዎች የዘለሌ ሚካኤል ወራሾች ናቸው በማለት ሐምሌ 18 ቀን 129/67 ዓ/ም በተሰጠው ውሳኔ ስለተተካ የአሁን ይግባኝ እንደ ብቸኛ □ራሽ የወራሽነት የምስክር ወረቀት የተቀበሉትበት መ.ቁ 172/66 ሚያዚያ 21 ቀን 1966 ዓ.ም. የተሰ□□ ውሳኔ ቀሪ ሆኗል፡፡

ይግባኝ ባዮችንና መልስ ሰጭዎችን ከዘለሌ ሚካኤል ጋር በዝምድና የማያገናኛቸው የሦስቱም ወገኖች አያት የሆነውን አዝህ ነው፡፡ አዝህ የይግባኝ ባዮቹን አያት የእናታቸውን እናት አትኩን፣ ከመልስ ሰጭዎች ለአንዱ አያት ለሁለቱ ደግሞ አባት የሆነውን ይታገሱን፣ እና የዘለሌን እናት ወለተማርያምን ስለሚወልድ የይግበኝ ባዮች እናት አስረሰሽ የዘለሌ ሚካኤል የአክስቱ የልጅ ልጅ ናቸው፡፡ መልስ ሰጭዎች ዘለሌ ሚካኤል የእናቱ ወንድም የይታገሱ ልጆችና የልጅ ልጆች ናቸው፡፡

ሚቹ ዘለሌ ሚካኤል የመጀመሪ ደረጃ ወራሽ ልጅ ወይም የልጅ ልጅ ሳይተው ስለሞተ በፍትሐ ብሔር ሕግ በቁጥር 845 መሠረት በሦስተኛ ደረጃ ወራሾች የሆኑት አያቶችም ባለመኖራቸው በምትካቸው ልጆቻቸውና የልጅ ልጆቻቸው ማለትም የዘለሌ ሚካኤል አክስትና አጎት ወጁም በምትክነት የነርሱ ልጆችና የልጅ ልጆች የወርሳሉ፡፡ ይግባኝ ባዮች የዘለሌ ሚካኤል የእናት እህት ልጆችና የልጅ ልጆች መልስ ሰጭዎች የዘለሌ ሚካኤል የእናት ወንድም ልጅና የልጅ ልጆች በመሆናቸው ሕጋዊ ወራሾች ናቸው የተባሉት በዚህ ነው፡፡ ዘለሌ ሚካኤል በአባቱ በኩል ለሕጋዊ ወራሽነት የሚበቁ ዘመዶች ስላልተገኙ በፍትሐ ብሔር ሕግ በቁጥር 844 መሠረት ለአባቱ ወገኖች ጁገባ የነበረው ውርስ በሟሉ ተ□ቅልሎ በእናቱ በኩል ላሉት ወራሾች ይሰጣል፡፡ ይግባኝ ባዮችና መልስ ሰጭዎች ውርሱን በሙሉ ያገኙሉ የተባለው በዚህ ምክንያት ነው፡፡

ከዚህ በላይ በተገለጠው መሠረት ይግባኝ ባዮችና መልስ ሰጭዎች የዘለሌ ሚካኤል እኩል ወራሾች ስለሆኑ፡- ይግባኝ ባዮች 1. ሽዋንግዛው መርስዔ 2. አቶ ሀብተማርያም መርስዔ 3. አቶ ይጥናጋሻው መርስዔ የ□ለሌ ሚካኤልን ውርስ ሀብት ግማሽ ይቀበላሉ፡፡ የወራሽነታቸውን ማረጋገጫ ውሳኔ ለሚለከተው ክፍል እንዲያስተላልፍቸው ይግባኝ ባዮችና መልስ ሰጭዎች ውሳኔውን ትክክል □ልባ□ ከሕግና ፍትሕ ሚኒስቴር ይወስዱ፡፡ ከይግባኝ ባዮችና ከመልስ ሰጭዎች አንዳንዶቹ ይህ የውርስ ክርክር ከተጀመረ በኋላ ሞተዋል ስለተባለ በምትክነት ወራሾቻቸው የሆኑት በተጨማሪ በፍርድ ቤት ያስወሰኑት ወራሽነት ማረጋገጫ ለሚመለከተው ክፍል ያቅርቡ፡፡ ሁለቱም ወገኖች ኪሣራና ወጭ ይቻቻሉ፡፡

ይህ ውሣኔ በጠቅላይ ፍርድ ቤት በፓናል ችሎት አዲስ አበባ በኢትዮጵያ በሙሉ ድምጽ በዛሬው ሚያዚያ 18 ቀን 1977 ዓ.ም. ተሰጠ፡፡

The law prescribes the fulfillment of very stringent formalities when one makes a will. The reason is: a will becomes effective after the death of the testator. The testator is not in a position to defend his/her positions if someone makes some fraudulent act against the will. To narrow the possibility of making any fraudulent act against the will, the law lays down very strict formalities. In many instances the courts are so serious in executing the provisions of the law and they rarely validate a will when it fails to fulfill one of the important formal requirements.

Exercise
Can a deaf person take part in the making of a public will as a witness? What about the blind? State your reasons.

A deaf person can take part in a will as a witness if he/she is literate. He/she can read the contents of the will just after it is drawn up. If he/she is unable to read the contents of the will, his/her presence serves no useful purpose as he/she has no mechanism of knowing the contents of the will. Blind people may take part in a will as witnesses so long as they hear when the contents of the will are read. The only thing expected of them is to understand the language in which the will is drawn up.

The law in Art 882 prescribes that the number of witnesses could be reduced to two if one of them is a court registrar, a notary or a judge (See the Amharic version) in his/her official capacity. So a judge, or a notary or a court registrar represents three ordinary witnesses, if such person acts as a witness in his/her official capacity.

II) Holograph will[21]

Holograph will is a will that is totally made by the testator himself/herself in the absence of witnesses. Only literate persons may make a holograph will. It is the testator that writes a holograph will totally and if there is an additional word (even if it is a single word) written by the hand of another person, that is a sufficient cause to invalidate the will wholly. The

[21] Articles 884 to 886, Civil Code

testator must explicitly indicate, in the holograph will, that it is a will. Absence of such an indication is also a ground for the invalidation of the will. As a rule, the testator himself/herself should fully write a holograph will. If it is a handwritten will, it is possible to know for sure that it is written by the testator. Everyone has his/her own style of writing. A machine-written document has no individual style and it is not possible to identify who has written it. Therefore, the law requires a handwritten indication of the fact that the testator writes the will using a machine. The handwritten indication should be included on every page of the will. This is to confirm that the machine written holograph will has been really made by the testator.

Art 886 of the Civil Code advises the testator not to simply reproduce graphic symbols without understanding their meaning.

Exercise
How do you understand the contents of Art 886?

Someone may write a will using his/her handwriting style. This may happen without understanding the meaning of what has been written in the document containing the will. For instance, you understand English and Afan Oromo. However, you may not necessarily understand French or Sidama language. But you can copy a document that is written in French or Sidama language, as these languages use the same script (the Latin script). If you do so, it is said that you have reproduced graphic symbols without understanding their meaning. In such circumstances, the one who has produced the graphic symbols is not a real testator. Because such person simply copied a will in a language that he/she does not understand.

With respect to Art 888, the will refers to another document. You cannot understand the provisions of the will without referring to another document. When the will refers to another document or when it is impossible or difficult to understand the will without referring to another document, such a document must have been written and signed by the testator.

Example

Assume that the testator had acknowledged his child born outside marriage or he had written a letter to child's mother recognizing that the child was his. If the will says, for instance:

"I hereby bequeath Birr 25,000 to my child whom I acknowledged or recognized sometime ago".

In such cases, we cannot understand the will, unless we supplement it with the acknowledgement document or letter. The law under Art 888 requires that such a document or letter should be written and signed by the testator.

Exercise

Can a blind person make a holograph will by using a brail machine? Explain!

III) Oral will[22]

Oral will is a will made verbally to two witnesses. As you might have understood from Art 892 of the Civil Code, the testator does not make an oral will under normal circumstances. He/she makes such a will when he/she feels that he/she is going to die within short period of time, particularly after accidents, shocks or similar situations. It can be said that oral will is not a proper will. The testator can make only restricted testamentary dispositions through an oral will. That is, the testator cannot make any order of his wish by way of an oral will. The law has listed down the contents of an oral will. The testator cannot add other testamentary dispositions, which are not included in Art 893.

Exercise

Comment the following oral will made by Ato Asrat!

[22] Articles 892 to 894, Civil Code

I Ato Asrat Woldu, hereby make the following oral will as I consider that I may die soon.

1. I give half of my whole estate to my beloved daughter Derartu.
2. My other children should take the rest of my property in equal proportion.
3. To my spiritual father, I bequest Birr 3000.
4. My funeral should take place at the monastery of Debre Libanos.
5. I appoint W/ro Ayelech as a guardian for my minor child Bikila.

The law allows the testator to make several wills during his/her lifetime. This is also the manifestation of his right to make, revoke or alter a will at any time. The contents of different wills made by the testator may or may not contradict each other. If the provisions of various wills contradict each other and cannot be enforced together the latest will shall prevail. (See Art 895)

B. PROOF OF WILL

It is a commonplace practice that there are lots of controvercies on the validity and existence of proof. The one who claims a right in a will has to prove one or both of the following two things. First, he/she has to prove the existence of the will. That is, he/she has to show a will made by the testator. Second, he/she has to prove the contents of a will. In other words, the claimant has to show the fact that he/she is beneficiary of the will.

From Art 897, one can see the following important points:

a) The existence and contents of a will (whether a public or holograph will) shall be proved only by producing the original will itself or the copy of the original will, certified to be true by the court registrar. The court registrar could issue the copy of the original will, if he/she had received the original will to be deposited in his/her archives. Otherwise, the claimant shall only present the original will.

b) To benefit from the will, approval by presenting the will itself is obligatory and no any other means of evidence can be possible. For example, witnesses cannot prove the contents of a public will.

c) If someone destroys or causes the destruction of a will by his/her fault or negligence, such a person may be obliged to pay compensation to the beneficiary of the will. To get compensation from the person who has destroyed or caused the destruction of the will by his/her fault or negligence, the beneficiary can prove the fact that he/she is a beneficiary by any means of evidence. For instance, he/she can prove that he/she is beneficiary of the will by producing witnesses.

Exercise
The Ethiopian law of successions does not allow the contents of a will to be proved by some means of evidence such as videoed wills, etc. Why do you think does the law prohibit such means of evidence for the purpose of proving the contents of a will?

1.3.3 Revocation and lapse of wills

A. REVOCATION OF WILLS[23]

A will is always revocable, until the death of the testator. A testator may make an agreement with a beneficiary not to revoke the will. However, sometimes elderly people who have no descendants of their own may promise to leave some property to a person, on condition that the latter nurses the former. This promise cannot be enforced as the will is still able to be revoked.

There are various ways in which a will may be voluntarily revoked:

a. By another will.

[23] Articles 898 to 901, Civil Code

b. By an express intention to revoke, made in the same manner as a will, i.e., this must comply with the formalities set out by the law.

c. By destruction.

d. By alienation of the thing bequeathed

a. Another will

The testator may, in his will include works like: 'I hereby revoke all former wills and testaments made by me'. The testator may revoke specific clauses of a will, while leaving the rest of it intact. As has been stated above, a new will usually impliedly revokes a previous will. But sometimes, it may be disputable whether it was the intention to supplement the previous will. This may be the case if the two wills are not inconsistent. The second will may thus operate as a kind of codicil. A codicil is a formal document which varies, but does not revoke, a will.

b. An intention to revoke

A will may be revoked by any other written instrument, provided it is executed with the same formalities as are required for a will. For instance, the testator may revoke wholly or some f the provisons of a previously made will not by a new will but by a document made by following similar formalities. Even if such document is not a will it has a power to revoke a valid will.

d) Destruction

A will may be revoked 'by the burning, tearing or otherwise destroying . . . with the intention of revoking the same'. Some formal act of destruction seems to be necessary, although the whole of the will need not be destroyed. Merely throwing the will in a waste-paper basket is not sufficient, even if the testator indicates to a third person that he/she considers it to be an act of revocation.

Exercise

1. If the testator inadvertently destroys the document in which the will is made, can that be taken as revocation of the will? Give reasons!
2. If the testator is in a condition that he/she has no capacity to make a will, can he/she revoke a will while in same condition? Why/Why not?

e) Alienation of the thing bequeathed

By alienating the thing bequeathed, the testator can revoke the will he/she has made. For instance, in his/her will made last year, assume he/she gave a mule to his/her friend. Now, if the testator sells or donates the mule to some other person, it means that he/she has revoked his/her will. You must note here that the thing bequeathed may come back to the possession of the testator at a later date. However, that does not cause the revival of the will which was already revoked. (See Art 900)

B. LAPSE OF WILLS[24]

As discussed above, it is the testator by his/her wish who revokes the will he/she has made. Lapse of will takes place by the operation of the law. There are a number of reasons for the revocation of a will by the operation of the law. The reasons depend on the type of the will. Therefore, various types of wills have various reasons for their lapse.

a) Failure to deposit a holograph will

According to Art 903 of the Civil Code, a holograph will shall lapse where it is not deposited with a notary or in a court registry within seven years since it has been made. No such imposition exists for a public will.

Exercise

Why do think does the law impose lapse for holograph will

[24] Articles 902 to 908

while there is no lapse for a public will for reason that it is not deposited with a notary or court registry?

b) Birth of child

Another reason for the lapse of a will is birth of a child. If a child is born after a will is made (whether a public or a holograph will) such a will, shall lapse if the newly born child accepts the succession.

From Art 905 of the Civil Code, you may observe the following points:

- Although the law provides that the will shall lapse if a child is born to the testator after making such a will, there is a situation where such will could be maintained totally or partially by the court. The court may maintain the will irrespective of the birth of the child, if it had been of the opinion that the testator would have maintained the will despite the birth of the child. For instance, if the testator made a will while his wife was expecting a child, it would be clear that the testator had intended to maintain the legacies ordered in the provisions of the will even if a child was going to be born to him. A discretionary power is given to the court as to the maintaining of the will as total or partial. The court may arrive at a decision on this matter after having seen the prevailing circumstances.

- When the will, which the testator makes before the birth of the child, is active either wholly or partially, the newly born child should receive, at least, three–fourths of the share he would receive in the intestate succession. That is, 75% of the value which he would be entitled in the intestate succession.

c) Dissolution of marriage

According to Article 906 of the Civil Code, legacies made in favor of a spouse of the testator shall lapse where the marriage of the testator with that spouse is dissolved through divorce or court order when the marriage is concluded without observing the conditions for the

validity of marriage. However, such a legacy cannot lapse where the marriage is dissolved by death.

When a husband or a wife makes a will to the benefit of his/her spouse, it is believed that the testator has made the will with the expectation taht the marriage would continue until his/her death. Therefore, the testator may give a considerable amount of personal property to his/her spouse with the expectation that the marriage would persist. If the marriage dissolves through divorce, the reason that has caused the making of the will to the benefit of the spouse is already lost. Unless such a will lapses, it may seriously affect the interests of the relatives of the testator.

d) Death, unworthiness, or renunciation by a legatee

Art 907 lays down the rule of lapse of legacies. According to Art 907, three factors cause the lapse of legacies.

i. When the legatee dies before the testator. In this case, the legatee has no capacity to succeed the testator since he does not fulfill the requirement of survivorship.

ii. When the legatee cannot succeed the testator. This has a relation with unworthiness. When a legatee is condemned as unworthy, anything destined to his benefit shall lapse.

iii. When the legatee does not want to take the legacy. This has something to do with the renunciation of the legatee to the succession of the testator. The law passes the legacy when anyone renounces the succession of the testator, as it does not consider him as the legatee of the testator.

Although we say that the legacy shall lapse where the legatee dies before the testator, there is a possibility that representation could take place. As you remember from your previous studies, only children or descendants of a person can represent him/her.

According to Art 908(a), the legatee who died before the testator would be represented if he/she is a legatee by universal title (or a universal legatee).

There is a very narrow chance for the existence of representation in the case where the legatee is a legatee by singular title (or a singular legatee). According to Art 908 (b), where the singular legatee25 dies before the testator, the descendants of the singular legatee shall represent him only when the legacy destined to such singular legatee devolves upon the state as a result of failure of the singular legatee to receive the legacy. According to the rules of intestate succession, the hereditary estate shall devolve upon the state when relatives up to fourth relationship do not survive the deceased. In the above situation, the rules of the intestate succession shall regulate the singular legacy, because of the prior death of the singular legatee. If a relative survived the testator (from the nearest relative — a child — up to a far apart relative at the fourth relationship), such a relative would receive the legacy. In the absence of any relative up to the fourth relationship, the legacy shall devolve upon the state. Instead of devolving the property upon the state, the law favors the representatives of the predeceased legatee to inherit the deceased by way of representation.

Exercise
Ato Wagaw made a public will 6 months before his death. One of the provisions of the will gave 5000 Birr to his ex-wife, W/ro Hilina. Their marriage was dissolved by divorce 5 years ago. The new wife and some of the relatives of Ato Worku challenged the will on the ground that a provision made to the benefit of a divorced wife shall lapse and she has no right to succeed the deceased. Can Hilina succeed Ato Wagaw?

1.3.4 Contents and interpretation of wills

A. CONTENTS OF WILLS

[25] Discussion on universal and singular legatee shall be made under Article 912 below.

The testator can determine the contents a will he/she makes freely so long as the contents of his/her will do not violate the law or so long as they are not contrary to public moral. Art 909 lists down the contents of a will. But this should not be seen as an exhaustive list. It only gives us illustration. These enumerations may guide the testator. However, it does not mean that he/she has no power to declare dispositions that are not listed in Art 909. You can infer this from Art 909 (e). The only limitation with respect to the contents of a will is, the testator cannot declare in his will anything illegal and/or immoral.

The general rules of interpretation of statutes may be helpful also to interpret the provisions of a will. When the provisions of a will are doubtful, we may need to interpret them. The intention of the testator is a key element as far as interpretation of a will is concerned. We, therefore, have to seek the intention of the testator. The will itself may reveal this or it may be obtained from other circumstantial evidence. You should note here that getting the intention of the testator is not an easy task. You should also note that the motive of seeking the intention of the testator must not drive us to interpret the will, if the provisions of the will are clear.

B.INTERPRETATION OF WILLS

In Ethiopia, there is no obligation for a will to be drafted or executed by a professional person. It is thus not uncommon for wills to be made without professional advice. 'Home-made' wills may use colloquial and unclear language. But even where a will is prepared by a professional, ambiguities and uncertainties can result.

Courts, especially the Supreme Court may construe (or interpret) a will. Words in a will, as in any other document, are construed in their context. The essential task of the court is to give effect to the intention of the testator. But this intention is to be deduced from the words used. It is not permissible to re-write the will simply because the court suspects that the testator's words did not really specify his/her real intentions. In order to understand the language employed by the testator, however, it is possible to 'sit in his/her armchair'.

The general rule is that words must be construed in their usual, or literal, sense. But this is subject to the 'special vocabulary' of the testator. And it also must yield to the special

circumstances of the testator. Suppose a testator left a legacy to 'my wife'. He was not lawfully married, but lived with a woman in an irregular union, whom he was accustomed to call 'wife'. The lady would surely take the legacy, despite the fact that the word 'wife' was a misuse of the language.

There are also well-developed 'canons' or rules of statutory interpretation, which assist a court in construing laws made by the Parliament. As a general rule, these canons may be applied to the construction of any document, including a will. But, since the ordinary testator is unlikely to have the same drafting skills as a Parliamentary draftsman, the courts must use these canons with more care when they apply them to interpret wills. (See Articles 910 and 911)

I) Legacies by universal title

Sometimes it is difficult to distinguish between universal legacies and singular legacies. The law itself does not clearly give the meaning these terms. However, it is believed that the following explanation will shed light on the meanings of these terms. You may have recognized from your reading of Art 912 (1) the following four aspects of universal legacies.

- When the testator gives his/her whole estate to one person, the property given to the beneficiary is a universal legacy and the beneficiary is a universal legatee.
- When the testator gives his/her whole estate to two or more persons, the whole estate given to these persons is a universal legacy and such persons are universal legatees.
- When the testator gives a portion of his/her estate to one person, such a portion of the hereditary estate is a universal legacy and the beneficiary of the portion of the hereditary estate is a universal legatee.

- When the testator gives a portion of his/her estate to two or more persons, such portion of the hereditary estate is a universal legacy and the persons appointed to receive such a portion are said to be universal legatees.

From the above points one can see that a universal legatee is the one who is called to the succession to receive a certain portion of the hereditary estate, not a particular thing from the succession. Therefore, a universal legatee does not know what thing he/she is going to receive from the succession.

II) Legacies by singular title

What is a singular and legacy and who is a singular legatee? According to Art 912(2), any other disposition (that is, outside the ones discussed above) is a singular legacy. The general tendency of the law toward singular legacies is that, singular legacies are minor testamentary dispositions usually given to non–relatives. When a single item, such as a bicycle, a television, an overcoat, a watch, a radio, etc., is given to someone, the property is a singular legacy and the one who is in a position to receive such a property in kind is a singular legatee. A universal legatee, in majority of the cases, does not know what thing he is going to receive before partition of the succession.

Fitawrari Anjullo, in his testamentary disposition made the following persons beneficiaries.

1. My elder son Elias shall take 40% of my estate and in addition to the 40%; he shall take my wristwatch.
2. My little daughter Mary shall take 40% of my estate.
3. Let the mule be given to my spiritual father Aba Mathewos.
4. The maidservant who has served me for the past 25 years shall take 2000 Birr.
5. An environmental organization called Green Hill Movement shall take 10% of my hereditary estate.

Elias, Mary and Green Hill Movement are universal legatees since they are allowed to receive the hereditary estate in a certain proportion. Besides, Elias is a singular legatee since he is given a wristwatch in addition to the 40% portion of the hereditary estate. That is, Elias has two capacities in this will. Aba Mathewos, who is to receive a mule, is also a

singular legatee. The last singular legatee is the maidservant, who is allowed to receive 2000 Birr.

A legacy may be given to the legatee in full ownership or only the bare ownership right may be given to the legatee. In the latter case, the legatee shall be entitled to use or derive the fruit from the legacy without having the right to alienate (sell or donate) it to third persons.

III) Legacies and rules of partition

The contents of Art 913 may be difficult to understand. The following example shall clarify the concept in Art 913.

Example

Assume that Ato Habtamu made the following will by fulfilling all the legal requirements:

"My elder daughter Ayantu shall take the ISUZU pickup car."

Assume also that this is the whole content of the will of Ato Habtamu. Let us consider that Ato Habtamu has other two children (other than Ayantu). This will does not give to Ayantu the pickup car, in addition to what she partakes with her siblings. Rather, the will shall be interpreted that the pickup car shall fall in the portion allocated to Ayantu. The children of Ato Habtamu have equal portions in the successions as there are no other dispositions in the will. Other children, since they are universal legatees, do not know what a specific property they are going to receive. Only Ayantu knows that the car falls in her portion.

A problem may arise here. That is, the value of the ISUZU car may be greater than other portion of the inheritance. If Ayantu is in need of the pickup car, she can set off the excess amount by paying sums of money to the co–heirs. For instance, if the total hereditary estate is about Birr 600, 000, including the pickup car, each of

the co–heirs is entitled to receive Birr 200,000. If the value of the car is Birr 225,000, Ayantu should equalize her share with others by paying them back Birr 25,000.

You should note here that the testator could give an exclusive right to one of his/her heirs, on a certain property, in addition to what such an heir shares with other co–heirs. However, if this is the intention of the testator, he/she should express it clearly.

IV) Effects of universal legacies

When a person is in a position to receive a universal legacy, he/she becomes a universal legatee. The appointment of a universal legatee does not follow any special formality. That is, a public or holograph will that normally fulfills the formal requirements could appoint a universal legatee. No special will with special formalities is required to appoint a universal legatee (Art. 914).

When someone is appointed as a universal legatee, he/she is assimilated to an heir–at–law. When it is said that a universal legatee is assimilated to an heir–at–law, it means that a universal legatee who is a non–heir (such as a friend, a servant, a spiritual father, a spouse, etc.) shall be treated in all respects in relation to the succession in the same manner as the legal heirs of the testator. The rights and responsibilities of such universal legatees will be similar to that of the legal heir to the testator.

1.3.5 Conditional Legacies[26]

The testator may make his succession to depend on certain conditions. The conditions are of two types. In the words of the Code, they are suspensive and resolutive conditions. We also call suspensive conditions as condition precedent and resolutive conditions as condition subsequent.

[26] Articles 916 to 919, Civil Code

Suspensive condition — In the case of suspensive condition or condition precedent, the legatee shall wait until a certain time lapses or until a certain circumstance occurs. Therefore, the legatee will not be entitled to receive the bequest until the fulfillment of the specified condition. For example, the testator may order a legacy in favor of Mahlet. However, Mahlet may be in a position to receive the property upon the expiry of five years and until that time, the property would remain in the hands of specifically designated persons. The testator may even say that, Mahlet shall receive the property when someone dies. Hence, the legatee shall be entitled to take the property upon death of that specified person.

Resolutive condition — Resolutive condition or condition subsequent is a situation where the legatee brings back what he received from the succession when a certain condition is fulfilled. That is, in the case of resolutive condition, the legatee is automatically entitled to receive the bequest, unlike the case of suspensive condition. For instance, the testator may order Brook to receive some property until a certain circumstance occurs. Brook returns the property upon the occurrence of the mentioned circumstance. For example, the testator may not be happy with the flirting of his daughter with Zelalem. (Zelalem is member of a gang of robbers). The testator may order a conditional legacy to stop his daughter from marrying such a person. He may say in his will that, "my daughter shall receive four cows so long as she does not marry Zelalem". In this case, the testator's daughter can enjoy the bequest until she decides to marry Zelalem. Whenever she marries Zelalem, she shall restitute what she received from the succession.

You may have understood from Art 917 that the testator may impose a condition of marrying or not marrying of a specific person. However, the testator has no right of imposing, in general terms, not marrying or not remarrying. The testator cannot even impose on the legatee a condition such as not marrying or not remarrying a person who belongs to a certain race, nationality, member of a religious group, etc.

All persons who have attained the marriageable age have a constitutionally guaranteed right to marry and found a family. The FDRE Constitution in Article 34 (1) states that:

"Men and Women without any distinction as to race, nation, nationality or religion, who have attained marriageable age defined by law, have the right to marry and found a family…"

The imposition of marrying or not marrying a specific person does not affect this constitutional right. Nevertheless, the condition that imposes, in general terms, not to marry or not to remarry infringes the rights of persons. However, the testator may impose a condition of not marrying or not remarrying (See the Amharic version of the Civil Code), by giving to the legatee a usufruct right on a certain property or by giving him/her a certain amount of pension. The condition of not to marry seems to affect the rights of individuals. Nevertheless, the condition of not to remarry is usually practiced. For instance, the testator may order his wife not to remarry by giving her a usufruct right on a certain property or by giving her a pension in the form of annuity or any other appropriate form.

1.3.6 Charges

Charge is the order of a testator against his/her heirs and/or legatees in which he/she binds them to take some responsibility or take care of one or more persons. However, the testator cannot bind the heirs and/or legatees to give or to do something to specified persons more than the value of the legacy.

Example

The testator may order that Ato Chala would take his (the testator's) taxicab whose value is 60,000 birr. The testator also orders that Ato Chala shall make a monthly payment to his old mother W/ro Wude 500 Birr. Ato Chala is obliged to make the payment to W/ro Wude up to the extent of the value of the taxicab. In case Ato Chala fails to pay the said amount, W/ro Wude has the right to claim payment. But W/ro Wude cannot demand the dissolution of the legacy made to Ato Chala unless the testator orders this clearly in his/her will.

For more details read Civil Code Articles 920 — 923

1.3.8 *Substitutio vulgaris*

Substitutio vulgaris was very common in Roman wills. An alternative heir was appointed in the event that the person instituted as the primary heir failed to become the heir (e.g. because he/she died before the testator or refused the inheritance). According to the Ethiopian Civil Code, Substitutio vulgaris is the situation where the testator orders another person to take the legacy in cases where the appointed universal or singular legatee fails to appear and receive what the testator allocates to him/her. The causes for the disappearance of the appointed legatee could vary from case to case. (See Article 928).

1.3.8 Entails

The concept similar to entail existed in Roman law. It was also common in many parts of Europe. It is a restriction of inheritance to a limited class of descendants for at least several generations. It is mainly linked with real estate. The object of entail is to preserve large estates in land from the disintegration that is caused by equal inheritance by all the heirs and by the ordinary right of free alienation (disposal) of property interests. Many changes have been developed regarding entails in the law of successions. In some countries, (E.g. England) the law permits the holder of entailed property (either real or personal) to dispose of it by deed; otherwise the entail persists. In the United States for the most part entails are either altogether prohibited or limited to a single generation.

In Ethiopia, the testator has the power to order that his/her heir and/or his/her legatee shall hand over the legacy to one or more persons after such heir and/or legatee has benefited with the legacy. The testator may order the heir and/or legatee to transfer the legacy (or even portion of it) to the specified person(s) upon the following conditions:

- On the expiry of a certain period, for example, after 5 years from the opening of the succession;
- Upon the death of the heir or the legatee; and,
- On the accomplishment of a certain condition, for instance, when the testator's little daughter gets married.

Entail is not widely practiced in the life of the society. Therefore, instead of discussing it, in detail, the following important points will be provided on the rest of the articles dealing with entail.

- Once the legacy is transferred into the hands of the holder entail, the holder entail needs to expect to have only a usufruct right on the legacy. Since he/she is not a true successor, the law does not vest him with powers of an owner of the property. Therefore, the holder entail cannot alienate (sell or donate) the property to third parties. Moreover, the holder should not have any attachment with such property for his/her debts (Art. 931 (1)).
- Courts are generally empowered to order the alienation or transfer of a property or its attachment, if such order is justifiable. However, in no case can the court authorize the alienation or attachment of the property in the hands of the holder entail. Because, the holder entail is obliged to utilize the property by taking all the necessary care not to cause a serious damage to the property and finally hand it over to the true successor upon the opening of the substitution (Art 932).
- The testator has the right to regulate only until the property is transferred to the person who is called to succeed. Once the property is transferred to the person who is called to succeed the testator loses the right to pass any order concerning the property (Art 934).
- In the case where the holder entail refuses to take the legacy or if he/she loses capacity to succeed, for instance, by being unworthy, the person called to succeed shall be called to take the legacy. However, the testator may vary such by an otherwise order (Art 935).
- With respect to the contents of Art 936, there is lack of clarity. Moreover, there is a discrepancy between the Amharic and English versions of Art 936(2). Generally, it seems that the law has allowed the holder entail to exercise a full right on the property if it is absolutely clear that the substitution cannot take place.

Exercise

What differences and similarities do you observe between entails and *substitutio vulgaris?*

1.3.9 Disherison[27]

In the Ethiopian law of successions, the testator has wider rights to disinherit one or more of his/her heirs by the will he/she makes. His/her rights may even go to the extent of disinheriting all of his/her children. Disherison is an order passed by the testator to exclude his/her heirs from the succession. It usually serves as a means of punishment for the misbehavior of his/her heirs. Some people argue that giving powers to the testator to the extent of disinheriting his/her heirs is not proper. At present time, in many countries the power of the testator to disinherit his/her heirs has been reduced or there are many conditions to be fulfilled to disinherit, especially a child. In many jurisdictions in the US, the powers of the testator to disinherit heirs, including children is still effective. The situation is different in most European jurisdictions. In Ethiopia, the law allows the testator to disinherit one or more of his/her heirs. It seems that the law considered that the testator's only power as far as punishing disobedient children is disinheriting such children.

The testator may disinherit his/her heir either expressly or tacitly. Express disherison is a kind of disherison in which the testator excludes his/her heir from the succession in an explicit manner by stating clearly that he/she has disinherited the heir. The testator may disinherit all of his/her heirs (descendants and other heirs) expressly and appoint a universal legatee. For instance, Ato Wagaw may disinherit all his children and other heirs and he may appoint his friend Gosaye as a universal legatee. In such a case, Gosaye is called to receive the whole estate of Ato Wagaw without any contender. If the testator disinherits all his/her heirs and if he/she does not appoint someone as a universal legatee, there shall be no one to take his/her hereditary estate. In such circumstances, the law has devised a mechanism to enable the descendants of such disinherited heirs to take the property of the testator by way of representation (See Art 937).

[27] Articles 937 to 940, Civil Code

Descendants can only be disinherited expressly. That is, no descendant may be disinherited tacitly. Moreover, the testator shall clearly state a justifiable reason why he/she has decided to disinherit his/her descendants. The law makes such imposition on the testator with the view to protect the interest of the descendants in succeeding their ascendants.

Exercise
Give examples of tacit disherison!

It is stated above that the testator must give justifiable reason(s) to disinherit one or more of his/her descendants. The law does not list down what things are justifiable and not justifiable. A justifiable reason is a subjective standard. It is believed that it should impress a reasonable person. It should be a reason that is sufficient to move the testator to the decision of disinheriting his/her descendant. The testator is expected to attribute some acts of the heir that have dissatisfied him/her. If the acts done by the heir were not illegal and/or not immoral, it would be difficult to the testator to give justifiable reasons.

The court has a power to examine and decide whether the reason given by the testator is justifiable or not. Although the court has the power to ascertain whether the reason given is justifiable or not, it cannot ascertain whether the given reason is true or false. Any statement that the testator gives is a true statement. Therefore, the heir cannot claim that the statement of the testator is untrue.

Exercise

1. Why do you think does the law consider any statement given by the testator as a true statement?
2. Consider that Mr. “A” belongs to a faith called “B”. “A” brought up his son “D” by teaching strictly the tenets of religion “B”. “A” is a known benevolent and humane person in the vicinity. As “A” got older he wanted his only son to get married and replace him in his humanitarian and other kindly works. “D” has fallen in love with a woman from faith “C” and lastly “A” learned this fact from some people. “A” asked his son

> "D" why he chose to marry a woman from another religion. "D" 's response was just love. "D" concluded marriage with the woman irrespective of the opposition and discontent of his father. "A" had decided to disinherit his son on the basis that his son married a woman who does not belong to his faith. Does the reason given by "A" justify disinheritance? Why/Why not?

It is clear that the succession of the testator shall open after he/she is dead. A dead person cannot express anything and he/she cannot defend himself/herself if someone claims that the statement of the testator is false. Therefore, it is not possible to pass a decision by hearing only one party. Because of this, the law simply presumes that any reason given by the testator is a true statement. Moreover, the law trusts parents (or ascendants more than any other persons regarding matters relating to their children (or descendants). Therefore, the law takes for granted what has been stated by the testator as a true statement.

When the testator does not make someone beneficiary in his/her will, we say that he/she has tacitly disinherited such a person. However, this kind of tacit disinheritance does not work against descendant heirs. It works only against the heirs of second, third and fourth relationship. This is a mechanism of protection given by the law to the descendant heirs (See Art 939 (1) & (2)).

If the testator appoints someone as a universal legatee to receive the whole property, that does not imply the disherison of the children of the testator. In such a case, the universal legatee is called to succeed the testator as if he/she is one of his children (See Art 939 (3)).

Example

W/ro Gelane has appointed in her last will Ato Bereket to take her hereditary estate as a whole. She has two children, Meskerem and Wodessa. She gave nothing to her children. As it is not allowed to tacitly disinherit children, Ato Wodessa cannot take the whole property of the succession. Instead, he would be considered as one of the children of W/ro Gelane and shall partake the property together with them.

Disinheriting heirs is a legally recognized power of the testator. However, if the law considers that the provisions of the will are defective with respect to any matter, and if the heirs impugn the defective provision, then the provision that disinherits the heirs shall be of no effect. For instance, assume that one of the provisions of a will contains an illicit provision. If this same will contains a provision that disinherits one or more of the heirs of the testator, only by challenging the illicit provisions, the disinherited heirs can get the invalidation of the disherison.

CHAPTER TWO

LIQUIDATION OF SUCCESSION AND DETERMINATION OF RIGHTFUL SUCCESSORS

2. 1. PRELIMINARY CONSIDERATIONS

2. 1. 1. The Essence of "Liquidation"

A succession, whether testate or intestate, opens when the deceased dies[1]. And at the time of its opening, it consists in the gross rights and obligations of the deceased. In other words, the inheritance of a dead person, which is technically called the "estate", is initially a crude total sum of the deceased's rights (such as properties and claims) and obligations (such as debts incurred and owed by the deceased in his lifetime, and those that are owed by the succession).

It goes without saying that before any right over things making up the inheritance passes to heirs-at-law[2] and/or legatees by universal title[3], some kind of screening must be made. That means, before any property or right of the inheritance is delivered to properly identified heirs, there should be a winding up of the deceased's affairs. In particular, assets and claims the deceased owned should be identified and collected, debts and taxes ascertained and paid, maintenance claims entertained, and singular legacies ordered by the deceased, if any, paid.

1 Article 826 (1), the 1960 Civil Code of Ethiopia.
2 Article 1060 (1), *Id*., implies that a succession is partitioned among heirs-at-law.
3 *See,* Article 915 (1), *Id,* which stipulates that unless otherwise provided by the testator, legatees by universal title are assimilated to heirs-at-law.

"Liquidation" is the technical term we use in the law of successions to refer to that winding up process. Liquidation is legally important for a host of reasons. For instance, the property forming part of the inheritance merges with the other property of the heir only after the closure of the liquidation of the succession[4].

In the event of multiplicity of heirs, co-heirs start to privately exercise actual right over the inheritance only after partition is made. "Partition", which is usually effected through division, is in rough terms the process of practically delivering to each heir his proper share of the property and rights remaining after liquidation. Obviously, partition is made only where there are more than one rightful heirs.

So, partition does not take place unless and until the succession has been fully liquidated[5]. It is not even an indispensable part of the process of devolution of a succession. There will be no partition where, all the property in the inheritance having been disposed of in the course of liquidation, there remains nothing to partition. Nor will there be any partition where there is just one properly identified heir.

But, what is the doctrinal meaning of "liquidation"? Black, one of the most renowned legal linguists of all time, attaches the following meaning to the term:

> "Liquidation is the settlement of accounts or the winding up of the business. [It is] the act or process of making of clear, fixed and determined that which was before uncertain or unascertained. Payment, satisfaction, collection, or realization of assets and discharges of liabilities; winding up or settling with creditors and debtors. The settling of the financial affairs of the individual usually by liquidating/turning into cash/ all assets for the distribution to creditors, heirs, etc…"[6]

As can be noted from the above observation, liquidation is a multifaceted screening process relating to settlement of accounts or winding up of, in our case, the estate of the deceased. It is the act or process of ascertaining that which was uncertain in connection with a

4 Article 1053 (1), *Id.*
5 *See,* Article 1062, *Id.*
6 Blacks Law Dictionary.

succession. It, among other things, involves payment, satisfaction, collection, or realization of assets and discharges of liabilities, which is winding up or settling with creditors and debtors of the succession. It also includes determining the net value of the succession up for partition.

The Ethiopian Law of Successions takes a somewhat similar stance with respect to liquidation. Article 944 of the Civil Code provides for what the liquidation of a succession consists of. It states that liquidation means the process of determination of the rightful recipients and constituents of the succession; the recovery of debts due to and the payment of debts due to it; the payment of the legacies by singular title and the taking of such other steps as are required to carry into effect the provisions made by the deceased.

Liquidation is a tough task, especially when the testator has left lots of property. It demands the liquidator to do a series of toiling activities. The first thing the liquidator is required to do immediately after assuming office is making a search to find out whether the deceased has left a will[7]. He should then go on to receive, preserve, and administer the properties left by the deceased. The liquidator should also perform such other important functions as establishing the identity of the persons that are eligible to receive the inheritance, determining what property makes up the estate, recovering debts for which the deceased was a creditor, and paying debts owed by the succession, etc. [8]

2. 1. 2. The Guiding Principles of Liquidation

Art. 942 of the Civil Code sets forth a very important principle. This principle serves as a guideline for the entire process of liquidation. Here is the content of the Article in full:

Art. 942. — *Guiding principle.*

So long as a succession has not been liquidated, it shall constitute a distinct estate.

But, what does "a distinct estate" mean? Literally, a distinct estate means some property

7 *See,* Article 956 (a), *Id,* which implies that the liquidator begins performing his functions by making a search for a will.

8 *See,* generally, Article 944, *Id.*

set aside for a special purpose. Art. 942 obliges that the succession will constitute a distinct estate pending liquidation. And one of the most important purposes of the device of liquidation is the satisfaction of debts claimed from the succession in favor of persons with rightful claims.

In the context at hand, the law considers the succession a distinct estate. The primary reason behind this move seems to be the protection of the interests of rightful persons. The succession is specially kept for the benefit of lawful claimants pending liquidation.

So long as it has not been fully liquidated, heirs, legatees, and creditors (both creditors of the succession and the personal creditors of the heirs) will have an undivided interest over the succession. Article 943 provides for a specific instance of the practical application of the principle set forth under Article 942. It states that the creditors of the succession shall have the property of the inheritance as their exclusive security. Since the creditors have right to satisfy their claims from the property of the inheritance, the implication is that the law prescribes the setting aside of the succession as a distinct estate for their protection. The creditors may require the attachment of the property of the inheritance in order to satisfy their claims. To protect this right of the creditors, the property forming part of the inheritance may not merge with the personal properties of the heirs pending liquidation. That means, heirs have no distinct right over the property of the inheritance before the end of the liquidation process. By the same token, personal creditors of the heirs shall have no right on the properties of the inheritance while the liquidation is still going on.

It should be noted at this junction that the succession is considered a distinct estate only until it has been fully liquidated. That is, it ceases to be considered as such when the liquidation process ends. Upon the closure of the liquidation process, any remaining property or right will merge with other personal properties of the heir. So happens after partition in the event where there are more than one heirs.

REVIEW EXERCISES

Case

Anchor Micro Finance Institute (AMFI) is a local institute that lends money to small-scale

business enterprises. W/ro Aster borrowed 5,000 Birr from AMFI to reinforce her poultry business. Unfortunately, she died without repaying the loan to AMFI. The poultry business went bankrupt while W/ro Aster was bedridden during the three months period preceding her death. W/ro Aster had saved a total of 8,000 Birr in her saving account at a bank before she died. Her son, Dedefo, wants to withdraw the money from W/ro Aster's account to finance the process he has started to get a visa to South Africa.

Questions

1. Is the intention of Dedefo legitimate in the light of the interests of AMFI? Why, or why not?
2. If Bezabih is a creditor of Dedefo, can he make any lawful claim on the money deposited in W/ro Aster's bank account? Why, or why not?

Hint

1. Dedefo will have to wait until the closure of the liquidation process before withdrawing any money from W/ro Aster's bank account for his personal uses. W/ro Aster's succession has not yet been fully liquidated. True enough, Dedefo is the sole heir-at-law of W/ro Aster. However, that fact alone does not entitle him to the inheritance property before the liquidation phase comes to an end. AMFI, by showing that it is the creditor of the deceased, may request a court of law to order the attachment of the money deposited in W/ro Aster's bank account. Dedefo is entitled only to what is left after liquidation. That is, he has a lawful claim only on the amount of money left after the debt due to AMFI has been served.
2. While liquidation is still pending, Bezabih has no right to claim payment from the money deposited in W/ro Aster's bank account. He will have to wait until the closure of liquidation. He may forward his claim after all the creditors of the succession, including AMFI, have been paid. Since the property of the inheritance merges with the property of Dedefo, the heir, upon the closure of liquidation, Bezabih may require the satisfaction of his claim by then.
3.

2. 1. 3. General Objectives of the Chapter

When they complete this Chapter, it is expected that students will acquire the knowledge, skills, and attitude they need to personally undertake the liquidation of the succession of a dead person, offer sound lawyerly advice on liquidation-related matters, and solve both real and hypothetical cases involving issues of liquidation in accordance with the relevant provisions of the law by, among other things, internalizing the specifics of the legal rules governing the modes of appointment, duties, liabilities, and scope of power of a liquidator, as well as the meaning and elements of liquidation.

Specifically, after finishing the Chapter, students will, *inter alia*, be able to:

- Internalize the whatness of the liquidation of a succession;
- Understand the meaning and constituents of a distinct estate in the context of the Law of Successions;
- Discuss the significance of the device of distinct estate in the real societal life especially in relation to the rights of persons who have legitimate claims over the succession;
- Discuss the modes of appointment of a liquidator;
- Analyze the duties, liabilities, and the scope of power of the liquidator;
- Outline the options available for heirs and legatees by universal title after they are called to the succession;
- Identify the modes of payment and the identity of the recipients of the debts of a succession;
- Discuss such issues as the grounds for the closure of liquidation, and the legal effects of closure; and
- Dissertate about the right of creditors who appear after closure and the duty, if any, of the heirs.

2. 1. 4. Contents and Organization of the Chapter

The Chapter is divided into six distinct Sections. Save for a couple of them, all Sections are

themselves in turn divided into Sub-Sections. Here is a brief synopsis of the contents and the pattern of organization of the Chapter.

Section One - the present Section - is meant to introduce the contents and structure of the Chapter and its subject matter - liquidation of a succession. It has four Sub-Sections. The First Sub-Section purports to provide the meaning of the term "liquidation" in the context of the Law of Successions. The Second explores the guiding principles on which the whole process of liquidation is based. The Third sets forth the envisioned general objectives of the Chapter. Whereas, the Fourth Sub-Section - the one at hand - outlines the contents as well as the pattern in which the Chapter and its elements have been organized.

Liquidation is an act or a process. It thus naturally requires an institution to carry it out. A succession is liquidated by one or more persons called liquidators. Section Two is on "The Liquidator of a Succession". It examines issues such as who the liquidator is, how he is appointed, what his functions, powers and duties are, etc.

Liquidation involves a host of activities. It is, therefore, worthwhile to take a close look at the anatomy of these activities. This Chapter entertains some of the most important of those activities. Section Three explores the process of identifying the rightful heirs and legatees of a succession. On its part, Section Four discusses the "how" of the administration of a succession. And Section Five examines the type of debts that may be claimed from a succession, and the order and manner of payment of such debts.

Liquidation is not an indefinite process. It will come to an end upon the fulfillment of certain conditions. Section Six provides a brief overview of the grounds for, and matters precedent and subsequent to the closure of the liquidation process.

2. 2. THE LIQUIDATOR OF A SUCCESSION

2. 2. 1. Who is the "Liquidator"?

Liquidation, as alluded to earlier, is a process. It is a process that involves a series of tasks and activities. As such, it naturally requires an executing institution.

Article 946 of the Civil Code establishes that executing institution designated with the task of carrying out the liquidation of a succession. The Article in question reads:

> "A succession, whether intestate or testate, shall be liquidated by one or more persons…referred to as 'the liquidators'".

The liquidator, therefore, is nothing but the institution designated with the task of carrying out the liquidation of a given succession. From the spirit of the statement of Article 946 and its environs, it can be inferred that the term "person" is employed to refer exclusively to natural or physical persons. Thus, a liquidator is a human person who is in charge of the process of liquidation. It goes without saying that a succession may have one or more liquidators.

The institution of the liquidator takes a different name in other jurisdictions. This is the case particularly in countries that subscribe to the common law legal system. In those jurisdictions, the terms "executor" and "administrator"[9] are used in reference to a similar institution which the Ethiopian Law of Successions calls "liquidator".

An "executor" is a person who is appointed by a will to carry into effect the provisions of the will and to administer the estate of the testator[10]. His authority to act is derived from the will. In contrast, an "administrator" is appointed by the court to administer the estate of the deceased[11].

9 Rendell, Catherine. (1997). *Law of Succession.* Macmillan Law Masters: Macmillan. p.138.
10 *Id.*
11 *Id.*

The functions of the liquidator are numerous and painstaking, and may even entail personal liability. As a matter of principle, the liquidator must be a diligent person capable of administering the property of the deceased as a bonus paterfamilias. He should also be a person of integrity and thick patience.

The Ethiopian Law of Successions provides for various mechanisms through which a person may assume the office of the liquidator. We will discuss those mechanisms in the coming Sub-Section in a detailed fashion. But at this juncture, it is important to note that a liquidator is expected to discharge his duties faithfully, diligently, and vigilantly, whatever the mechanism through which he has come to hold the function. Moreover, no distinction whatsoever is made between liquidators with respect to powers, rights, and duties on the basis of the manner of appointment.

2. 2. 2. Mechanisms of Appointment of a Liquidator

2. 2. 2. 1. Designation by Law

One of the mechanisms of appointment of a liquidator is designation by the law[12]. The law designates the capacity of liquidator to the heirs-at-law of the deceased. Heirs-at-law assume the office of liquidator solely by the operation of the law[13]. Where a person dies wholly intestate; or where the deceased dies without leaving a will at all; or where he dies leaving a will, but the will is either subsequently declared invalid by a competent court of law or fails to appoint a liquidator, the function of liquidator will devolve to his heirs-at-law.

Article 947 of the Civil Code states that "on the day of death, the capacity of liquidator shall pertain 'ipso facto' to the heirs-at-law". Here, the phrase "ipso facto" appears to be a bit confusing. But we can simply ignore this phrase as the title of the same Article, which reads "Designation by the law", makes it unequivocally clear that heirs automatically become liquidators by the operation of the law. They assume the office because of the mere fact that they happen to be the heirs-at-law of the deceased.

12 *See,* generally, Article 947, Civil Code.
13 *Id.*

2. 2. 2. 2. Appointment by Will

A person has a right to specify, by a legally valid will, the manner in which his estate should be disposed of after his death. He has also the power to name a person or persons whom he wants to oversee the disposition. That in other words means, he can appoint the liquidator of his succession by his will.

The testator has a right to bestow the capacity of liquidator to any person he thinks fit. He may choose one or more of his heirs-at-law to be the liquidator of his succession. He may even appoint an outsider who has no relation whatsoever with him. Although appointing a liquidator is not a common practice in Ethiopia, most testators who do appoint one designate their closest relatives or friends as liquidators.

It is presumed that the testator appoints the person whom he trusts most as liquidator. It seems, the Ethiopian Law of Succession takes that presumption too. So long as the appointment is made in compliance with the pertinent legal provisions, the law respects the testator's wish. It even gives priority to testamentary appointment over others.

Where the deceased has left a valid will, and where he has validly named a person as a liquidator, the person so named shall be the sole liquidator of the succession[14]. No other person may take the position – not even those designated by law. Testamentary appointment prevails over all other modes of appointment[15].

The law apparently takes a great deal of care to observe the deceased's dying wish. Remarkably, it is not confined to just respecting the testator's wish. It goes to a great length to try and find the intention of the deceased with respect to the appointment of liquidator. For instance, the deceased may have left a valid will but had failed to make any express disposition as to whom he wishes to be the liquidator. The law lends a hand to fill such gap. Article 948(2) of the Civil Code provides that in such a case, the capacity of liquidator shall pertain "***ipso jure***" to the legatees by universal title appointed in the will.

14 *See,* generally, Article 948 (1), Civil Code.
15 *Id.*

That, therefore, means that failing any express disposition by the testator, the law assigns legatees by universal title to the office of the liquidator[16]. Legatees by universal title are persons whom the testator has called to receive one whole or a portion of his inheritance[17]. It seems, the law took this position presuming the fact that the testator would have preferred those persons whom he has appointed legatees by universal title also to be the liquidators of his succession.

Akin to the term ***"ipso facto"*** in Article 947, the term "***ipso jure***" in Article 948(2) of the Civil Code appears to be confusing. The two terms seem to be misplaced erroneously. They both would have been more sensible if they switched places.

As a matter of rule, a legatee by universal title acquires any right over the succession because of the fact that the deceased has included him in his will. His appointment as a liquidator follows from this fact. Therefore, a legatee by universal title becomes a liquidator ***ipso facto***, not ***ipso jure***. It should, however, be noted that this is just some linguistic mishap. Whether a legatee by universal title ipso facto liquidator or an heir-at-law is an ***ipso jure*** does not substantially matter.

Article 948(3) of the Civil Code provides that where a legatee by universal title happens to hold the office of liquidator by the operation of Article 948(2) of the Civil Code, the heirs-at-law shall also act as joint liquidators. But there appears to be a discrepancy between the Amharic and the English versions of Article 948(3). The English version makes it clear that heirs-at-law that have been disinherited by the deceased my not act as liquidators.

As it might be recalled, the deceased may in his will expressly disinherit his descendants, including his own children, by giving a reason which justifies the disherison[18]. Moreover, he may tacitly disinherit his relatives of the second degree and beyond[19]. The exclusion of such heirs-at-law from the function of liquidator makes sense as the deceased has apparently on purpose left those people out of his succession with a view to punishing them for some wrongful act. What is more, once they have been validly disinherited by the testator, they

16 Sub-Article (2), *Id.*
17 *See*, Article 912(1), Civil Code.
18 Article 938(1), *Id.*
19 Article 939(1), *Id.*

will have no right or any other claim whatsoever over the succession. So, as far as the succession is concerned, those people are irrelevant and unwelcome. There is no point in involving such people in any thing having to do with the succession as their involvement is probably counterproductive, to say the least.

In contrast, the Amharic version of Article 948(3) imparts the message that where, because of the application of Article 948(2), a legatee by universal title becomes liquidator, the heirs-at-law may not act as joint liquidators. That is, heirs-at-law are not entitled to act as liquidators. Rather, only the legatee by universal title will have the power to perform the function.

Arguably, the English version of this Article is more logical and sensible than the Amharic one. One thing should, however, be kept in mind. That is, the Amharic version is always the controlling and prevailing version.

2. 2. 2. 3. Incapable Liquidator

A person may be the heir-at-law of the deceased or might have been appointed a legatee by universal title by the deceased in his will. As discussed shortly earlier, an heir-at-law has the right to claim the office of the liquidator by the operation of Articles 947 and 948(3). A legatee by universal title is also eligible to the same office thanks to Article 948(2).

But such a person may happen to be incapable in terms of the language of the law. He may, for example, be a minor or an interdicted person. For all purposes, a minor or an interdicted person has the same right as others.

As a matter of fact, a minor or an interdicted person lacks the capacity to act as a liquidator. That is arguably true both in terms of the legal and literal senses of the term. Remember, liquidation is a daunting task even for someone who is capable. Accordingly, the law assigns the tutor of the incapable person to represent the latter for the performance of the functions of liquidator[20].

20 Article 940, *Id.*

2. 2. 2. 4. Appointment by Court

It may happen that a succession remains without a liquidator even after the application of Articles 947, 948, and 949 of the Civil Code. Such a scenario could happen where all the heirs-at-law and legatees by universal title decline inheritance. Ditto for a vacant succession where the succession is taken by the state.

In such an event, the court intervenes. It appoints a liquidator upon the application of any interested person. In the present context, a legatee by singular title or the public prosecutor could be regarded as interested person. In particular, the court appoints a liquidator in either of the following to cases:

- When the succession is a vacant one. That is, when no person appears claiming that he is an heir, or when all of the heirs renounce the succession, or when all of the heirs do not want to liquidate the succession[21].
- When the succession goes to the state. That is, where there is no person legally entitled to receive the succession[22].

2. 2. 2. 5. Other Cases of Judicial Appointment

There is one more possibility for judicial intervention. The court may replace a liquidator already appointed in terms of Articles 947, 948, 949, or 950 of the Civil Code. There are a number of various grounds for the court to make such replacement. The following are some of the grounds:

- Where, in the case of a testamentary liquidator, the validity of the appointment is impugned[23];
- Where there are several liquidators and they unable to agree on the manner of the liquidation of the succession[24];
- When one or more of the heirs is incapable or is not, for any other reason, in a position to look after his interests[25];

21 Article 950(1), Civil Code.
22 Sub-Article (2), *Id.*
23 Sub-Article (a), *Id.*
24 Sub-Article (b), *Id.*

- When the liquidator is no active or diligent, or is a squanderer or dishonest[26].

Finally, it should be noted that the court acts upon the application of any interested person[27]. That is, the court replaces a liquidator only when an interested person applies to that effect. Here, an heir-at-law, a legatee by universal or singular title, or the public prosecutor could be regarded as an interested person.

2. 2. 3. Nature of the Functions of the Liquidator

The function of liquidator is voluntary. No person is bound to take the office of the liquidator without his consent. In other words, no one is compelled to become a liquidator, even if he has been appointed in terms of the provisions of the pertinent Articles.

By the same token, the liquidator may resign after starting his functions. According to Article 954(1), the liquidator may resign at any time. This is saving where he has expressly committed himself to perform his functions up to the conclusion of the liquidation process or for a definite period of time.

However, an untimely resignation may entail personal liability. The liquidator may not resign at a time "which is not convenient". For instance, the liquidator may not resign while there are perishable goods out there that seek his immediate attention. If he resigns at this particular time, he will personally bear the loss. (See Article 954(2) cum. Article 961).

The other point is that the liquidator may not necessarily be paid for his functions. Article 959 provides that the liquidator shall be entitled to remuneration only where this is justified by the work he has performed. And the remuneration, where any, is paid under the conditions determined by the deceased, or by agreement between the heirs, or by the court.

When any interested person applies, the court may require the liquidator to furnish security or some other guarantee for the proper performance of his functions. An heir-at-law, a

25 Sub-Article (c), *Id.*
26 Sub-Article (d), *Id.*
27 Article 951, Civil Code.

legatee by universal or singular title, or the public prosecutor could be considered an interested person for this purpose. The applicant may invoke a host of various reasons for his move. He may, for example, cite the dishonesty of the liquidator. However, given the voluntary and gratuitous nature of his functions, it seems practically ironic to make him honest or diligent simply by requiring him to give a security.

The functions of a liquidator will terminate where he is replaced by a new liquidator. A liquidator may be validly replaced in conformity with the law, the will, or a decision of the court. They may also terminate where the liquidator has fully accomplished his functions and rendered an account of his management[28].

2. 2. 4. Powers and Duties of the Liquidator

The liquidator's functions are enormous. The most important of his functions can be generalized as follows by reading Article 944 of the Civil Code in conjunction with Article 956 of the same Code. We will see these functions in a greater detail in the coming Sections.

- Search for a will of the deceased: This is a very important step in determining whether the succession is testate or intestate.
- Determination of persons who are called to the succession: If a valid and uncontested will is discovered, there will be no problem - the persons named in the will shall alone be called to the succession. If there is no will, or if the court invalidates it, the recipients shall be determined according to the rules of intestate succession.
- Determination of the property that constitutes the succession: This is probably the most difficult part of the functions of the liquidator. It involves the discovery and collection of the properties of the deceased, the recovery of debts due to and the payment of debts due by the succession which are exigible.
- Administration of the succession: This involves the day-to-day tending of the succession by the liquidator.

28 *See,* generally, Article 955, Civil Code.

- Payment of debts of the succession: A number of creditors may lodge claim against the succession for the payment of the debts due to them. These debts should be paid in accordance with the order and the manner prescribed by the law.

The liquidator has several powers and duties. However, the deceased or the court may limit the powers of the liquidator or give him instructions regarding the manner how he should perform his functions[29]. Nonetheless, the court may, for good reason, modify such instructions[30].

The liquidator is duty bound to render the accounts of his management when he has accomplished his functions to their conclusions[31]. He may also be required to render such accounts before that date at the time agreed upon with the heirs or fixed by the court[32]. Failure to do so has the liability of the liquidator as its sanction[33].

In addition, several other reasons may entail the personal liability of the liquidator. In particular, the liquidator shall be liable for any damage he causes through his fault or negligence[34]. He shall be deemed to be at fault where he acts contrary to the provisions of the law, to the provisions of the will or to the instructions given to him by the deceased or by the court[35]. Nevertheless, the court may relieve him in whole or in part of such liability in his relation with the heirs or legatees where it appears that he has acted in good faith with the intention of performing his functions[36].

29 Article 957(1), Civil Code.
30 Sub-Article (2), *Id.*
31 Article 960(1), Civil Code.
32 Sub-Article (2), *Id.*
33 *See,* generally, Article 957(3), Civil Code.
34 Article 961(1), Civil Code.
35 Sub-Article (2), *Id.*
36 Sub-Article (3), *Id.*

Read the following case and comment on the decision of the court

የፍ/ብሔር ይ/መ/ቁ/1538/88

መጋቢት 24 ቀን 1993 ዓ.ም

አቶ ጋባን ጀማል ግንቦት 8 ቀን 1980 ዓ/ም የሞተ መሆኑ የወረዳ 22 ፍ/ቤት በፍ/መ/ቁ/ 3936/80 በ1981 ዓ/ም ወራሽነትን በሚመለከት በሰጠው ውሳኔ ላይ ተገልጿል።

አንደኛዋ ወራሽ ወ/ሮ ገነት ጋባን አውራሻቸው ከሞተ ከ6 ዓመት ቆይታ በኋላ ጥቅምት 3 ቀን 1987 ዓ/ም በተጻፈ ማመልከቻ ከአባታችን በውርስ ሊተላለፍልን የሚገባ ንብረቶች ተጣራተው እንዲታወቁ የውርስ አጣሪ እንዲሾም የውርስ አጣሪውም የውርሱን ንብረቶች በማጣራት እንዲያከፋፍላቸው የሚጠይቅ አቤቱታ ለወረዳ 17 ፍ/ቤት አቅርባለች።

አመልካች በውርስ ከአባቴ ሊተላለፍልኝ የሚገባ ንብረቶችን ተጠሪው አቶ ታምራት ጋባን እንዲያካፍለኝ ተጠይቆ ፈቃደኛ ባለመሆን በግሉ ይዞ በመጠቀም ላይ ይገኛል ብላ በማመልከቻዋ ላይ ገልጻለች።

ተጠሪው ቀርቦ በሰጠው መልስ አውራሻችን ባደረጉት ኑዛዜ መሰረት የንብረት ክፍፍልና ድልድል አድርገን ባለቀ ጉዳይ አመልካች ያቀረበችው የውርስ አጣሪ ይሾም ጥያቄ መስተናገድ የለበትም ብሎ የተከራከረ ቢሆንም የወረዳው ፍ/ቤት ውርስ አጣሪ መሾም አለበት የሚል ትዕዛዝ ሰጥቷል።

ይህንኑ ትእዛዝ በመቃወም ለክልል 14 መስተዳደር ዞን ፍ/ቤት የይግባኝ አቤቱታውን በማቅረብ ቢያሰማም የዞኑ ፍ/ቤት የወረዳው ፍ/ቤት ውርስ አጣሪ ይሾም በሚል የሰጠው ትዕዛዝ ጉድለት የሚታይበት አይደለም በማለት መልስ ሰጪን ጠርቶ በይግባኙ ላይ ሣያከራክር በፍ/ሥ/ሥ/ህ/ ቁ. 337 መሠረት ይግባኙን ሠርዞበታል።

እንደገና በዚህ መዝገብ የይግባኙ ከርክሩ ቀጥሎ ለይግባኝ ሰሚው ፍ/ቤት የቀረበውም በሥር በሁለቱ ፍ/ቤቶች የተሰጠው ትዕዛዝ ተቀባይነት ሊሰጠው አይገባም፤ ሟች ንብረታቸውን በኑዛዜ ባደላደሉበት ጉዳይ ላይ ውርስ አጣሪ መሾም የለበትም፤ የሚጣራ ንብረትም የለም በሚል ተቃውሞ ነው።

የይግባኙ ማመልከቻ ለመልስ ሰጪ ደርሷት ቀርባ መልስ እንድትሰጥበት ታዛ የነበረ ቢሆንም ከይግባኙ ማመልከቻ ጋር የተላከላትን የፍ/ ቤት መጥሪያ አልቀበልም ብላ የመለሰችና በቀነ ቀጠሮውም ሣትቀርብ የቀረች በመሆኑ የይግባኙ ክርክር በሌለችበት ታይቶ እንዲወሰን

ይህ ፍ/ቤትም የይግባኝ ባይ እና የመልስ ሰጪ አውራሽ የሆነው አቶ ጋባን ጀማል ከሞተ ከስድስት ዓመታት ቆይታ በኋላ ከሁለቱ ወራሾች መካከል የአሁኗ መልስ ሰጪ በውርስ መከፋፈል የሚገባን የአባታችንን ንብረቶች የአሁኑ ይግባኝ ባይ አቶ ታምራት ጋባን በድርሻዬ እንዲሰጠኝ ብጠይቀው ፈቃደኛ ስላልሆነ የውርስ አጣሪ ተሹሞ ንብረቶቹን እንዲያከፋፍለን ይደረግ በማለት ያቀረበችው ጥያቄ መስተናገድ የሚገባው ነው? አይደለም? የሚለውን ከሕጉ ጋር በማገናዘብ መርምሯል።

በቅድሚያ በሕጉ የውርስ አጣሪ በመባል የሚታወቀው አካል የውርስ ክርክር ጉዳዮችን በሚመለከት አከራክሮ የመወሰን የዳኝነት ሥልጣን የሌለውና ያልተሰጠው መሆኑ መታወቅ ይነኖርበታል።

ውርስ ማጣራት ማለት ምን ማለት እንደሆነ ደግሞ የፍ/ብሔር ሕግ ቁጥር 944 ያስረዳል።

ውርስ ማጣራት ማለት፦

- ✓ የውርስ ተቀባይ እንማን እንደሆኑ መወሰን፣
- ✓ የውርስ ሀብት ምን መሆኑን መወሰን፣
- ✓ ለውርሱ የሚከፈለውን ገንዘብ መቀበል፣ ለመክፈል አሰገዳጅ የሆነውን ዕዳ መክፈል፣
- ✓ ሟቹ በኑዛዜው ስጦታ ላደረገላቸው ሰዎች የተሰጣቸውን መክፈል ነው።

የፍ/ብሔር ሕግ ቁጥር 956 ድንጋጌ እንደሚያስረዳው የውርስ አጣሪው ሥራ

- ✓ ሟቹ አንድ ኑዛዜ ትቶ እንደሆነ መፈለግና በመጨረሻ ውርሱ የሚደርሳቸው ሰዎች እነማን እንደሆኑ ማረጋግጥ፣
- ✓ የውርሱን ሀብት ማስተዳደር፣
- ✓ መክፈያቸው የደረሰውን የውርስ ዕዳዎች መክፈል፣
- ✓ ሟቹ በኑዛዜ ያደረጋቸውን ስጦታዎች መክፈልና የኑዛዜውን ቃል ለመፈፀም ማንኛቸውም ሌሎች አስፈላጊ ጥንቃቄዎች ማድረግ ነው።

ከዚህ ሌላ በቁጥር 960 ንዑስ ቁጥር /1/ ላይ እንደተመለከተው ውርስ አጣሪው

የውርስ ማጣራት ዋና አላማም ባለቤቱ በመሞቱ ምክንያት በቤተሰቦቹ ዙሪያ በሚፈጠር ያለማረጋጋትና የአስተዳደር ችግር ባጋጣሚው የውርስ ሀብት በየአቅጣጫው እንዳይባክንና የሚች ሀብት በአግባቡ ተጠብቆ በሕጉ ለሚገባቸው ወራሾች እንዲተላለፍላቸው ለማድረግና የሚች ገንዘብ ጠያቂዎችን ጥቅም ለማስጠበቅ ጭምር መሆኑን ከሕጉ አጠቃላይ መንፈስ ለመረዳት ይቻላል።==========//

የፍትሐብሔር ሕግ ቁጥር 1052 (1) እንደሚገልፀው የውርስ ማጣራት ሥራ ሚቹ ከሞተ ከአንድ ዓመት በኋላ ይዘጋል።

ይህ ለውርስ ማጣራቱ ስራ በሕጉ የተወሰነው ጊዜ ሊራዘም የሚችለው የነገሩ አካባቢ ሁኔታ የሚያስገደድ ሆኖ ሂሣብ አጣሪው ወይም ከባለጉዳዮች አንዱ ለዳኞች ጥያቄ አቅርቦ አሣማኝነቱ ታይቶ የተፈቀደ እንደሆነ ነው።

በአጠቃላይ የውርስ ማጣራት ሥራን በሚመለከት እና ከዚሁ ጋር በተያያዘ ስለውርስ አጣሪ ተግባራትና የሥራ ኃላፊነት የተጻፉት የሕጉ ልዩ ልዩ ድንጋጌዎች የውርስ ማጣራት ጥያቄ ሊኖርና ሊቀርብ የሚችለው ስለውርሱ ማጣራት አስፈላጊ ሆኖ ሲገኝና በአጣሪው አማካኝነት የሚጣራ ውርስ ባለበት ሁኔታ መሆኑን የሚያመለክቱ ናቸው።

በጊዜም ረገድ ስንመለከተው እንኳንስ ሚቹ ከሞተ ከስድስት ዓመታት ቆይታ በኋላ ውርስ እንዲጣራ ጥያቄ ማቅረብ ቀርቶ የተጀመረው የውርስ ማጣራት ሥራ እንኳን የተለየ ሁኔታ ካላጋጠመ በቀር ሚቹ ከሞተ ከአንድ አመት በኋላ የሚዘጋ መሆኑን ነው ሕጉ የደነገገው።

በዚህ ጉዳይ እንደተስተዋለውና በሌሎች ተመሣሣይ ጉዳዮች ላይ እንደታየው አንዳንድ ፍ/ቤቶች ስለውርስ አጣሪ ተግባርና ≠ላፊነት ያላቸው ግንዛቤና አመለካከት ፍጹም የተሣሣተና የሕጉን መሰረት አላማ የተከተለ አይደለም። በአብዛኛው ውርስ ይጣራ የሚለው ጥያቄ ምን ዓይነትን ችግር ለማስወገድና የሚያስገኘው መፍትሔም ምን እንደሆነ ሣይታወቅ እየቀረበ እንደመደበኛ የፍርድ ቤት ክርክር ሲያወዛግብና በዚህ አቅጣጫ ክርክር እየቀጠለ ረጂም ዓመታት እንደሚወስድ ታይቷል።========//

በዚህ መዝገብ በቀረበው ይግባኝ ለማረጋገጥ የተቻለውም የሚጣራ ውርስ በሌለበት እና አንድ የውርስ ማጣራት ሥራ ቀረቦ ፍጻሜ ማግኘት ከሚገባው ጊዜ ውጭ ሚች ከሞተ ከስድስት ዓመታት በ□ላ ውርስ ይጣራ በሚል ጥያቄ ቀርቦ የወረዳው ፍርድ ቤትም ሆነ የዞኑ ፍ/ቤት ከሕጉ

2. 3. IDENTIFYING LEGITIMATE SUCCESSORS

2. 3. 1. Provisional Determination

The rightful recipients of a succession – be it testate or intestate – must be identified with the utmost care. This is important for a number of obvious reasons. To mention but one reason, if the recipients of a succession are not correctly identified, then there will be a risk of violating the intent of the deceased and the law by denying the persons who are lawfully entitled and by entitling those that are not entitled.

The liquidator does most of the identification activity. The first and the foremost task of the liquidator is to make a search for a will. The cumulative reading of Articles 962(1) and 956(a) of the Civil Code provides that:

> "The liquidator shall make a search to find out whether the deceased has left a will, and establish who is to receive the property of the succession"

One may wonder what type of liquidator makes the search for a will. Logic and the spirit of the relevant legal provisions dictate that such a liquidator is a liquidator designated by law. That is because with the exception of heirs-at-law, who are designated by law, no other liquidator can be legitimately appointed before the presence or absence of a will is conclusively determined. For example, it is highly unlikely for a testamentary executor to make a search for a will as his very position fully depends on the existence of a will.

The liquidator must make in all places that seem appropriate and the ways that are reasonable a search to find out whether the deceased has left a will. For this purpose, the places that seem appropriate include the papers of the deceased, and the notaries and the registries of the courts of the places where the deceased had lived. The liquidator should sign up at those places and make all necessary researches[37].

37 Article 962 (2), Civil Code.

Apart from the liquidator, any person who has knowledge of a will in a witness capacity is duty bound to contribute toward the search. Article 963 (1) of the Civil Code provides that whosoever has in his possession, finds or knows, in his capacity as a witness, of a will made by the deceased shall make a declaration regarding such will to the liquidator as soon as he comes to know of the death of the deceased. Sub-Article (2) of the same Article states that the duty of such a person to make the declaration holds notwithstanding that the will seems to be affected by nullity. Apparently, the law put in place such a duty with a view to facilitating the search and easing the burden of the liquidator. But the duty is toothless as it is not backed by any punitive sanction that may be imposed on a witness who refuses or fails to make a declaration. That will likely make the entire venture ineffective.

The search may bear fruit and produce a will. It may also happen that more than one wills are discovered. But Article 970 declares that the irrespective of the number of wills, the following legal requirements need to be complied with.

Where the will found is public or holograph, it must be deposited without delay with a notary or in the registry of the court where it is discovered or conserved[38]. The liquidator or any interested person applies to that effect[39]. The idea here is to protect the will and/or its terms from destruction and conversion.

Where the will discovered is oral, the witnesses who have attested it must see to it that the will is reduced to writing and deposited with a notary or court registry[40]. And they must do this without delay. The justification for this seems to be the fear that witnesses, being fallible human persons, may intentionally or for any other reason twist the dying wishes of the deceased, or change their places, or forget the contents of the will, or may die.

Once a will has been discovered, it shall be opened. Opening means to formally publicize the will and its contents. According to Article 965 of the Civil Code, the liquidator opens the will.

Article 965 prescribes also that the liquidator is expected to open the will forty days after

38 Article 964 (1), Civil Code.
39 *Id.*
40 Sub-Article (2), *Id.*

the death of the deceased[41]. There is nothing special with the fortieth day. It is simply the reflection of the religious or customary practice of "***tezkar***" or ***"arba"***, i.e., commemorating the dead on the fortieth day of his death.

However, the above rule is not hard and fast. A will may be opened after the fortieth day of the deceased's death. Article 965 (2) of the Civil Code provides for an instance where a will may be opened after such date. This Sub-Article states that where a will has been discovered after the fortieth day of the death of the testator, it shall be opened on a day fixed by the liquidator within the month of its discovery.

The date specified under Article 965 (1) may be changed for other reasons also. It may, for example, put forward where the deceased has so ordered; or where doing so is necessary for the purpose of making funeral arrangements; or where the majority of the heirs called in the first place by the law agree to the putting forward of the date of the opening. But where for any legitimate reason, a will is to be opened on a date other than the fortieth day of the testator's death; it must, prior to its opening, be deposited with a notary or in a court registry without delay in conformity with the provisions of the law governing deposit of will[42].

Article 967 of the Code stipulates the place where the liquidator should open the will. Sub-Article (1) of this Article specifies that the will shall be opened at the notary or in the registry of the court where it has been deposited during the deceased's lifetime or after his death. Sub-Article (2) of the same Article purports to fill the gap that may be created in the event where the will is not deposited for any reason. This Sub-Article states that in default of such deposit, the will shall be opened at the place where the deceased had his principal residence at the time of his death.

Needless to say, all the potential successors of the deceased are expected to be present at the opening of the will. Accordingly, the law imposes the duty to publicize the opening of the will on the liquidator. Naturally, the heirs-at-law whom the law calls to the succession of the deceased are the foremost potential successors. Thus, Article 968 (1) obliges the

41 Article 965 (1), Civil Code.
42 Articles 965 (3) and 966 (3), Civil Code.

liquidator to invite such persons to be present or be represented. In any case, for the opening of a will to be legitimate, at least four legally capable persons must be present[43].

Besides the liquidator and potential successors, the law authorizes the presence of arbitrators at the opening of the will. Arbitrators are appointed to settle any dispute arising out of the succession[44]. However, a close reading of the relevant provisions of the law reveals that neither the appointment nor the presence of arbitrators is mandatory.

At the time of the opening of the will, the liquidator and all other persons present shall in the first place verify the validity or the form of the will[45]. Then, the contents of the will shall be read out[46]. Furthermore, the necessary provisions shall be made to ensure the conservation of the will[47].

During the opening meeting, the liquidator shall oversee the reading out of the will. He shall make known who the heirs or legatees of the deceased are and to what portion of the succession they are entitled[48]. He shall also establish an order of partition, that is, the manner in which he considers that the succession should devolve and reveal same to interested persons[49]. For this purpose, "interested persons" include the persons who are called to receive the property of the deceased, and persons who would have been called to receive it had there been no will[50].

All potential successors should, for their own sake, make themselves available at the opening meeting. Minors and interdicted persons should be represented by their tutors. Potential successors or their representatives should carefully listen to the terms of the will and the order of partition proposed by the liquidator.

Any interested person who feels aggrieved by the will, or a provision contained therein, or the order of partition may challenge same. He may, for example, demand the nullification of

43 Article 968 (2), Civil Code.
44 Article 969 (3), Civil Code.
45 Sub-Article (1), *Id.*
46 Sub-Article (2), *Id.*
47 Sub-Article (3), *Id.*
48 Article 971 (1), Civil Code.
49 Article 971 (2), Civil Code.
50 Article 971 (3), Civil Code.

the will on the ground that it does not fulfill a formality requirement stipulated by the law. Article 973 (1) provides that any interested person present or represented at the opening of the will may within fifteen days from the opening of the will declare his intention to apply for the nullity of the will or of a provision contained therein, or to impugn the order of partition. But any such declaration will be effective only where it is made in writing and notified to the liquidator, the court or the arbitrators, where any, within fifteen days from the opening of the will[51].

The cumulative reading of Articles 969 (3) and 973 (1) suggests that such a person should, before going to court, bring his case to the attention of arbitrators, where arbitrators have been appointed to settle disputes that may arise out of the succession. But arbitrators might have not been appointed or may fail to resolve the dispute. In such an event, the aggrieved person may initiate a court action.

Article 973 talks only about interested persons who were at the meeting of the opening of the will. But there could be interested persons who were neither present nor represented at the meeting. With regard to such persons, the period for the declaration of intention to challenge the will, its provision, or the order of partition shall begin to run from the day when the liquidator informs them of the order of partition proposed by him[52]. However, no application to contest the validity of a will or an order of partition may be filed after five years from the day of the opening of the will[53].

The discussion so far is confined to the case of testate succession. It goes without saying that there is no such thing as opening of will where the succession is intestate. But as long as other matters are concerned, the liquidator of an intestate succession burdens similar responsibilities as that of a testate succession.

Akin to the liquidator of a testate succession, the liquidator of an intestate succession must establish an order of partition at the time it appears certain that the deceased has not left a will[54]. He must also inform interested persons of his proposed order of partition without

51 Article 973 (2), Civil Code.
52 Article 974 (1), Civil Code.
53 Sub-Article (2), *Id.*
54 Article 972 (1), Civil Code.

delay. The liquidator must give such information as soon as it appears certain that there is no will and, at the latest, forty days after the death of the deceased[55].

Any interested person aggrieved by the manner of the devolution of the succession that the liquidator proposed may challenge same. The last limb of Article 974 (1), which is the counterpart of Article 973 for intestate succession, authorizes that an interested person may declare his intention to impugn the liquidator's order of partition within fifteen days from the day on which the liquidator informs him of it. But any such declaration shall be of no effect unless it is made in writing and notified to the liquidator, the court or the arbitrators, where any, within the above period[56]. No interested person may contest the order of partition after five years from the death of the deceased[57].

2. 3. 2. Option of Heirs and Universal Legatees

In principle, an individual right is a right in the legal sense of the term. That is, an individual right generally is optional. The holder of a certain individual right has two options as far as that particular right he holds is concerned. He is at liberty to opt to exercise the right or, if he so wishes, to renounce it single-handedly so long as his act does not directly harm any right of others recognized by law as valid and enforceable.

From the perspective of the beneficiary, succession is obviously an individual right. Thus, just like most individual rights, the doctrine of option or election is applicable to succession. Accordingly, any person who has right to succeed a deceased person is at liberty to make an election as to whether he will accept the succession.

The Ethiopian Law of Successions is no different. It follows the "no necessary heirs" rule. Pursuant to this rule, "no heir is bound to accept the succession to which he is called"[58].

The abovementioned rule gives a person called to a succession two options - to accept the succession or to renounce it. Acceptance is an act by which a person takes his title to a

55 Sub-Article (2), *Id.*
56 See, generally, the last limb of Article 974 (1) together with Article 973 (2), Civil Code.
57 Article 974 (2), Civil Code.
58 Article 976, Civil Code.

succession. In the contrary, renunciation is an act by which a person opts to give up his title.

The "no necessary heirs" rule applies not only to heirs-at-law, but also to both legatees by universal and singular titles. That is because the law, via Article 915 (1) of the Civil Code, assimilates legatees by universal title to heirs-at-law. And as for legatees by singular title, Article 1038 of the same Code provides that the provisions relating to the option of heirs-at-law and legatees by universal title shall apply also to legatees by singular title, save for a handful of differences.

Akin to making, altering and revoking a will, the right to opt to accept or to renounce the succession is strictly personal to the heir[59]. No other person may make the option on behalf of the heir as long as he is alive and capable. Likewise, where several heirs are called to the succession, it is up to each individual heir to make the choice. Some heirs may accept the succession, while others renounce it[60].

Even the personal creditors of an heir may not exercise the right of election notwithstanding the likelihood that the heir will opt to renounce the succession at their peril[61]. But the rights of such creditors shall not be affected by the heir renouncing the succession in fraud of their interests[62]. Once the heir has opted to renounce the succession, the creditors may, where it is prejudicial to them, apply to the court to annul the renunciation by invoking the device of ***"Actio Pauliana"*** [63].

However, Article 987 of the Civil Code provides that where the heir who is called to the succession dies without making a decision, the right to accept or renounce the succession will devolve on his heirs. Each heir of such an heir is at liberty to opt to accept or to renounce the succession. An heir who has renounced the succession is deemed to have renounced the succession of the deceased.

Article 988 demands that election must be pure and simple. Without prejudice to the provisions of the law stipulating otherwise, acceptance or renunciation of a succession may

59 Article 977 (1), Civil Code.
60 Article 986, Civil Code.
61 Article 977 (2), Civil Code.
62 Sub-Article (3), *Id.*
63 Article 993 (1), Civil Code.

not be made with a time limit or under a condition[64]. Election made otherwise shall be of no effect. Consequently, an heir who accepts or renounces a succession with a time limit or under a condition shall be deemed not to have elected at all[65].

Acceptance or renunciation may not be partial[66]. An heir may not, for instance, accept to take the benefits of a succession and decline its debts. A valid election is said to be made only where the heir accepts or renounces the succession in total. And an heir who accepts the succession for one purpose accepts it for all purposes. By the same token, an heir who renounces the succession is deemed to have never been an heir for all intents and purposes.

However, the "no partial election" rule should not be taken on the surface. A number of qualifications and, even exceptions are attached to it. For example, a person who has renounced the succession in his capacity as a legatee by universal title may still accept it in his capacity as an heir-at-law of the deceased[67]. And an heir-at-law in whose favor a legacy by singular title has been ordered may renounce the succession and accept the legacy or, conversely, accept the succession and renounce the legacy[68]. What is more, a person to whom more than one legacy by singular title has been bequeathed may accept one of such legacies and refuse the other[69].

The fundamental idea behind the "no partial election" rule is simple: A person cannot be permitted to claim inconsistent rights with respect to the same subject matter. Accordingly, an heir who accepts the succession of the deceased cannot enjoy its rights and avoid its burdens.

In the ordinary course of events, debts imputable to the deceased and the succession, which are otherwise referred together as debts of the inheritance, should be paid from the estate. If the property the deceased left is not sufficient to pay off those debts, the heir is not obliged to pay the debts on condition that he renounces the succession. But if he

64 Article 988 (1), Civil Code.
65 Sub-Article (2), *Id.*
66 Article 989 (1), Civil Code.
67 Sub-Article (2), *Id.*
68 Sub-Article (3), *Id.*
69 Article 1039, Civil Code.

accepts the succession, he is bound by the obligation the acceptance may bring about.

Some jurisdictions uphold the principle of simple and unconditional acceptance. According to this principle, if a person opts to take the benefits of a succession by accepting it, then he must also assume any burden attached thereto even though the burdens turn out to be greater than the benefits. So, in such jurisdictions, it is wise to ascertain that the succession is solvent before committing oneself to acceptance.

In sharp contrast, under the Ethiopian Law of Successions, the liability of an heir to the debts of the inheritance does not in any case exceed the value of the benefit he gains by accepting the succession. If all the property of the inheritance is disposed of during the process of liquidation, creditors of the inheritance will not have any legal recourse against the heir as nothing has gone to the heir from the succession. If, on the other hand, some property remains after the liquidation process is wound up and the heir takes the property so remaining, he will be liable only to the extent of the value of the property he has taken[70].

Apparently, the Ethiopian Law promotes acceptance more than renunciation of succession. That is because the law prescribes stricter time limit and formality requirements for valid renunciation than acceptance. For example, renunciation not made in conformity with the specified time limit or form amounts to acceptance[71].

That is not really a problem given that the obligations which acceptance may bring about will in no case be greater than the benefits it entails. But renunciation is a wise choice to make in some instances. A case in point is an heir who is a descendant of the deceased and who has received donations from the deceased. It is advisable for such an heir to renounce the succession if, on condition that it has not been exempted from collation, the value of the donations outweighs what he gets by accepting the succession. The reason is that pursuant to the principle of collation, "any descendant of the deceased who accepts his succession shall bring to the succession the value of the liberalities which he has received from the deceased and which are not exempted from collation"[72].

70 Article 1054 (3), Civil Code.
71 *See,* generally, Article 982 (2), Civil Code.
72 Article 1065, Civil Code.

Be that as it may, the law still allows heirs some room to think and make their mind. As discussed in the previous Sub-Section, the liquidator is duty bound to inform an heir about his being called to the succession without delay. This is necessary to give time to the heir to think over the matter.

An heir will be legally considered to have renounced a succession only where he makes the renunciation in strict compliance with the following requirements; otherwise he is deemed to have accepted the succession. The renunciation will be valid only where the heir makes it:

I. Within one month from the day on which the liquidator has informed him that he is called to the succession[73]; or
II. Where the court, upon his application, grants extension, within three months from the day on which the liquidator has informed him that he is called to the succession[74]; and
III. In writing[75]; or
IV. If he has to make it orally, in the presence of four witnesses[76]; and
V. Known to the liquidator before the expiry of the period stated under (I) or (II) above as the case may be[77].

An heir may simply renounce a succession or, if he likes, renounce it in favor of other persons. If an heir makes the renunciation in favor of one or more specified persons, then he is deemed not to have renounced the succession, but rather to have accepted it[78]. And such renunciation is legally considered as an assignment of rights[79]. If, on the other hand, an heir renounces the succession in favor of all his co-heirs indistinctly without receiving any pecuniary compensation in return, he is deemed to have renounced the succession[80].

73 Article 978 (1), Civil Code.
74 Sub-Article (2), *Id.*
75 Article 979 (1), Civil Code.
76 *Id.*
77 Sub-Article (2), *Id.*
78 Article 983 (2), Civil Code.
79 Sub-Article (1), *Id.*
80 Sub-Article (3), *Id.*

Once it has been validly made, renunciation produces serious legal effects. The renouncing heir will be deemed never to have been an heir for all purposes of the succession[81]. And the portion which he has renounced will go to his co-heirs who have accepted the succession, and where appropriate, to the heirs who come next[82]. However, those co-heirs may themselves renounce such portion within one month from the day on which the renunciation of their co-heir has been brought to their knowledge[83].

Because renunciation produces legal effects which are difficult to undo, revoking renunciation is not as easy as making it. An heir who has validly renounced a succession is not free to change his mind any time he wants and decide to accept the succession. Renunciation may be revoked only under certain circumstances.

As a matter of principle, an heir must give his defect-free consent to renounce the succession. Otherwise, defective consent may render the renunciation revocable. In particular, a renunciation extorted by violence may be revoked[84]. Similarly, a renunciation obtained through fraud perpetrated by another person called to the succession, or by a descendant, ascendant, brother, sister, or spouse of the renouncing person may be revoked[85]. Except for the above two, renunciation may not be revoked for any other cause[86].

An heir who intends to revoke his renunciation must bring an action before the court within two years from the cessation of the violence or the discovery of the fraud because of which he claims to have decided to renounce the succession[87]. However, renunciation may in no case be revoked ten years after it has been made even though the alleged violence did not cease or the fraud was not discovered within this period[88]. If the plaintiff proves the existence of the violence or the fraud, the court to which the action for revocation has been

81 Article 995 (1), Civil Code.
82 Sub-Article (2), *Id.*
83 Sub-Article (3), *Id.*
84 Article 991 (1), Civil Code.
85 Sub-Article (2), *Id.*
86 Sub-Article (3), *Id.*
87 Article 992 (1), Civil Code.
88 Sub-Article (2), *Id.*

brought may annul the renunciation or in some other way it thinks fit specify the effects of the revocation[89].

REVIEW EXERCISES

Case

Azeb, an Ethiopian national who went to Canada five years ago, has succeeded in making a pile of cash. She has even succeeded in remitting money to her parents, brothers and sisters back home although her parents are economically better off. In July 2004, Azeb's father Ato Iyasu passed away.

The late Ato Iyasu appointed Ato Bekele, a good friend of his, as the liquidator (testamentary executor) of his succession in the legally valid will he left. Azeb was among the beneficiaries in the will. Ato Iyasu has made it clear that he intends all of his children to have equal rights in his succession.

Ato Bekele, the liquidator, made a telephone call to Azeb to ask whether she is accepting or renouncing the succession. Azeb replied that she has plenty of property so she does not want to take the succession. Six months after the death of her father, Azeb came home. She observed that the hereditary estate is by far greater than what she expected. She immediately demanded her share. But Ato Bekele told her that she has already renounced the succession and she has no right to demand anything. Her brothers and sisters also opposed her request. The only person who supported Azeb's demand was her mother Wro Almaz.

Question

Can Azeb succeed if she takes her case to court? Why, or, why not?

Hint

89 Sub-Article (3), *Id.*

It is difficult in this case to say that Azeb has validly renounced Ato Iyasu's succession. Renunciation has to be made either in writing or in the presence of four witnesses. But Azeb declined the succession by a telephone response. Neither of those formalities, which is a legal requirement under Article 979 (1), has not been fulfilled. Her response is thus of no legal effect and she will not considered to have renounced the succession.

Ato Bekele's move is erroneous. He should have requested Azeb to write down and mail her decision. She has the right to demand her share in the succession.

So far so good. That was all about renunciation of succession. Now let us turn to acceptance.

Acceptance is not as complicated as renunciation. It may be made either expressly or impliedly/tacitly[90]. An heir who assumes the status of heir in writing is deemed to have accepted expressly[91].

Implied acceptance, in contrast, may be made in a wide variety of ways. An heir who fails to renounce the succession in compliance with the requirements of the law is deemed to have impliedly accepted the succession[92]. Moreover, an heir who performs any act which shows unequivocally his intention to accept the succession is also deemed to have impliedly accepted the succession[93]. For example, an heir who orally tells the liquidator that he accepts the succession, or one who misappropriates or conceals property forming part of the inheritance is deemed to have accepted the succession[94]. But an heir who performs urgent acts of preservation or administration is not deemed to have impliedly accepted the succession[95]. That seems because the intention of such an heir is not unequivocally clear. He might perform the acts of preservation or administration out of good intention for the benefit of other heirs. Just in case such heir does not want to take the succession, considering his acts as acceptance will amount to punishing him for good behavior.

90 Article 980, Civil Code.
91 Article 981, Civil Code.
92 Article 982 (2), Civil Code.
93 Sub-Article (1), *Id.*
94 Article 985, Civil Code.
95 Article 984, Civil Code.

Failure to renounce a succession is taken as acceptance thereof. As long as he has not validly renounced it, an heir is considered to have accepted the succession. Therefore, acceptance starts to produce legal effect beginning from the day on which the deceased has died[96].

Unlike renunciation, acceptance is totally irrevocable[97]. In no case may acceptance be revoked. The decision of an heir to accept the succession to which he is called is final and conclusive. He may not seek the invalidation or annulment of his acceptance even by going to court.

2. 3. 3. Certificate of Heir

An heir[98] does not start to exercise his inheritance right as soon as he is informed that he is called to the succession. He must wait until the property of the inheritance merges with his personal property in accordance with the pertinent provision of the law. However, he can before that apply to the court and obtain a "certificate of heir".

But what does "certificate of heir" mean? Blacks Law Dictionary defines the term "certificate" as follows:

> "Certificate is a written assurance or official representation that some act has or has not been done; some event occasioned; or some legal formalities have been complied with. A written assurance made or issued by some court designed as a notice of things done therein".

As can be inferred from the above definition, a "certificate of heir" is thus a written assurance or official representation issued by the competent court to confirm the inheritance right of an heir who meets the all the legal requirements to succeed a deceased person. This expression is consistent with the provision of Article 996 (1) of the Civil Code, which reads:

96 Article 994, Civil Code.
97 Article 990, Civil Code.
98 Note that the provisions governing certificate of heir apply not only to legatees by universal title by assimilation (Article 915, Civil Code), but also to legatees by singular title by the operation of Article 1002, Civil Code.

> "An heir may apply to the court to be given a certificate of heir of the deceased and the share of the succession which he is called to take".

As an official court document, certificate of heir produces binding legal effects. For example, so long as the certificate has not been annulled, an heir holding a certificate of heir is deemed to have the status the certificate attributes to him[99]. That in other words means that the holder of the certificate is considered to actually have a rightful heir status and to be entitled to the amount of share of the succession as specified therein.

Accordingly, an heir with a certificate of heir can enter into valid juridical acts in the capacity he derives from the certificate. The acts performed by the heir in such capacity may not be impugned, unless it is proved that the person who avails himself of such acts knew for certain, at the time when such acts were performed, that the heir had no right[100]. Since it produces legal effects as serious as that, the court may, before granting the application, require the applicant for a certificate of heir to adduce such evidence and to produce such securities as it thinks fit[101].

The right to succeed is a right the heir or the legatee acquires by law or will, as appropriate. The court has no power to grant such right or to determine the amount of the share of the succession to which an heir or a legatee is entitled. By issuing a certificate of heir, the court simply officially confirms a right that already exists.

But, at which stage in the process of devolution of succession should a certificate of heir be issued? Generally, the practice in Ethiopia, at least until recently, is that be it in a testate or intestate succession, any person who claims to be an heir or a legatee of a deceased person may apply for a certificate of heir anytime after the death of the deceased. Upon receipt of such application, the court will require the production of a will where the succession is testate and, where it is intestate, evidences showing actionable relationship with the deceased. Then, the court usually orders the publication of the application in a widely circulating newspaper. The idea is to notify interested persons to appear and contest the application. If no contestant appears on the day specified in the published notice, the court

99 Article 997 (1),Civil Code.
100 Sub-Article (2), *Id.*
101 Article 996 (1), Civil Code.

will automatically grant the application.

Nonetheless, the existing practice seems to contradict with the applicable law. Even if the law does not specify any stage or time for the issuance of a certificate of heir, close examination of the spirit of the relevant legal provisions reveals that a certificate of heir should not be issued at least before the process of liquidation is wound up. That is because, before the liquidation process is wound up and the identity and the share of persons who are rightful recipients of the succession cannot be conclusively and finally determined. Obviously, issuing a certificate of heir before that stage will be devastating to the proper devolution of the succession.

REVIEW EXERCISE

Case

Kitila is an illegitimate child of Yibrah. Yibrah had acknowledged Kitila by fulfilling all the formalities of acknowledgment required by family law. Assume that Yibrah died intestate and Kitila happens to be the only child of Yibrah. Yibrah had a total of Birr 50,000 in his saving account at the Walya International Bank.

Question

Can Kitila withdraw the money from the bank by producing the document by which Yibrah had acknowledged him? Why, or, why not?

Hint

Kitila cannot withdraw the money from the Bank by merely producing the document in which he was acknowledged. He should apply to the court and obtain a certificate of heir. The document of acknowledgement is important only to prove to the court that he is the rightful and the sole heir of Yibrah.

Once he obtains the certificate of heir, Kitila will have the status which the certificate attributes to him. And since he is the only child of Yibrah, Kitila has sole heir status and, as a result, he is entitled to the entire succession. Pursuant to Article 997 of the Civil Code, Kitila

can enter into juridical acts in that status. Withdrawing money from a bank is a juridical act. Therefore, Kitila can withdraw the money from the Bank by producing not the document by which Yibrah had acknowledged him, but rather by making use of his certificate of heir.

2. 3. 4. Petitio Haereditatis

The danger of issuing a certificate of heir before the liquidation process is wound up and rightful recipients of the succession are correctly identified is that someone without a valid title or with a lesser title may obtain one. For example, a person who, while he is not entitled to the succession at all, obtains a certificate of heir through fraud or any other means is said to be without a valid title. If, on the other hand, a brother or a sister of a person who died intestate controls the estate upon the deceased's death, obtains a certificate of heir, and takes possession of the property of the inheritance while the deceased is survived by a child whom he fathered out of wedlock, such brother or sister is said to have a lesser title as compared to the child.

The person without a valid title or with a lesser title will, once he has a certificate of heir in his hand, have the status which the certificate attributes to him[102]. That happens regardless of the defectiveness of his title so long as his certificate has not been annulled[103]. He might enter into juridical acts in the capacity he derives from the certificate[104]. He might even manage to take possession of all or a portion of the property forming part of the inheritance[105].

That naturally takes place at the expense of the rightful recipients of the succession who have valid title. Fortunately, the law has devised a mechanism through which the persons who are lawfully entitled to the succession may redeem their rights. It may be impossible to undo the damage completely, but this mechanism is better than nothing.

A lawful heir may sue the person who has obtained a certificate of heir without a valid title

102 Article 997 (1), Civil Code.
103 *Id.*
104 Sub-Article (2), Id, implies that a person with a certificate of heir may perform juridical acts in the capacity he derives from the certificate.
105 *See,* generally, Article 999, Civil Code.

with a view to redeeming his right. The suit such an heir institutes is technically called the action of ***"petitio haereditatis"***. Article 999 of the Civil Code, which sets forth the principle of ***"petitio haereditatis"***, states that:

> "Where a person without a valid title has taken possession of the succession or a portion thereof, the true heir may institute an action of ***"petitio haereditatis"*** against such person to have his status of heir be acknowledged and obtain the restitution of the property of the inheritance".

However, with the exception of suits relating to family immovables[106], the right to make use of the action of ***"petitio haereditatis"*** does not hold forever. It stays put only for a limited period of time. An heir who intends to avail himself of such action must institute it within the period specified under Article 1000 of the Civil Code. Otherwise, his right will be barred by limitation. Sub-Article (1) of this Article provides that "an action of ***"petitio haereditatis"*** shall be barred after three years from the plaintiff became aware of his right and of the taking possession of the property of the inheritance by the defendant".

An heir might not be able to institute a ***"petitio haereditatis"*** action within the three years period specified under Article 1000 (1) for one reason or another. If the reason is legally acceptable, the heir may institute the action within fifteen years from the death of the deceased or the day when the plaintiff can enforce his right over the succession[107]. An action of ***"petitio haereditatis"*** may in no case be instituted after such period, save for those suits that relate to family immovables[108].

The heir who is the plaintiff in a ***"petitio haereditatis"*** action may, in his statement of claim, request the court to:

- Annul the status and certificate of heir of the defendant[109];
- Order the defendant to return his certificate of heir[110]; and where he alleges that he has lost the certificate or that he cannot return it for any other reason, order

106 *See,* the exception set forth in the last limb of Article 1000 (2), Civil Code.
107 Article 1000 (2) , Civil Code.
108 *Id.*
109 See, generally, Article 998 (1), Civil Code.
110 Sub-Article (2), *Id.*

the defendant to give all appropriate securities to ensure that he will not make use of the certificate in the future[111];

- Acknowledge his own status of heir[112]; and
- Order the defendant to return to him all the property of the inheritance which he had come to possess[113].

If the plaintiff wins the suit, the court will grant his requests. Consequently, the defendant will return to the plaintiff all the property of the inheritance that has remained in his possession[114]. It is no good even if the defendant invokes the provision of property law that authorizes acquisition of ownership through possession in good faith. He cannot avail himself of this provision by claiming to have become the owner of such property as a result of his good faith[115]. In spite of any such claim, he will be ordered to restitute the property of the inheritance which he had come to possess.

REVIEW EXERCISES

Case

W/ro Birritu has made a valid will in which she has appointed her sister, Konjit, as a legatee by universal title by bequeathing to the latter 20% of her estate. Besides, W/ro Birritu has made a disposition in her will whereby she appointed her brother, Ararso, as a legatee by singular title by leaving him her diamond bracelet worth 500,000 Birr.

Sometime after she made the will, W/ro Birritu sold the diamond bracelet to her neighbor, Akalu. Six months after he bought it, the sale, of the bracelet, Akalu, worried about the safety of the bracelet, decides to resell it. So happens that W/ro Birritu bought back the bracelet for 450,000 Birr from Akalu.

Sadly, W/ro Birritu dies three months after she bought back the bracelet. At the time of W/ro Birritu's death, Ararso was in the Australia doing his Masters Degree. When he came

111 Sub-Article (3), *Id.*
112 Article 999, Civil Code.
113 *Id.*
114 Article 1001 (1), Civil Code.
115 Sub-Article (2), *Id.*

back, all of W/ro Birritu's heirs have already distributed the hereditary estate amongst themselves. Shocked, Ararso institutes an action of ***"petitio haereditatis"*** against the heirs.

Question

Will Ararso succeed in his suit? Why, or why not?

Hint

True enough, W/ro Birritu has made a disposition in her will whereby she left Ararso a diamond bracelet worth 500,000 Birr. But she has sold the bracelet sometime after she made the will. Pursuant to Article 900(1) of the Civil Code, the sale of the bracelet by W/ro Birritu operates as a revocation of the legacy she ordered in favor of Ararso. The revocation remains effective notwithstanding the fact that W/ro Birritu bought back the bracelet at a later date (Article 900(2)). That means, Ararso has no right over the bracelet. He will not therefore succeed in his suit as his claim is unfounded.

2. 4. ADMINISTRATION OF THE SUCCESSION

A person has died means that he ceases to hold any right or duty. The deceased losses all humane rights he used to have, including, but not limited to, the right to control and administer in his own name all the assets and liabilities he earned during his lifetime. All the deceased's assets and liabilities will be paid to persons with valid claim in accordance with the relevant provisions of the law. But until that time, the inheritance must be kept separate as a distinct estate, and administered as properly as the deceased himself would have administered it.

Article 1003 of the Civil Code provides that:

> "The liquidator shall administer the estate of the deceased from the day when he is appointed until the persons having a right to the succession have received the shares or the property to which they are entitled".

This Article charges the liquidator with the task of administering the estate of the deceased, which includes his assets and liabilities. As a matter of fact, the liquidator will start to administer the estate as of his appointment. And he should do the administration until the persons having a right to the succession have received the shares or the property to which they are entitled.

In the ordinary course of events, persons who may have right to the succession are persons who have covered the expenses of the funeral of the deceased and of the administration and liquidation of the succession from their personal pocket, where this is the case; heirs-at-law; legatees by universal title; creditors of the deceased; maintenance claimants; and legatees by singular title. That means that the liquidator must administer the estate until that time at which properly identified debts of the inheritance, i.e., expenses of the funeral of the deceased, expenses of the administration and liquidation of the succession, debts of the deceased, maintenance claims, and legacies by singular title, if any, have been paid to properly identified creditors and the net rights of the deceased have been delivered to the deceased's rightful heirs and/or legatees by universal title.

The liquidator is expected to administer the properties of the succession with the prudence and zeal of a ***bonus pater familias***[116]. That means that the liquidator must act as honestly and diligently as a good head of a family does. Besides, either the heirs acting in agreement between them or, upon the application of any interested person, the court may give the liquidator directives concerning the administration of the estate[117]. That, however, is without prejudice to the compulsory provisions of the law or of the will relating to administration. The law in particular provides for several mechanisms which are designed to ensure the safety as well as the proper administration, preservation and upkeep of the property of the inheritance. Those mechanisms have been discussed below.

Immediately after the death of the deceased, any interested person, especially those having a right to the succession, may apply to the court to order the affixing of seals on the effects, or on some of the effects of the deceased[118]. The person requesting the affixing of seals is

116 Article1010 (1), Civil Code.
117 Sub-Article (2), *Id.*
118 Article 1004 (1), Civil Code.

bound to bear the expenses of the affixing and removal of the seals[119]. But the expense is arguably worth it. Affixing of seals is a wise thing to do to protect the properties of the deceased from such illicit acts as theft, misappropriation, and concealment given the possible void created in terms of an entity to control and tend to the estate at the time of the deceased's death.

Within forty days from the death of the deceased, the liquidator must draw up an inventory to establish what the succession is made up of[120]. The inventory must show each constituent of the succession – be it an asset or a liability. The liquidator must also as necessary draw up supplementary statements for any asset or liability discovered after this period within fifteen days from such property having been discovered[121].

In drawing up the inventory, the liquidator may demand the cooperation of the heirs. As a rule, the heirs will, with the exception of those which come to an end with the deceased's death, retain all the rights and obligations they had against or in favor of the deceased in their relations with the succession[122]. The law obliges the heirs to give the liquidator all relevant information in regard to such rights and obligations so that he can draw up a complete and an all-inclusive inventory[123].

The inventory so drawn up is open to whosoever is called to receive a share of the succession. Such a person may require that a copy of the inventory be sent to him on condition that he bears the expenses thereof[124]. Even the creditors of the inheritance, either of the deceased or of the succession, may order a copy where so authorized by the court[125].

Moreover, the liquidator must provisionally value each of the succession's constituents, whether an asset or a liability[126]. He must make the valuation within forty days from the

119 Sub-Article (2), *Id.*
120 Article 1005 (1), Civil Code.
121 Sub-Article (2), *Id.*
122 *See,* generally, Article 1007 (1), Civil Code.
123 Sub-Article (2), *Id.*
124 Article 1008 (1), Civil Code.
125 Sub-Article (2), *Id.*
126 Article 1006 (1), Civil Code.

death of the deceased[127]. He may, where necessary, seek the assistance of expert valuators in carrying out the valuation[128].

As a matter of fact, an asset or a liability attributable to the succession may be discovered after this period has expired. The law is silent as to when and how such asset or liability is valued, or even whether it is valued at all. But taking a cue from commonsense and the spirit of the legal provisions relating to valuation, it can be said that this component of the inheritance should be valued. Furthermore, applying the case of inventory by analogy, it can arguably be said that any asset or liability must provisionally be valued as necessary within fifteen days from it having been discovered[129].

Hence the name, the provisional valuation made by the liquidator is tentative. It can readily be revised until the time that the succession has been once and for all partitioned. Accordingly, whosoever is called to receive a share of the succession may require that the provisional valuation be revised at any time before the final partition of the succession has been effected[130].

Where an authorized person requests that the provisional valuation of a certain property be revised, expert valuators may be called to revalue the property whose valuation has been contested. If the expert valuators find the provisional valuation to be incorrect, the expenses of the revaluation will be charged to the succession[131]. Otherwise, the person who has requested it will bear the expenses of the revaluation[132].

The ***bonus pater familias*** standard requires the liquidator to act with the utmost honesty and diligence possible. The liquidator must, under pain of being personally liable, perform all acts necessary for the collection of the assets of the estate. In particular, he should take all reasonable steps to recover the debts due to the deceased which are exigible[133], viz.,

127 *Id.*
128 Sub-Article (2), *Id.*
129 Article 1005 (2), Civil Code, provides that the liquidator must as necessary draw up for any asset or liability discovered after forty days from the death of the deceased supplementary statements within fifteen days from such property having been discovered .
130 Article 1009 (1), Civil Code.
131 Sub-Article (2), *Id.*
132 Sub-Article (3), *Id.*
133 *See,* generally, Article 1012 (1) cum. Article 944 (c) together with Article 1021 (1), Civil Code.

debts that, in the technical sense of the term, should be paid because they have fallen due.

Where necessary, the liquidator should commence legal proceedings for the recovery of such debts. He should collect the debts as soon as is practically possible. He will risk personal liability if he unnecessarily delays in demanding payment. For example, if the liquidator, without just excuse, took so long to demand the payment of a debt that the claim was barred by limitation, he would be personally liable to the succession for the debt[134].

According to Article 1012 (2) of the Civil Code, "the liquidator is authorized to give acquittance for such debts". At this juncture, it seems important to raise a common mistake committed while interpreting the term "acquittance" in its present context. It has been observed that many lawyers take "acquittance" to mean that the liquidator may acquit or pardon debts. But in the light of the powers of the liquidator and the whole purpose of liquidation, it is not plausible and logical to think that the law would give the liquidator power to acquit debts – and without any precondition or qualification at that. In law, "acquittance" means a written statement attesting settlement or payment. Therefore, the term "acquittance" and the entire provision of Article 1012 (2) should be understood to mean that the liquidator may issue written statements attesting the settlement or payment of debts.

Conversely, the liquidator should pay exigible debts of the succession[135]. But he should not pay such debts automatically as soon as they are claimed. As a rule, he should refer any claim for the payment of debts pertaining to the succession to the court for proper screening. In other words, the liquidator ought to tell the persons who come forward claiming payment for any alleged debt of the succession to come up with the appropriate court order. He should also contest court actions that such persons may institute as well as any suit filed by any third party claiming a right over the property of the succession[136].

What is more, the liquidator should perform all the acts and institute all the actions

134 *See,* generally, Article 961, Civil Code.
135 *See,* generally, Article 944 (c) cum. Article 956 (c), Civil Code.
136 Article 1011 (b), Civil Code.

necessary for the preservation of the property of the succession[137]. He may sell such properties of the succession as fruits and crops, and other movable chattels which are rapidly perishable or which require considerable expense or particular care for their custody and preservation[138]. He may not, however, sell any other type of movable unless the sell is required to pay the debts of the succession[139]. Likewise, except with the consent of all the heirs or the authorization of the court, the liquidator may not sell any immovable property pertaining to the succession[140].

2. 5. PAYMENT OF DEBTS CLAIMED FROM THE SUCCESSION

2. 5. 1. Introductory Remarks

One of the most important elements of the process of liquidation is the ascertainment and payment of debts claimed from the succession, which, as alluded to earlier, are preferably called debts of the inheritance. Generally, debts that may be claimed from the succession can be classified into two categories: The first category consists in debts which are imputable to the deceased, whereas the second those that are attributable to the succession.

The debts which are imputable to the deceased include the expense of the deceased's funeral, debts he assumed during his lifetime, claims of maintenance by his rightful, and properties he bequeathed to legatees by singular title. These debts are said to be imputable to the deceased because they are linked to him in one way or another. Without prejudice to the difference as to the reason behind their origin, all of these debts come into being because of the deceased. For instance, expenses of funeral arise due to his death. Debts relating to maintenance claims trace their origin to a civil obligation he had while alive. And legacies by singular title happen to be there because they are ordered by the deceased in

137 Article 1011 (a), Civil Code.
138 Article 1013 (1), Civil Code.
139 Sub-Article (2), *Id.*
140 Sub-Article (3), *Id.*

his will.

Moreover, debts of the deceased exist because he had incurred them during his lifetime. Strictly speaking, claimants of these particular debts are creditors of the deceased, rather than of the succession. But as of his death, both the deceased's debts and the corresponding creditors are transferred to the estate he has left behind. As a result, the personal creditors of the deceased may only claim from his succession

The second category is composed of debts that are attributable to the succession. These debts, which generally arise after the death of the deceased, have more affinity to the succession that the deceased. These include the expenses of administration, liquidation, and partition of the succession such as those incurred for affixing of seals, drawing up of inventory, preservation of property, partition and delivery of the inheritance to the heirs, etc.

2. 5. 2. Order to be followed

Not all the debts of the inheritance have equal legal importance. The law has devised a hierarchy of debts in which each type of debt is placed on a different rank depending on its perceived precedence. Some must be paid before others. Accordingly, for purposes of payment, creditors are treated differently on the basis of the priority attached to the debts they claim. The liquidator is thus expected to stick to the order specified by the law while effecting payment. Below is a detailed discussion of the whatness of each of those debts and the order to be followed in their payment.

2. 5. 3. Funeral Expenses

Funeral expenses are expenditures required for the disposal of the body of the deceased. In Ethiopia, the most common practice of disposal of a dead body is burial. And funeral expenses include expenses incurred to buy a coffin, mortify and transport the body, dig the grave, and host relatives, neighbors, colleagues, and other acquaintances who show up to offer consolation to the deceased's immediate families.

Most of those expenses are usually covered by the ***"Idir"*** of which the deceased or his family is a member. But that may not be always the case. The deceased or his family may not belong to any ***"Idir"*** or the ***"Idir"*** to which they subscribe may not cover all the expenses or a portion thereof.

For those or any other reason, it may happen that someone has to bear the expense of the funeral or a portion thereof. In principle, funeral expenses are charged to the estate. Just in case any person has paid such expenses, he may claim to be indemnified out of the estate.

Funeral expenses are legally considered as one of the most important debts of the inheritance. The cumulative reading of Articles 1014 (a) and 1015 (1) of the Civil Code suggests that funeral expenses are payable before any other debt provided that they are justified. This is apparently the case even where the estate is insolvent.

However, funeral expenses will not have priority over other debts of the inheritance unless they are justified, having regard to the social position of the deceased[141]. That means that the expenses incurred for the funeral should be reasonable. As to what are justified or reasonable funeral expenses depends upon the deceased's economic and social status. Such factors as the station in life of the deceased and whether he died insolvent must be taken into consideration. If funeral expenses are considerably exaggerated having regard to such factors, then they are not justified. Note that any expense incurred in excess of what could be considered reasonable will still be paid, but only after all the other debts of the inheritance have been paid[142].

For purposes of indemnification, funeral expenses do not include expenses for the commemoration of the deceased[143]. The law even goes to the extent of expressly declaring that organizing commemoration services is not a juridical obligation of the spouse or relatives of the deceased[144]. Therefore, any expense incurred to organize such traditional Ethiopian commemorative or memorial services as ***"tezkar"*** and ***"sedeqa"*** are not payable out of the estate at all – not even after all the other debts of the inheritance have been

141 Article 1015 (1), Civil Code.
142 *Id.*
143 Sub-Article (2), *Id.*
144 Sub-Article (3), *Id.*

paid.

REVIEW EXERCISES

Case

Ato Amare, a wealthy farmer, died aged 90. He is estimated to be worth 150,000 Birr at the time of his death. Ato Amare is survived by six children with ages ranging from 10 to 65. All of the children, including the minor through his the representative, agreed to the appointment of Bekalu, the eldest son, as a liquidator. At the end of the liquidation, Bekalu came up with a report that contains the following statements:

- Birr 10,000 incurred for the disposal of the body of the deceased.
- Birr 30,000 spent on various customary and religious rites related to the funeral and commemoration of the deceased.
- Birr 15,000 paid for the construction of a marble tomb on the deceased's grave.
- Birr 5,000 spent to organize prayer services for the deceased.

The other children, who felt that the expenses were exaggerated, were disappointed by Bekalu's report. Consequently, they instituted a court action to have the report annulled.

Questions

Assuming that you are the judge to who the case is assigned, what will be your decision on each element of the report? State your reasons.

2. 5. 4. Expenses of Administration and Liquidation

The administration and liquidation of the succession involve a number of various activities that may require expenditure. Expenses incurred for purposes of administration and liquidation should be paid next to the funeral expenses[145]. Such expenses comprise:

145 Article 1014 (b), Civil Code.

I. The expenses of the affixing of seals and of the inventory and those of the account of the liquidation[146];
II. The useful expenses incurred by the liquidator for the ordinary preservation, maintenance and administration of the property of the inheritance[147];
III. The expenses of the partition and those of the transmission of the property of the inheritance to the heirs[148];
IV. Estate duty[149].

2. 8. 5. Debts of the Deceased

These are debts which the deceased actually incurred during his lifetime. These debts could be contractual, non-contractual, or penal by nature. Contractual debts are liabilities emanating from the deceased's contractual undertakings. Non-contractual debts originate in torts imputable to the decease. And penal debts, such as fines, arise as a result of sentence imposed on the deceased for his criminal acts.

Creditors of the deceased do not have any right over the personal property of the heirs and legatees. They, however, have the estate of the deceased as their "exclusive security". As long as their claim is based on a legally valid and enforceable obligation of the deceased, they can enforce it against the estate.

For the simple fact that the deceased is dead, his creditors may not, under normal circumstances, seek specific performance of a debt arising from his obligations. Specific performance is not an option as the deceased is no longer alive to perform it. Creditors need to bring an action for the satisfaction of their claim in terms of an equivalent monetary sum.

It is in the interest of justice and fairness that all genuine creditors of the deceased be paid. The law has put in place mechanisms so that creditors can show up and take what is due to

146 Article 1014 (a), Civil Code.
147 Sub-Article (b), *Id.*
148 Sub-Article (c), *Id.*
149 Sub-Article (d), *Id.*

them before it is too late. For instance, the law requires the necessary publicity and search to be made to identify the creditors of the deceased.

According to Article 1017 (1) of the Civil Code, the liquidator is required to make the appropriate search for creditors. He must take all the steps necessary to establish whether there are persons who are creditors of the deceased[150]. He should, to this end, examine the registers and papers of the deceased and make the necessary searches in the public registers, in the places where the deceased has resided and in those where he has immovable property[151].

Furthermore, where there is reason to believe that the deceased may have creditors whom the search has not disclosed, the liquidator must make such publicity as is appropriate to inform the creditors of the death of the deceased in the places where this seems useful[152]. He must require the creditors to make themselves known to him within three months from the date of publicity[153]. Failure to the search and publicity required by the law will apparently have the personal liability of the liquidator as its only sanction[154].

The liquidator must in the first place use the liquid cash he finds in the succession to pay the debts of the succession[155]. He may sell property only where the cash is not enough to satisfy all debts. And where property has to be sold, the property bequeathed in legacy by the deceased may not be sold unless the debts could not be paid by selling other property[156]. The heirs have the right of preemption to buy any property of the inheritance sold for the purpose of serving debts. The liquidator is bound to offer such property to the heirs before selling it to another person[157]. He is also required to sell it the heir where he offers for it the market value or a higher price[158].

But, what if the property left by the deceased is not sufficient to pay off all his debts? Here

150 Article1017 (1), Civil Code.
151 Sub-Article (2), *Id.*
152 Article1018 (1), Civil Code.
153 Sub-Article (2), *Id.*
154 *See,* generally, Article 1017 (1) and (2), Civil Code.
155 Article 1022, Civil Code.
156 Article 1024, Civil Code.
157 Article 1023 (1), Civil Code.
158 Sub-Article (2), *Id.*
.

is what the liquidator should do. Creditors of the deceased may be of either of the following types:

- Secured creditors;
- Creditors with special privilege under the law; and,
- Ordinary creditors.

Secured creditors are those whose claims have been guaranteed by a personal guarantor or who possess what is known as "real security" by way of a mortgage or a pledge. Secured creditors are always with advantages in comparison with other creditors. They have the right to follow the guarantor or the property which constitutes their security for the satisfaction of their claims.

In the case of a real security, secured creditors have a priority right over the property under pledge or mortgage. Other creditors may make recourse against such property only after the claims of secured creditors have been satisfied. Banks are usually secured creditors.

Creditors with special privilege are such creditors as workers claiming payment under employment contracts. The debts could be salaries or unpaid occupational safety claims, etc. For instance, if the deceased was a factory owner, workers of the factory may demand payment of any unpaid wage. The workers have a right of preference on the property forming part of the inheritance next to secured creditors. Tax authorities are also creditors with special privilege under the law, where there is any tax due.

Ordinary creditors are creditors who do not have any security or who are not conferred with a special privilege by the law. There are two classes of ordinary creditors: Those whose debts are exigible and those that are not.

Ordinary creditors whose debts are exigible are creditors with liquidated and mature claims. These debts have priority over debts that are not exigible, i.e., debts that are not yet liquidated and mature. Creditors whose debts are not exigible and those who have conditional claims over the estate may require deposit of securities from the liquidator to ensure that he will later pay their claims when they fall due or when the conditions attached to the claims materialize.

Note that secured creditors are not generally affected although the succession has no sufficient means to pay off its debts. They may pursue their security, whether personal guarantor or real security, for the satisfaction of their claims. As for the remaining two classes of creditors, where more than one contending creditors with an equal footing demand payment simultaneously, the rule of pro rata distribution, in which the estate is to be distributed between the creditors in proportion to the amount of their respective claims, is applied.

2. 5. 6. Debts Relating to Maintenance

The obligation to supply maintenance is not just moral. It is also a legal obligation sanctioned by the law. Family law governs maintenance provision obligations that may exist as between persons who are alive. According to the pertinent provisions of this law, a person is under certain circumstances obliged to supply maintenance to his spouse, descendants, ascendants, parents-in-law, siblings and stepchildren.

This obligation apparently continues even after death. Under conditions laid down in the relevant provisions of the Law of Successions, some persons may claim to get maintenance out of the estate of the deceased. After paying off the expenses of the funeral of the deceased, the expenses of administration of the succession, and the deceased's debts, the liquidator should, before handing over legacies by singular title, pay the debts relating to maintenance claims[159].

Debts relating to maintenance are purely legal in terms of source and substance. Any act or contract concluded during the lifetime of the deceased in connection with eventual debts of the succession for maintenance is void[160]. By the same token, testamentary dispositions aiming at excluding or modifying the rules relating to maintenance debts are of no effect[161].

According to Article 1026 of the Civil Code, the following three groups of persons may claim for maintenance from the succession. These are:

159 Article 1025, Civil Code.
160 Article 1036 (1), Civil Code.
161 Sub-Article (2), *Id.*

- The spouse of the deceased;
- The relatives of the deceased, namely, his descendants, ascendants, and brothers and sisters; and
- Other persons who lived with deceased or were maintained by him at the time of his death.

Notice that the right of those groups of persons is not unqualified. They are not entitled to claim for maintenance against the estate unless they are in need[162]. That is, they must not have any own means to support themselves. They will not also have such right if they are in a position to earn their living by their work[163].

The spouse of the deceased may claim maintenance irrespective of whether the succession is testate or intestate. S/he may claim regardless of the fact that the deceased has ordered a legacy in her/his favor, unless it is shown that the claimant can live on such legacy. The spouse may get the maintenance by way of a life annuity in accordance with the rules laid down in the applicable family code concerning maintenance obligations[164]. However, where the maintenance is payable by way of annuity, the annuity will no longer be due in case the spouse remarries[165].

In contrast, the relatives of the deceased, i.e., his descendants, ascendants, and brothers and sisters may claim only where the succession is testate and the deceased has left a valid will to their prejudice. That in other words means that they must be persons who could have been called by the law to take the inheritance or a part thereof had the succession been intestate[166]. Accordingly, any descendant, ascendant, brother or sister of the deceased who does not have the capacity to succeed because he has been excluded from the succession as unworthy will not have a claim for maintenance[167].

Likewise, a descendant, ascendant, brother or sister excluded by heirs who have a better

162 Article 1027, Civil Code.
163 *Id.*
164 Article 1030, Civil Code.
165 Article 1034 (3), Civil Code.
166 Article 1028 (1), Civil Code.
167 Article 1028 (2), Civil Code.

right is not entitled to claim maintenance[168]. As discussed in the previous Chapter, relatives that are closer to the deceased are given preference for the purpose of succeeding him. The implication is that distant relatives are excluded by closer ones. For example, ascendants are excluded by descendants. And among descendants, children of the deceased exclude other descendants. The deceased's brother and sisters are excluded by his parents and so on. Applying the rules of intestate succession concerning preference of heirs, relatives who are excluded from the succession by heirs with a better right have no right to claim maintenance.

Furthermore, even where a descendant, ascendant, brother or sister has a right to claim maintenance, there is a limit to the amount which he may receive. Such a person may only get money or things of a value equal to that he would have received from the succession by virtue of the law, had the deceased not made testamentary dispositions to his prejudice[169]. As a consolation, the law assimilates liberalities made by the deceased during the last three years preceding his death to testamentary dispositions made in the will[170].

Any person legally entitled to claim for maintenance must establish his right by forwarding his claim to the liquidator within one year from the opening of the succession[171]. The liquidator is empowered to decide on such claims. He may acknowledge or refuse a claim. However, the decision of the liquidator to refuse a claim may immediately be challenged before the competent court[172].

Article 1031 (2) implies that a person may make a provisional claim for maintenance in urgent cases. This provision is silent as to what constitutes a provisional claim. But the whole purpose of maintenance being provision of the necessities of life, it can be said that a provisional claim a claim made even before the other debts of the succession having precedence over maintenance have been paid. The liquidator may acknowledge such provisional claim in favor of the claimant where the estate has sufficient resources to pay

168 Sub-Article (3), *Id.*
169 Article 1029 (1), Civil Code.
170 Sub-Article (2), *Id.*
171 Article 1031 (1), Civil Code.
172 Sub-Article (3), *Id*.

off the debts with precedence[173].

The liquidator must pay claims for maintenance in conformity with the manner of payment prescribed by the law. As a rule, maintenance should be paid by way of a lump sum[174]. Apart from the case when the recipient is the spouse of the deceased, maintenance may be paid by way of a life annuity only where the creditor is at least sixty years old[175].

If payment by way of a life annuity is allowed, the amount will be fixed definitely[176]. Such amount may be revised only if the entity of the succession has been erroneously appraised when it was established[177]. The creditor may, where appropriate, require that security be given to him to guarantee the payment of what is due to him[178].

Annuity is payable as from the death of the deceased[179]. It, including the arrears, if any, are paid at the place of residence of the creditor[180]. In principle, arrears may not be assigned or attached[181]. However, where there are institutions that provide for the wants of the beneficiary of the annuity, arrears may be assigned to such institutions even before they fall due[182]. They may also be attached by persons who have given to the beneficiary what was necessary for his livelihood[183].

REVIEW EXERCISES

Case

Berchu, who died recently, is survived by his sister, Firehiwot, and his brother, Tesfu. Berchu has left a valid will in which he called Firehiwot to receive the whole property of the inheritance. He has not, however, said anything about Tesfu.

173 Article 1031 (2), Civil Code.
174 Article 1032 (2), Civil Code.
175 Sub-Article (1), *Id.*
176 Article 1034 (1), Civil Code.
177 Sub-Article (2), *Id.*
178 Article 1033 (3), Civil Code.
179 Sub-Article (1), *Id.*
180 Sub-Article (2), *Id.*
181 Article 1035 (1), Civil Code.
182 Sub-Article (2), *Id.*
183 Sub-Article (3), *Id.*

Questions

Can Tesfu claim maintenance from Berchu's succession? Why, or why not? State your reasons.

Hint

Tesfu can claim maintenance. If the will was not there, he would have been called to the succession together with Firehiwot by the operation of the rules of intestate succession. In other words, had Berchu not made his will to his prejudice, Tesfu would have divided the estate with Firehiwot fifty-fifty.

2. 5. 7. Payment of Legacies by Singular Title

A legacy by singular title is not an indispensable element of a succession. There will be a legacy by singular title only where the succession is testate. That is, the deceased must have left a valid will. Moreover, the testator must have made a disposition to that effect.

A legacy by singular title is a disposition whereby the testator calls a person, otherwise called a legatee by singular title, to receive a specific property which forms part of the inheritance[184]. Legatees by singular title are, as a rule, are assimilated to creditors of the inheritance. As such, like the other creditors of the inheritance, viz., the creditors of the expenses of the funeral of the deceased, the expenses of the administration of the succession, and the debts of the deceased, legatees by singular title are paid during the liquidation phase[185].

However, unlike the creditors of the expenses of the funeral of the deceased, the expenses of the administration of the succession, and the debts of the deceased, the title of legatees by singular title is not generally onerous. So long as the law is concerned, legatees by singular title are not presumed to have got their right for consideration. That is, they are not considered to have obtained their claim in return for something they have paid or

184 Article 912 implies that a disposition not relating to the whole or a portion of the property of the inheritance is a legacy by singular title.

185 *See,* generally, Article 1014 (4), Civil Code.

performed for the benefit of the deceased or the succession. The legacy was presumably ordered in favor of them by the deceased without quid pro quo. In other words, their claim is not based on an obligation recognized by the law as valid and enforceable as against the deceased. What is more, unlike persons legally entitled to claim for maintenance against the succession, legatees by singular title might not be in need or might be in a position to earn their living by their work.

The implication of all that is legatees by singular title will be paid only after all other creditors of the inheritance are paid. After paying off all the debts having precedence, the liquidator is expected to pay the legacies by singular title ordered by the deceased out of the estate[186]. Once legatees by singular title have been paid, the liquidation process will end and be closed.

As mentioned earlier, the provisions relating to the option of the heirs or legatees by universal title also apply to legatees by singular title[187]. That is, however, without prejudice to the following two rules. First, the doctrine of total acceptance or refusal is not applicable to legatees by singular title. A person to whom more than one legacy by singular title has been bequeathed may freely accept one of such legacies and refuse the other[188]. Second, refusal of a legacy does not result in the return of the property bequeathed to the succession. If a legatee by singular title refuses the legacy, his refusal benefits either the liquidator or the heir – whoever has the charge of paying the legacy under the will[189].

Nonetheless, the testator is at liberty to provide otherwise in his will. Instead of the liquidator, the testator may order one of the heirs to pay a legacy by singular title[190]. The law is silent as to whether such an heir should pay the legacy out of his share of the succession or out of his personal property. But the testator does not have any power to order an heir to pay a legacy out of his pocket. Nor is any heir obliged to pay anything unless he has accepted the succession and has received all the property of the inheritance or a portion thereof. It can, therefore, safely be said that an heir on whom payment of a

186 *See*, generally, Article 1037 cum. Article 1041, Civil Code.
187 Article 1038, Civil Code.
188 Article 1039, Civil Code.
189 Article 1040, Civil Code.
190 Article 1037, Civil Code.

legacy may be imposed is an heir who, having accepted the succession, has received some inheritance property.

Such an heir can be analogized with a legatee whose legacy has been encumbered by a certain condition. A conditional legatee will receive the legacy ordered in his favor only upon the accomplishment of the condition imposed by the testator[191]. Likewise, the heir will receive his share of the succession only if he pays the legacy he is ordered to and vice versa. That is, the heir receives the inheritance property to which he is entitled only if he pays the legacy, and is liable to pay the legacy, of course out of his share of the succession, only if he has received some inheritance property.

In the normal course of events, a legatee by singular title may not get his legacy at all if the entire property of the inheritance is spent early serving the debts with precedence. A legatee whose legacy has been ordered to be paid by an heir may also experience a similar fate. Where all the property of the inheritance has been disposed of in the course of the liquidation process, a legatee the payment of whose legacy has been imposed on an heir will have no right of recourse against the heir as it is clear that nothing has gone to the heir from the succession.

The position of legatees by singular title is precarious even under normal circumstances. Where the testator has not imposed payment on an heir or has not made any disposition as to the manner of payment at all, the liquidator normally pays singular legacies out of the estate. However, such legacies may be paid only where it appears that the succession has sufficient means for paying them[192]. No means, no payment.

It is possible that some property has remained from the earlier phases of the liquidation process. It may, nevertheless, happen that the testator has ordered several singular legacies and the property remaining is not sufficient to pay all of them. In such an event, payment of is made in three alternative ways. If the testator has expressly laid down order of payment, the legacies will be paid following such order[193]. If, however, the testator has not made an express disposition to that effect, legatees whose legacies could, considering the will or any

191 Article 916, Civil Code.
192 Article 1041, Civil Code.
193 Article 1042 (1), Civil Code.

other written act of the deceased, be said to have been ordered as remuneration for the services they have rendered will be paid first[194]. The property which remains after this, where any, will be distributed among the rest of the legatees on pro rata basis. That in other words means that the legacies that have not been paid will be reduced in proportion to their respective values and be paid[195].

The liquidator is expected to hand over to the legatee the thing bequeathed along with its accessories[196]. The expenses of the delivery are charged to the succession[197]. The thing is delivered in the state in which it is found[198]. In case of any defect or nonconformity, the legatee does not have the right to require that the thing be delivered to him in a good state[199].

The disposition whereby the testator has bequeathed a thing by way of a legacy might happen to be affected by linguistic or titular defect. Linguistically, a legacy may be defective because the testator has ordered it without sufficiently defining its subject matter referring only to its genus[200]. Where this is the case, the legatee is at liberty to select whichever he wishes from among the things of that genus belonging to the testator[201]. Where, on the other hand, several legatees are called to select from things of the same genus, they will draw lots to determine the order in which they are to make their selection[202].

In regard to titular defect, the legacy could relate to a property encumbered, that is, a thing pledged or mortgaged[203]. When the thing bequeathed has been given as a pledge or has been mortgaged by the testator, the corresponding debt is paid out of the estate. Accordingly, the legatee concerned has the right to demand that security be given to him to guarantee the liberation of the thing at the time when the debt falls due[204]. But if he pays the debt required to liberate the thing at maturity, he may seek recovery from the heirs by

194 Sub-Article (2), *Id.*
195 Sub-Article (3), *Id.*
196 Article 1043 (1), Civil Code.
197 Article 1051, Civil Code.
198 Article 1043 (1), Civil Code.
199 Sub-Article (2), *Id.*
200 Article 1044 (1), Civil Code.
201 *Id.*
202 Sub-Article (2), *Id.*
203 See, generally, Article 1045, Civil Code.
204 Sub-Article (2), *Id.*

being subrogated in the rights of the creditors whom he has paid[205].

The other instance of titular defect is where the testator has ordered a legacy in respect of a thing that does not belong to him. This occurs because, for example, the subject matter of the legacy is a thing belonging to other persons[206]. In any case, the thing bequeathed must be a thing over which the testator had no right at the time of his death.

Such titular defect does not necessarily affect the validity of the legacy. In particular, where the subject matter is a thing of a genus, the legacy will, regardless of the defect in the testator's title, still be valid and paid. The liquidator may pay the legatee concerned another thing of a similar genus with that of the bequeathed[207]. But if there is no such thing in the succession, the legatee will get the value of the thing bequeathed to him[208].

Where, on the other hand, the thing bequeathed is a determinate thing which is not a thing of a genus, the whole legacy will, in principle, be of no effect[209]. However, if the testator has ordered the legacy knowing that he had no right over the subject matter at the time of his death, the legacy will be valid[210]. In such case, the legatee may demand that the liquidator pay him the value of the thing bequeathed to him[211].

What a person bequeaths by way of a legacy may not necessarily be a property. He may also make a disposition whereby, for instance, he calls a person to collect a debt owed to him[212]. Where such a legacy has been ordered, the value of the debt will be determined by the amount due to the deceased at the time of his death[213].

Apparently, the position of a legatee in whose favor a legacy of debt has been ordered is even more precarious in comparison with other legatees by singular title. It is up to the legatee to pursue the debtor and secure payment. Even worse, the succession does not

205 Sub-Article (3), *Id.*
206 *See,* the title of Article1046, Civil Code.
207 Article 1046, Civil Code.
208 *Id.*
209 Article 1047 (1), Civil Code.
210 Sub-Article (2), *Id.*
211 Sub-Article (3), *Id.*
212 *See,* generally, Article 1048, Civil Code.
213 Sub-Article (1), *Id.*

guarantee the payment of the debt[214]. The liquidator fulfils the obligation with respect to the legacy by merely delivering the instrument which makes possible the recovery of the debt to the legatee[215].

Apart from a debt, a person may bequeath an annuity owed to him[216]. Where an annuity is bequeathed, the arrears thereof will be due as from the day of the death of the testator[217]. Likewise, where the legacy relates to a determinate thing, its fruits will be due as of the death of the deceased[218]**.** In contrast, if what is bequeathed is a sum of money, it will bear interest at the legal rate, which runs from the day when the liquidator has been called upon to effect payment[219].

214 Sub-Article (3), *Id.*
215 Sub-Article (2), *Id.*
216 See, generally, Article 1049, Civil Code.
217 *Id.*
218 Article 1050 (1), Civil Code.
219 Sub-Article (2), *Id.*

Read the following case and comment on the decision of the court

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መልስ ሰጭዎች ፦ 1 ወ/ሪት ታዬ ወርቅ ለማ ቀርባለች

2 አቶ ብዙአየሁ ለማ አልቀረበም

ይህን መዝግብ እና የፍ/ብ/ይ/መ 1742/88 ን በአንድነት መርምረን የሚከተለውን ውሳኔ ሰጥትናል።//

ውሳኔ

በሁለቱ መዛግብት ለቀረበው ይግባኝ መነሻ የሆነው ክርክር የተጀመረው በክልል 14 መስተዳደር በዞን ፍ/ቤት ነው። በዞን ፍ/ቤት ከሣሾች የነበሩት መልስ ሰጭዎች ሲሆኑ፣ ይግባኝ ባዮች ደግሞ ተከሣሾች ነበሩ። ከመዝገቡ እንደተመለከተነውም መልስ ሰጭዎች ክስ የመሠረቱት ካባታችን በውርስ ያገኘነውና የጋራ ሃብታችን የሆነውን ንብረት ተከሣሾች ከመያዛቸውም በላይ፣ እያከራዩም ገንዘብ የሚያገኙበት በመሆኑ ከንብረቱና በኪራዩ ከተገኘው ጥቅም የድርሻችንን ያካፍሉን ዘንድ ሊወሰንባቸው ይገባል በማለት ነው።=====

ይግባኝ ባዮችም ለቀረበባቸው ክስ መልስ የሰጡ ሲሆን፣ የተከራከሩትም "የጋራ ሃብት የሆነው በአዲስ አበባ ከተማ በወረዳ 20 ቀበሌ 43 ክልል የሚገኘው ቁጥሩ 098 የሆነው መኖሪያ ቤት ያረጀ በመሆኑ አንደ አዲሰ በራሳችን ወጪ አሰርተነዋል። ተጨማሪ ክፍሎችንም ሠርተንለታል። በመሆኑም በቅድሚያ በቤቱ ላይ ያወጣነውን ወጪ በቅድሚያ ሊቀንስ ይገባል። ከሣሾች የቤት ኪራይ ጥቅም የጠየቁት እነሱን ከማይመለከቱ ቤቶች በተገኘው ላይ በመሆኑ ጥያቄው ተቀባይነት ሊኖረው አይገባም። በወረዳ 21 ቀበሌ 22 የሚገኙት አራት ደጃፍ ቤቶች የ1ኛ ተከሣሽ /የወይዘሮ አልማዝ ይግለጡ/ አጎት የነበሩት የአቶ ደስታ ይርዳው ወራሾች ንብረት ነው። በሟች አቶ ለማ ሞላ እና በ1ኛ ተከሣሽ መካከል ህዳር 26 ቀን 80 ዓ/ም በተደረገው የንብረት መቀላቀል ውልም ይህ ቤት የጋራ ሃብት መሆኑ አልተገለጸም። ቤቱ በ1ኛ ተከሣሽ ስም የተመዘገበ አይደለም" በማለት ስለመሆኑ ተገንዝበናል።=====

የዞን ፍ/ቤት በበኩሉ ከግራቀኝ ወገኖች የቀረበለትን ክርክር ከመረመረ በ□ላ፣ በወረዳ 20 ቀበሌ 43 ክልል የሚገኘው ቁጥሩ 098 የሆነው ቤት የከሣሾችና የተከሣሾች የጋራ ሃብት በመሆኑ እና 1ኛ ተከሣሽ የሌሎቹ ተከራካሪ ወገኖች አባት ሚስት በመሆንዋ ከቤቱ ላይ ግማሽ ድርሻዋን ካነሳች በ□ላ ግማሹን አራቱ የሟች ልጆች ይካፈሉ። ተከሣሾች ቤት እያከራዩ ጥቅም ማግኘታቸውን ያልካዱ በመሆኑ በወር ብር 30 ታስቦ ተከሣሾች ድርሻቸውን ይቀበሉ። የቤቱን ግቢ በማከራየት ተገኘ ከተባለው ገቢም ድርሻቸውን ይወሰዱ። በቤቱ ውስጥ የተገኙት ንብረቶች በፍርድ አፈጻጸም መምሪያ ተገምተው በሚገኘው ውጤት ድርሻ ድርሻቸውን ይካፈሉ። በወረዳ 21 ቀበሌ 22 ይገኛል የተባሉት ቤቶች በጋብቻ ውሉ የጋራ ንብረት መሆናቸው ያልተመለተ በመሆኑ ውሣኔ የሚሰጥበት አይደለም በማለት ውሳኔ ሰጥቶአል። የአሁን ይግባኝ የቀረበውም በዚህ ማለትም የዞን ፍ/ቤት በፍ/ብ/መ/ቁ 566/85 የካቲት 22 ቀን 88 ዓ/ም በሰጠው ውሳኔ ላይ ነው።====

ይግባኝ ባዮች ሚያዝያ 18 ቀን 1988 ዓ/ም በጻፉት የይግባኝ ማመልከቻ ለይግባኝ ሰሚው ፍ/ቤት ይግባኝ ያቀረቡት "2ኛ መልስ ሰጭ ከእኛ ጋር አብሮ የሚኖር በመሆኑ ክስ የመመሥረት መብት የለውም። መልስ ሰጭዎች ይገባናል የሚሉት ቦታ የመንግስት በመሆኑና በቦታው ላይ የመጠቀም መብት ያለንም እኛ ብቻ ስለሆንን ክርክራቸው ከሕግ ውጪ ነው ሊባል ይገባል። መልስ ሰጭዎች በቦታው የመጠቀም መብት አላቸው ቢባል እንኳን ያቀረቡት ክስ በሁለት ዓመት /ጊዜ/ ይርጋ ተቋርጧአል። የዞን ፍ/ቤት የሁለታችንም ወገኖች ማስረጃ መስማት ሲገባው የሰማው የመልስ ሰጭዎችን ብቻ ነው። እኛ ያከራየናቸው ቤቶች በ□ላ በእኛ ገንዘብ የተሰሩ ስለሆኑ መልስ ሰጭዎች በእነዚሁ ቤቶች መብት የላቸውም። ከቤቶች ኪራይ ገቢ ሊካፈሉ ይገባል ቢባልም ቤቶቹ ያለማቋረጥ ይከራያሉ ማለት ስለሚያስችግር በዚህ ፍርድ ሊታይ የሚገባውን ሁኔታ የዞን ፍ/ቤት አላየም። ከቤቱ ግቢ ኪራይ ተገኘ የተባለው ጥቅም ባዶ ቦታ በማከራየት የተገኘ በመሆኑ ክስ

ሊያቀርቡበት አይችሉም። ሌሎች ንብረቶች መኖራቸው ያልተረጋገጠ በመሆኑ ውሣኔ ሊሰጥባቸው አይገባውም። ቤቱን ለማደስ ያወጣነው ወጪ አይታሰብላችሁም መባሉ ትክክል አይደለም" የሚሉትን የመከራከሪያ ነጥቦች መሰረት በማድረግ ነው።//

መልስ ሰጭዎች በበኩላቸው በ25/8/1992 ዓ/ም ጽፈው ባቀረቡት ማመልከቻ መልስ ሰጥተዋል። በመልሱም 2ኛ መልስ ሰጭን በተመለከተ በቀረበው ይግባኝ መልስ ሰጭው ከሌሎች መልስ ሰጪዎች ጋር አብሮ የሚኖር በመሆኑ ከይግባኝ ባዮች ጋር አብሮ ይኖራል መባሉ ሐሰት መሆኑንን፤ የተሰጠው ምክንያት መብታቸውን ከመጠየቅ የሚከለከል ባለመሆኑ የከተማ ቦታ የመንግስት መሆኑ የቤቱን ወራሽነት መብት ሊያሳጣ እንደማይችል፤ ስለይርጋ አስመልክቶ የቀረበው ቅሬታ ከሚያከራክረው ጉዳይ ጋር ግንኙት የሌለው ስለመሆኑ፤ ስለቤቱ ኪራይ ክፍያ የቀረበው ይግባኝ በዞኑ ፍ/ቤት ያልተነሣ መሆኑንን፤ የባዶ ቦታ ኪራይ በተመለከተም በማስረጃ ተደግፎ ውሳኔ የተሰጠበት ስለመሆኑ፤ ስለዛፎቹ የቀረበው ቅሬታ ሐሰት መሆኑንን፤ በሚያከራክረው ቤት ላይ በፍንዳታ ጉዳት የደረሰ ስለመሆኑም በዞኑ ፍ/ቤት ያልተነሣ ክርክር ይዞ ይግባኙ የቀረበ መሆኑንና የቤት ዕቃን በተመለከተም በታመነው መሠረት ስለመወሰኑ በመግለጽ ይግባኙ ውድቅ ተደርጎ እንዲወሰን አመልክተዋል።

ይግባኝ ባዮችም በ19/11/1992 ዓ/ም በተጻፈ ማመልከቻ ይግባኛቸውን ለማጠናከር ያሰችላሉ ያሏቸውን ምክንያቶች በመዘርዘር የመልስ መልስ ሰጥተዋል።

ከዚህ በላይ በአጭሩ የተመዘገበው በዚህ የተካሔደው ክርክር ሲሆን በፍ/ ይ/ መ/ ቁ 2230/88 ላይ ደግሞ መልስ ሰጭዎች የዞኑ ፍ/ቤት በሰጠው ውሳኔ በይግባኝ ባይነት በመቅረብ በ21/8/1988 ዓ/ም የተዘጋጀ ማመልከቻ አቅርበዋል።

በይግባኙም ሚችና 1ኛ ይግባኝ ባይ የጋብቻ ውል የተፈራረሙት ከጋብቻ በፊትና በኋላ ያፈሯቸውን ሀብቶች በተመለከተ ለመሆኑ የውሉ ሰነድ እንደሚያስረዳ፤ ይህንንም 1ኛ መልስ አምና የገለጸችበት በወረዳ 21 ቀበሌ 22 ጽ/ቤት የሚገኘው መዝገብ የሚያስረዳ ሆኖ ሳለ ፍ/ቤቱ ይህን አረጋገጦ አለመወሰኑንን፤ በወረዳ 20 ቀበሌ 43 በቤት ቁጥር 098 የሚታወቀውንም ቤት በተመለከተ የቤቱ ሁለት ክፍሎች በወር ብር 30·00/ሰላሳ/ ሳይሆን እያንዳንዳቸው ብር 30·00/ሰላሳ/ እንደሚከራዩ መልስ ሰጭዎች በ5/4/1985 በሰጡት መልስ ያመኑ ስለሆነ ባመኑት መሰረት መወሰን እንደሚገባው በማስረዳት የዞኑ ፍ/ቤት የሰጠው ውሣኔ በቀረበው ይግባኝ መሰረት ተሻሽሎ እንዲወሰን ጠይቀዋል። በዚህ መዝገብ መልስ ሰጭዎች በ16/10/1992 ዓ/ም የተጻፈ መልስ ሰጥተዋል። በመልሱም በወረዳ 21 ቀበሌ 22 ውስጥ የሚገኘው ቤት የአቶ ደስታ ይርዳው

የነበረና ወራሾች የወረሱት እንጂ የሚች አቶ ለማ እና የ1ኛዋ መልስ ሰጭ የጋራ ንብረት ያልነበረ ስለመሆኑ፤ የጋራ ሀብት ስለመሆኑም ቢሆን የማስረዳት ሸክም የሚጣልባቸው ይግባኝ ባዮች ስለመሆናቸው በመግለጽ ይግባኙ ተቀባይነት እንደሌለው ተከራክረዋል።

ክርክሩ አጠር ብሎ ሲመዘገብ የተገለጸውን የሚመስል ሲሆን እኛም የዞኑ ፍ/ቤት የሰጠው ውሳኔ በአግባቡ ስለመሆኑ የበኩላችንን ምርመራ አካሂደናል። በመጀመሪያ በወረዳ 20 ቀበሌ 43 በቤት ቁጥር 098 የሚታወቀውን ቤት በተመለከተ የቀረበውን ክርክር ተመልክተናል። ይግባኝ ባዮች እነ ወ/ሮ ይግለጡ ቤቱ በግንቦት 1983 ዓ/ም በአዲስ አበባ በበቅሎ ቤት አካባቢ ተነስቶ በነበረው ፍንዳታ በመጎዳቱ ለታደሰበትና ለተሰሩ ክፍሎች መልስ ሰጭዎች በከፊል ወጭውን ሊሸፍኑ ይገባል በማለት የሚያቀርቡት ቅሬታና ክርክር የተከሳሽ ከሳሽነት ከመጀመሪያው ያልቀረበበት በመሆኑ አግባብነት የሌለው ሆኖ ስለተገኘ አልተቀበልነውም። 2ኛ መልስ ሰጭ ከመልስ ሰጪዎች ጋር አብሮ በቤቱ የሚኖርና የሚጠቀም ነው በማለት የሚቀርበውም ክርክር በማስረጃ ያልተደገፈና የተካደ ከመሆኑም ሌላ ወራሽነቱ እስካልተካደ ድረስ ከአባቱ ንብረት እንደሌሎቹ ማግኘት የሚገባውን ከመጠየቅ የሚከለክለው ምክኒያት አይደለም። የከተማ ቦታ የመንግስት ቢሆንም የግል ቤት ያረፈበት ግቢ ውስጥ የሚገኝን ቦታ በቤቱ ላይ መብት ያለው ሰው የመጠቀም መብት ስለሚኖረው መልስ ሰጪዎች በቤቱ ላይ መብት ካላቸው በግቢውም የማይጠቀሙበት ምክኒያት አይኖርም። የፍ/ብ/ሕ/ቁጥር 1149 አግባብነት የሁከት ጉዳይን የሚመለከት በመሆኑ በተያዘው የወራሾችና የሚስት ድርሻ ክርክር ላይ አግባብነት የለውም። የሌለው በመሆኑም በተጠቀሰው ሕግ መሠረት ጉዳዩ በይርጋ መታገድ እንደነበረበት የቀረበው ቅሬታ ተቀባይነት የማይኖረው ነው። የቦታ ኪራይን እና የግቢውን ዛፎች በተመለከተም የዞኑ ፍ/ቤት የወሰነው በታመነውና በማስረጃም አረጋግጦ በማየት በመሆኑ በእነዚህ ነጥቦች ላይም የቀረበው ቅሬታ ተቀባይነት የሌለው ነው።

ቀጥለን እነወ/ሪት ታዬ ወርቅ ለማ በወረዳ 20 ቀበሌ 43 በቤት ቁጥር 098 በሚታወቀው ቤት በረንዳ ላይ ተሰሩ የተባሉትን ሁለት ክፍሎች ኪራይ በተመለከተ ያቀረቡትን ይግባኝ መርምረናል። ባደረግነው ምርመራም የሁለት ክፍሎች የኪራይ ዋጋ በወር ብር 60·00/ስልሳ/ መሆኑን አረጋግጠናል። በመሆኑም መልስ ሰጭዎች ከ24/4/1980 ጀምሮ የሁለቱ ክፍሎች ኪራይ በየወሩ ብር 60·00/ስልሳ/ ታስቦ ይካፈሉ ብለናል።

በወረዳ 21 ቀበሌ 22 በቤት ቁጥር ከ133 እስከ 135 እና 137 የሚታወቁትን ቤቶች በተመለከተም እነወ/ሪት ታዬ ወርቅ ለማ ቤቶቹ ሙሉ በሙሉ የጋራ ሀብት ናቸው ያሉ ቢሆንም

2. 6. CLOSURE OF LIQUIDATION

Liquidation is not a process which goes on indefinitely. It will come to an end be closed upon the fulfillment of certain conditions. The law recognizes two alternative grounds that may lead to the closure of liquidation.

Article 1052 (1) of the Civil Code provides for the first ground for the closure of liquidation. It states that "the liquidation of a succession will be closed where the creditors of the succession who made themselves known and the legatees by singular title have been paid their claim or legacy". It seems this provision singles legatees by singular title out not because they are not creditors of the inheritance, but rather because they are the last to be paid. As such, they serve as a benchmark for the payment of all debts of the inheritance. Therefore, the liquidation process will be closed at the time when singular legatees have received what is due to them.

The liquidation process may go up to the stage where legatees by singular title are paid their legacies only when the succession has sufficient means to do that. All the property of the inheritance could be depleted at some earlier stage. Article 1052 (2), which sets forth the other ground entailing closure, states that liquidation will be closed when all the property of the succession is disposed of. That in other words means that liquidation could be closed before legatees by singular title are paid and even at any earlier stage at which the inheritance is left with no more resources.

Closure of liquidation has important legal effects. Pending liquidation, the succession is kept separate and administered as a distinct estate. The rationale is protection of the interests of persons having right to the succession, especially the creditors of the inheritance. And the closure of the liquidation implies either the depletion of all the property of the inheritance or the payment of all the debts of the succession.

In particular, when the liquidation is closed all the creditors of the inheritance having been

paid their claims, it is no more necessary to keep and administer the succession as a distinct estate. Therefore, pursuant to Article 1053 (1), any property which remains from the inheritance after such closure will merge with the personal property of the heir. That seems to be the case where the succession has just one sole heir. In the event of multiplicity of heirs, such property will stay jointly owned by the heirs as per the provision of Article 1053 (2) until it is partitioned.

The merger of the property of inheritance with the personal property of the heir will give the heir's personal creditors a right of recourse against the property of the inheritance that has so merged. Pending liquidation, such creditors do not have any right on any of the properties forming part of the succession. But once the merger takes place, they can proceed against the property obtained from the succession as if it were the personal property of the heir.

Article 1054 confirms that creditors of the inheritance who show up after the closure of liquidation may, just like the personal creditors of the heir, claim payment of what is due to them from the heir. Before the liquidation process is wound up, such creditors were even preferred to the personal creditors of the heir in so far as their claim over the estate is concerned. However, one the liquidation is closed, they will have no better right than the personal creditors of the heir. Even worse, while the personal creditors of the heir may claim the entire property of the heir, including what he had before taking his share of the inheritance, as their common security, post-liquidation creditors of the inheritance may claim only to the extent of the value of property the heir has received as his share from the succession.

As for a legatee by singular title, Article 1058 provides that he will be liable to the post-liquidation creditors of the inheritance only in default of the heir and only to the extent of the value of the legacy which he has received. Such a legatee is assimilated to a simple guarantor in the law of contracts (Articles 1920-1951, the Civil Code) in his relation with a post-liquidation creditor who has sued him. Thus, he may avail himself of any defense available to a guarantor as soon as he is proceeded against. He may invoke the defense of benefit of discussion and demand the suing creditor to discuss the assets of the deceased that have gone to the heirs.

It can be argued that legatees by singular title will be liable to the late coming creditors of the inheritance under two circumstances. First, if the property of the inheritance is fully depleted immediately after such legatees are paid, the heirs would receive nothing. As a result, the heirs will not be liable to pay anything.

Second, after the property of the inheritance has merged with his personal property, the heir may change his address, or become insolvent, or may not, for any other reason, be in a position to pay. In such an event, the legatee by singular title might be compelled to pay the claim of the latecomer creditors. But Article 1059 (2) authorizes the paying legatee to make a recourse against the heir as if he himself were the personal creditor of the heir.

If the singular legatee pays the debt of the succession to the latecomer creditor, he shall substitute himself for the creditors of the heir and can demand from the heir what he has paid to the latecomer creditor (Art. 1059).

REVIEW EXERCISES

Case

Ato Mulugeta spends most of the year in Nairobi, where he operates a business. He came to Ethiopia to visit his relatives and old friends. Before his flight back to Nairobi, however, Ato Mulugeta had to undergo a prostate operation. For this purpose, he concluded an agreement with a specialist called Dr. Oljira for whose service Ato Mulgeta paid 20,000 Birr. But Dr. Oljira was too busy to perform the operation on the day it was scheduled to take place. Even worse, Ato Mulugeta had to fly to Nairobi even without arranging another appointment.

Sadly, Dr. Oljira died a short time afterwards. At the time Ato Mulugeta came back to Ethiopia, he was told that Dr. Oljira had died six months ago. He also heard that the liquidation of the succession of Dr. Oljira was over and all the property of the deceased has been transferred to Mesfin, his only son. Mesfin is a debtor of Natty and he has no any other property other than what he received from the succession. Mesfin owes Natty 50,000 Birr.

Questions

Assuming that Dr. Oljira died intestate leaving property worth 60,000 Birr, can Ato Mulugeta succeed in recovering his money? Why, or why not? If yes, how? Discuss the legal and factual problems Ato Mesfin may encounter.

Hint

Since Ato Mulugeta has not received the service agreed, he can claim the refund of the money he paid to Dr. Oljira on the basis of their contract. The problem with Ato Mulugeta is that, the liquidation phase is over and he cannot have the estate as his exclusive security. Moreover, the estate has already merged with the personal property of Mesfin. To add insult to injury, Natty, the personal creditor of Mesfin, is also demanding payment. Ato Mulugeta will have to compete with Natty to recover his money. Nevertheless, the estate is not sufficient to satisfy both claims. Assume that both Natty and Ato Mulugeta have appeared simultaneously, payment in proportion to their claims will be a legitimate solution. That does not, however, mean that Mesfin will be relieved from his liability to Ato Mulugeta by paying just a portion of the 20,000 Birr. As a rule, he is obliged to pay up to the extent of the value which he has received from the succession. Even though he does not have the money to fully pay Ato Mulugeta for the time being, he will be obliged to do it in the future.

CHAPTER THREE

PARTITION OF SUCCESSION

3. 1. INTRODUCTION

After the liquidation process comes to an end, the following phase is partition of the remaining hereditary estate among the heirs and universal legatees. This phase shall exist only if some property is left from the liquidation phase. That is, if the estate of the deceased is depleted in the liquidation phase, nothing shall remain for partition and hence there will be no partition.

You may be fascinated with the strange rules that are included in this chapter. Most of the rules of partition are totally unknown by the vast majority of the people. You must study this part of the law very seriously since it would enable you to solve problems that arise in one of the areas where our people seek the assistance of experts in law.

You are expected to achieve the following objectives after completing this chapter:

- Prepare a design in which you conduct partition of succession;
- Compare and contrast the rights of latecomer creditors of the succession during liquidation and partition;
- Explain how and why the estate is jointly owned by the heirs;
- Discuss the importance and the difficulties in implementing the theoretical shortcomings of the principle of collation by coheirs;
- Workout the relations that exist between the coheirs after partition, in relation to themselves and in relation to latecomer creditors of the inheritance;
- Reason out the rules that prohibit conventions relating to a future inheritance.

3. 2. COMMUNITY OF HEREDITARY ESTATE

Partition may not necessarily follow when liquidation comes to an end. The coheirs may jointly own the property that they acquired from the succession. The joint ownership of property by the coheirs is different from the community of property of spouses.

Sometimes co-heirs may be obliged to jointly own the hereditary estate. However, this obligation is not a lasting one and hence partition of the property may be made after some time if a co-heir applies to the court for the effect of partition of the property held jointly.

What are the differences between the community of property of spouses and that of coheirs? Discuss.

The community of property of spouses is different from the common ownership of coheirs in that:

(a) In the case of spouses, every property in the hands of the spouses is presumed to be a common property, while only the property obtained from the succession is the common or joint property of the coheirs.

(b) The common property of the spouses remains their common property so long as their marriage exists, but the joint ownership of coheirs stays only for a limited time, unless the co-heirs agree to jointly own for longer time.

(c) The spouses have an equal right over their common property, but the coheirs may have a different proportion, especially in the case of testate succession.

In line with the above discussion, the joint ownership of the co-heirs shall be governed by the law of property, not by the law of family.[1]

Although the coheirs have the right to jointly own the hereditary estate, the provisions relating to liquidation shall not be affected. For instance, if a latecomer creditor of the deceased appears, the heirs who own the estate jointly are bound to pay the claims of such

1 See, generally, Article 1060 (2), Civil Code.

creditors. You should remember here that such coheirs should pay in proportion to what they have received from the inheritance.

Read Art. 1061 and explain its contents.

Article 1061 gives two rules to the coheirs. Firstly, the coheirs may not demand the sale by auction of a particular thing forming the property obtained from the succession. For example, one of the heirs cannot demand, while the estate is still owned jointly, the sale of a car or a table or any other specific property, which is part of the inheritance. As a rule partition has to be made in kind.[2] Hence, the law favors the coheirs to receive a particular property from the succession instead of cash. Secondly, the coheirs cannot demand partition of a particular property from the succession, while the hereditary estate is still held in common. Since they are either heirs or universal legatees all of them have a right over the whole hereditary estate. Unless their condition is regulated by the rule of Article 913, they cannot know which specific property is going to fall in their portion. Moreover, when partition is made, the law requires that care shall be taken to give to each heir the things, which are most important to him.[3] Therefore, partition should involve the whole hereditary estate and partition of a specific or a particular thing that forms portion of the succession should not be made.

The partition of the total hereditary estate (but not only part of it) can be required by any of the coheirs at any time once the liquidation is completed.[4] But this is not always true. That is because Art. 1063 provides for possible exceptions to the rule laid down under Art. 1062.

Here are two of the possible exceptions that Art. 1063 prescribes to what has been provided under Art. 1062:

- The community may be maintained by the order of the court for not more than two years, if the partition is required at an appropriate time. Partition of

2 See the discussion under Article 1086, *Id*, below.

3 See the discussion under Article 1087(2), *Id*, below.

4 See, generally, Article 1062, *Id*.

the hereditary estate may be particularly not appropriate in some circumstances; for example, the only hereditary estate that is left from liquidation is a villa. It is impossible to physically divide the villa and move it to different places. Unless the coheirs agree to jointly own the villa, the only way of partition is selling it and dividing the proceedings of the sale. The market price of villas may fluctuate. That is, it may sometimes rise and fall at other times. It could be said that selling the villa during the seasons of price fall with the intention of partitioning the liquid cash, is selling it at an inappropriate time. In such circumstances, it is important to wait until the price of the villa rises. The court may, therefore, order the suspension of the partition for the period of not more than two years.

- Any request for partition of the hereditary estate shall be suspended when the partition depends on the condition of birth of a child who is merely conceived.[5] According to Art. 2 of the Civil Code, a merely conceived child shall be considered as born whenever his interest so requires, provided that he is born alive and viable. The child is deemed to be viable where he lives for 48 hours after his birth. That is, if the child dies before living for 48 hours, it cannot be considered as a person succeeding his father.

  For instance, at the time of the death of the deceased, his wife may be pregnant. A child who is merely conceived may be called to a succession.[6] In this case, because the interest of the child so demands, he shall be considered as though born. That is why he is called to the succession. However, his viability is an important factor to consider him as a human being and give him a portion of the succession. The succession shall remain without being partitioned until the condition of viability of the merely conceived child is ascertained. Therefore, the request of a coheir to the effect of partition of the succession is not a valid request when one of the heirs is a merely conceived child.

5 To understand this point, you are advised to reiterate your knowledge of The Law of Persons. See, particularly, Articles 2 and 4 of the Civil Code.

6 See, generally, Article 834 of the Civil Code.

Furthermore, Art. 1064 (1) seems to lay down yet another exception to Art. 1062. Art. 1064 (1) denotes that the right of a coheir to apply for the partition of the hereditary estate may be excluded by the will of the deceased or by the contract concluded between the co-heirs. That is, the deceased in his will, may order that the coheirs shall jointly own the property he has left and no partition shall be made. Likewise, the coheirs may agree among themselves to jointly own the property they have acquired from the succession. But such testamentary provision or agreement among coheirs can be effective only up to five years. When a coheir does not want to jointly own the property, irrespective of the order by the deceased or the agreement among the coheirs, partition can be made after five years of joint ownership. Even if the deceased has ordered the joint ownership for more than five years, it shall be reduced to five years. The same is true for the agreement reached among the coheirs. If it goes beyond that it is believed that this would seriously affect one's property rights. The FDRE Constitution guarantees the right to property. According to this constitutionally guaranteed right, a person can use, sell, exchange, alienate his property in any way he likes. This right of an individual shall be affected if the hereditary estate is allowed to stay for a very long period against the will of the individual.

CASE REVIEW

Hypothetical Case

Ato Oman was a hardworking man and he succeeded in having lots of property. However much of his property was spent on his hospitalization. His succession is, therefore, liquidated and only a lorry is left to his heirs after the liquidation. The deceased's wife produced a medical certificate that shows she is pregnant. The deceased is survived by a son of 30 years old and a daughter of 25 years old. The deceased made a will saying that 60% of his property be given to his daughter and the rest 40% be given to his son. Now the daughter needs a quick partition of the property since she needs some money to run a new business.

Questions

Can the court in any way order an immediate partition of the property according to the

request of the daughter of the deceased? (Assume the value of the lorry to be 900,000 Birr). State your reasons.

Hint

In this case the wife was an expectant mother at the time of death of the deceased. As a rule partition shall be suspended when there is a merely conceived child. The reason is that a merely conceived child is called to the succession of the deceased (See Art. 834).[7] If the child is born, there is a possibility that the will could even lapse. In this case, the 25 year old daughter of the deceased wants a quick partition for running a new business. The law favors the suspension of partition when there is a merely conceived child. The suspension in this case shall be until the viability of the future child is verified. However, the court may recognize the allegation of this girl to effect partition even before the birth of the child. If the court believes that the reason of the girl is justifiable, it could authorize the partition (See Art. 1063(2).[8] But it is expected that the court would consider the lapse of the will and accordingly the portion of the girl shall not exceed one-third of the total amount of the hereditary estate.

3. 3. COLLATION BY COHEIRS

Many people do not have information about the existence of the principle of collation in the law of successions. Collation is the bringing back of properties that were given by donation to a descendant by the ascendant during the lifetime of the latter into the succession. Collation is devised to bring equality among the coheirs.

A descendant who has received some property by way of donation (liberality) shall bring back such a property into the inheritance. But it is only descendant that has accepted the succession who should be obliged to bring back the donations he/she has received from his/her ascendant or parent. That is, renunciation would relieve a descendant from

7 See, generally, Article 834, *Id.*
8 See, generally, Article 1063(2), *Id.*

collation. The testator may also exempt his descendant from collation. [9]

As prescribed under Article 1066, the following donations or liberalities are subject to collation.

- Any money that is given to establish the heir;
- Money paid to settle the debts of the heir;
- Property or money given to the heir during his marriage in the form of dowry.

An heir who has benefited from such donations shall be obliged to pay back the values of the properties he received into the succession. However, any payment incurred for the education of the heir is not subject to collation. The property or money incurred for education may be by far greater than the ones listed above. Still tuition fee is not subject to collation.

Only those descendants who accept the succession shall be obliged to collate. It is also possible that the testator can exempt his/her child from collation in his/her valid will. For example, the testator can express in his/her testamentary disposition that his/her child shall participate in the succession without the need to bring the properties he/she took in the form of donation. Moreover, the testator could exempt the heir from collation in the act of donation.

The law provides that only descendant heirs of the deceased are obliged to collate. Other heirs, who have been benefited from donation are not obliged to collate, even if they are beneficiaries of the succession. But this is not a mandatory rule. The testator, in his/her will, can effectively impose these heirs to collate what they have received in the form of donation.

[9] Article 1065

A person who was not an heir of the deceased but later becomes an heir is also bound to collate. This could happen, for instance, if the donor adopts the donee after making the donation.

As provided for in Art. 1074, the value to be collated shall be added to the estate left by the deceased. It is this mass that is ready to be partitioned among the heirs. But here you must note that the co-heir who is obliged to collate need not bring the value in real terms. That is, he/she is not required to bring the value of the donation in liquid cash nor is required to bring in kind. The computation shall be worked out merely theoretically. For instance, assume Ato Adane's succession is liquidated and the estate left after the liquidation is 90,000 Birr. While he was alive, Ato Adane gave to his elder son Joni a car whose value at the time of donation was 30,000 Birr. The mass to be divided between the children of Ato Adane is 90,000+30,000=120,000 Birr.

The purpose of collation is to ensure justice by distributing the estate left by the deceased fairly among his/her children. Therefore, any value brought into the succession by collation can only be distributed or partitioned among the coheirs. Collation is made only to the benefit of coheirs. Even latecomer creditors of the deceased have no right to claim payment from what is collated.

An heir who is bound to collate is considered to have already received his/her portion from the succession to the extent of the value he/she is bound to collate. Therefore, collation is made by taking less. (Read Arts. 1074 (2) cum. 1076(1)).

The heir who is required to collate need not pay the value of the property that he received by way of donation from the deceased. Instead, he is allowed to take less from the succession, which is ready to be partitioned. That is, he collates by way of set-off. You should not consider collation as a physical bringing of the thing taken by donation.

As the Ethiopian law has restricted the modality of collation to "by taking less", the value to be collated shall be added to the hereditary estate for the purpose of forming the mass to be divided among the co-heirs. This can be illustrated by the following examples.

a) Illustration 1

Dawit donated a taxi cab to his elder daughter Ayantu 5 years prior to his death. Assume that the value of the vehicle at the time of donation was ETB100,000. Dawit has left hereditary estate whose net worth is valued to be ETB 500,000. The deceased is survived by three children Ayantu, Kebede and Meron, and he died intestate. The value that Ayantu collates shall be added to the property left by Dawit according to Article 1074(1) of the Civil Code.

ETB100,000 + ETB 500,000 = ETB 600,000

As the succession is intestate in the example above, each of the co-heirs shall receive equal amount from the succession, that is, ETB 200,000. But Ayantu deemed to have already received her portion of the succession to the extent of the value which she is bound to collate, that is, ETB 100,000. This means Ayantu shall receive only ETB 100,000 from the hereditary estate left by Dawit. This is the simplest example of collation by taking less.

b) Illustration 2

Assume that Ayantu had instead received a donation whose value is ETB 200,000, and that the hereditary estate is ETB 400,000.

In this case, as well, the mass to be divided shall be ETB 600,000. But now Ayantu has already received the maximum amount which she could get from the intestate succession, that is, ETB 200,000. The obligation of collation reaches to its peak when the amount given by way of donation is equal to the value which one has as his/her right in the succession. Because the maximum Ayantu is required to collate, according to Article 1076(2) of the Civil Code, is what she would receive from the inheritance in the intestate succession thereby she is bound to collate ETB 200,000. In this case, she is not required to pay physically the

money but merely collates by taking nothing (zero) from the succession and the net hereditary estate shall be divided between the two of her siblings, Kebede and Meron.

c) Illustration 3

Even if the Ethiopian law follows the principle of collation by taking less, it also introduces another rule (as part of the principle of taking less in Article 1076(2)) which would equate the maximum amount to be collated to the value which the heir has in the succession. This means that collation by taking less is also applicable when there is insufficiency of the hereditary estate due to which the co-heirs who demand collation are unable to get what they should get from the hereditary estate. For instance, assume that Ayantu received a donation of the value of ETB 300,000 and the hereditary estate left is again ETB 300,000. The value of the donation shall be added to the estate left by the deceased thereby making the mass worth ETB 600,000.

Under such circumstances, collation "by taking less" would mean that Ayantu shall actually pay to the succession for the purpose of correcting the deficiency of the hereditary estate. The insufficiency shall be corrected when Ayantu pays back ETB 100,000. This makes the actual mass to be divided between Kebede and Meron ETB 400,000, enabling them to get what is due to them from the succession. The natural equality among the co-heirs shall be maintained through such mechanisms which consists of not only taking less but also by correcting the insufficiency in the balance of the hereditary estate. In correcting the insufficiency, however, the donee heir is not bound to collate more than to which he/she has a right in the succession. This situation is treated in illustration 4 below.

d) Illustration 4

No heir shall collate more than the value to which he/she has a right in the succession. Even if collation "by taking less" constitutes the actual payment of sums of money to the succession, the donee co-heir is not obliged to completely cover the deficiency of the estate so that the other co-heirs get what they should get in the intestate succession.

Example

Dawit gave a donation to his elder daughter Ayantu whose value is ETB 500,000. Dawit left a hereditary estate of only ETB 100,000 upon his death, the mass to be divided will be:

ETB 500,000 + ETB 100,000 = ETB 600,000.

Each of the coheirs has a right to receive ETB 200,000 from the succession. As the estate is severely deficient in this case, Ayantu is obliged to pay back sums of money but only to the extent of her share in the succession.

ETB 200,000 + ETB 100,000 = ETB 300,000

It is this ETB 300,000 that will be divided between Kebede, Meron. As per Article 1076 (2) of the Civil Code, Ayantu will keep ETB 300,000 which is more than what she should get in the intestate succession, demonstrating that the Ethiopian law of successions does not compel the donee-heir to correct the deficiency of the hereditary estate in an absolute manner.

e) Illustration 5

Let's finally assume that Ayantu received, by way of donation, ETB 600,000 and nothing was left by the deceased. Like the case in illustration 4, Ayantu is bound to collate only ETB 200,000 by keeping the rest for herself. This allows Kebede and Meron to get ETB 100,000 each.

Review Exercises

1. Do you think that collation would perfectly create equality among the coheirs?
2. If your response is yes, explain why you say yes and if your response is no, give reasons why you say no!

3. 4. THE MODALITIES OF PARTITION

The law prescribes that partition shall, first and foremost, be made as per the terms of the agreement to be made as between the coheirs.[10] But this may not always be possible. Where the coheirs fail to agree on how partition should be made, it shall be made in accordance with the provisions of the law.

The law respects any agreement among the heirs with respect to partition of the succession. In default of an agreement, one of the coheirs may draw up a plan, which could serve as a blueprint for partition.[11] This, however, is on condition that such plan is approved by the court.[12] If partition were to be single-handedly made by one of the coheirs, such heir may make the partition to the prejudice of other coheirs or of the creditors of one of the coheirs. This could particularly be true when partition is made in the absence of the coheir, or in the absence of the creditor of the coheir. That is why the law requires court approval of the agreement by the court.[13]

As a rule, partition must be made in kind.[14] That is, instead of selling the property and dividing the liquid cash or the money, the law considers it good to divide the property as it is.[15] However, sometimes it could be very difficult or even impossible to partition the property equally among the coheirs in accordance with the rule of partition in kind. In such a case, the inequality of the shares in kind shall be setoff by payment of sums of money.[16] What is more, the law stipulates that an heir should be given the property which is most useful to him, so long as that is possible.[17]

Example

10 See, generally, Article 1079 (1), Civil Code.
11 Article 1079 (2), *Id*.
12 *Id*.
13 See, generally, Articles 1080 and 1081, *Id*.
14 Article 1086 (1), *Id*.
15 *Id*.
16 Article 1086 (2), *Id*.
17 Article 1087 (2), *Id*.

The succession of the late Ato Bayissa, who is survived by three sons, comprises a minibus taxi, a residential house, and carpentry equipment. Suppose these three properties have equivalent monetary value. Assume that the first of Ato Bayissa's coheirs is a married man who desperately needs a house, the second an aspiring carpenter who needs to have his own equipment to work as a professional carpenter, and the third with third grade driving license, who always dreams to have his own taxi. Pursuant to Article 1087 (2), it would be appropriate to give the minibus taxi, the residential house, and the carpentry equipment to the first, the second, and the third coheirs respectively, as that is the property which is most useful to each.

3. 5. THE RELATION BETWEEN THE CO-HEIRS AFTER PARTITION

The entire process of the devolution of a succession comes to an end with partition. With partition also ends the relation between the co-heirs in regard to the succession. Basically, there will be no binding relation, whether contractual or legal, as between the co-heirs once the succession has been fully partitioned.

However, with a view to protecting the interests of the co-partitioners, or of one or some of them, the law has put in place provisions that extend the relation between the co-heirs even after partition with respect to two issues. The first is the issue of warranty. The co-partitioners owe to each other warranty in respect of their shares in the succession.[18] The other is the issue of the annulment or correction of the partition.[19] Partition may be annulled or corrected for the benefit of all, some, or one of the co-partitioners in certain circumstances. Let us now examine these two issues in depth.

18 Article 1097, *Id*.
19 See, generally, Articles 1102 - 1109, *Id*.

3. 5. 1. Warranty due by Co-heirs

"Warranty" basically means the security a person provides for the benefit of another person to ensure that something is done safely in favor of that other person. Often, warranty is associated with sales, wherein the seller is duty bound to warrant the buyer as to the transfer of the ownership of the thing sold as per the terms of the contract.[20] There also exists a warranty obligation as between the co-heirs in the Law of Successions. This obligation is meant to serve as a sort of risk distribution mechanism among the co-heirs.

Remember that partition technically means an agreement whereby the share each co-heir has in the succession is approved. Partition does not necessarily entail delivery. Shares are usually practically delivered after partition has been made. In other words, co-partitioners receive their shares after partition. The fundamental idea pertaining to the warranty obligation in the Law of Successions is that the co-heirs, who are the co-partitioners so to say, are bound to provide warranty to each other to ensure the safe delivery of their shares in the succession after partition.

For this purpose, the share of a co-partitioner is used to guarantee payment of the shares of his co-partitioners. That is, a co-partitioner provides security to the amount of the value of his share in the succession.[21] He is not obliged to provide the warranty with his personal property.

The warranty a co-partitioner may owe could be grouped into two depending on the type of the content of the share in relation to which the warranty is provided. According to Article 1097 (1) of the Civil Code, in respect of the corporeal things or movable properties placed in their shares, the co-partitioners owe to each other the warranties which a seller owes to a buyer. In contrast, pursuant to Sub-Article (2) of the same Article, they owe to each other the warranty provided for in regard to the case of an assignment of a debt by onerous title in respect of rights and debts placed in their shares.

20 Article 2273 cum. 2287, *Id*.

21 Article 1099, *Id*.

Basically, a seller owes two important warranties to the buyer. These are warranty against dispossession and warranty against the non-conformity of the thing sold with the contract.[22] Let us now see a couple of possible scenarios in which these two warranties may come into play in the relation between the co-heirs after partition.

As for warranty against dispossession, someone may come forward with a claim over a movable property placed in the share of a co-partitioner after partition has been made. Such a person may produce sufficient evidence to prove that the property actually belongs to him and may even manage to dispossess the co-partitioner. As a result, the co-partitioner in question may end up getting nothing from succession. The other co-partitioners are required to warrant such co-partitioner against any total or partial dispossession which he might suffer in consequence of the third party claimant exercising the right he had at the time of the partition of the succession.

In contrast, the idea behind warranty against non-conformity is that the co-partitioners have the duty to warrant each other that the thing delivered to each of them conforms to the terms of the partition and is not defective. It may happen that a co-partitioner has received a thing that differs in quantity or quality from the thing placed in his share during partition. By providing warranty, the other co-partitioners in effect share the loss with the co-partitioner who has received such a thing.

In the normal course of events, the warranty is implemented by the other co-partitioners indemnifying the aggrieved co-partitioner. Pursuant to Article 1098, the amount of the indemnity is fixed according to the value of the thing warranted at the time of the partition. The indemnity is due by each of the co-partitioners in proportion to the value of the share of the succession which he has received.[23] In case one of the co-partitioners is insolvent, the indemnity due by him will be divided between the co-partitioners in whose favor the warranty operates and all the other co-partitioners who are solvent, again in proportion to the value of the share of the succession which each has received.[24]

22 See, generally, Article 2273 cum. 2287, *Id*.

23 Article 1099 (1), *Id.*

24 Article 1099 (2), *Id.*

Warranty may not be due in certain circumstances. For instance, warranty may not be due if the dispossession or the non-conformity complained of by a co-partitioner is imputable to his own fault.[25] Nor may it be due where the dispossession or the non-conformity results from a cause that arises subsequent to the partition agreement.[26] Moreover, there will be no warranty where, in the words of Article 1101 (2), the dispossessed or non-conforming property has been placed in the share of the co-heir without warranty in accordance with an express provision to that effect in the partition agreement.

REVIEW EXERCISES

Case

Abebe, who passed away in 1993 E. C., died intestate. He is survived by his children Mammo, Kebede, and Ayele. Upon the winding up of the liquidation of Abebe's succession, Belete, the liquidator, came up with a report showing that the succession consists of 100,000 Birr in liquid cash deposited in the deceased's bank account, a small-sized flour factory which was valued to be worth 100,000 Birr by expert valuators, and 100,000 Birr which the late Abebe lent to Dimamu in 1974 E. C.

At the beginning of 1995 E. C., the three co-heirs of Abebe agreed to partition the succession in the following manner in conformity with the relevant provisions of the law. According to the partition agreement, Mammo, the youngest son, will take the 100,000 Birr cash deposited in Abebe's bank account; the flour factory is placed in the share of Mammo's elder brother, Kebede, who is a mechanical engineer by profession; whereas the eldest son, Ayele, who is a lawyer, will collect the 100,000 Birr loan money from Dimamu.

Questions

1. Assume that the night before it was delivered to Engineer Kebede, the flour factory was destroyed by fire caused due to the electrical problem it had for a long time. Who do you think should bear the loss? What is the obligation of Mammo and

25 Article 1101 (1), *Id.*
26 *Id.*

Ayele, the other co-partitioners? Assuming that all co-partitioners are liable, how much is due by each co-partitioner?

2. Ayele, who sue Dimamu for the recovery of the 100,000 Birr loan money in1995 E. C., lost the suit because the claim was barred by limitation. Does Ayele have any other legal remedy? Explain.

3. 5. 2. Annulment and Correction of Partition

Partition is made by an agreement that is concluded between the co-heirs. As such, a partition agreement is expected to meet all the validity requirements of a contract as to consent, capacity, object, and form. Otherwise, it may be annulled in the same circumstances as other contracts.[27]

Articles 1808 through 1818 of the Civil Code state how contracts may be annulled or invalidated. For example, a contract may be annulled where the consent of one of the contracting parties is legally defective or where one of the parties is incapable to perform juridical acts.[28] Similarly, a partition agreement may be annulled on the ground of defective consent or incapacity of one of the co-heirs.[29]

Partition will not be annulled for the sole reason that a property forming part of the succession is discovered subsequent to it. [30] Article 1103 prescribes that without affecting the partition previously made, a supplementary partition will be made in relation to such property. It may, nonetheless, happen that the newly discovered property was in the possession of one of the co-heirs who had concealed its existence from his co-heirs in bad faith with the intention of owning it exclusively. In such an event, the concealing heir will, by way of punishment, be deprived of any share in the property he concealed.[31]

27 Article 1102, *Id.*
28 Article 1808 (1), *Id.*
29 See, generally, Article 1102 cum. 1808 (1), *Id*.
30 See, generally, Article 1103, *Id*.
31 Article 1104, *Id.*

Consider the following example:

Colonel Bayissa, who died two years ago, kept a kilogram of gold that he bought 10 years ago in his safe. Immediately after the death of Colonel Bayissa, his daughter, Chaltu, took the gold and hid it. The other surviving children of Colonel Bayissa, Deribe and Eshetu, who were well aware of the existence of the gold, were worried about its absence. They made repeated searches in all the places they suspected, but to no avail. Chaltu also pretended that she was worried by the loss of the gold. However, one fateful day, while visiting Chaltu's house, Deribe discovered the gold in Chaltu's cupboard. Chaltu will lose her right of the succession as far as the gold is concerned.

Partition might have been made to the prejudice of one or more of the co-partitioners due to erroneous valuation or the failure of an heir to collate a donation which is subject to collation. Neither of these two factors entails the annulment of the partition all together. Instead, the partition will be corrected by indemnifying the aggrieved co-partitioner.

Article 1105 (1) provides that a person who has received in all less than three-fourth parts of what he had a right to because of an erroneous valuation of a certain property may apply to the court to order the correction of the partition. Pursuant to Sub-Article (2) of the same Article, an application for the correction of a partition may also be filed where a donation subject to collation has not been declared by the person who was bound to collate it in favour of his co-heirs. Such application must be filed within three years after the partition has been made.[32] The right to apply for correction will be barred after the expiry of this period.[33]

As said shortly earlier, correction of partition is made by paying the aggrieved co-partitioner an equivalent monetary indemnity. According to Article 1107, where the court allows an application for correction, it will fix the amount of the indemnity due to the applicant as well as the person by whom and the conditions on which such indemnity should be paid. The court is expected to fix the indemnity due in terms of money in all cases.[34] Naturally, payment of indemnity may be required only from the co-partitioners of the applicant or

32 Article 1106, *Id.*
33 *Id.*
34 See, generally, Article 1107 (1) cum. 1108 (1), *Id*.

from their heirs or legatees.[35]

If, on the other hand, the correction is made in consequence of a donation subject to collation not having been declared in the partition as corrected, the defaulting co-heir shall be subject to punishment for his conduct. The punishment is the deprivation of such heir of the value equal to the donation which he must have collated.[36] However, if the co-heir in question proves his good faith to its satisfaction, the court may waive the imposition of the punishment.[37]

3. 5. 3. The Right of Creditors Coming after Partition

Creditors of the inheritance may sometimes appear after partition has been made. Such creditors do not loss their rights simply because the succession has already been partitioned. However, they will have a lesser or, at least, no better right than the personal creditors of the co-partitioners in as much as the property of the succession is concerned.

As a rule, a creditor coming after partition must divide and forward his claim to the co-partitioners in proportion to the value of the share received by each unless the debt due to him is indivisible or there is an agreement made in the partition whereby the whole debt or a larger part thereof is charged to one or more co-partitioners.[38] This is not really an easy thing to do. The co-partitioners might have already taken their shares and departed to their respective destinations.

REVIEW EXERCISES

Case

Ato Bokku, who died five years ago, passed away leaving a valid will behind He left an estate estimated to be worth Birr 400,000. His children, Worku, Yared and Zinash partitioned the estate according to the will, which stated that:

35 Article 1108 (2), *Id*.
36 Article 1107 (2), *Id*.
37 Article 1107 (3), *Id*.
38 Article 1110 (1) cum. (2), *Id*.

i) Worku would receive 40%;

ii) Yared would receive 30%; and,

iii) Zinash would receive 30% of the succession.

Sometime before his death, Ato Bokku had borrowed Birr 200,000 from a certain W/ro Habtish, which he died without repaying. W/ro Habtish did not show up during the liquidation phase to claim what was due to her.

Questions

1) How much does each co-heir receive from the succession?
2) How, and how much should W/ro Habtish claim from the co-heirs?

Hint

1) Each of the co-heirs is paid from the succession in the following manner:

   a) Worku - 40/100 X 400,000 = 160,000
   b) Yared - 30/100 X 400,000 = 120,000
   c) Zinash - 30/100 X 400,000 = 120,000

   Worku takes 40% of the 400,000 Birr. 40% of the estate is equal to 160,000 Birr. Yared and Zinash will each receive 30% of the 400,000 Birr, which is equal to 120,000 Birr.

2) W/ro Habtish's total claim is 200,000 Birr. W/ro Habtish is required to divide and forward her claim to each co-partitioner in proportion to what he/she has received from the succession. W/ro Habtish's claim, 200,000 Birr, divided by the estate, 400,000 Birr, is equal to ½. Accordingly, her claim from Worku is ½ X 160,000 = 80,000. As for Yared and Zinash, her claim from each is ½ X 120,000 = 60,000.

A creditor of the inheritance who arrives after partition may divide his claim among the co-partitioners only where his claim is divisible. If his claim is indivisible, he may claim only from either of the co-partitioners. However, where a co-partitioner has paid to the creditor of the inheritance more than the share of the debt which should finally remain to his charge,

he may make recourse against the other co-partitioners for the amount he has paid in excess.[39]

Examine the following example:

Ato Ayalew has sold his car to Yeneneh. Yeneneh paid the money to the deceased immediately after the contract was concluded. Unfortunately, Ato Ayalew died before handing over the car to Yeneneh. Assuming that Yeneneh has appeared after the succession was partitioned and the car was allocated in the portion of one of the co-partitioners, Yeneneh may simply demand the car from the co-partitioner in whose share the car was placed.

But, what if one of the co-partitioners becomes insolvent after partition is made? How would the creditor of the deceased satisfy his claim? Article 1111 gives a solution to this problem. Where one of the co-partitioners becomes insolvent, the creditor can demand payment from other co-partitioners. These co-partitioners are obliged to pay the portion of the debt that should have been paid by the insolvent co-partitioner by sharing it among themselves pro rata, i.e., in proportion to the amount they have received from the succession.

A singular legatee who appears after partition has the status of a creditor of the deceased for the purpose of the application of Article 1111.[40] That means that even when one of the co-partitioners is insolvent, the singular legatee could demand what is due to him from the other co-partitioners. He should, however, demand payment from the other co-partitioners by dividing what is due by the insolvent co-partitioner among each solvent co-partitioner in proportion to what he has received from the succession.

Note that this does not mean that the insolvent co-partitioner is relieved from liability altogether. His liability stays put, and he may be required to pay any time he returns to the state of solvency. By availing himself of the provisions of Article 1113, a co-partitioner who has paid the portion of the debt of the succession owed by the insolvent co-partitioner may seek restitution when the later becomes solvent.

39 See, generally, Article 1113, *Id*.
40 Article 1112, *Id*.

3. 6. CONVENTIONS RELATING TO AN INHERITANCE

Succession is a strictly ***mortis causa*** process. Any act relating to a succession will be of no legal effect unless it occurs after the death of the person being succeeded. That, of course, is with the exception of will, which is naturally made while the person to be succeeded is alive.

However, the validity of even a will, the likely exception, is conditional. A will may be valid only where it is made with the full and free volition of the testator. Anything that affects the testator's free volition will render the will invalid.

As a continuation of this principle, the law does not recognize any agreement made in connection with the inheritance of a person while he is still alive. Any agreement as to how the succession of the deceased shall devolve on the heirs or an agreement made between third parties and heirs, particularly before the opening of the succession shall be of no effect.[41] Without prejudice to this, parents and ascendants may partition their property among their children and descendants by way of donations during their lifetime.[42]

3. 6. 1. Pacts on Future Successions

A "pact" is an agreement made between two or more people. The law does not allow people to make agreements on a succession that has not yet opened. Such agreements are believed to affect the powers of a person with respect to making, modifying, or revoking a will. The law is always interested in ensuring that the testator makes his will with his free volition.

One of the mechanisms through which the law tries to accomplish this goal is preventing interference by others. Allowing a valid agreement to be made on a future succession is tantamount to obliging the testator to make his will as agreed. This will definitely limit the powers of the testator to make, replace, modify, or annul his will with his free volition.

41 See, generally, Article 1114, *Id*.
42 See, generally, Articles 1117 - 1123, *Id*.

In short, in the words of Article 1114, any contract or unilateral undertaking relating to the succession of a person alive that is not expressly authorized by law is void ***ab initio***. The provision at hand renders void a pact that may be entered into by the person whose succession is concerned. This assertion is corroborated by Article 1116, which provides that "no person may bind himself by contract to leave his succession or to bequeath a legacy to a person contracting with him or to a third person".

Apart from that, Article 1114 prohibits a likely heir or any other person to make any kind of contract concerning the succession of a person who is still alive. Seemingly in explanation of this, Article 1115 outlaws in particular any advance acceptance, renunciation, or assignment of rights pertaining to a future succession. According to this Article, it is not lawful for a potential heir or legatee to accept or renounce a succession in advance, or to assign in advance one's eventual rights to a succession. Such an act is unlawful notwithstanding the fact that the person to be succeeded has agreed to it.[43]

REVIEW EXERCISES

Exercise I

Case

Hajji Hussein Aba Bulgu, a factory owner, is the richest person in the small town of Lekim. As of recently, Hajji Hussein has been seriously ill. He has been hospitalized for the last two months.

However, Hajji Hussein's illness is too terminal that the doctor treating him has lost hope of curing him. The doctor finally concluded that Hajji Hussein has just a week to live. He communicated this sad story to Hajji Hussein's only son, Mohammed. Upon hearing the news, instead of being sad, Mohammed was pleased that his father would die within a week. He thought his dreams to be a wealthy man is just to come true.

So, Mohammed went to his friend Yonas immediately and told him that he would soon get a good deal of money from the succession of his father. He further explained that if Yonas

43 Article 1115 (2), *Id*.

gives him some money, he would pay it back with a generous interest in a matter of days. Accordingly, the two concluded a loan agreement forthwith in performance of which Mohammed collected the money agreed at the spot.

Question

Comment on the legality of the agreement concluded by Mohammed and Yonas.

Hint

To begin with, the agreement under consideration is an agreement on a future succession. The law strictly prohibits any such agreement. There are a number of rationales for the prohibition. The following are the most pressing ones.

1. A future succession means the person to be succeeded is still alive. That means that the person is still the subject of rights and duties under the law. As a result, he, among other things, is the owner of his property and has a will making power.

   In the given case, regardless of the fact that he is terminally ill, Hajji Hussein is still alive and, therefore, holds the rights and duties attributable to personality. He consequently enjoys pertaining to the ownership of his property and has all the rights and powers related to will making. He can make a new will, or can change, modify or even revoke the will he had previously made. There is no certainty as to what is going to happen in the future since Hajji Hussein has full right to make, modify or revoke a will at the eleventh hour. The agreement concluded by Mohammed and Yonas is against this legal right of Hajji Hussien.

2. If agreements on a future succession were allowed, the person who has entered into such an agreement may be tempted to kill the person whose succession is concerned if such a person does not die within the time expected.
3. There is a possibility of the reverse happening. The person who has entered into an agreement on another person's succession may himself die before the person being succeeded.

Exercise II

Case

Anaconda is an NGO established with an aim of preserving the world's wildlife. Anaconda is extensively engaged in fundraising to fund the activities of other smaller NGOs which operate in the same area as it. Some time ago, Anaconda signed a contract with a certain Ato Desalegn, a very wealthy businessman. The following are the contents of the contract in part:

Case

This is an agreement concluded between Anaconda, a nongovernmental organization, and Ato Desalegn Techane, a businessman.

Article 1

Ato Desalegn hereby agrees to renounce the succession of his father, Captain Addisu, to the benefit of Anaconda. Ato Desalegn is the only son and thus the sole successor of Captain Addisu.

Article 2

In return, Anaconda undertakes to honor Ato Desalegn with a lifetime award.

Article 3

This contract shall enter into force as of the death of Captain Addisu. Captain Addisu, 85, currently resides in Addis Ababa.

Question

Comment on the contract concluded between Ato Desalegn and Anaconda.

Hint

This is a contract prohibited by law. It is illegal to a make a contract in relation to the succession of a person who is still alive. The contract in question requires Ato Desalegn to renounce his father's succession. It is not allowed to renounce the succession that has not yet opened. Captain Addisu has the right to make, modify, or revoke a will at any time. As far as the law is concerned, it is not yet certain whether Ato Desalgn is called to the succession of his father at all or what portion of it he would be entitled to receive. The contract concluded between Ato Desalegn and Anaconda limits the will making powers of Captain Addisu. Generally, the contract is an illegal agreement that has no legal effect whatsoever. Therefore, it is null and void and binds no one.

3. 6. 2. Partitions made by Donations

As discussed in the previous Sub-Section, any contract or unilateral undertaking relating to the succession of a person who is alive will have no legal effect, unless it is expressly authorized by law. In particular, a contract providing for how the succession of a person should devolve or an agreement made between heirs or a pact involving third parties which is made before the opening of the succession is not legally binding. For instance, a contract by which a person undertakes, while alive, to leave his estate or a portion thereof to one or more persons is not valid.[44] However, under certain conditions, the law allows certain persons to validly partition their properties by way of donations while they are still alive.

It is a common practice in Ethiopia for parents to distribute their property among their children during their lifetime. Such distribution is technically different from succession. Nevertheless, without prejudice to their technical differences, the two processes produce somehow similar legal effects.

The practice of parents in Ethiopia whereby they distribute their property among their children while alive is apparently recognized by the country's Law of Successions. Article 1117 of the Civil Code sets forth the following rule:

44 See, generally, Article 1116, *Id*.

> "The father and the mother and the other ascendants may make a distribution and partition of their property among their children and descendants".

According to this provision, not only parents, but also grandparents or other ascendants may validly distribute their properties to their descendants during their lifetime. Note that the disposition of property by way of such type of partition is legally allowed only as between a specific group of persons.

The other point that should be noted is that the law recognizes and gives effect only to unidirectional distributions. Only ascendants may, while alive, validly partition their properties, and only among their descendants. Such partition could not validly be conducted the other way round, i.e., by descendants to ascendants. Nor could it be effectuated as between persons other than ascendants and descendants. Apparently, the rationale for this restriction has got to do with right to inheritance. Descendants are the likely heirs of their ascendants anyway.

Furthermore, such partition should be made in compliance with the formality requirements prescribed by the law for donations ***inter vivos***.[45] Articles 2427 through 2470 of the Civil Code, which specifically govern donations, provide for those requirements.

Donation ***inter vivos*** is one of the two legally recognized types of donations, the other being donation ***mortis causa***. It is a donation made while the donor is alive. The donee receives the donated property during the lifetime of the donor.

In contrast, donation ***mortis causa*** is a donation given effect after the death of the donor. This type of donation is similar with a bequest left by a will. As such, it is subject to the provisions governing wills.[46]

As a rule, a donation ***inter vivos,*** the subject matter of which is an immovable property or a right thereon, must, should it be valid, be made in the form of a public will.[47] In other words,

45 Article 1118, *Id*.
46 See, generally, Article 2428, *Id*.
47 Article 2443, *Id*.

a donation ***inter vivos*** of an immovable or a right on such property will be of no effect unless it fulfills the formality requirements stipulated for a public will by Articles 881 through 883 of the Civil Code.

Other rights may, however, be donated ***inter vivos*** in the form governing their transfer for consideration.[48] Alternatively, they may be validly donated in the form governing the donation of immovables.[49] That means, the donation of a movable property may be made by mere delivery of the property to the donee, or in the form governing the making of a public will.

Article 1119 makes restriction to the subject matter of the distribution that may be made by an ascendant. This Article specifies that an ascendant may distribute among his descendants only the property which belongs to him at the time of the distribution. In other words, he may not distribute a property which belongs to others or one he will acquire in the future.

The other worth examining scenario is the partition, by an ascendant, of only part his property. Article 1120 provides that where part only of the property which the ascendant leaves on the day of his death has been included in the partition made by donation, the property that has not been included shall be distributed in conformity with the law. That means that if the deceased has left a valid will pertaining to the property that was not donated, then such property will be disposed of in accordance with the terms of his will. Otherwise, it will be distributed pursuant to the rules of the intestate succession.

If, on the other hand, the donor-ascendant has omitted one of his children in the partition of his property, or where a child is born to him after the day of such partition, the omitted child may impugn the partition.[50] Such a child or his representative may apply to the court to nullify the partition made to his prejudice at the time of the death of the donor availing himself of the provisions of Article 1121.

However, the right of recourse of a child omitted from partition is not absolute. Article 1122 (1) qualifies his right by providing that such child may not apply for nullification where he

48 See, generally, Article 2444 (1) cum. Article 2445 (1), *Id*.
49 Article 2444 (2), *Id*.
50 See, generally, Article 1121, *Id*.

has been validly disinherited by the disposition the deceased has made to that effect in a valid will. Moreover, the partition may not be annulled if the donor has left sufficient property to the benefit of the omitted child.[51]

Nonetheless, the provisions of Article 1122 (1) notwithstanding, though a disinherited child has no right to apply for the annulment of the partition made by way of donations, any other claim he or his representative may have as against the inheritance will not be affected.[52] For instance, the child may be a creditor of the donor. In such an event, he may seek the satisfaction of his claim from the succession. Moreover, the child retains the right to challenge the disherison. He may apply to the court for the invalidation of the disherison on, for example, the ground that it is unjustifiable.[53]

Last but not least, a donor may or may not evenly distribute his property among his descendants. If the donations he made to his descendants are different in value, and he has expressly indicated in the partition document that he did so deliberately, then the descendant who has received a donation smaller in value than the others may not challenge the partition.[54] If, however, there is no such indication in the partition document, the descendant may apply for the cancellation of the partition on condition that he has suffered lesion of more than one-fourth part.[55]

In the context at hand, there is said to be an actionable lesion where a descendant has actually received less than three-fourth of what he should have received.[56] For the purpose of establishing whether there is a lesion, the value the property had on the day of the partition will be considered.[57] An action for the cancellation of a partition on the ground of lesion will be barred unless it is brought within two years from the death of the donor and ten years at most from the date of the partition.[58]

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51 Article 1122 (3), *Id*.
52 Article 1122 (2), *Id*.
53 Such a child may challenge the disherison by invoking Article 938 of the Civil Code, which is a special provision regarding the disherison of descendants.
54 See, generally, Article 1123 of the Civil Code.
55 *Id.*
56 Article 1123 (1), *Id*.
57 Article 1123 (2), *Id*.
58 Article 1123 (3), *Id*.

3. 6. 3. Assignment of Rights to a Succession

As discussed in the preceding Sub-Sections, it is not lawful for a potential heir or legatee to enter into a juridical act in relation to a future succession. In particular, an heir or a legatee may not accept, renounce, or assign any right pertaining to a succession in advance.[59] Such an act is void regardless of the fact that the person whose succession is concerned has agreed to it.[60]

That does not seem to be the case once the person being succeeded has died and his succession opened. An heir may validly assign his rights to a succession in whole or in part after the opening of the succession.[61] However, an heir may assign his rights on a determinate or a specific thing pertaining to the succession only after the thing has been allotted to him as his own.[62]

The co-heirs of an heir who intends to assign his rights to the succession shall have the right of legal preemption, save where the assignment is made in favor of one of the co-heirs.[63] That means, if the assignment is made in favor of a third person, the assignor's co-heirs may recourse against the assignee. The co-heirs may seek to recover the assigned rights from such assignee. Nonetheless, the assignee may demand payment of the value of the rights which have been assigned to him.[64]

59 Article 1115 (1), *Id*.
60 Article 1115 (2), *Id*.
61 Article 1124 (1), *Id*.
62 Article 1124 (2), *Id*.
63 Article 1125 (1), *Id*.
64 That is what is implied by Article 1125 (2) of the Civil Code, which authorizes the application of Articles 1386 - 1409 of the same Code which govern "Joint ownership, usufruct and other rights *in rem*" to the right of preemption of the coheirs in the event of assignment of rights to the succession by an heir.

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Annexure

Read the following excript from an Amharic article on wills, which appeared in ***Higawinet, Volume 2 № 3, 1990 (1982 E.C.)***.

ከኢትዮጵያ የኑዛዜ ሕግ አንዳንድ ነጥቦች

በላቸው አንቷን ፣ ሕጋዊነት ቅጽ 2 ቁጥር 3

መ ግ ቢ ያ

ዛሬ ፍርድ ቤቶችን አጣበው ከሚገኙት ንብረት ነክ ክርክሮች ውስጥ ውርስን የሚመለከቱ ጉዳዮች ቁጥር ቀላል ግምት የሚሰጠው አይደለም::

ከውርስ ጉዳዮች መካከል ከፊሎቹ ኑዛዜን □ሚመለከቱ ሆነው ይገኛሉ:: ከኑዛዜ የሚመነጭ ውዝግብ መብዛት መንስኤ በአመዛኙ ተናዛዦች ኑዛዜ በሚያደርጉበት ጊዜ የኑዛዜ ሕግ ድንጋጌዎችን ስለማይከተሉ ነው:: ለዚህም ምክንያቱ ተናዛዦች እነዚህን የኑዛዜ ሕግ ድግጋጌዎች በሚገባ አለማወቃቸው እንደሆነ ይገመታል::

የዚህ ውጤት ደግሞ ተናዛዦች የሚያደርጉት ኑዛዜ በሕግ ተቀባይነትን ማጣት ይሆናል:: ይህም ተናዛዦች የንብረታቸውን ድልድል በተመለከተ የሰጡት የመጨረሻ ፈቃዳቸው ተፈፃሚ አለመሆን ማለት ነው ::

ከኑዛዜ ለሚመነጭ ክርክር ዋነኛው ምክንያት ተናዛዦች ሕግን ተከትለው ኑዛዜ አለማድረጋቸው ቢሆንም የኑዛዜ ተጠቃሚዎችም ሆኑ የሕግ ወራሾች ከኑዛዜው ጋር በተያያዘ ሕጋዊ መብትና ግዴታዎችን ጠንቅቀው አለማወቃቸውም ለክርክሩ መብዛት አስተዋጽዖ ማድረጉ አልቀረም:: ለዚህም ቢሆን ምክንያቱ በከፊል የኑዛዜን ሕግ ድንጋጌዎች አለማወቅ ነው ማለት ጁቻላል::

የዚህ አነስተኛ ጽሁፍ ዓላማ ሀብታቸውን በኑዛዜ ማደላደል የሚፈልጉ ተናዛዦች የመጨረሻ ፈቃዳቸው ተፈፃሚ ሊሆን የሚችለው ሕጉን ተከትለው ሲናዘዙ በመሆኑ ለዚህ ይረዳቸው ዘንድ መሠረታዊ ከሆኑ የኑዛዜ ሕግ ድንጋጌዎች ውስጥ የተወሰኑትን ማሳወቅ ነው:: የኢትዮጵያ የኑዛዜ ሕግ ድንጋጌዎች በጣም ብዙ በመሆናቸው እያንዳንዳቸውን በማንሳት የተሟላ ትንተና ማድረግ ከዚህ ጽሁፍ የወሰን አድማስ በላይ ነው::

ምንም እንኳን ኑዛዜን በተመለከተ ይህንን ጽሁፍ ማዘጋጀት ያስፈለገው በአጠቃላይ በፍርድ ቤቶችና በሌሎችም የፍርድ አስተዳደር አካላት አካባቢ ያለው ክርክር መበርከት ቢሆንም የቅርብ ምክንያቱ ግን አንድ ለጠቅላይ ወቃቤ ሕጉ ጽህፈት ቤት የቀረበ የሰበር አቤቱታ ነው::

ይህ የሰበር አቤቱታ የቀረበበት ጉዳይ ክርክር መንስዔ ተናዛዥ ትተውት ያለ□ት የኑዛዜ ሰነድ ነው:: ኩሎኔል ልዑልሰገድ ኃይሌ ጥቅምት 22 ቀን 1977 የተጻፈ ኑዛዜ ትተው የካቲት 17 ቀን 1977 ዓ.ም. ይሞታሉ:: ሚች ኑዛዜውን ያዘጋጁት በራሳቸው የእጅ ጽሁፍ ሆኖ በተለያዩ ጊዜዎች አራት ምስክሮችን ጠርተው ባዘጋጁት የኑዛዜ ሰነድ ላይ እንዲፈረሙላቸው እደርገዋል:: በኑዛዜአቸውም መኖሪያ ቤታቸውን አሜሪካ ለሚገኘው ልጃቸው ለዳንኤል ልዑልሰገድ ሰጥተዋል:: ኩሎኔል ልዑልሰገድ ከመሞታቸው በፊት ቀደም ሲል የሞቱት ወንድማቸው የሻለቃ ታዬ ኃይሌ ልጆች አብረዋቸው ይኖሩ ነበር:: ሲሞቱም ከወንድማቸው ልጆች መካከል ወይዘሪት ሃይማኖት ታዬ የተባለችው ከቤቱ ውሰጥ አንዱን ክፍል ራሷን ችላ ቤት አግኝታ እስክትወጣ □ረስ □ንድትኖርበት፣ ሠራተኛ□ የነበረችው □ቱነሽ ሐሰንም እንዲሁ አንዱን ሰርቪስ ክፍል ቤት አግኝ□ □ስክትወጣ ወይም ዳንኤል ልዑልሰገድ ከውጭ አገር እስኪመጣ እንድትኖርበት ብለው ተናዘዋል::

በዚህ ኑዛዜ መነሻ በአውራጃ ፍርድ ቤት የተጀመረው ክርክር በይግባኝ እስከ ጠቅላይ ፍርድ ቤት ዘልቋል:: የጠቅላይ ፍርድ ቤት ውሳኔም ለጉዳዩ እለባት አልሰጠውም:: በውሳኔው ቅር የተሰኘው ወገን አቤቱታውን ለጠቅላይ ዐቃቤ ሕጉ ጽህፈት ቤት አቅርቧል::

ኑዛዜን በተመለከተ ለጠቅላይ ዐቃቤ ሕጉ ጽሕፈት ቤት የቀረበው አቤቱታ ይህ ብቻ አይደለም:: በርካታ ኑዛዜ ነክ አቤቱታዎች በመሥሪያ ቤቱ ተስተናግደዋል ለሰበር ሰሚ ችሎት የቀረቡም አሉ:: ከነዚህ ሁሉ ለዚህ ጽሁፍ መንደርደሪያነት ይህ አቤቱታ የተመረጠበት ምክንያት አለ:: ይኸውም በጉዳዩ በየደረጃው በተደረጉት ክርክሮች በርካታ የኑዛዜ ሕግ ጭብጦች መነሳታቸው ነው::

ጽሁ□ መሠረት አድርጉ የተነሳውና □ንዲያተኩር የተደረገው የኩሎኔል ልዑልሰገድ ኑዛዜን አስመልክቶ በየደረጃው በተነሱ የሕግ ክርክሮች ላይ ቢሆንም በተወሰነ ደረጃ ከዚህ ውጭ በመሄድ አንዳንድ የኑዛዜ ሕግ ድንጋጌዎችን መነካካቱ አልቀረም:: ይህም ቢሆን በተቻለ መጠን ከዚህ ውጭ የሚነሱ ነጥቦች ከዚሁ ጋር ተዛማጅነት ባላቸውና ለመሥሪያ ቤታችን በቀረቡ ሌሎች ኑዛዜ ነክ አቤቱታዎች ላይ ተመስርቶ አከራካሪና አወዛጋቢ ሆነው በታዩ የኑዛዜ ሕ□ ድንጋ□ዎች ላይ እንዲወሰኑ ተደርጓል::

ለክርክሩ መንስዔ ከሆነው ኑዛዜ ጋር በተያያዘ ከተነሱት የሕግ ጭብጦች ውስጥ የኑዛዜን

ፎርም የሚመለከተው ዋንኛው ነው፡፡ ቄብጡ የኰሎኔል ልዑልሰገድ ኑዛዜ ግልጽ ኑዛዜ ነው ወይስ በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ✍ የሚል ሲሆን ጽሑ□ም በዚሁ መነሻ የኑዛዜን ዓይነቶች ምንነት የሚደረጉበትን ፎርም አንድነታቸውንና ልዩነታቸውን ከፍትሐብሔር ሕጋችን አኳያ ይቃኛል፡፡

ሌላው አከራካሪ ነጥብ ይዘትን የሚመለከት ነው፡፡ ይዘትን በተመለከተ ከተነሱት ቄብጦች ውስጥ የኰሎኔል ልዑልሰገድ ኑዛዜ ተፈጻሚ ሊሆን የሚችል ኑዛዜ ነው ወይስ አይደለም✍ ኑዛዜው ለሕግና ለመልካም ጠባይ ተቃራኒ ነው ወይስ አይደለም✍ የሚሉ ይገኙበታል፡፡ ቀጥተኛ በሆነ መንገድ ባይሆንም በአንድ ንብረት ላይ በአላባ የመጠቀም መብት በኑዛዜ መስጠት ይቻላልን✍ የሚል ቄብጥም ተነስቷል፡፡ እነዚህና ሌሎች ይዘት ነክ ቄብጦች በጽሑ□ ውስጥ ተዳሰዋል፡፡

በኰሎኔል ልዑልሰገድ ኑዛዜ ሳቢያ በየደረጃው በተካሄደው ክርክር ውስጥ የታየው ሌላው ቄብጥ በሕግ ተቀባይነት ያለው ኑዛዜ ለማድረግ የሚያስፈልገውን ችሎታ የሚመለከት ነው፡፡ ከዚህ ቄብጥ በመንደርደር ጽሑ□ የኢት□ጵያ ፍትሐብሔር ሕግ ተናዛዥ በሕግ ኻጮ ያለው ኑዛ□ ለማድረግ ስለሚፈለግበት ችሎታ የሚደነግገውን ለማብራራት ይሞ□ራል፡፡

ምንም እንኳን ለዚህ ጽሑፍ መዘጋጀት የቅርብ ምክንያት የሆነው የኰሎኔል ልዑልሰገድ ኑዛዜ ያስከተለው ውዝግብ ቢሆንም በዚህ ውዝግብ መነሻ የተነሱ ክርክሮችና የተሰጡ ውሳኔዎች በዚህ ጽሑፍ ውስጥ የተጠቀሱት በተሟላ ሁኔታ አይደለም፡፡ ይህም የተደረገው በኑዛዜው ሳቢያ በየደረጃው ከተካሄዱት ክርክሮች፣ ከተደረጉት ትንታኔዎች እና ከተሰጡት ውሳኔዎች ውስጥ አስፈላጊ የሆነው አጠር ባለ ሁኔታ ተጠናቅሮ ከዚህ ቀጥሎ በዚህ መግቢያ ላይ በመቅረቡ ነው፡፡

□□□ □ንዲህ ነው፡፡ ኰሎኔል ልዑልሰገድ □ይሌ ጥቅምት 22 ቀን 1977 የተጻፈ ኑ□□* ትተው የካቲት 17 ቀን 1977 ከዚህ ዓለም በሞት ተለይተዋል፡፡

በኑዛዜያቸውም ውስጥ በከፍተኛ 18 ቀበሌ 18 □ስዓ □ሚ□ኘ□ ቁዓሩ 165 የሆነ መኖሪያ ቤ□ ቸውን አሜሪካ ለነበረው ልጃቸው ለዳንኤል ልዑልሰገድ አውርሰዋል፡፡ በዚሁ ኑዛዜአቸው □ስዓ ❸ሃይማኖት □ዬ ራሷን ችላ ቤት □ስካ□ኘች ድረስ አሁን ያለችበትን አንድ ከፍል □ንደያዘች ትቀመጥ . . .❾ 🕭 ❸□ቴነሽ ሐሰን እንደ ልጄ ሆና አገልግላኛለችና ቤት አግኝ□ በ□ቃ□ ለቃ እስከሄደች ወይም ዳንኤል እስኪመጣ ድረስ ከሰርቪሶቹ አንዱን ክፍል አሁን ያለችበትን ትቀመጥበት 🕭 ማንም □ንዳይደርስባት . . .❾ የሚል ቃል አስፍረዋል፡፡

* የኑዛዜው ሰነድ በዚህ ጽሁፍ መጨረሻ አባሪ ሁለት ሆኖ ቀርቧል፡፡

የኑዛዜው ተጠቃሚች ወራሽነ□ቸው □ንዲታወቅላቸው በአዲስ አበባ አውራጃ ፍርድ ቤት የሥራ ፋይል ይከፍ□ሉ::

የዳንኤል ልዑልሰገድ □ናትና ወኪል የሆኑት ወይዘሮ ድጌሃና ዳኜ ኑዛዜው ሕግ በሚ□□ መሠረት የተፈጸመ ባለመሆኑ ሊፈርስ ይገባል በማለት በተቃዋሚነት ይቀርባሉ:: ተቃውሞአቸውም

- ኮሎኔል ልዑልሰገድ በመሞቻቸው አካባቢ ሐኪም አይድኑም ብሏቸው ቤ□ቸው ተኝተው ስለነበር በዚህ ወቅት ያደረጉት ኑዛዜ በንጹህ አዕምሮአቸው ክፉውንና በጎውን ለይተው ያደረጉት ነው ማለት አይቻልም
- ኑዛዜው ግልጽ ኑዛዜ ሆኖ ሳለ አፈጻጸሙ ግን የፍትሐብሔር ሕግ ቁጥር 881 በሚጠይቀው መሠረት አይደለም
- ኑዛዜው የተጻፈው በኮሎኔል ልዑልሰገድ የ□ጅ ጽሑፍ አይደለም
- ቤቱን ለዳንኤል ልዑልሰገድ ሰጥቻለሁ ብለው □ንደገና ወረድ ብለው ይህንኑ ቤት ሌሎች □ንዲጠቀሙበት ማድረጋቸው ኑዛዜውን ለመፈጸም የማይቻል ስለሚያደርገው ይህ ለሕግና ለባሕላዊ ሥርዓት ተቃራኒ ነው ::

የሚሉና የመሳሰሉት ናቸው::

የአውራጃው ፍርድ ቤት የግራ ቀኙን ክርክር ካዳመጠና ጉዳዩን ከሕግ ጋር በማገናዘብ ከመረመረ በኋላ ታኅሣሥ 14 ቀን 1979 ዓ.ም. በዋለው ችሎት በሰጠው ውሳኔ ሚች ኑዛዜውን በተናዘዙበት ወቅት ትክክለኛ አዕምሮ እንዳልነበራቸው የሚያረጋግጥ ማስረጃ አላቀረቡም በማለት ተቃውሞውን ውድቅ አድርጐታል::

ሚች ባደረጉት ኑዛዜ ላይ ቤታቸውን ዳንኤል ልዑልሰገድ እንዲወርስ የተናዙለት ሲሆን ቤቱን በየክፍሎች በመከፋፈል የአሁን ኑዛዜ ተጠቃሚዎች ነን ባ□ች እንዲጠቀሙበት ማድረግ ለዳንኤል የሰጡትን ቤት ለሌሎች በስጦታ መስጠት ማለት አይደለም በማለት በዚህም አቅጣጫ ተቃዋሚዎች ያቀረቡትን ተቃውሞ ፍርድ ቤቱ አልተቀበለውም::

ሚች ቤታቸውን ለዳንኤል ከሰጡ በኋላ ዘር ያላፈራ እንደሆነ ለአሁን ወራሾች ይሁን የተባለውም ሚች ለዳንኤል ከሰጡ በኋላ እንደገና ለሌሎች መስጠታቸው ኑዛዜውን እንዳለ ሊያፈርስ አይችልም:: በመሆኑም ዳንኤል ዘር ባያተርፍም ሕጉ በሚ□ቅደው መሠረት መፈጸም አለበት እንጂ ለአሁን የኑዛዜ ወራሾች መተላለፍ አለበት ብሎ ተናዛዡ ማዘዝ ስለማይችልና ይህም የኑዛዜ ቃል ለሕግ ተቃራኒ ስለሆነ እንዳልተጻፈ እንዲቆጠር በማለት በፍትሐ ብሔር ሕግ ቁጥር 879 (1) መሠረት ፍርድ ቤቱ ወስኗል::

ኑዛዜው ግልጽ ኑዛዜ ሆኖ ሳለ አፈጻጸሙ ግን በፍትሐብሔር ሕግ ቁጥር 881 መሠረት አይደለም ተብሎ የቀረበውንም ክርክር የአውራጃው ፍርድ ቤት በኑዛዜው ላይ ምንም ስህተት የለበትም በሚል ውድቅ አድርጐታል::

ኑዛዜው ሊፈጸም የማይቻልና ለሕግና ለባሕላዊ አሠራር ተቃራኒ በመሆኑ በፍትሐ ብሔር ሕግ ቁጥር 865 መሠረት ሊሻር ይገባዋል ለተባለውም ተቃዋሚዎች በቂ ማስረጃና መከራከሪያ አላቀረቡም በሚል አልተቀበለውም::

በማጠቃለልም ❽ሚች የተናዘዙት ኑዛዜ በፍትሐብሔር ሕግ ቁጥር 884 (1) መሠረት የተፈፀመ ስለሆነ ሚች ጥቅምት 22 ቀን 1977 ዓ.ም. የተናዘዙትን ኑዛዜ ፍርድ ቤቱ ተቀብሎ አጽድቆታል❾ በማለት የአውራጃው ፍርድ ቤት ውሳኔ ሰጥቷል::

በአውራጃው ውሳኔ ቅር የተሰኙት የዳንኤል ልዑልሰገድ ወኪል ለከፍተኛው ፍርድ ቤት ይግባኝ በመጠየቃቻው ፍርድ ቤቱ ጉዳዩን እንደገና ከመረመረ በኋላ ኅዳር 14 ቀን 1980 ዓ.ም. በዋለው ችሎት የአውራጃውን ፍርድ ቤት ውሳኔ ሽሯል::

ከፍተኛው ፍርድ ቤት በሰጠው ውሳኔ ኑዛዜው በፍትሐብሔር ሕግ ቁጥር 881 መሠረት የተፈጸመ ግልጽ ኑዛዜ ሆኖ ሳለ አፈጻጸሙ ግን ሕጉ በሚያዘው መሠረት አለመሆኑን ገልጿል:: የኑዛዜውን ይዘት በተመለከተም ፍርድ ቤቱ የሚከተለውን ሐተታና ውሳኔ ሰጥቷል::

> ሚች ጥቅምት 22 ቀን 1977 ዓ.ም. ያደረጉትን ኑዛዜ ስንመለከት በተራ ቁጥር 1 ሥር ቁጥር 165 የሆነውን ቤቴን ለዳንኤል ልዑልሰገድ ሰጥቼዋለሁ ካሉ በኋላ በተራ ቁጥር 2 ላይ ሃይማኖት ታዬ ራሷን ችላ ቤት እስካገኘች ድረስ አሁን ያለችበትን አንድ ክፍል እንደያዘች ትቀመጥ . . . ' እቴነሽ ሐሰን እንደ ልጄ ሆና አገልግላኛለችና ቤት አግኝታ በፈቃዷ እስከሄደች አንዷን ክፍል አሁን ያለችበትን ትቀመጥበት. . . ' ብለዋል:: እነዚህን የኑዛዜ ቃሎች ስንመለከት ለአፈጻጸም አስቸጋሪ መሆናቸውን መረዳት አያዳግትም:: አሁን ካለው ጊዜያዊ የቤት ችግር አንጻርም ቢታይ ቤት አግኝታ በፈቃዷ እስከሄደች ትኑርበት የተባለው ቤትስ አግኝታ የምትሄደው መቼ ነው፣ በፈቃዷስ ይህንን ቤት ለቃ ትሄ□ለችን፣ የሚሉትን ነጥቦች ስናነሳ ምላሹ አሉታ ወይም የማይሆን መሆኑ ግልጽ ነው:: የቤቱ ባለቤትነት ለአንዱ ተሰጥቶ በሌላ በኩል ከላይ በተመለከተው ዓይነት ተጠቃሚው እስከመቼ እንደሆነ ላልታወቀ ጊዜ ወይም በራሱ ፍቃድ ለቆ እስከሄደ ይኑር አይነካ ከተባለ ቤቱ የተሰጠው ሰው መቼ ነው ባለቤት ሊሆን የሚችለው፣ በርግጥስ ሊሆን ይችላል ተብሎ የሚጠበቅና የሚታሰብስ ነው፣ በኑዛዜው

> በተመለከተው ዓይነት ይፈጸም ቢባል✍ ይህንንም ስንመለከት የኑዛዜው አፈ□ጸም የማይቻል ማለትም፡ ቤቱ የተሰጠው ሰው ባለቤት መሆን ፈጽሞ የማይቻል መሆኑን እንገነዘባለን፡፡ እንደነዚህ ዓይነት ኑዛዜን በተመለከተ የፍትሐብሔር ሕጋችን በቁጥር 865 ✉1☎ ሥር 'አፈ□ጸሙም የማይቻል እንደሆነ እንደዚሁ ፈራሽ ነው' በማለት የሚደነግግ በመሆኑ ኑዛዜው በዚህም ነጥብ ላይ ፈራሽ ሆኖ እናገኘዋለን፡፡ ስለዚህ ጥቅምት 22 ቀን 1977 ዓ.ም. በኰሎኔል ልዑልሰገድ ኃይሌ የተደረገው ኑዛዜ ሕጋዊ ፍርማሊቲን ያላሟላና አፈጻጸማም የማይቻል በመሆኑ የአውራጃው ፍ/ቤት . . . ኑዛዜው ይ□ናል ብሎ የሰጠውን ውሳኔ ሽረን ፈራሽ ነው በማለት ወስንናል፡፡

የከፍተኛውን ፍርድ ቤት ውሳኔ በመቃወም እነ ሃይማኖት ታዬ ለጠቅላይ ፍርድ ቤት ይግባኝ አቅርበዋል፡፡ ፍርድ ቤቱም ጉዳዩን ከመረመረ በኋላ ሰኔ 30 ቀን 1980 ዓ.ም.በዋለው ችሎት በሰጠው የመጨረሻ ውሳኔ የሚከተለውን ብሏል፡፡

> የሟች ኑዛዜ በተናዘዝ፡ ጽሑፍ ስለሚደረግ ኑዛዜ በፍትሐብሔር ሕ□ ቁጥር 884 ሥር የተመለከቱትን መሥፈርቶች አሟልቶ የሚገኝ ስለሆነ ከፍተኛው ፍርድ ቤት ስለግልጽ ኑዛዜ የተደነገገውን አንቀጽ ያለቦታው በመጥቀስ የሰጠውን አስተያየት ውድቅ አድርገነዋል፡፡
>
> . . . ሟች የቤቱን ስጦታ ለዳንኤል ልዑል ሰገድ ካደረጉ በኋላ ቀድሞ በቤቱ ውስጥ የነበሩትን ቤተሰቦቻቸውን ቤት አግኝተው እስኪለቁ ድረስ በየነበሩበት ክፍል ይቆዩ ብለው መናዘዛቸው የጊዜውን የቤት ችግር ተገንዝበው ቤት ከማግኘታቸው በፊት ያለመጠለያ የትም እንዳይጣሉ በማሰብ የፈጸሙት ሰብዓዊ ርህራሔ ስለሆነ ሊነቀፍ አይገባውም፡፡
>
> በፍትሐብሔር ሕግ ቁጥር 865 (2) አንድ ኑዛዜ አፈጻጸሙ የማይቻል በሆነ ግዜ ፈራሽ ነው ተብሎ የተደነገገው በዚህ መልኩ ለተደረገ ኑዛዜ አይደለም፡፡
>
> እነ ሃይማኖት ታዬ ቤት አግኝተው እስኪለቁ ድረስ በየነበሩበት ክፍል እንዲቆዩ የሚለው የሟች ኑዛዜ ቤት ካገኙ በኋላ ግን ለዳንኤል ልዑልሰገድ የመልቀቃቸው ጉዳይ ተግባራዊ የማይሆንበት ምክንያት ስለሌለ ፣ ከፍተኛው ፍርድ ቤት አፈጻጸሙ የማይቻል ነው ሲል የተሳሳተ ትርጉም ተከትሎ ኑዛዜው እንዲፈርስ የሰጠውን ውሳኔ አልተቀበልነውም፡፡

> የአውራጃው ፍርድ ቤት ኑዛዜው አይፈርስም ሲል የሰጠው ውሳኔ መልካም ስለሆነ በፍትሐብሔር ሥነ ሥርዐት ሕግ ቁጥር 348 ✉1☎ መሠረት የፀና ነውብለን ወስነናል::

የዳንኤል ልዑልሰገድ ወኪል ወይዘሮ ጽጌሃና ዳኜ የጠቅላይ ፍርድ ቤት የመጨረሻ ውሳኔ መሠረታዊ የሕግ ስህተት ስላለበት በሰበር እንዲታይ ይደረግልኝ ሲሉ ነሐሴ 11 ቀን 1980 ዓ.ም. በተጻፈ ማመልከቻ ለጠቅላይ ዐቃቤ ሕጉ ጽሕፈት ቤት አቤቱታ አቅርበዋል::

የጠቅላይ ዐቃቤ ሕጉ ጽሕፈት ቤትም አቤቱታውን በጉዳዩ ላይ የአዲስ አበባ አውራጃ ፍርድ ቤት፣ የአዲስ አበባ ከፍተኛው ፍርድ ቤት እና ጠቅላጁ ፍርድ ቤት የሰጧቸው ውሳኔዎች በየደረጃው የተነሱ የሕግና የፍሬ ነገር ክርክሮችና ከጉዳዩ አግባብ ያላቸውን የሕግ ድንጋጌዎች ከመረመረ ከኋላ ከሰጠው ምላሽ* ውስጥ የሚከተለው ይገኝበታል::

> የሚች የኰሎኔል ልዑልሰገድ ኑዛዜ 1ኛ በተናዛዥ የእጅ ጽሑፍ የተጻፈ 2ኛ ኑዛዜ መሆኑን በማያሻማ መንገድ የሚገልጽ 3ኛ በአንደኛው ገጽ የተዘጋጀበት ቀን የተገለጸበት እና 4ኛ በአግባቡ የተፈረመ በመሆኑ በፍትሐብሔር ሕግ ቁጥር 884 የተደነገገውን በአብዛኛው የሚያሟላ ሕጋዊ ኑዛዜ ነው::
>
> በፍትሐብሔር ሕግ ቁጥር 884 መሠረት የሚደረግ ኑዛዜ አንድም ምስክር ሳያሰፈልግ በተናዛዡ በግሉ የሚዘጋጅ ኑዛዜ ነው::
>
> ማንም ሰው ንብረቱን ወይም ሀብቱን በኑዛዜ ለሌላ ማስተላለፍ እንደሚችል በፍትሐብሔር ሕግ ቁጥር 1184 ተደንግጓ ይገኛል:: በዚሁ መሠረት ሚች ኰሎኔል ልዑልሰገድ ኃይሌ በመኖሪያ ቤታቸው ላይ የነበራቸውን የባለቤትነት መብት ለልጃቸው ለዳንኤል ልዑልሰገ□ በኑዛዜ አስተላልፈዋል::
>
> ሃይማኖት ታዬ ደግሞ 'ራሷን ችላ ቤት እስካገኘች ድረስ አሁን ያለችበትን አንድ ክፍል እንደያዘች ትቀመጥ . . . ለሌላ ማስተላለልፍ አይቻልም' በማለት ኰሎኔል ልዑልሰገድ በፍትሐብሔር ሕግ ከቁጥር 1309 ጀምሮ በተመለከተው መልክ በቤቱ የመገልገል መብት ለግለሰቧ ሰጥተዋታል:: ይህ መብት ለሌላ ማስተላለፍ የማይቻል ጊዜያዊ መብት ሲሆን በዳንኤል ልዑልሰገድ የባለቤትነት መብት ላይ ጊዜያዊ ገደብ የሚጥል ነው::

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*ለአቤቱታው የሰጠው ምላሽ ሙሉ ቃል አባሪ አንድ ላይ ይገኛል፡፡

ስለዚህ በኮሎኔል ልዑልሰገድ ኑዛዜ ውስጥ የተጠቀሰው ከላይ የመረመርነው ገደብ ለማስፈጸም አዳጋች ይሆን እንደሆነ እንጂ በፍትሐብሔር ሕግ በቁጥር 879 (1) አነጋገር ❽ሊፈጸም የማይችል❾ ገደብ አይደለም።

1 ስለ ውርስ አጠቃላይ

አንድ ሰው ከዚህ ዓለም በሞት በሚለይበት ጊዜ መብቶቹና ግዴታዎቹ በመሞቱ ምክንያት የሚቋረጡ ካልሆኑ በቀር ለወራሾቹ ይተላለፋሉ። ወራሾቹ የሕግ ወራሾች (heirs-at-law) ወይም የኑዛዜ ባለስጦታዎች (legatees) ሊሆኑ ይችላሉ።

የሟች መብቶችና ግዴታዎች ለሕግ ወራሾች ወይም ለኑዛዜ ባለስጦታዎች የሚተላለ□ባቸው የሚተላለፊባቸው ሁኔታዎች ወይም ደንቦች በኢ□ትዮጵያ የፍትሐብሔር ሕግ ሁለተኛ መጽሐፍ <u>ስለ ውርስ (ስለ አወራረስ)</u> በሚለው አንቀጽ 5 ውስጥ ተደንግገዋል።

በኢ□ትዮጵያ የፍትሐብሔር ሕግ መሠረት የውርስ ዓይነቶች ሁለት ናቸው እነሱም፤

1/ ጸለኑዛዜ ውርስ እና

2/ የኑዛዜ ውርስ ናቸው

አንድ ሰው የሟችን ሀብት መውረስ የሚችለው ሁለት ሁኔታዎች ሲሟሉ ነው። አንደኛው አውራሹ በሞተበት ጊዜ ወራሹ በሕይወት መኖር (ማለትም ወራሽ ከአውራሽ ቀድሞ አለመሞት☎ ሲሆን ሁለተኛው ደግሞ በሕግ ለወራሽነት የማይገባ አለመሆን ነው።

አንድ ሰው ለወራሽነት የማይገባ ነው የሚባለው ሟቹን ወይም የሟቹን ወደታች የሚቆጠር ተወላጅ ወይም ወደላይ የሚቆጠር ወላጅ ወይም የሟቹን ባል ወይም ሚስት አስቦ ለመ□ደል በመሞከሩ የተቀጣ እንዲሁም ከነዚሁ ሰዎች መካከል በአንደኛው ላይ የሞት ፍርድ ወይም ከአሥር ዓመት የበለጠ ጽኑ እስራት በሚያስቀጣ ወንጀል በሐሰት በመክሰሱ ወይም በሌላ ሰው በቀረበ ተመሳሳይ የወንጀል ክስ ላይ በሐሰት በመመስከሩ የተቀጣ ከሆነ ነው። ይሁን እንጂ ወራሹ ይህንን የወንጀል ድርጊት የፈጸመው አውራሹ ከሞተ በኋላ ከሆነ የወራሽነት መብቱን አያጣም። ሟችን ለመውረስ አይገባም የሚያሰኙ ሌሎች ምክንያቶችም አሉ። □ነዚህም አውራሹ ከመሞቱ በፊት ባሉት ሶስት ወራት ውስጥ ኑዛዜ እን□ያደርግ እንዳይለውጥ ወይም እንዳይሽር መከልከል እና □ሟቹን የመጨረሻ ኑዛዜ ሆን ብሎ ማበላሸት መደበቅ መጥፋት ወይም በሐሰት ኑዛዜ መጠቀም ናቸው። ይሁን እንጂ እነዚህን ነገሮች ሁሉ ቢፈጽምም ሟቹ ግልጽ በሆነ ጽሑፍ ይቅርታ ካደረገለት የመውረስ

መብቱን አያጣም::

ወራሽ ለመውረስ የሚበቃው አውራሽ በሞተበት ጊዜ የተወለደ ከሆነ ብቻ አይደለም:: አውራሹ በሞተበት ጊዜ የተጸነሰ ልጅም ወራሽ መሆን ይችላል:: ሕጉ ወራሹን እንደ ተወለደ ይቆጥረዋል:: ለዚህ ግን ልጁ በሕይወት መመለድና የመኖር ብቃቱን ማሳየት አለበት:: በሕይወት የሚኖር ብቃቱን አሳየ የሚባለው ልጁ ተወልዶ ለ48 ሰዓታት በሕይወት የቆየ ከሆነ ነው::[አ] ከ48 ሰ□□ት በፊት ከሞተ ግን በሕይወት እንዳልኖረ ስለሚቆጠር ወራሽ ሊሆን አይችልም:: ነገር ግን ከ48 ሰዓታት በፊት ለመሞት ያበቀው የተፈጥሮ ጉድለት ሳይሆን ውጫዊ ምክንያት ከሆነ የሕጉ ግምት ተፈጻሚ አይሆንም[8]::

ከፍ ብሎ ለመጥቀስ እንደተሞከረው ውርስ ያለ ኑዛዜ ወይም በኑዛዜ ሊሆን ይችላል፡፡ ያለኑዛዜ ውርስ የሚባለው ሟች ከመሞቱ በፊት የንብረቱን ድልድል በተመለከተ ምንም ዓይነት ኑዛዜ ጸልተ□ □ንደሆነ ነው:: ሟች ኑዛዜ ሳይተው ቢሞት ንብረቱን ማን መውረስ አለበት የሚለውን ጥያቄ የፍትብሔር ሕጋችን በዝርዝር ይመልሳል::

የሟች ንብረት ለወራሾች የሚተላለ□በት ሌላው መንገድ ኑዛዜ ነው:: የዚህም ጽሑፍ ትኩረት ይኸው ነው::

2 የኑዛዜ ዋጋ መኖር ሁኔታዎች

የኢት□ጵያ ፍትሐብሔር ሕግ የኑዛዜ ድንጋጌዎችን በሁለት ትላልቅ ንዑስ ክ□ሎች ይከ□ላቸዋል:: እነዚህም የኑዛዜ ዋጋ መኖር ሁኔታዎች እና በኑዛዜዎቹ የሰፈረ ቃልና የኑዛዜ ትርጓሜ ናቸው::

የኑዛዜ ዋጋ መኖር ሁኔታዎች የሚለው ንዑስ ክፍል በተራው በሶስት ትናንሽ ክፍሎች ይከፈላል:: እነዚህም

1 የሥረ ነገር ሁኔታዎች
2 የኑዛዜዎች □ርምና ማስረጃ እና
3 ስለ ኑዛዜዎች መሻርና ውድቅ መሆን ናቸው::

[*] በፍትሐ ብሔር ሕግ ቁጥር 1 መሠረት ልጅ ከተወለደነት ጊዜ አንስቶ እንደ ሰው ቢቆጠርም፣ ገና ያልተወለደ ልጅ ጉዳይ መካራከሪያ ሆኖ ሲቀርብ ልጁ እንደተወለደ የሚቆጠረው፤ ከተወለደ በኋላ 48 ሰዓታት በሕይወት ሲቆይ ነው፡፡ ይህም በልዩነት (exception) የሚሠራ ነው፡፡ (በዋናው ጽሑፍ ወስጥ የሌለ)

ከነዚህም ውስጥ የሥረነገር ሁኔታዎችን □ና የኑዛዜዎች □ርምን ቀጥለን እንመለከታለን::

2.1 የሥረ ነገር ሁኔታዎች

በዚህ ርዕስ ሥር የምናነሳቸው ነጥቦች፤

1 ኑዛዜ በሚች በራሱ የሚፈጸም ድርጊት ስለመሆኑ፤

2 ኑዛዜ ለማድረግ ችሎታ ስለማስፈለጉ፤

3 ኑዛዜ ሊፈጸም የሚችል መሆን ያለበት ስለመሆኑ፤

4 ኑዛዜ ለሕግ ወይም ለመልካም ጠባይ ተቃራኒ ስላለመሆኑ፤

5 ኑዛዜ በማስገደድ የተገኘ ሲሆን፤

6 ኑዛዜ በስህተት የተሰጠ ሲሆን፤ እና

7 ኑዛዜውን በፍርድ ስለመሻር፤

የሚሉ ናቸው::

2.1.1. ኑዛዜ በሚች በራሱ የሚፈጸም ድርጊት ስለመሆኑ

በመሠረቱ ኑዛዜ ሚች ራሱ በግሉ የሚፈጽመው ሕጋዊ ድርጊት (Juridical act) ነው:: ይህ የሚች የግል ድርጊት (personal act) በሌላ ሰው በውክልና ሊፈጸም አይችልም:: ማለትም ሚች አንድን ሶስተኛ ሰው በሱ ቦታ ሆኖ ወይም በስሙ ኑዛዜ እንዲያደርግ፣ እንዲለውጥ ወይም እንዲሽር ስልጣን ሊሰጠው አይችልም:: በሚችና በሶስተኛው ሰው መካከል የሚደረግ የዚህ ዓይነት ስምምነት በሕግ ዋጋ አይኖረውም::

በሌላ አነጋገር ሚች ሀብቱ እንዴት ለወራሾቹ መከፋፈል እንዳለበት፣ ማን ሀብቱን መውረስ እንዳለበት እንዲወስን ለአን□ ሶስተኛው ሰው ኃላፊነት ወይም ሥልጣን ሊሰጠው አይችልም:: ምክንያቱም ኑዛዜ ሚች በራሱ ፈቃድና ራሱ ብቻ የሚፈ□መው ግላዊ

ድርጊት ነውና::[311]* ይህ ሶስተኛ ሰው የሚቹ ሞግዚት ቢሆን እንኳን በስሙ ኑዛዜ ሊያደርግ አይችልም:: ይህንን አስመልክተው አንድ የሕግ ምሁር እንዲህ ይላሉ::

> ኑዛዜ የሚች ጥብቅ የሆነ ራሱ የሚፈጸመው ስራ ነው ከሚለው ከቁጥር 857 (1) መሠረታዊ ድንጋጌ በሚጣጣም ሁኔታ ቁጥር 308 (1) ሞግዚቱ በሌላ ሁኔታ አካለ መጠን ያላደረሰ ልጅ ንብረት በተመለከተ ኃላፊ የሆነው አካለ መጠን ያላደረሰ ልጅ ወላጅ ቢሆን እንኳ በሱ ስም ኑዛዜ እንዳያደርግ ይከለክላል::

2.1.2. *ኑዛዜ ለማድረግ ችሎታ ስለማስፈለጉ*

ኑዛዜ እንዳያደርጉ በሕግ የሚከለከሉ ሰዎች አሉ:: ከነዚህም መካከል አካለ መጠን ያላደረሱና በፍርድ የተከለከሉ ሰዎች ይገኙበታል:: አካለመጠን ያላደረሰ ልጅ አሥራ አምስት ዓመት ካልሞላው ኑዛዜ ሊያደርግ እንደማይችል ተደንግጓል ፡፡ በዚህ ጉዳይ ላይ □ብዙ አገሮች ሕጎች ተመሳሳይነት አላቸው::

ሞግዚቱም አሥራ አምስት ዓመት ያልሞላውን ልጅ ኑዛዜ እንዲያደርግ ፈቃድ ሊሰጠው አይችልም:: ምክንያቱም ሞግዚቱ አካለ መጠን ላላደረሰ ልጅ ፈቃድ የሚሰጠው ❽ለዕለት ጉዳይ ሥራዎች❾ ብቻ በመሆኑ ነው:: ኑዛዜ ግን ከዕለት ጉዳይ ሥራዎች ውስጥ የሚመደብ አይደለም::

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[311]* በፈረንሳይም በተለያዩ በርካታ አጋጣሚዎች ተናዛዦች የኑዛዜ ተጠቃሚውን ራሱ መወሰን ሲገባው ይህንን ስልጣን ለሌላ ሶስተኛ ሰው አሳልፎ በመስጠቱ የኑዛዜ ስጦታዎች በፍርድ ቤት ተቀባይነት አጥተዋል:: ይህንንም ብዙ ጸሐፊዎች ደግፈውታል::

** የፈረንሳይ ሕግ እንደ ምሳሌ የወሰድን እንደሆነ አካለ መጠን ያላደረሰው ልጅ አሥራ ስድስት ዓመት ካልሞላው ኑዛዜ ሊያደርግ እንደማይችል ተደንግጎ እናገኘዋለን:: ዕድሜው ከአሥራ ስድስት ዓመት በ□ል□ እንኳን አካለመጠን □ስካላደረሰ ማለትም 21 ዓመት □ስካልሞላው ድረስ ንብረቱን በኑዛዜ በማስተላለ□ መብቱ ላጁ ሕ□ □□ብ ጸ□ር□በታል:: በኑዛዜ ሊያስተላልፍ የሚችለው ካለው ሀብት ግማሹን ብቻ ነው:: የኩቤክ ሕግ ደግሞ ይበልጥ ጠበቅ ያለ ነው:: አካለመጠን □ስካልደረሰ ማለትም 21 ዓመት □ስካልሞላው ድረስ ልጁ ኑዛዜ ሊያደርግ አይችልም:: ከሞግዚት አስተዳደር ነፃ የወጣ ቢሆን እንኳን በኩቤክ ሕግ መሠረት ልጁ ኑዛዜ ሊያደርግ አይችልም:: የኩቤክ ሕግ ' ከሞግዚት አስተዳደር ሥልጣን ይውጣ ተብሎ የተበየነለት ልጅ ሰውነቱን ለማስተዳደርና ገንዘቡን የሚመለከቱትን ጥቅሞች ለማስተዳደር ስለሚመለከተው ስለማናቸውም ነገር ሁሉ በሕግ አካለ መጠን □ንዳደረሰ ሆኖ ጁቆ□ራል' ከሚለው ከኢትዮጵያ የፍትሐብሔር ሕግ ቁጥር 333 ድንጋጌ ጋር ይቃረናል::

*** በአዲሱ ሕግ 16 ዓመት ሆኗል፡፡

በኢትዮ□ያ የኑዛዜ ሕግ መሠረት አካለመጠን ያልደረሰ ልጅ አሥራ አመስት ዓመት ሳይሞላው ያደረገው ኑዛዜ አሥራ አምስት ዓመት ከሞላውም በኋላ ባይሽረው እንኳን ኑዛዜው በሕግ ፊት ዋጋ አይኖረውም። □ራሽ ነው።

በፍርድ የተከለከለ ሰው*** (Juridically Interdicted Person) ሁኔታም አሥራ አምስት ዓመት ካልሞላው ልጅ ሁኔታ እምብዛም የተለየ አይደለም። ክልከላው በፍርድ* ከተነገረ በኋላ ግለሰቡ ኑዛዜ ሊያደርግ አይችልም። ከክልከላው በፊት ያደረገው ኑዛዜ ግን ተፈጻሚ ይሆናል። ይሁን እንጂ ምንም እንኳን ኑዛዜው የተደረገው ክልከላው በፍርድ ከመነገሩ በፊት ቢሆንም የኑዛዜው ይዘት ሲታይ ለርትዕ ነገር ተቃራኒ ነው። ወይም የጤንነቱ መታወክ ውጤት ነው። የሚያሰኝ ሆኖ ከተገኘ ወይም ፍርድ ቤት እንዲህ ያለ እምነት ካደረበት ኑዛዜውን በሙሉ ወይም በከፊል ሊያፈርሰው ይችላል።

ፍርድ ቤት ተናዛጥ በፍርድ ከመከልከሉ በፊት ያደረገውን ኑዛዜ በሙሉ ወይም በከፊል ለማፍረስ ሥልጣን እንዳለው ሁሉ ተናዛዡ በፍርድ ከተከለከለ በኋላ ያደረገውን ኑዛዜም በከፊል ወይም በሙሉ ሊያጸናው ይችላል። ፍ/ቤቱ ይህንን የሚያደርገው ተናዛዡ በኑዛዜው ውስጥ የተመለከቱትን የኑዛዜ ቃሎች በጤናው መታወክ ምክንያት ያደረጋቸው አይደሉም የሚል እምነት ካደረበት ነው። ሆኖም ፍርድ ቤቱ በዚህ ሁኔታ ዋጋው አምስት ሺህ ብር በላይ የሆነ የኑዛዜ ስጦታ ሊያጸና አይችልም። ዋጋው ከአምስት ሺህ ብር በታች ሆኖም ፍርድ ቤቱ ኑዛዜውን የሚያፈርስበት ሁኔታ አለ። ይኸውም የኑዛዜ ስጦታው በፍርድ ከተከለከለው ሰው ጠቅላላ ሀብት ከአንድ አራተኛው (ከአንድ ሩብ) የበለጠ እንደሆነ ነው። ይህንን በምሳሌ እንመልከተው። አቶ እንዳይላሉ ከመጠን በላይ ጠጪ በመሆናቸውና በጠጡበት ጊዜም ገንዘባቸውን ያለ አግባብ ስለሚያባክኑ በልጆቻቸው ጠያቂነት በፍርድ ይከለከላሉ። አቶ አንዳይላሉ ከመሞታቸው በፊት የጽሁፍ ኑዛዜ ያደርጋሉ። በኑዛዜያቸውም አንዲት አራት ሺህ ብር የምታወጣ አሮጌ ቮልስ ዋገን መኪናቸውን ለወንድማቸው ለአቶ አይተንፍሱ ይሰጣሉ። አቶ እንዳይላሉ በሞቱበት ጊዜ የነበራቸው ጠቅላላ ሀብት በገንዘብ ሲተመን ስምንት ሺህ ብር ቢሆን ፍርድ ቤት ይህንን የኑዛዜ ስጦታ ሊያጸናው አይችልም። ምክንያቱም በኑዛዜ የሰጡት ከጠቅላላ ሀብታቸው አንድ ሁለተኛውን ማለትም ሁለት* ሩቡን

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* □እንግሊዝኛ□ ቅጂ ከአሥር ሺህ ብር በላይ ይላል። የእንግሊዝኛ□ ቅጂ ከአማርኛውና ከፈረንሳይኛ □ ቅጂች ስለሚለይ በስህተት የተጻፈ መሆኑ ግልጽ ነው።

* በፍርድ የተከለከለ ሰው □ሚባለ□ በተ□ዓ ሮ በሕመም □ጁም በእርጅና በመጠጥ ወይም በሌሎች አደንዛዥ በሆኑ ነገሮች በመመረዝ አ□ምሮ□ በመ□□ሉ ዐ □ደንቆሮ ክ□ር □ጁም በሌላ ነዋሪ በሆነ ደዌ ምክንያት የሚሠራው ሥራ የሚያስከትለውን ውጤት ማወቅ የማይችል ገንዘቡን ያለአግባብ የሚያባክን ወይም ራሱን ችሎ ለመተዳደር ወይም ንብረቱን ለማስተዳደር ችሎ□ □ሌለ□ በመሆኑ ለጤናውና ለጥቅሙ ሲባል በሚፈጽመው ማንኛውም ድርጊት ተጠያቂ እንዳይሆን □ጁም በሕ□ □ጻ□ የሚያስገባ ድርጊት እንዳይፈጽም በፍርድ ቤት የተከለከለ ወይም የተጠበቀ ሰው ነው።

በመሆኑና ሕጉ ግን የሕግ ወራሾች በምንም ሁኔታ ቢሆን የሚች ሀብት ቢያንስ ሶስት ሩብ ማግኘት ይኖርባቸዋል ስለሚል ነው::

በፍርድ ባይከለከል እንኳን የታወቀ ወይም የለየለት እብድ ከሆነ ያደረገው ኑዛዜ በሕግ ዋጋ አይኖረውም:: አንድ ሰው የታወቀ እብድ ነው የሚባለው ❽በሆስፒታል ውሰጥ ወይም በአንድ የእብዶች መኖሪያ ቤት ውስጥ ወይም በአዕምሮ ሁኔታ ምክንያት በአንድ የጤና ጥበቃ ቤት ውስጥ ተዘግቶበት በዚህ በተዘጋበት ቦታ እስከሚቆይበት ጊዜ ነው❾** ይህ ከሁለት ሺህ በላይ ነዋሪዎች በሚገኙባቸ አካባቢዎች ያለው ሁኔታ ሲሆን ሁለት ሺህ የማይሞሉ ነዋሪዎች በሚገኙባቸው የገጠር ቀበሌዎች ደግሞ አንድ ሰው በግልጽ የታወቀ እብድ ነው ተብሎ የሚቆጠረው በአዕምሮው ሁኔታ ምክንያት በቤተዘመዶቹ ወይም አብሮአቸው በሚኖር ሰዎች ጥበቃ የሚደረግበት □ና በዚሁ ምክንያት በመዘዋወር ነፃነቱ ላይ ገደብ የተረገበት ከሆነ ነው:: ከዚህ ውጭ ግን ተናዛዡ ኑዛዜውን ባደረገበት ወቅት አዕምሮው የተስተካከለ አልነበረም ወይም አእምሮው ጉድለ ነበር በሚል ሰበብ ኑዛዜ እንዲፈረስ ሕግ አይፈቅድም::

በአንፃሩም በኢት□ጵያ ሕግ መሠረት በሕግ የተከለከለ ሰው (Legally Inerrdicated person) ኑዛዜ ለማድረግ ሙሉ ችሎታ አለው:: በማንኛውም ዓይነት ወንጀል ተከሶ ምንም ዓይነት ቅጣት ቢወሰንበት ኑዛዜ በማድረግ መብቱ ላይ ለውጥ አያስከትልም:: ምክንያቱም በወንጀል ተከሶ የተቀጣ ሰው ንብረቱን በኑዛዜ ማስተላለፍ አይችልም ሊባል ስለማይቻል ነው:: በመሆኑም የኢትዮጵያ ሕግ በዚህ ረገድ ከብዙ አገሮች ሕጐች የተለየና የበለጠ ዘመናዊም ነው ማለት ይቻላል::

2.1. 3. ኑዛዜ ሊፈጸም የሚቸል መሆን ያለበት ስለመሆነ

በመሠረቱ ተናዛዥ የሚያደርገው ኑዛዜ ሊፈጸም የሚችል መሆን ይኖርበታል:: ሊፈጸም የማይችል ከሆነ ኑዛዜ ማድረጉ ምንም ትርጉም አይኖረውም:: ትርጉም እንዳያጣ ደግሞ ተናዛዥ ኑዛዜ በሚያደርግበት ጊዜ ከፍተኛ ጥንቃቄ ሊያደርግ ይገባል::

አንድ የኑዛዜ ቃል በተለያዩ ሁኔታዎች ምክንያት ተፈጻሚ ላይሆን ይችላል::[ኦ] ከነዚህ

** ሁለት የእብዶች ሆስፒታሎች ወይም በቋሞች ብቻ በሚገኙበት አገራችን የታወቀ እብድ የሚባል ሰው በእነዚህ ተቋሞች ውስጥ የተዘጋበት ብቻ ነው ብሎ መወሰኑ አስቸጋሪ ነው:: ጨርቃቸውን ጥለው የሚሄዱት እብዶች ቁጥር በተቋሞቹ ውስጥ ከሚገሸኙት ቁጥር ቢበልጥ እንጂ አያንስም:: እነዚህ ደግሞ የለየላቸው እብዶች ለመሆናቸው የሚያከራክር አይሆንም::

* ይህ ንዑስ ቁጥር በእንግሊዝኛ□ ቅጂ ውስጥ የተደነገገው በቁጥር 866 ስር ነው:: ትክክለኛው የአማርኛው ቅጂ አቀማመጥ ነው:: ምክንያቱም የቁጥር 865 ርክስ ❽የማይቻል

ሁኔዎች ውስጥ የኑዛዜውን ተጠቃሚ ወይም የኑዛዜው ጉዳይ በበቂ ሁኔታ ግልጽ አድርጐ አለማመልከት አንዱ ነው። ለምሳሌ ሚች በኑዛዜው ውስጥ መኪናዬ ለወንድሜ ይሰጥ የሚል የኑዛዜ ቃል ቢያሰፍር □ና ሚች ብዙ መኪናችና ብዙ ወንድሞች ቢኖሩት የትኛው መኪናው ለየትኛው ወንድሙ ይሰጥ እንዳለ ግልጽ ስላለሆነ የኑዛዜውን ቃል ተፈፃሚ ማድረግ አይቻልም። ይህ ሲባል ግን ተናዛዥ መኪናዬ ወይም ወንድሜ ሲል የትኛውን ወንድሙን ማለት እንደፈለገ በተለያዩ መንገዶች ማረጋገጥ ከቻለ ፍ/ቤት የኑዛዜውን ቃል ሊያጸናው ይችላል። በዚህ መንገድ ማረጋገጥ ባይችል እንኳን ከመኪናዎቹ ውስጥ አነስተኛ ግምት ያለውን ለወንድሞቹ በጋራ ቢሰጥ የሚነቀ□በት ምክንያት አይኖርም የሚል ሀሳብም ሊቀርብ ይችላል።

ሌላ ምሳሌ እንውሰድ። ሚች ካባቱ በውርስ ያገኘው አንድ ዲሞትፎር ጠመንጃ አለው። ሲሞት ያደረገው ኑዛዜ እንዲህ የሚል ነበር። ❸እንደ ልጄ የምወደውን ዲሞትፎር ጠመንጃዬን ልጄ ደመላሽ አካለመጠን እስኪደርስ ወንድሜ ይቀጠመበት❾። ሚች ሶስት ወንድሞች ቢኖሩትና ከሶስቱ ወንድሞቹ ለየትኛው ወንድሙ እንዲጠቀምበት መስጠቱን በኑዛዜው ለይቶ ስላልገለጸ የኑዛዜውን ቃል ተፈጻሚ ማድረግ የሚቻል አይሆንም። ሶስቱም ወንድሞቹ ሽጠው ይካፈሉት እንዳይባል በኑዛዜ የተሰጠው የባለቤትነት መብት ሳይሆን የመጠቀም መብት ብቻ ነው። ምክንያቱም በኑዛዜው የጠመንጃው ባለቤትነት የተሰጠው ለደመላሽ ነውና።

ሌላው ዓይነት አፈጻጸሙ የማይቻል የኑዛዜ ቃል በፍትሐብሔር ሕግ ቁጥር 865 ንዑስቁጥር 2 የተደነገገው ነው*። በዚህ ንዑስ ቁጥር መሠረት አንድ የኑዛዜ ቃል ተፈጻሚ ማድረግ የማይቻለው የኑዛዜውን ተጠቃሚ ወይም የኑዛዜውን ጉዳይ ግልጽ አድርጐ ባለመመልከቱ አይደለም። ይህ በዚሁ አንቀጽ ንዑስ ቁጥር 1 ላይ ተደንግጓል። □ንግዲህ ንዑስ ቁጥር 2 የሚደነገገው ስለ ሌላ ሁኔታ ነው ማለት ነው።

ታ□ያ በንዑስ ቁጥር 2 አነጋገር መሠረት ተፈጻሚ ማድረግ የማይቻል የኑዛዜ ቃል ምን ዓይነቱ ነው✍ ይህ ንዑስ ቁጥር የተለያዩ ትርጉሞች ሊሰጠው የሚችል ነው🕭 እየተሰጠ ውም ነው። ፍርድ ቤቶችም ይህንን በተመለከተ በርካታ ክርክሮችን እያስተናገዱ ናቸው። የኰሎኔል ልዑልሰገድ ኑዛዜን በመቃወም ከተነሱት ክርክሮች ውስጥ አንዱ ቁጥር 865 (2)ን

አፈፃፀም❾ የሚለው በንዑስ ቁጥር 2 የተደነገገውን በትክክል ይገልፃል። በእንግሊዝኛው ቅጂ ውስጥ ግን ❸ሕገወጥ የሆኑ የኑዛዜ ቃላት❾ በሚል ርዕስ ሥር ነው የሚገኘው። ይህ ንዑስ ቁጥር የሚናገረው ግን ስለ ሕገወጥነት ሳይሆን አፈፃፀሙ የማይቻል ስለመሆን ነው። የፊርንሳይኛው ቅጂም በአማርኛው ቅጂ ዓይነት ነው የተደነገገው።

* ቁጥር 865 /2/ ለማለት ነው።

በመጥቀስ የቀረበ ነው፡፡ ክርክሩም ❽በኑዛዜው ላይ ቤቱ ለዳንኤል ከተሰጠ በኋላ በቤቱ ተጠቃሚዎች ሌሎች ወገኖች እንዲሆኑ የሚያደርግና ከፍ ብሎ የተጠቀሰውን ዝቅ ብሎ የሚሸር በአፈፃፀም ደረጃ ከፍተኛ ውዝግብ የሚያስከትል ቤቱን 'ዳንኤል እስኪመጣ ድረስ' በሚል ገደብና በሌሎችም ሰዎችን እርስ በርስቸው በሚያፋጅ ሁኔታ ላይ የተመሠረተ በመሆኑ በፍትሐብሔር ሕግ ቁጥር 865 (2) መሠረት ለአፈፃፀም የማይቻል በመሆን ፈራሽ መሆን ይገባዋል❾ የሚል ነበር፡፡

ይህንን ክርክር አስመልክቶ የአውራጃው ፍርድ ቤት የሚከተለውን ውሳኔ ሰጥቷል፡፡

> ሚች ባደረጉት ኑዛዜ ላይ ቤታቸውን ለዳንኤል ልዑልሰገድ እንዲወርስ የተናዘዙለት ሲሆን ቤቶቹን በየክፍሎች በመከፋፈል የአሁኑ የኑዛዜ ተጠቃሚ ነን ለሚሉት ሰዎች እንዲጠቀሙበት እንጂ ለአቶ ዳንኤል ልዑልሰገድ የሰጡት ቤት ለሌሎች በስጦታ መስጠት ስላልሆነ በዚህ ነጥብ የቀረበው ተቃውሞ ተቀባይነት የለውም ::

ጉዳዩ በይግባኝ የቀረበለት ከፍተኛው ፍርድ ቤት በበኩሉ የግራ ቀኙን □ርክር ከሰማ በኋላ ነጥቡን በማስመልከት በፍርዱ ላይ ያሰፈረው ሀተታና የሰጠው ውሳኔ ደግሞ እንደሚከተለው ይነበባል፡፡

> ሚቸ ጥቅምት 22/77 ዓ.ም. ያደረጉትን ኑዛዜ ስንመለከት በተራ ቁጥር 1 ሥር በከፍተኛ 18 ቀበሌ 18 ውስጥ ቁጥር 165 የሆነውን ቤቴን ቢበድለኝም መጠ ሪያ ዘሬ ነውና ለልጄ ለዳንኤል ልዑልሰገድ ሰጥቼዋለሁ፡፡ ካሉ በኋላ በተራ ቁጥር 2 ደግሞ ሃይማኖት ታዬ ራሷን ችላ ቤት እስካገኘች ድረስ አሁን ያለችበትን አንድ ክፍል እንደያዘች ትቀመጥ ብለው ዝቅ ብለው በተራ ቁጥር 6 ስር ደግሞ እቴነሽ ሐሰን እንደ ልጅ ሆና አገልግላኛለችና ቤት አግኝታ በፈቃዷ ለቃ እስከሄደች አንዷን ክፍል አሁን ያለችበትን ትቀመጥበት ማንም □ንዳይደርስባት . . . ብለዋል፡፡ እነዚህን የኑዛዜ ቃሎች ስንመለከት ለአፈጻጸም አስቸጋሪ መሆናቸውን መረዳት አያዳግትም፡፡ አሁን ባለው የጊዜው የቤት ችግር አንጻርም ሲ□ይ ቤት አግኝ□ በ□ቃ□ ለቃ □ስከሄደች ትኑርበት የተባለው ቤትስ አግኝ□ የምትሄደው መቼ ነው? በፈቃዷስ ይህንን ቤት ለቃ ትሄዳለችን ? የሚሉትን ነጥቦች ስናነሳ ምላሹ አሉ□ □ጁም የማይሆኝ መሆኑ ግልጽ ነው፡፡ የቤቱ ባለቤትነት ለአንዱ ተሰጥቶ በሌላ በኩል ከላይ በተመለከተው ዓይነት ተጠቃሚው □ስከመቼ እንደሆነ ላልታወቀ ጊ□ □ጁም በራሱ □ቃ□ ለቆ □ስኪሄድ ይኑር አይነካ ከተባለ ድረስ ቤቱ የተሰጠው ሰው መቼ ነው ባለቤት ሊሆን የሚችለው? በርግጥስ ሊሆን ይችላል ተብሎ የሚጠበቅና የሚ□ሰብስ ነው በኑዛዜው በተመለከተው ዓይነት

ጁ□□ም ቢባል? ይህንንም ስንመለከት የኑዛዜው አፈፃፀም የማይችል መሆኑን □ንገነዘባለን። እንደዚህ ዓይነት ኑዛዜን በተመለከተ የፍትሐብሔር ሕጋችን በቁጥር 865(1) ሥር አፈጻጸሙ የማይቻል □ንደሆነ እንደዚሁ ፈራሽ ነው በማለት የሚደነግግ በመሆኑ ኑዛዜው በዚህም ነጥብ ላይ ፈራሽ ሆኖ □ናገኘዋልን።

❽አፈጻጸሙ የማይቻል❾ ለሚለው ሐረግ የተለያዩ ትርጉሞች እንደሚሰጠው ከፍ ብለን ከጠቀስናቸው የፍርድ ቤት ውሳኔች በስፊል አይተናል። ቀጥለን በዚሁ ነጥብ ላይ ጠቅላይ ፍርድ ቤትና የጠቅላይ ዐቃቤ ሕጉ ጽሕፈት ቤት የወሰዱትን አቋም እንመልከት።

ጁሻው ጉዳይ በይግባኝ ጠቅላይ ፍርድ ቤት ቀርቦ በፍትሐብሔር ይግባኝ መዝገብ ቁጥር 507/80 እንደሚከተለው ተወስኗል።

በፍትሐብሔር ሕግ ቁጥር 865/2/ አንድ ኑዛዜ አፈጻጸሙ የማይቻል በሆነ ጊዜ ፈራሽ ነው ተብሎ የተደነገገው በዚህ መልኩ ለተደረገ ኑዛዜ አይደለም።

እነ ሃይማኖት ታዬ ቤት አግኝተው እስኪለቁ ድረስ በየነበሩበት ክፍል እንዲቆዩ የሚለ□ የሟች ኑዛዜ ቤት እስኪያገኙ ድረስ ብቻ የሚያገለግል ሆኖ ቤት ካገኙ በኋላ ግን ለዳንኤል ልዑልሰገድ የመልቀቃቸው ጉዳይ ተግባራዊ የማይሆንበት ምክንያት ስለሌለ ከፍተኛ□ ፍርድ ቤት ኑዛዜው አፈጻጸሙ የማይቻል ነው ሲል የተሳሳተ ትርጉም ተከትሎ ኑዛዜው እንዲፈርስ የሰጠውን ውሳኔ አልተቀበልነውም። የጠቅላይ ዐቃቤ ሕጉ ጽሕፈት ቤት አቋም ከፍ ብሎ ከተጠቀሰው የጠቅላይ ፍርድ ቤት አቋም ያልተለየ ነው። የጠቅላይ ፍርድ ቤትን ውሳኔ በመቃወም የዳንኤል ወኪል የሆኑት ወይዘሮ ጽጌሃና ዳኜ □□□ ለሰበር ሰሚ□ ችሎት እንዲቀርብላቸው ላቀረቡት አቤቱ□ □ቅላጁ ወቃቤ ሕ□ ከሰጡት ምላሽ ውስጓ ለ□ህ ነጥብ አግባብነት ያለው ክፍል የሚከተለውን ይላል፡-

ማንም ሰው ንብረቱን ወይም ሀብቱን በኑዛዜ ለሌላ ማስተላለፍ እንደሚችል በፍትሐብሔር ሕግ ቁጥር 1184 ተደንግጎ ጁ□ኗል። በዚሁ መሠረት ሟች ኮሎኔል ልዑልሰገድ □ጁሌ በመኖሪያ ቤታቸው ላይ የነበራቸውን የባለቤትነት መብት ለልጃቸው ለዳንኤል ልዑልሰገድ በኑዛዜ አስተላልፈዋል። ስለዚህም የተጠቀሰው የመኖሪያ ቤት ሕጋዊ ባለቤት ዳንኤል ልዑልሰገድ ነው።

ሃይማኖት □ጽ □□ሞ ❽ራሷን ችላ ቤት □ከካ□ኝች ድረስ አሁን ያለችበትን አንድ ክፍል ɔ□ንደያዘችɔ ትቀመጥ . . . ለሌላ ማስተላለፍ አይቻልም❾ በማለት ኮሎኔል ልዑል ሰገድ በፍትሐብሔር ሕግ ከቁጥር 1309 ጀምሮ በተመለከተው መልክ በቤቱ የመገልገል መብት ለ□ለሰቧ ሰዓ ተኘ□ል። ጁኼ መብት ለሌላ ሊተላለፍ የማይችል ጊዜያዊ መብት ሲሆን በዳንኤል ልዑል ሰገድ የባለቤትነት መብት ላይ ጊዜያዊ ገደብ የሚጥል ነው።

ስለዚህ በኮሎኔል ልዑል ሰገድ ኑዛዜ ውስጥ የተጠቀሰው ክላይ የመረመርነው ገደብ ለማስፈፀም አዳጋች ይሆን □ንደሆነ እንጂ በፍትሐብሔር ሕግ ቁጥር 879/1/ አነጋገር ❽ሊፈጸም የማይችል❾ ገደብ አይደለም።

ክፍ ብለን ከጠቀስናቸው የፍርድ ቤቶችና የጠቅላይ ዐቃቤ ሕግ መሥሪያ ቤት ሀተ□ችና □ሳሄች ማየት □ንደሚቻለው ❽አፈጻጸሙ የማይቻል❾ □ሚለ□ □ጁለቃል ተመሳሳጁ ወይም አንድወጥ ግንዛቤ የተሰጠው አለመሆኑን ነው።

የከፍተኛው ፍርድ ቤት አቋም በግልጽ ከሌሎቹ ተለይቷል። የሌሎቹም ወሳኔ ቢሆን ጉዳዩን በተናጠል ከመመልከት አልፎ በአጠቃላይ ❽አፈጻጸሙ የማይቻል❾ የሚለውን የሕግ ፅንሰ ሀሳብ ያብራራ አልነበረም። ጉዳዩን በማስመልከት የሰጡት ውሳኔ ግን የሚነቀፍ አይደለም (ከከፍተኛው ፍርድ ቤት ውሳኔ በቀር)። ምክንያቱም ኮሎኔል ልዑልሰገድ የቤቱን ባለቤትነት የሰጡት ለዳንኤል ልዑልሰገድ ብቻ ሲሆን ለሃይማኖትና ለ□ቴነሽ የሰጡት ግን ለተወሰነ □□ በቤቱ የመጠቀም (ያውም በተወሰኑ ክፍሎች ብቻ) መብት በመሆኑ ነው። ኑዛዜው አፈጻጸሙ የማይቻል ነው ሊባል ይችል የነበረው ቤቱን ለዳንኤል በባለቤትነት ከሰጡ በኋላ ወረድ ብለው ይህንኑ ቤት ለሃይማኖት ወይም ለ□ቴነሽ በባለቤትነት የሰጡ ቢሆን ነበር።

2.1.4 ኑዛዜ ለሕግ ወይም ለመልካም ጠባይ ተቃራኒ ስላለመሆኑ

ተናዛዥ የሚያደርገው ኑዛዜ በሕግ ያልተፈቀደ ወይም ከመልካም ጠባይ (ሞራል) ያፈነገጠ ወይም ተቃራኒ መሆን አይኖርበትም። አንድን የኑዛዜ ቃል ለሕግ ወይም ለመልካም ጠባይ ተቃራኒ ነው የሚያሰኘው የኑዛዜው ጉዳይ ነው። በመሠረቱ ሟች በኑዛዜ የሚያስተላልፈው ሀብቱን ነው። የኑዛዜ ጉዳይ ምንጊዜም ቢሆን የተናዛዥ ሀብት ወይም ንብረት ብቻ ነው። ይህ ሳይሆን ቀርቶ ለምሳሌ ተናዛዥ የራሱ ባልሆነ ሀብት ላይ ቢናዘዝ ኑዛዜው በሕግ ተቀባይነት ሊኖረው አይችልም።

ሟች በኑዛዜው ውስጥ ❽ሚስቴን አቶ □ከሌ ይወረስ❾ ❽የቤት ሠራተኛዬን □ከሌ ጁ□ሰ□❾ ❽ልጄን □ከሌ ያግባት❾ ወዘተ ... የሚሉ የኑዛዜ ቃሎች ቢያሰፍር ኑዛዜው ተቀባይነት ያለው አይሆንም። ምክንያቱም ሰው ንብረት ባለመሆኑ በኑዛዜ ማስተላለፍ አይቻልም። ይህ ዓይነቱ ኑዛዜ ሕገወጥ ነው። ለመልካም ጠባይም ተቃራኒ ነው። በመሆኑም ፈራሽ ነው።

2.1.5 ኑዛዜ በማስገደድ የተገኘ ሲሆን

በመሠረቱ ኑዛዜ ሟች በፍላጎቱ ተነሳስቶ የሚፈጸመው ድርጊት ነው። ኑዛዜ ከማንኛውም ዓይነት ተፅዕኖ ውጭ በነፃ ፈቃድ ሊደረግ የሚገባ ሕጋዊ ድርጊት ነው። ከነፃ ፈቃድ

ወይም ፍላጎት ውጭ የተሰጠ የኑዛዜ ቃል ሕጋዊ ውጤት አይኖረውም።

ኑዛዜ በነፃ ፈቃድ □ንዳይሰጥ ከሚያደርጉ ሁኔ□ች ውስጥ አንዱ የ□ጁል ሥራ □ጁም ማስገደድ ነው። በማስገደድ የተሰጠ የኑዛዜ ቃል ፈራሽ □ንደሚሆን የፍትሐብሔር ሕግ በግልጽ ይደነግጋል። የ□ጁል ሥራ□ ተናዛዡን ራሱን ወይም የቅርብ ዘመዶቹን ወይም ወዳጆቹን ማለትም ❽ወላጆቹን ወይም ተወላጆቹን ወይም ባልን ወይም ሚስትን ከባድና የማይቀር አደጋ በሕይወቱ በአካሉ በክብሩ ወይም በንብረቱ □ንደሚመጣበት❾ ማስፈራራት ሊሆን ይችላል።

2.1.6 ኑዛዜ በስህተት የተሰጠ ሲሆን

ከፍ ብሎ □ንደተጠቀሰው ኑዛዜ በሕግ ዋጋ □ንዲኖረው በተናዛዡ ነጻ ፈቃድ ላይ የተመሠረተ መሆን ይኖርበ□ል። በነጻ ፈቃድ ላይ ያልተመሠረተ ከሆነ ኑ□□□ ጁ□ርሳል።

የተናዛዥን ፈቃድ ከሚያጎድሉ ምክንያቶች ውስጥ ስህተት አንዱ ነው። በስህተት ላይ የተመሠረተ የኑዛዜ ቃል ፈራሽ □ንደሚሆን የፍትሐብሔር ሕጋችን በግልጽ ደንግጓል። ይሁን □ንጂ የኑዛዜን መፍረስ የሚያስከትለው ማንኛውም ዓይነት ስህተት አይደለም። ስህተቱ ወሳኝና መሠረ□ዊ መሆን አለበት። ስህተቱ የኑዛዜውን ስጦ□ ለማ□ረ□ ጸበቃ መሆን አለበት። ለምሳሌ ሚች ሲሞት የወርቅ ሰዓቱን አበበ ለተባለ ሰው ይናዘዝለ□ል። ሚችና አበበ የቅርብ ዝምድናም ሆነ ወዳጅነት የላቸውም። ሚች በኑዛዜው ውስጥ የወርቅ ሰዓቱን ለአበበ የተናዘዘለት ልጁ ለትምህርት ወደ ውጭ □ንዲሄድ ከፍተኛ ያደረገለት ስለሆነ ማሞኑን ይገልጻል፣ ነገር ግን የሟች ልጅ ወደ ሙጭ አገር እንዲሄድ ትብብር ያደረገው አበበ አለመሆኑ ቢ□ወቅ ሚች የኑዛዜውን ስጦ□ ጸ□ረ□□ በስህተት ስለሆነ ተፈጻሚ አይሆንም ማለት ነው።

2.1.7 ኑዛዜን በፍርድ ስለመሻር

ከላይ ከተገለጹት በሕግ ወራሽ ከሚሆኑ ኑዛዜች ሌላ ፍርድ ቤት ሁኔ□ችን ገምግሞ ተ□ቢ ሆኖ ሲያገኘው የሚቀንሳቸው ወይም ጭራሹን የሚሽራቸው ኑዛዜች ይኖራሉ። ከ□ዚህም □ስጥ ተናዛዡ ለአስተዳዳሪው ወይም ለሞግዚቱ ከመሞቱ በፊት ባሉት ስድስት ወራት ውስጥ የሕክምና ርዳ□ ወይም የመንፈስ ርዳታ ላደረገለት ሰው በሕ□ □ል ለማሻሻል ሥልጣን ለተሰጠው ሰው ለኑዛዜ ምስክሮች □ንዲሁም ለተናዛዡ ባለቤት ያደረጋቸው የኑዛዜ ቃሎች ይገኙበ□ል። ከዚህ ውጭ ግን ተናዛዡ የመንፈስ መጫን ተደርጎበ□ል በሚል ሰበብ የኑዛዜ ቃል □ንዲሻር ሕግ አይፈቅድም።

2.2 የኑዛዜ ዓይነቶች

በኢትዮጵያ ሕግ መሠረት የኑዛዜ ዓይነቶች ሦስት ናቸው። □ሉም፦

1. በግልጽ የሚደረግ ኑዛዜ
2. በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ □ና
3. በቃል የሚደረግ ኑዛዜ ናቸው።

2.2.1 ግልጽ ኑዛዜ

ግልጽ ኑዛዜ በሕግ ተቀባይነት ያለው □ንዲሆን የሚከተሉት ሁኔ□ች መሟላት ይኖርባቸዋል።

1. ኑዛዜው ተናዛዡ ራሱ ወይም ተናዛዡ □የተናገረ ሌላ ማንኛ□ም ሰ□ ለ□□□ □□ባል።
2. ኑዛዜው በተናዛዡና በአራት ምስክሮች ፊት መነበብ አለበት።
3. ኑዛዜው በተናዛዡና በአራት መስክሮች ፊት መነበቡና የተነበበት ቀን በኑዛዜው ሰነድ ላይ መጠቀስ አለበት።
4. በተራ ቁ□ር (2) □ና (3) የተጠቀሱት ሥርዓቶች (□ርማሊቲች) □ንደተፈፀሙ ተናዛዡና ምስክሮቹ ወዲያውኑ ፊርማቸውን ወይንም ያውራ ጣት ምልክ□ቸውን ኑዛዜውን ሰነድ ላይ ማድረግ አለባቸው።

ግልጽ ኑዛዜ ተናዛዡ □□ተናገረ በሌላ በማንኛውም ሰው ሊጻፍ ይችላል። ኑዛዜውን ግልጽ ጸሰኘውም አንዱ ምክንያት ይኸው ነው። ማለትም ተናዛዡ የመጨረሻ ፈቃዱን ለሌላ ሦስትኛ ሰ□ (□ዚህ ላይ የኑዛዜውን ቃል በጽሑፍ ለሚያሰፍርለት ሰው) □ህ□ ማ□ረ□ ነው። ሌላው ደግሞ የመጨረሻ ፈቃዱን ለምስክሮች ገሀድ ማድረጉ ነው።

ኑዛዜ። ተናዛዡ □የተናገረ በሌላ ሦስተኛ ሰው በመጻፍ ላይ የብዙ አገሮች ሕጎች ጁስማማሉ። በ□ር□ዓ። የተናዛዡን ቃል በጽሑፍ በሚያሰፍረው ሰው ማንነት ላይ ልዩነት ጁ□ጸል። □ኛ ሕ□ ❸ማንኛ□ም ሌላ ሰ□❾ ሲል። የሌሎች አገሮች ሕጎች ግን ። ቃሉን በጽሑፍ ማስፈር ያለበት ውል አዋዋይ ነው ብለው ይደነ□ጋሉ።*

በዚህ ላይ ኢትዮጵያ ከሌሎች አገሮች የተለየችበት ተጨባጭ ምክንያት አለ። ይኸ□ም የፍትሐብሔር ሕጋችን በተረቀቀበት ጊዜ የክብር መዝገብ ጽሐፊት ቤት ወይም በሕግ ውል □ንዲያፈራርም የተፈቀደለት ሰው አለመኖሩ ነው።

የኢትዮጵያ ሕግ ግልጽ ኑዛዜ በተናዛዡ በራሱ ሊጻፍ □ንደሚችልም ይደነግጋል። ይህ

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* ለምሳሌ አንድ የሕግ ምሁር የፈረንሳይን ሕግ አስመልክተው የሚከተለውን ብለዋል። ... ኑዛዜው ራሱ ተናዛዡ በሚናገረው ዓይነት በውል አዋዋይ መጻፍ አለበት። ይሁን እንጂ ይህንን ሲጸ□ረ□ □ል አዋዋዩ የተናዛዡን ትዕዛዝ በሕግ ቋንቋ ሊቀረፅና አሻሚ ነገሮችን ግልጽ ለማድረግ ጥያቄችን ሊጠይቅ ይችላል።

ብቻም አይደለም። ተናዛዡ ኑዛዜውን ምስክሮች በሌሉበት ጽፎ ሊያስቀምጠው ይችላል። የኢትዮጵያ ፍትሐብሔር ሕግ ቁጥር 881/2/ አጥብቆ የሚጠይቀው ግን ኑዛዜው በሕ ኻፉ ፫ንዲኖረው በተናዛዡና በአራት ምስክሮች ፊት መነበብ ያለበት መሆኑን ነው። ቀደም ሲል የተጠቀሱት የሕግ ምሁር ይህን በማስመልከት የሚከተለውን ጽፈዋል፡-

> የኢትዮጵያ ፍትሐብሔር ሕግ ቁጥር 881 ኑዛዜው የግድ በምስክሮች ፊት መጻፍ አለበት አይልም ኑዛዜው ማንም በሌለበት በግል ሊጻፍ ይችላል። ይሁን ፫ንጂ ሕ ፫ንዲህ ያለው ኑዛዜ በተናዛዡና በአራት ምስክሮች ፊት መነበቡን ፫፬ በ፫ም አስፈላጊ አድርጎ ይቆጠራል።[39]

በዚህ ረገድ የኢትዮጵያ የፍትሐብሔር ሕግ ከብዙ ሀገሮች ሕግጋት ለየት ያለ ነው። ለምሳሌ የፈረንሳይ ሕግ ተናዛዡ ለአዋዋዩ በቃል ሲነገረው አዋዋዩ የኑዛዜውን ሲጽፍ ፫ና ኑዛዜውን ሲፈርም ምስክሮች መገኘት አለባቸው ይላል።[40] ፍትሐ ነገሥት ፫ንኳን ሣይቀር ኑዛዜ በተናዛዡ በራሱ የሚጻፍም ቢሆን መጻፍ ያለበት በምስክሮች ፊት ነው ብሎ ይደነግጋል። **

የከፍተኛው ፍርድ ቤት ይህንን ሥርዓት አስመልክቶ ከፍ ብለን በጠቀስነው በኮሎኔል ልዑልሰገድ ኑዛዜ ጉዳይ ላይ የተሳሳተ አቋም ወስዷል። ፍርድ ቤቱ ኮሎኔል ልዑልሰገድ ያደረጉት ኑዛዜ ግልጽ ኑዛዜ ነው ካለ በኋላ የዚህ ዓይነቱ ኑዛዜ መደረግ ማለትም መጻፍ ያለበት በምስክሮች ፊት ነው ከሚል መደምደሚያ ላይ ደርሷል። የፍርድ ቤቱ ውሳኔ ፫ንዲህ የሚል ነበር፡-

> በኑዛዜው በ፫ማኝነት ተጠቅሰው የፈረሙት 4 ምስክሮች በሰጡት የምስክርነት ቃል <u>ሲናዘዙ ያልነበሩ መሆናቸውና ያለማየ፫ቸው መቼም ፫ንዳደረጉት ፫ንደማያውቁ</u> የሚች ኑዛዜ ነው ለማለትም የበቁት ሚች በተለያየ ወቅት ጠርተዋቸው ኑዛዜ አድርጌአለሁ ያሏቸው ስለሆነና ፫ንዲሁም በምስክርነት ስማቸው የጠቀሱት መሆኑን ነግረዋቸው በተለያየ ጊዜ ፫ንዲፈርሙ ጠይቀዋቸው የፈረሙ መሆኑን በመጥቀስ መስክረዋል። ከነዚህም የኑዛዜ ፫ማኞች የምንማረው ጥቅምት 22/77 ዓ.ም በሚች የተደረገው ኑዛዜ ሕጉ በቁጥር 881 በደነገገው መሠረት ያለ መሆኑን ነው። .. /ሰረ፫ ፫ተፊ መረ/

ከዚህ ጥቅስ የምንረዳው ከፍተኛው ፍርድ ቤት የሕጉን ድንጋጌ በተሳሳተ መንገድ የተረጎመው መሆኑን ነው። ምክንያቱም የፍትሐብሔር ሕግ ቁጥር 881 ኑዛዜው ሲዘጋጅ ማለትም ሲጻፍ ምስክሮች መገኘት ወይም ማየት አለባቸው ፫ንደሚል ተደርጎ ሊነበብ ወይም ሊተረጎም የሚቻልበት ምንም ዓይነት ፍንጭ የለምና።

ኑዛዜው በተናዛዡና በአራት ምስክሮች ፊት መነበብ ያለበት መሆኑን ብቻ ሳይሆን ይኸ□ሥርዓት (ፎርማሊቲ) የተፈጸመበትንም ቀን ማለትም ኑዛዜው በተናዛዡና በምስክሮች ፊት የተነበበበትን ቀን ጭምር ማመልከት □ንዳለበት የፍትሐብሔር ሕጉ ቁዓር 881(2) ይደነግጋል። ከዚህ ድንጋጌ አንድ የምንገነዘበው ነጥብ አለ። ይኸውም ኑዛዜው የሚጸፍበት ቀን ኑዛዜው ከሚነበብበት ቀን የተለየ ሊሆን የሚችል መሆኑን ነው። ሁለቱም ሥርዓቶች የግድ በአንድ ቀን ወይም በአንድ ጊዜ መፈጸም ያለባቸው ቢሆን ኖሮ ኑዛዜው የተነበበትን ቀን ብሎ ለይቶ መግለጹ አስፈላጊ ባልሆነ ነበር። ምክንያቱም ሁለቱም (ኑዛዜውን መጻፍና ኑዛዜውን በምስክሮች ፊት ማንበብ) የግድ በአንድ ቀን የሚፈጸሙ ቢሆን ኖሮ በኑዛዜው ላይ የሚኖረው ቀን በቂ ነበርና ነው።

ኑዛዜው ተናዛዡና አራት ምስክሮች ባሉበት ከተነበበና ይህም መፈጸሙ በኑዛዜው ጽሑፍ ላይ ከሰፈረ በኋላ ወዲያውኑ ተናዛዡና አራት ምስክሮች በኑዛዜው ጹሑፍ ላይ ፊርማቸውን ወይም ያውራጣት ምልክ□ቸውን ማኖር አለባቸው። ካልሆነ ኑዛዜው ፍርስ ይሆናል።

□ዚህ ላይ አንድ መስተዋል ያለበት ነጥብ አለ። ይኸውም ኑዛዜው የሚጸፍበት ጊዜና ኑዛዜው የሚነበብበት ጊዜ የተለያየ ሊሆን መቻሉን ነው። ኑዛዜው በሚጸፍበት ጊዜ ምንም ምስክር አያስፈልግም። ምስክሮች የሚያስፈልጉት ኑዛዜው በሚነበብበት ጊዜ ነው። ❽ወዲያውኑ❾ የሚለው ቃል የሚያመለክተውም ይህንኑ ጊዜ ነው፡ ። ኑዛዜው የተጻፈበትን ሳይሆን የተነበበበትን፡ ። ይህ ሲባል ግን ኑዛዜው የሚጸፍበትና የሚነበብበት ጊዜ የግድ የተለያየ መሆን አለበት ማለት አይደለም። ኑዛዜው ወዲያው ተጽፎ ወዲያው ተነቦ ወዲያው ቢፈረም የሚከለክል ሕግ የለም።

ምስክሮችን በተመለከተ አከራካሪ ሊሆን የሚችል ሌላም ነጥብ አለ። ይኸውም ምስክሮች በኑዛዜው ላይ መፈረም ያለባቸው አራቱም በአንድ ጊዜ ነው ወይስ በተናጠልም ሊፈርሙ ይችላሉ✍ የሚል ነው። በዚህ ነጥብ ላይ የተለያዩ አቋሞች ይንጸባረቃሉ። አንዱ አቋም ሕጉ የሚጠይቀው አራት ምስክሮች □ንዲኖሩና እያንዳንዳቸው በኑዛዜው ጽሑፍ ላይ ከመፈረማቸው በፊት ኑዛዜውን □ንዲያነቡ □ጭም □ንዲነበብላቸው ብቻ ስለሆነ በተናጠል ሊፈርሙ የማይችሉበት ምክንያት አይኖርም የሚል ሲሆን ሌላው ደግሞ አራቱም ምስክሮች አንድ ላይ በተገኙበት ኑዛዜው ተነቦ አራቱም ምስክሮች ወዲያውኑ መፈረም አለባቸው የሚል ነው።*

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* የፈረንሣይ የኑዛዜ ሕግም ❽... ምስክሮች፣ ኑዛዜው በተናዛዡ በሚነገርበት፣ በሚጸፍበት እና በማፈረምበት ጊዜ ሁሉ በአካል መገኘት አለባቸው❾ ይላል። የሕንድ የኑዛዜ ሕግ ግን ትንሽ ለየት ይላል። ኑዛዜው በሁለት ምስክሮች መረጋገጥ አለበት። ይበል እንጂ፣ ምስክሮቹ በኑዛዜው ላይ መፈረም የሚኖርባቸው በአንድ ጊዜ ነው አይልም። የሚፈለገው ምስክሮቹ በኑዛዜው ሰነድ ላይ ተናዛዡ ባለበት እንዲፈርሙ ብቻ ነው። እንዲያውም ምስክሮቹ የኑዛዜውን ይዘት ወይም ምንነት ላያውቁ ይችላሉ። ምክንያቱም ከመፈረማቸው በፊት ኑዛዜውን እንዲያነቡ □ጭም እንዲያስነብቡ አይጠየቁምና።

ትክክለኛ□ □ኋለኛው አቋም ነው። ❽በአራት ምስክሮች ፊት❾ የሚለው ሐረግ አራቱም አንድ ላይ በተገኙበት ለማለት ነው። የሕጉ አገላለጽ የሚያሻማ አይደለም። ከዚህም ሌላ ተናዛዡ ምስክሮቹን በተናጠል ጠርቶ ማስፈረም የሚችል ከሆነ አንዱን ምስክር ካስፈረመ በኋላ ሌላኛውን አስኪያስፈርም ምናልባት ኑዛዜውን ሊያሻሽለው /ሊቀንስ □ጁም ሊጨምርበት/ ይችል ይሆናል። □ንዲህ ከሆነ በተሻሻለው ኑዛዜ ላይ የፈረመው ምስክርና ቀደም ብሎ የፈረመው ምስክር ምስክርነ□ቸው ለአንድ የኑዛዜ ሰነድ ሳይሆን በተለያዩ የኑዛዜ ሰነዶች ሊሆን ነው ማለት ነው።

አራቱም ምስክሮች /ተናዛዡን ጨምሮ አምስቱም/ በኑዛዜው ላይ *መፈረም* ያለባቸው በአንድ ጊዜ መሆኑን ከራሱ ከሕጉ ድንጋጌ መረዳት ይችላል። ❽ይኸው *ሥርዓት* /ፎርማሊቴ/ *መፈጸሙንና* የተፈጸመበትንም ቀን❾ የሚለው አገላለጽ የሚያሳየው *ሥርዓቱ* አንድ ጊዜ ብቻ የሚፈጸም □ንጂ ተናዛዡና አራቱ ምስክሮች በተለያየ ጊ□ □□መ□ አምስት *ሥርዓቶች* የሚፈጽሙ አለመሆኑን ነው።

በግልጽ ኑዛዜ ሁለት ምስክሮች ብቻ በቂ የሚሆኑበት ሁኔ□ም አለ። ሁለት ነገሮች ግን መሟላት ይኖርባቸዋል። አንደኛ ከሁለት ምስክሮች አንዱ የፍርድ ቤት መዝገብ ቤት ሹም /ሬጂስትራር/ □ጁም በሕግ ውል ለማዋዋል ሥልጣን የተሰጠው ሰው መሆን ይኖርበ□ል። ሁለተኛው ኑዛዜው ሬጂስትራሩ ወይም ውል አዋዋዩ ሥራውን በሚያከናውንበት ክፍል ወይም ቢሮ ውስጥ መደረግ ይኖርበ□ል።

ከምስክሮች በተያያዘ አሁንም አንድ ነጥብ □ናንሳ — የምስክሮቹን ቁጥር በሚመለከት። ሕ□ ለግልጽ ኑዛዜ አራት ምስክሮች □ንደሚያስፈልጉ ይደነግጋል። ነገር ግን ተናዛዡ በአራት ምስክሮች ሣይወሰን በኑዛዜው ሰነድ ላይ □ንበል ሰባት ምስክሮች እንዲፈርሙ ቢጸ□ር□ስ✍ ይህ ኑዛዜ *ሥርዓቱን* አልተከተለም በሚል መፍረስ ይኖርበ□ለን✍ መልሱ በአጭሩ🔔 አይፈርስም ነው። ሕጉ በአራት ምስክሮች ሲል መነሻውን ለማመልከት □ንጂ ከዚያ ቁጥር መብለጥ የለበትም ለማለት አይደለም። ቢያንስ ቢያንስ አራት ምስክሮች ያስፈልጋሉ ለማለት ነው። ከሚፈለገው ቁጥር በላይ ያሉት ምስክሮች አመሰካከራቸው የህጉን *ሥርዓት* ያለተከተለ ቢሆን □ንኳ /ለምሳሌ ኑዛዜውን ሣያነቡ ወይም ሣያስነብቡ ቢፈርሙ/ ኑዛዜው አይፈርስም።*

በመጨረሻም ለምስክርነት ብቁ ናቸው የሚባሉት □ነማን ናቸው✍ የሚለውን ነጥብ □ንመልከት። በፍትሐብሔር ሕግ ቁጥር *883/1/ መሠረት* ምስክሮቹ አካለ መጠን ያደረሱና በፍርድ ወይም በሕግ ያልተከለከሉ መሆን አለባቸው። ከዚህ በተጨማሪ ኑዛዜው የተጻፈበትን ቋንቋ የማያውቁ □ና ኑዛዜውን ማንበብ ወይም ሲነበብ መስማት የማይችሉ

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* የፈረንሣይን ህግ አስመልክቶ የሕግ ምሁራን የሚሉትን □ንስማ። ❽አስፈላጊው ወይም ትርፍ /የተንዛዛ/ ፎርማሊቴችን መጠቀም በተገቢው ፎርም የተፈጸመን ኑዛዜ ተቀባይነት አያሳጣም። ፎርማሊቴቹ . .

ለኑዛዜ ምስክርነት አይበቁም።

2.2.2 በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ

በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ፣ ቃሉ ራሱ □ንደሚጸመለ□ተ□ ፣ ኑዛዜው በሙሉ በተናዛዡ በራሱ □□ሮ ጽሑፍ መዘጋጀት አለበት። እዚህ ላይ የፍትሐብሔር ሕ□ ቁዓር 881 /1/ ግልጽ ኑዛዜም በተናዛዡ በራሱ ሊጻፍ □ንደሚችል ስለሚደነግግ ልዩነ□ቸው ምንድንነው✍ የሚል ጥያቄ ሊነሳ ይችላል። አንድ መሠረ□ዊ ልዩነት መጥቀስ ይቻላል። ጁ□□ም ፣ ለግልጽ ኑዛዜ፣ የኑዛዜው ሰነድ የግድ በተናዛዡ □ሮ መጻፍ አይኖርበትም። በተናዛዡ ጽሁፍ ለሚደረግ ኑዛዜ ግን የኑዛዜው ሰነድ በሙሉ በተናዛዡ □ሮ መጻፍ ዋነኛና አማራጭ የማይገኝለት ሥርዓት ነው። በ□ር□ዓ፣ ግልጽ ኑዛዜም በተናዛዡ ጽሁፍ □ንደሚደረግ ኑዛዜ በተናዛዡ በራሱ ሊጻፍ ስለሚችል፣ ሁለቱን የኑዛዜ አይነቶች ለመለየት አስቸጋሪ የሚሆንበት ሁኔ□ ሊኖር ይችላል።** በተጨባጭም ውዝግቦች □□ታዩ ነው። የኮሎኔል ልዑልሰገድ ኑዛዜ ለዚህ አይነተኛ ምሳሌ ነው። ኮሎኔል ልዑልሰገድ የኑዛዜውን ሰነድ በራሣቸው የ□ፀ □ሐፍ ከአዘጋጁ በኋላ አራት ምስክሮችን በተለያየ ጊዜ በመጥራት ኑዛዜ ማዘጋጀ□ቸውን ገልፀውላቸው በኑዛዜው ሰነድ ላይ □ንዲፈርሙላቸው አድርገዋል ፣ ተናዛዡና አራቱም ምስክሮች በኑዛዜው ሰነድ ሁለቱም ገጾች ላይ ፈርመዋል፣ ኑዛዜውን ያዘጋጁበት ቀን፣ ወርና ዓመተ ምሕረት ከኑዛዜው ጽሑፍ አናት አስፍረዋል ❸ከዚህ □ሚከተለውን ኑዛዜ አድርጌያለሁ❾ በማለት ፣ ሰነዱ ኑዛዜ መሆኑን በማያሻማ ሁኔ□ አመልክተዋል።

ይህ የኮሎኔል ልዑልሰገድ ኑዛዜ የሁለቱም የኑዛዜ ዓይነቶች ማለትም የግልጽ ኑዛዜና በተናዛዡ ጹሑፍ የሚደረግ ኑዛዜ ባሕርያት አሉት። ከግልጽ ኑዛዜ ወስጥ በኑዛዜው ሰነድ ላይ አራት ምስክሮች □ንዲፈርሙ የሚጠይቀውን ሥርዓት አሟልቷል።

በተናዛዥ ጽሑፍ የሚደረግ ኑዛዜ ሊያሟላቸው ከሚገቡ ሥርዓቶች ውስጥ ደግሞ የሚከተሉትን ይዟል።

> የኑዛዜው ሰነድ በተናዛዡ የ□ሮ ጽሑፍ ተዘጋጅቷል፣
>
> 1. ሰነዱ ኑዛዜ መሆኑ በግልጽ ተመልክቷል፣
> 2. ኑዛዜው በተደረገባቸው ወረቀቶች በያንዳንዳቸው ላይ ተናዛዡ ፈርመውባቸዋል።

ኑዛዜውን ከሁለቱ የኑዛዜ ዓይነቶች ወደ አንዱ በቀላሉ መመደብ አስቸጋሪ ነው። ምክንያቱም

** ስርዓቱን ባይከተሉ □ኳን ውጤቱ ተመሳሳይ ነው። ለምሳሌ ሕግ ከሚጠይቀው በላይ ቁጥር ባላቸው ምስክሮች /ከፊሎቹ ለምስክርነት የማይበቁ ቢሆኑ □ንኳን/ ቢረጋገጥ ኑዛዜው ተቀባይነቱን አያጣም። ይሁን □ንጂ ለምስክርነት የማይበቁት ሲቀነሱ ለምስክርነት ብቁ የሆኑት ቁጥር ሕግ ከሚጠይቀው በ□ች መሆን የለበትም።❾

ኑዛዜው ከ□ያንዳንዱ የኑዛዜ ዓይነት የሚያሟላቸው ሥርዓቶች አሉት። ግልጽ ኑዛዜ □ንዳይባል ፡-

1. ኑዛዜው በተናዛዡና በአራት ምስክሮች ፊት አልተነበበም
2. ኑዛዜው በተናዛዡና በአራት ምስክሮች ፊት መነበቡና የተነበበበት ቀን አልተጠቀሰም
3. ተናዛዡና ምስክሮቹ በኑዛዜው ላይ ወዲያውኑ አልፈረሙም።

በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ □ንዲያሟላቸው ከሚፈለጉ ሥርዓቶች □ስዓ □□ሞ ❸ኑዛዜው የተደረገባቸው ወረቀቶች □ያንዳንዳቸው ተናዛዡ ቀን ካልጻፈባቸው❾ የሚለውን ኑዛዜው አያሟላም።

ይህንን ነጥብ ማንሳት ያስፈለገው የኑዛዜ ዓይነቶችን በቀላሉ መለየት የሚያዳግትበት ሁኔ□ ሊኖር የሚችል መሆኑን ጠቆም አድርጎ ለማለፍ ያህል ብቻ ነው። □ንዲህ ያለ ሁኔ□ ሲጸፉዓም የጉዳዩን አካባቢ ሁኔ□ ግምት ውስጥ በማስገባት መወሰን ተገቢ ይሆናል። በመሆኑም ❸ከተቻለ ኑዛዜውን ማንበብ ያለባችሁ ተናዞ □ንጂ ሳይናዘዝ ሞቷል □ንዲል አይደለም❾ □ና ❸የተናዛዡን የመጨረሻ ምኞት ለማክበርና ግብ ለማድረስ በማሰብ ስለ ኑዛዜዎች ሥርዓት የተጻፉትን የሕግ ድንጋጌች በሰፊው መተርጎም የፈራጆች ግዴ□ ነው❾ የሚሉትን ግንዛቤ ውስጥ ማስገባት ያስፈልጋል።

በተናዛዥ ጽሑፍ የሚደረግ ኑዛዜ በተናዛዡ በራሱ መጻፍ ያለበት ከመሆኑ በተጨማሪ ከፍ ብሎ ከኮሎኔል ልዑልሰገድ ኑዛዜ በተያያዘ ሁኔ□ እንደተጠቀሰው ሰነዱ ኑዛዜ መሆኑ በግልጽ መመልከት ይኖርበ□ል። ሕግ አውጪው ይህንን መደንገግ የፈለገው ከተናዛዡ የተለያዩ ሰነዶች ውስጥ ኑዛዜው የትኛ□ □ንደሆነ ለይቶ ለማ□ቅ □ንዲቻል በማሰብ ነው፡ ፡

ከዚህም በላይ በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ በሕግ ዋጋ □ንዲኖረው በኑዛዜው ጽሑፍ በያንዳንዱ ገፅ ላይ ተናዛዡ ሊፈርምበት ይገባል። በኑዛዜው ሰነድ ላይ የተናዛዡን □ርማ □ማስ□ሩ አስፈላጊነት የሚያከራክር አይደለም። ብዙም ጸሐፊች የሚስማሙበት ነው።

አከራካሪው በያንዳንዱ ገጽ ላይ የመፈረሙ ጉዳይ ነው። በሌላ አነጋገር ሕጉ በያንዳንዱ ገጽ ላይ የተናዛዡ ፊርማ መኖር አለበት ብሎ ቢደነግግም ይህ ባለመፈጸሙ ብቻ ኑዛዜው ሊ□ርስ ጁ□ል □ጁ የሕግ አውጪ ው ዓላማ ግልጽ ነው። ዓላማው ተናዛዡን የመጨረሻ ፈቃድ ማስከበር ነው። ልዩ ልዩ ሥርዓቶችን የሚደነግገውም ኑዛዜ ተብሎ የቀረበው ሰነድ የሟች መሆን አለመሆኑን ለማረጋገጥና የሟች ካልሆነም □ንዳይፈጸም ለመከላከል ነው። የሟች ለመሆኑ □ር□□ኛ መሆን ባልተቻለበት ጊዜም የኑዛዜ ሥርዓቶችን በጥብቅ በመከተል ኑዛዜውን መሻር የሚደገፍ ነው። ነገር ግን የሟች ኑዛዜ ለመሆኑ

ጥርጣሬ ሳይኖር አንዳንድ ሥርዓቶች አልተሟሉም በሚል ኑዛዜውን መሻር የተናዛዡን የመጨረሻ ፍላጐት ወይም ፈቃድ መጻረር የሚሆንበት ሁኔ ሊኖር ይችላል። የፊርማ ቦታ በተመለከተም አ የሚች ኑዛዜ ለመሆኑ በሌሎች ማረጋገጫ ዘዴች በትክክል ማረጋገጥ ከተቻለ በአንዳንዱ ገጽ ላይ ተናዛዥ አልፈረመም በሚል ብቻ ኑዛዜውን መሻር አግባብ ላይሆን ይችላል።

በተናዛዥ ጽሑፍ ለሚደረግ ኑዛዜ አንድ ሌላ ተጨማሪ ሥርዓት አለ። ይኸውም በኑዛዜ ላረቀቶች በያንዳንዱ ገጽ ላይ ኑዛዜው የተጻፈበት ቀን መኖሩ አስፈላጊ የመሆኑ ሁኔ ነው። በተናዛዥ ጽሑፍ ለሚደረግ ኑዛዜ በኑዛዜው ሰነድ ላይ የተናዛዥ ፊርማ እንደሚያስፈልግ ሁሉ ኑዛዜው የተጻፈበትንም ቀን ሊይዝ ይገባል። በዚህም ነጥብ ላይ ብዙ ሐሮች ይስማማሉ። ዚህም ላይ አወዛጋቢ ሆኖ የሚ ሁ በያንዳንዱ ገጽ ላይ ኑዛዜው የተጻፈበት ቀን መጠቀስ አለበት ወይ የሚለው ነጥብ ነው። በዚህ ረገድ የኛ ሕ ል ነው። ይኸውም በኑዛዜው ሰነድ በያንዳንዱ ገጽ ላይ ቀን መጻፍ አለበት ብሎ ይደነግጋል። ኛ ሕግ ግልጽ ብቻ ሳይሆን ከሚገባው በላይ ጥብቅም ነው። የብዙ አገሮች ሕግጋት ግን ንዲህ ያለ ጥብቅ ድንጋጌ የላቸውም።

ከፍ ብለን የጠቀስናቸው ኢትዮጵያዊ የሕግ ምሁር በኑዛዜው ሰነድ ላይ ቀን የማስፈሩን አስፈላጊነት በማስመልከት የሚከተሉትን ዘርዝረዋል፡-

1. ተናዛዥ ኑዛዜውን ባደረገበት ጊዜ ኑዛዜ ለማድረግ የሚፈለገው ችሎ የነበረው መሆን አለመሆኑን ለመወሰን፡- ለምሳሌ አካለ መጠን አላደረሰ ንደሆነ
2. ከሁለት ኑዛዜች መካከል የትኛው ተፈጻሚ መሆን ንዳለበት መወሰን /በተለጸ ች ከተደረጉ ሁለት የኑዛዜ ሰነዶች መካከል የኋለኛው ተፈጻሚ ስለሚሆን/
3. ኑዛዜው ውድቅ መሆን አለመሆኑን ለመወሰን /በተናዛዥ ጽሑፍ የተደረገ ኑዛዜ በሰባት ዓመት ጊዜ ውስጥ በፍርድ ቤት መዝገብ ቤት ካልተቀመጠ ኑዛዜው ውድቅ ስለሚሆን/

በተናዛዥ ጽሑፍ የሚደረግ ኑዛዜ በመሠረቱ በተናዛዥ ቃ መጻፍ ይኖርበ ል። ጁሁን ንጂ የፍትሐብሔር ሕግ ቁጥር 885 ተናዛዥ በፀ ጽሁፍ ሳይሆን በ ጁ ጸራጹ ኑዛዜም ተቀባይነት የሚያገኝበትን ሁኔ ይደነግጋል። ሕጉ ኑዛዜው በፀ እንዲጻፍ ለ ሩ የተናዛዥ ኑዛዜ መሆኑን ለማረጋገጥ ብቻ ነው። በማንኛውም መንገድ ይሁን ተናዛዥ ያዘጋጀው ለመሆኑ ርኛ መሆን ከተቻለ የግድ በፀ ካልተጻፈ የሚባልበት አንዳችም ምክንያት አይኖርም። በመሆኑም ቁጥር 885 ኑዛዜው የተዘጋጀው በተናዛዥ በራሱ መሆኑ ማረጋገጫ መንገድ በመፍጠር ኑዛዜው በ ጁ እንዲዘጋጅ ፈቅዷል። ማረጋገጫ መንገዱም በያንዳንዱ ገጽ ላይ ኑዛዜውን በ ጁ ጸራጹ ራሱ ተናዛዥ መሆኑን በፀ

ጽሑፍ ማመልከት ነው። ይህ ካልተፈጸመ ግን ኑዛዜው ይፈርሳል።*

በተናዛዥ ጽሑፍ ስለሚደረግ ኑዛዜ ከማጠቃለላችን በፊት አንድ ነጥብ □ናንሳ። በተናዛዥ □ሑ□ ለሚደረግ ኑዛዜ መሠረ□ዊ ሥርዓት ኑዛዜው በተናዛዡ በራሱ መዘጋጀት መሆኑ በተደጋጋሚ ተገልጿል። ኑዛዜውን ማንበብና መጻፍ የማይችል (ማጁም) ሰ□ ❸ቢ□□□ስ❾ ተቀባይነት ይኖረዋልን? ይህንን ጥያቄ ሕጉ በኢትዮጵያ ፍትሐብሔር ሕግ ቁጥር 886 አማካይነት ይመልሰዋል። በዚህ አንቀጽ መሠረት □ንዲህ ያለ ሰው ❸በ□ሑ□❾ ጸ□ፉጸ□ ኑዛዜ ፈራሽ ነው። ምክንያቱም ማይም ከሆነ መጻፍ ስለማይችል ❸□□❾ ከተባለም በሌላ ሶስተኛ ሰው ተጽፎ የቀረበለትን አስመስሎ ቀርጾ ሊሆን ስለሚችል በነዛ ፈቃዱ አላደረገውም የሚል ጥርጣሬ ስለሚያስነሳ ነው። ማንበብና መጻፍ የሚችል ቢሆን □ንኳን ኑዛዜው የተጻፈበትን ቋንቋ የማያውቅ ከሆነ ኑዛዜው ፈራሽ መሆኑን ይኸው የፍትሐብሔር ሕግ ቁጥር 886 ደንግጓል።*

2.2.3 የቃል ኑዛዜ

የቃል ኑዛዜ የሚባለው አንድ ሰው የመሞቻው ጊዜ መቃረቡ ተሰምቶት የመጨረሻ ፈቃዱን በንግግር ለሁለት ምስክሮች የሚገልጽበት ነው።

የዚህ ዓይነቱ ኑዛዜ በአሁኑ ጊዜ በብዙ ሀገሮች ውስጥ አጁሠራበትም። ለምሳሌ ፈረንሳይ የቃል ኑዛዜን እንደ እ.ኤ.አ ከ1735 ጀምሮ አስወግዳለች። በሀገራችን ግን የቃል ኑዛዜ ዛሬም ቢሆን በተወሰነ ደረጃ ተቀባይነት አግኝቶ □□ተሠራበት ነው። ተቀባይነት በማግኘቱ በፍትሐብሔር ሕጋችን ውስጥ ተደንግጓል።

ይሁን እንጂ የቃል ኑ□□ በፍትሐብሔር ሕጋችን ውስጥ ተቀባይነት ያገኘው ያለምንም ገደብ አይደለም። ተናዛዡ የቃል ኑዛዜ የሚያደርግበት ሁኔ□ች ውስን ናቸው። በዚህም መሠረት በቃል ኑዛዜ ተናዛዥ ሊያደርግ የሚችለው የሚከተሉትን ብቻ ነው።

እነሱም፦

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*, ኑዛዜ ... በታይፕ ሊደረግ ይችላል፤ ነገር ግን □ጁ□ራጁተሩን /□ይፑን/ መለየት የሚቻል ከሆነና ከተናዛዡ በስተቀር ሌላ ሰው የማይጠቀምበት የሆነ □ንደሆነ ብቻ ነው። ...❾ በማለት ኑዛዜ በ□ጁ□ በማ□ፉጹቱ □ዳይ ላይ ከፍ ብለን የጠቀስናቸው የፌንሣይ የሕግ ምሁር ይስማማሉ። የማረፉ□□ መንገዱን ግን በቁጥር 885 ላይ ከተደነገገው ይለያል። በኒህ የሕግ ምሁር የተጠቆመው የማረፉ□□ መንገድ ተፈጻሚነቱ አዳጋች ይመስላል። ለምሳሌ፤ □ጁ□ራጁተሩ ተሰርቆ የተባለው ኑዛዜ ተዘጋጅቶበትስ □ንደሆነ? □ጁ□ራጁተሩን መለየት አስቸጋሪ የሚሆንበት ሁኔ□ ቢኖርስ? አዳጋችነቱ □ጁቷቸውም ይመስላል፤ በተናዛዥ ጽሑፍ የሚደረግ ኑዛዜ በፍጹም በ□ይፕ መዘጋጀት የለበትም የሚሉ ምሁራን የሚከተለውን የጻፉት፦ /ኑዛዜው/ በማንኛውም ሁኔታ ሊጻፍ ይችላል፡፡... በ□ጁ□ ሲቀርብ፤ በ□ይፕ ከተዘጋጀ የኑዛዜው ሰነድ የተናዛዡ የራሱ የኑዛዜ ቃል የያዘ መሆኑና በ□ግ በሚያንቀሳቅሰው ማሽን አማካይነት ራሱ የጻፈው መሆኑን በተናዛዥ የ□ጅ ጽሕፈት በተዘጋጀና ቀንና □ርማ ባለ□ ማስ□□ሻ ቢ□ል□ እንኳን ኑዛዜው ፍርስ ነው።

* በፈረንሳይ ሕግ □ንደኛው ዓይነት ግልጽ ድንጋጌ ባይኖርም፤ ፍርድ ቤቶች በዚህ መልክ የተዘጋጁ ኑዛዜችን ይሽራሉ።

1. □ቀብሩ ሥነ - ሥርዓት እንዴት እንደሚ□□ም ማ□□ል
2. እያንዳንዳቸው ከአምስት መቶ ብር የማይበልጡ የተለያዩ የኑዛዜ ስጦ□ችን ማድረግ ል □ና
3. አካለ መጠን ላላደረሱ ልጆች አስተዳዳሪ ወይም ሞግዚት የሚሆኑ ሰች የሚመለከቱ ወሳኔችን ማድረግ ናቸው።

ከዚህ በላይ ከተመለከቱት ውጭ የሚደረግ የቃል ኑዛዜ ፈራሽ ነው። ይህ ሲባል ግን የኑዛዜው ቃል እንዳለ ይፈርሳል ማለት አይደለም። ለምሳሌ ል ተናዛዡ በቃል ኑዛዜ ከአምስት መቶ ብር በላይ የሆነ የኑዛዜ ስጦ□ ቢጸ□ረ□ል በዚህ ምክንያት ኑዛዜው በሙሉ አይፈርስም ል የኑዛዜው ስጦታ ወደ አምስት መቶ ብር ዝቅ ተደርጎ ተ□ባራዊ ጁ□ረፉል እንጂ። ከአምስት መቶ ብር በላይ ያለው የኑዛዜ ስጦታ ግን እንዳልተደረገ ይቆጠራል።

በቃል ኑዛዜ ላይ ሕጉ አንድ ተጨማሪ ገደብ ጥሏል። ገደቡም በፍትሐብሔር ሕ□ ቁዓር 892 ላይ የተደነገገውና የቃል ኑዛዜ ትርጉም አካል የሆነው ነው። ይህም ል የቃል ኑዛዜ ለማድረግ ተናዛዡ የሞቱ መቃረብ ሊሰማው ይገባል የሚለው ነው። ይህ ስሜት ሕሊናዊ ነው ል ግምቱ የተሳሳተ ሊሆንም ይችላል። ሟች መሞቻዬ ተቃርቧል ብሎ ኑዛዜ ካደረገ በኋላ ለረዱም ጊ□ በሕይወት ሊኖር ይችላል። የቃል ኑዛዜ ከተደረገ ከሶስት ወራት በኋላ ተናዛዥ በሕይወት ካለ ግን ኑዛዜው ይፈርሳል። ምክንያቱም የቃል ኑዛዜ ይጠቀሙበ□ል ተብሎ □ሚ□መተ□ በአደጋ፣ በሕመም □ጁም በእርጅና ምክንያት ከሞት አፋፍ ላይ የሚ□ኙ ሰች ናቸው። በቃል የሚደረግ ኑዛዜ መሞቻ ጊ□ መቃረብ ሲሰማ ብቻ ሊጠቀሙበት የሚቻል የኑዛዜ ዓይነት በመሆኑ ል ተናዛዥ በሶስት ወራት ጊዜ ውስጥ ካልሞተ የመሞቻ ጊ□ ሳይቃረብ ያደረገው በመሆኑ ፈራሽ ይሆናል ማለት ነው። ይኼንን በማስመልከት የተሰጠውን □ሕግ አስተያየት እንመልከት ፦

> . . . የመሞቻው ጊዜ መቃረቡ ተሰምቶት የቃል ኑዛዜ ያደረገው ሰው ኑዛዜውን ካደረገበት ቀን አንስቶ በሶስት ወራት ጊዜ ውስጥ በመሞት ግምቱ ትክክለኛ እንደነበረ ማሳየት አለበት፡ ፡ ነገር ግን ከሶስት ወራት በኋላም ተናዛዡ በሕይወት ካለ ሕጉ መሳሳቱን በማሳየት ኑዛዜውን ውድቅ ያደርገዋል።

ይህ ብቻም አይደለም። የቃል ኑዛዜ ምስክሮች የተናዛዡን የኑዛዜ ቃል ለረዥም ጊዜ ሳይረሱ እንዳለ ማስታወስ ሊያቅታቸው ስለሚችል በጊዜ ገደብ መከለሉ አስፈላጊ ይሆናል። ምክንያቱም የሰው የማሰታወስ ችሎታ ውሱን ነውና። ምስክሮቹ ኑዛዜውን ሳያረጋግጡ እንዳይሞቱ በመስጋትም ጭምር ነው ሕግ አውጪው የቃል ኑዛዜ የሚቆይበትን የጊዜ ገደብ ጸሳ□ረ□።

2.2.3 የወል ድንጋጌች

ከፍ ብሎ የሶስቱን የኑዛዜ ዓይነቶች የየግል ባሕርያት ለማሳየት ተሞክሯል። ከዚህ በመቀጠል ደግሞ የግልጽ ኑዛዜና በተናዛዥ ጽሑፍ የሚደረግ ኑዛዜ የጋራ ባሕርያት ጁ□ለ□ል።

የግልጽ ኑዛዜም ሆነ በተናዛዡ ጽሑፍ የሚደረግ ኑዛዜ የተጻፈበትን ቀን ፩ ወርና ዓመተ ምሕረት ወይም የመሳሰሉትን መግለጫች ሊይዝ ይገባል ፩ ካልያዘ ግን ኑዛዜው ይፈርሳል። ይሁን እንጂ ስህተቱ በዝንጋታ ምክንያት የተፈጸመ ከሆነና ኑዛዜው የተደረገበትን ትክክለኛ ቀን ከራሱ ከኑዛዜው ወይም ከሚች በተገኙ ሌሎች ሰነዶች ረዳትነት በትክክል ማረጋገጥ ከተቻለ በኑዛዜው ፅሑ□ ላጁ በ□□· የቀን መሳሳት ብቻ ኑዛዜው አይፈርስም።

በኑዛዜው ጽሑፍ ላይ የሚታይ ፍቀት ፩ ስርዝ ወይም ድልዝ ኑዛዜውን ዋጋ ሊያሳጣው ይችላል። ኑዛዜው ዋጋ ሊያጣ የሚችለው ግን ይህ ፍቀት፩ ስርዝ ወይም ድልዝ ያለበት የኑዛዜ ቃል የተናዛዡን ፈቃድ የመለወጥ ወይም የማሻሻል ውጤት ካለ ነው። ለምሳሌ፩ ተናዛዡ ❽መኖሪያ ቤቴ ለልጄ ለአንተነህ ተስፋዬ ይሁን❾ የሚለውን የኑዛዜ ቃል በመሰረዝ በምትኩ ይህንኑ መኖሪያ ቤቱን ❽ለልጄ ለአንቺነሽ ተስፋዬ ይሁን❾ ቢል፩ ጁህ ስር□ ያለበት ቃል የናዛዡን ፈቃድ ለውጧል ማለት ነው። በመሆኑም በዚህ ጊዜ ጠቅላላው ኑዛዜ ፈራሽ ይሆናል። ነገር ግን ተናዛዡ ❽መኖሪያ ቤቴ ለአንተነህ ተስፋዬ ይሁን❾ የሚለውንና ሌሎችንም የኑዛዜ ስጦ□ች ሳይነካ በተፊ ማሪ ❽የቤት መኪናዬን አንቺነሽ ተስፋዬ ትውሰድ❾ ብሎ ቢናዘዝ፩ ይህ የኑዛዜ ቃል በአጠቃላዩ ኑዛዜ ላይ ምንም ለውጥ የማያመጣ ወይም የተለየ በመሆኑ ፩ አጠቃላዩ ኑዛዜ እንዳለ ሆኖ ይህ ፍቀት ፩ ስር□ ወይም ድልዝ ያለበት የኑዛዜ ቃል ብቻ ፈራሽ ይሆናል።

ይሁን እንጂ ይህ ፍቀት፩ ስር□ □ጁም □ል□ □ሚጸታይበት የኑዛዜ ቃል፣ ከአጠቃላዩ ኑዛዜ የተለየም ቢሆን /ለምሳሌ ጭማሪ የኑዛ□ ስ□□ ቢጸ□ር□/ ፩ ተናዛዡ ይህንን ፍቀት ፩ ስርዝ ወይም ድልዝ በራሱ በተፃፈና በተፈረመ ማስ□□ሻ በግልጽ ካፀደቀው የኑዛዜው ቃል አይፈርስም። ፍቀት ፩ ስርዝ ወይም ድልዝ ያለበት የኑዛዜ ቃል ከአጠቃላዩ ኑዛዜ የሚጋጭ ወይም የሚቃረን ቢሆን እንኳን ፩ ከፍ ብለን በጠቀስነው ዓይነት ተናዛዡ ካፀደቀው ኑዛዜው አይፈርስም።

በ□ሐ□ ህ□□ ላጁ፩ በመስመሮች መካከል ወይም ከምስክሮች ፊርማ በኋላ ተጨማሪ ነገሮች ቢ□□ ል□ እንደ ፍቀት፩ ስርዝ ወይም ድልዙ የኑዛዜው መፍረስ ሊከተል ይችላል።

አንድ ሰው ያደረጋቸው የኑዛዜ ውሳኔች በአንድ ወይም በብዙ የኑዛዜ ሰነዶች ውስጥ ሊገኙ ይችላሉ። እነዚህ በተለያዩ የኑዛዜ ሰነዶች ውስጥ የሚገኙት የኑዛዜ ውሳኔች በሙሉ አብረው

የሚፈፀሙ ወይም የማይፋለሱ ከሆነ ፨ ማለትም በአንደኛው ሰነድ ውስጥ የሚገኘ□ የኑዛዜ ውሳኔ በሌላኛው ሰነድ ውስጥ ያለውን የኑዛዜ ውሳኔ የማይሽር ከሆነ ፨ የኑዛዜ ውሳኔቹ በሙሉ አብረው ተፈፃሚ ይሆናሉ። ይህ ካልሆነ ግን ፨ ማለትም በተለያዩ ሰነዶች □ሰዓ □ሚ□ኑት የኑዛዜ ውሳኔች አብረው የሚፈፀሙ የማይችሉ ከሆነ ፨ መፊ ረሻ ላጁ በተዘጋጀው የኑዛዜ ጽሁፍ ላይ ያሉት የኑዛዜ ውሳኔች ተፈፃሚ ይሆናሉ።

በ□ሐፍ የተዘጋጀውን ኑዛዜ ፨ ሶስተኛው ሰው ዘንድ ፨ በተለጁም ለማኸሻል ሥልጣን ከተሰጠው ሰው ዘንድ ፨ ወይም በፍርድ ቤት መዝገብ ቤት ማስቀመጥ ይቻላል። የኑዛዜው ሰነድ ለማዋዋል ሥልጣን ከተሰጠው ሰው ዘንድ ወይም በፍርድ ቤት መዝገብ ቤት የሚቀመጥ ከሆነ ፨ ኑዛዜ የሚያስቀምጡ ተናዛዦች ስም በሚመዘገብበት መዝገብ ውስጥ ኑዛዜው የተቀመጠበት* ቀን መጠቀስ አለበት።

የኑዛዜ መኖርና በውሰጡ ስለሰፈረውም ቃል ማስረዳት ያለበት በኑዛዜው ተጠቃሚ ነኝ ባይ ነው። የኑዛዜው መኖር የሚረጋገጠውም የኑዛዜውን ጽሐፍ ዋናውን በማቅረብ ወይም ለማኸሻል ሥልጣን በተሰጠው ሰው ወይም ፍርድ ቤት ሬጅስትራር ትክክለኛነቱ ተረጋግጦ የሚሰጥ ኮፒ በማቅረብ ነው። ከዚህ ውጭ የኑዛዜውን መኖር ማስረዳት የሚቻልበት መንገድ የለም። የኑዛዜም መኖር በምስክሮች ወይም በሌላ በማንኛውም መንገድ /የኑዛዜ ሰነድ ወይም ኮፒውን ከማቅረብ ሌላ/ ማስረዳት የሚቻለው ፨ ❽በጥፋት ወይም በቸልተኝነት ኑዛዜው እንዲጠፋ ካደረገው ሰው የጉዳት ካሣ ለማግኘት እንጂ ኑዛዜውን ለማስፈፀም አይደለም።❾**

3. ኑዛዜና አላባ* የመጠቀም መብት

ኑዛዜ የባለቤትነት መብት ብቻ ሣይሆን በአንድ ንብረት ላይ በአላባ የመጠቀም መብትንም ሊያስገኝ ይችላል። በአላባ የመጠቀም መብት በኑዛዜ መስጠት □ንደሚቻል የፍትሐብሔር ሕጋችን ይጠቁማል። ይህ ሕግ በከፊል ሲነበብ ፨ ❽. . . **<u>የአንድ የተወሰነ ሀብትን ሪም</u>**

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* የቁጥር 891 /3/ የአማርኛው ቅጂ ኑዛዜው ❽የተሰጠበት❾ እንጂ ❽የተቀመጠበት❾ ቀን አይልም። የአማርኛው ቅጂ ይህንን ቃል የተጠቀመው በስህተት መሆን አለበት። ምክንያቱም ኑዛዜ የሚሰጥበትን ቀን በተመለከተ በሌሎች ቁጥሮች ተወስቷል። የዚህ ንዑስ ቁጥር ዓላማ ግን በቁጥር 903 በተደነገገው መሠረት ማለትም ኑዛዜው በተደረገ በሰባት ዓመት ጊዜ ውስጥ የኑዛዜው ሰነድ አዋዋይ ዘንድ ወይም ፍርድ ቤት መዝገብ ቤት መቀመጡን ለማረጋገጥ በመሆኑ ትክክለኛ□ ❽የተቀመጠበት❾ የሚለው ቃል ነው።

** በፈረንሣይ ህግ ፨ ❽የኑዛዜው ሰነድ በአደጋ ምክንያት ቢጠፋ ወይም ቢደመሰስ የኑዛዜውን ይዘት በምስክሮች ማስረዳት ይቻላል።❾

* ❽በአላባ የመጠቀም መብት❾ □ሚለ□ ሐረ□ /Usufruct/ የሚለውን የእንግሊዘኛ ቃል ለመተርጀም □□ነ ነው። የፍትሐብሔር ህግ አልፎ አልፎ ❽ሪም❾ ብሎ ጁተረ□መኸል።

/Usufruct/** ወይም አንድ የተወሰነ ቀለብ በኑዛዜ ስጦታ የተደረገለት ያገኛል ብሎ ተናዛዡ ለመወሰን ይችላል።❾ ጁላል።/ሰረ□ □ተፊ መረ/

ከፍ ብሎ እንደተጠቀሰው🔔 በአላባ የመጠቀም መብት በኑዛዜ ሊሰጥ ይችላል። የአላባ መብት ማለት በአንድ ንብረት ወይም ሀብት የመገልገል ወይም በፍሬው የመጠቀም መብት ማለት ነው። የአላባ መብት በሚንቀሳቀሱና በማይንቀሳቀሱ ንብረቶች እንዲሁም መብቶች ላይ ሊሆን ይችላል። በአላባ የመጠቀም መብት ጉዳዮች የተለያዩ ሊሆኑ ይችላሉ። ከእነዚህ □ስጥ አንዱ በአንድ ቤት ውስጥ የመኖር ወይም በሌላ አነጋገር በመኖሪያ ቤት የመገልገል መብት ሊሆን ይችላል። በፍትሐብሔር ሕግ ቁጥር 1353 መሠረት በቤት ውስጥ የመኖር መብት ማለት ❽በአንድ ቤት ውስጥ የመቀመጥ ወይም ከቤቱ አንዱን ከፍል የመያዝ መብት❾ ማለት ነው።***

የኢትዮጵያ ፍትሐብሔር ሕግ በአንድ ቤት ላይ የመጠቀም መብት የተሰጠው ሰው በቤቱ ውስጥ አብረውት ሊኖሩ የሚችሉትን ሰች ወስኗል። በዚሁ መሠረት የኑዛዜው ተጠቃሚ በቤቱ ውስጥ ሊኖር የሚችለው ከትዳር ጓደኛ□* ከቀጥ□ መስመር ዘመዶቹና ከሠራተኞቹ ጋር ብቻ ነው። ተናዛዡ በኑዛዜው ላይ ይህንን ሊያሰፋውም ሊያጠበውም ይችላል። ለምሳሌ 🔔 ተናዛዡ በኑዛዜው ላይ ቤቱ ውስጥ የመኖር መብት የተሰጠው ሰው ለብቻው እንዲኖርበት ማለትም ሌላ ሰው አብሮት እንዳይኖር ሊገደድበው ይችላል። በተቃራኒው በቤቱ ውስጥ ከፈለገው ሰው ጋር መኖር ይችላል ብሎ ሊናዘዝ ይችላል።

** በአላባ የመጠቀም መብትን ኑዛዜ መስጠት እንደሚቻል በፈረንሣይ የኑዛዜ ሕግ ላይ በመመርኮዝ የተሰጠውን አስተያየት እንመልከት፡፡ በአላባ የመጠቀም መብት በኑዛዜ መስጠት በተግባር ከፍ ያለ ችግር ያስከትላል። እንዲህ ያለ ስጦታ የተለመደ ነው። 🔔 . . .
. . . የኑዛዜ ስጦ□🔔 የሚያስተላልፈው ሙሉ ባለቤትነት 🔔 ሌላ ባለቤትነት ወይም በአላባ መጠቀም መብት🔔 ግምት ውስጥ ሳይገባ በተለያዩ መደቦች ሊከፈል ይችላል።

*** በቤት ውስጥ የመኖር መብት የኑዛዜ መሰጠት እንደሚቻልና ከዚህ ጋር በተያያዙ አንዳንድ ጉዳዮች አንድ የሕግ ምሁር እንደሚከተለው □□ኻል፡-
በሁሉም የሪፑብሊክ ሕጎች ተናዛዥ በቤት ወይም ከቤቱ በተወሰነው ክፍል እስከ ሕጁ□ቱ □□ሜ እንዲጠቀምበት ለአንድ ሌላ ሰው እንዲሰጠው ቤቱ ያለኑዛዜ የሚተላለፍለትን የሕግ ወራሹን በኑዛዜ ማዘዝ ይችላል። ቤቱን /ወይም የተወሰነውን ክፍል የሕግ ወራሹ ለሌላ ሰው ቢያስተላልፈውም የኑዛዜ ተጠቃሚው በቤቱ ወይም በተወሰነው ክፍል ያለው የመጠቀም መብት እንደተጠበቀ እንደሚቆይም ይደነግጋሉ።
□ዱሲያ ሶቭየቶች ፌዴራል ሶሻሊስት ሪፑብሊክ የፍትሐብሔር ሕግም ይህንን ሲያጠናክር፡-
. . . ተናዛዥ የመኖሪያ ቤቱ የሚተላለፍለት ወራሹን በዚህ ቤት ውስጥ ወይም በተወሰነው ክፍል ሌላ ሰ□ እስከ ሕይወቱ ፍጻሜ እንዲጠቀምበት እንዲያደርግ ማስገደድ ይችላል። የቤቱ ወይም የተወሰነው ክፍል ባለቤትነት ለሌላ ሦስተኛ ሰ□ ቢተላለ□ም ጁህ እስከ ዕለተ ሞት የመጠቀም መብት እንደተጠበቀ ይቆያል❾ ጁላል።

* የአማርኛ ቅጂ ከሚስቱ ጋር ነው የሚለው። ይህ /spouse/ የሚለውን የእንግሊዝኛ ቃል /እንደ አግባቡ ባልም ሚስትም ሊሆን የሚችለውን/ ለመተርጎም የገባ ቃል ነው። ሚስት የሚለው ቃል አሳሳች ነው። ምክንያቱም በአላባ የመጠቀም መብት የሚኖረው ወንድ ብቻ የሆነ ያስመስላል። የአማርኛ□ ቅጂ ይህንን ቃል የተጠቀመው በትርጉም ስህተት ይመስላል። ምክንያቱም ቤተሰቦች የሚለው ቃል ሰፋ ያለ ቃል ነው🔔 ምንም አይነት ገደብ የለበትም።
ህጉ ግን በቤቱ መኖር የሚችሉ ሰችን ለይቶ ወስኗል። ስለዚህ ትክክለኛው ከሰራተኞቹ /servants/ የሚለው ቃል ነው። የፈረንሣይኛው ቅጂም ከ□ንግሊዝኛ□ ቅጂ ጁስማማል። በ□ርግጥ ሰራተኞቹ የሚለውን ከተከተልን በኑዛዜው ተጠቃሚ🔔 ቤቱ ውስጥ ወንድሞቹን □ና እህቶቹን አብረው □ንዲኖሩ ማድረግ ላይችል ነው ማለት ነው። ህጉ የሚለው ግን ይኸው ነው።

ከቤቱ ውሰጥ በአንዱ ወይም በተወሰኑ ክፍሎች ብቻ የመኖር መብት ያለው ሰው ለጋራ አገልግሎት በተቋቋሙት ነገሮች እንደመብራት፣ ውሃ ፣ ሽንት ቤት ማፅድ ቤት በመሳሰሉት የመገልገል መብት ሕግ ይሰጠዋል። ከዚሁ ጋር የመብቱ ተጠቃሚ የሆነው ሰው መደበኛ የሆኑ የመጠገኛ □□ ችን የመሸፈን ግዴ□ አለበት። ከዚህ ሌላ በኑሃዜው ተጠቃሚው ላይ ሕጉ አንዳንድ ገደቦችን ጥሎበ□ል። ለምሳሌ ፣ ተ□ቃሚው መብቱን በውርስም ሆነ በሌላ በማንኛውም ሁኔ□ ለሌላ ሰ□ □ንዳያስተላላፍ፣ በአላባ በያዘው ነገር ላይ ከመጠን በላይ □ንዳይገለገልበት፤ በአላባ በተሰጠው ነገር ላይ መሠረ□ዊ ለ□ጣ □ንዳያደርግ ወይም የነገሩን አገልግሎት □ንዳይለውጣ ሕግ ይከለክለዋል።

በአላባ የመጠቀም ዘመን ሲፈፀም የአላባ ተቀባዩ በአላባ የተሰጠውን ንብረት ለአላባ ሰጪው መልሶ ማስረከብ አለበት። በአላባ የመጠቀም መብት ያገኘው በኑሃዜ ከሆነ ደግሞ ንብረቱን የሚያስረክበው በኑሃዜ የባለቤትነትን መብት ላገኘውና የአላባ ተጠቃሚውን ለሚተካው ለዋናው ወራሽ ነው።

የአላባ መብት የሚያበቃው ተቀባዩ ሲሞት ወይም የአላባው ጊዜ፤ ማለትም በአላባው የመጠቀም መብት □ንዲቆይ የተወሰነው □□፤ ሲደርስ ነው።

ማ □ ቃ ለ ጸ

አንድ ሰው ከዚህ ዓለም በሞት በሚለይበት ጊዜ በሕይወት ዘመኑ ያፈራው ሀብት ለልጆቹ ወይም ለሚፈልጋቸው ሌሎች ሰች □ንዲተላለፍለት ይፈልጋል። ወላጆቹ በዚህ ዓለም ኖረው ሲያልፉ ያላቸውን ሀብት ለ□ሱ □ንደተውለት ሁሉ ፤ □ሱም በተራው ሲያልፍ ለተተኪቹ □መተ□ ሚክበራዊ □ጁም ሰብዓዊ □ጻ □ አለበት። የአባት ለልጅ ነውና።

ጁህ በሕግም ተደግፏል። ሚች ስለሀብቱ ድልድል ምንም ዓይነት ኑሃዜ ሣይተው ቢጸል□ ሕጉ ሀብቱ ለሚች ልጆች ይከፋፈላል ይላል። ልጅ ከሌለው ደግሞ ፤ ሚች ተናዞ ቢሆን ኖሮ ሀብቱን ያወርሣቸው ነበር ተብሎ ለሚገመቱት ወደ ላይ □ና ወደ ጐን ከሚቆ□ሩ □ቅርብ ዘመዶቹ መካከል ቅድሚያ የሚሰጣቸው ደረጃ በማውጣት ሕጉ ወራሾች የሚሆኑትን ወስኖ ንብረቱ □ንዲደለደል ያደርጋል። ድልድሉም በ□ኩልነት ላይ የተመሠረተ ነው። ሚች ተናዞ ቢሆን ኖሮ ሀብቱ ለወራሾቹ □ኩል □ንዲከፋፈል ያደርግ ነበር ከሚል ግምት በመነሣት ነው ወራሾቹ በ□ኩልነት የሚችን ንብረት □ንዲከፋፈሉ ሕጉ የደነገገው።

ይሁን □ንጂ የሚች ፍላጐት □ና □ሕ□ ግምት ጭራሽ የማይገናኝበት አጋጣሚ ሊኖር ይችላል። ሚች ተናዞ ቢሆን ኖሮ ሀብቱን ፤ በሕግ በወራሽነት ለማይ□□ቅ □ጁም ለማይገመት ሰው ሊያወርስ ይችላል። ለሕግ ወራሾቹ ቢያወርስም ድልድሉን በተመለከተ ግን ሕጉ □ንደገመተው በ□ኩልነት ሣይሆን በማበላለጥ ላይ የተመሰረተ ሊያደርገው ይችላል።

ሚች ኑዛዜ ማድረግ የሚፈለገውም በዚህ ምክንያት ሊሆን ይችላል — ሀብቱን ለ□ለ□□· ሰ□· ለማ□ረስ □ና □ንደፈለገው ለማደላደል። በሕይወት ሣለ በሀብቱ ማዘዝና ለፈለገው ሰው መስጠት □ንደሚችል ሁሉ ሲሞትም ከተወሰነ ደረጃም ቢሆን በሀብቱ አዞ መሞት ይችላል። ይህንንም የሚያደርገው በኑዛዜ አማካኝነት ነው። በኑዛዜ አማካኝነት ሚች ከዚህ ዓለም በሞት ከተለየ በኋላም ቢሆን በሀብቱ ላይ ያዛል ማለት ነው። ኑዛዜ አንድ ሰው ከዚህ ዓለም በሞት በሚለይበት ጊዜ ሀብቱን ለማንና □ንዴት መደላደል □ንዳለበት በሚወስንበት ሕጋዊ ድርጅት ነውና።

በ□ህ □ሐ□ ዓላማ ሚች ንብረቱን በኑዛዜ □ንዲያስተላልፍ ጥሪ ማድረግ አጁ□ለም። ዓላማ□· ንብረቱን በኑዛዜ ማስተላለፍ ከመረጠ ምርጫው ተፈፃሚ ሊሆን የሚችለው ኑዛዜውን ሕግ በሚ□ቅ□□· □ጁም በሚያዘው መሠረት ሲያደርግ መሆኑን ማሣየት ብቻ ነው።

ሚች ትቶት ባለፈው ኑዛዜ መነሻ ውዝግብ ቢነሳ የተናዛዡ የመጨረሻ ፈቃድ ተፈፃሚነት አጠራጣሪ ይሆናል። ወይም አደጋ ላይ ይወድቃል ማለት ነው። በኑዛዜው ጥቅማቸው የሚነካባቸው የሕግ ወራሾች ኑዛዜው ተፈፃሚ □ንዳይሆን የተቻላቸውን ሁሉ ሊያደርጉ ይችላሉ። የኑዛዜውን ሕጋዊነት ከመፈ□ተን አንስቶ የኑዛዜውን ሰነድ □ስከማጥፋት /መ□ምሰስ/ □ሚሞ□ሩ አይ□□·ም።

ተናዛዥ በሕይወት ባለመኖሩ ውዝግብ ያስከተለውን ኑዛዜ አስመልክቶ ❽ለማለት የፈለኩት □ንዲህ ነው❾ ❽□ንዲህ ስል □ንዲህ ማለቱ ነው❾ ❽□□ሌን ለማለት ፈልጌ ነው❾ ወዘተ... በማለት ውዝግቡን ሊያስወግድ አይችልም። በመሆኑም ተናዛዥ ኑዛዜውን ሲያዘጋጅ ተገቢውን ጥንቃቄ ሊያደርግ ይገባል። ከዚህም በተጨማሪ ኑዛዜው ሕግ በሚያዘው መሠረት የተፈፀመ መሆኑንም ለማረጋገጥ ጥረት ማድረግ ይኖርበ□ል።

የኑዛዜው ተ□ቃሚችም ቢሆኑ ጥቅማቸውን ማስከበር ይችሉ ዘንድ የመብትና ግዴ□ቸውን ዳር ድንበር ለይተው ለማወቅ የበኩላቸውን ጥረት ቢያደርጉ ይጠቅማቸዋል። ስለዚህ ከኑዛዜ ሕግ ድንጋጌች ጋር በተቻለ መጠን □ራስን ማስተዋወቁ ለተናዛዡም ለኑ□□ ተ□ቃሚችም የሚበጅ ነው።

ይህ አነስተኛ □ሐፍም በዚህ አቅጣጫ መጠነኛ □□□ □ንደአደረገ ይታመናል።

አባሪ አንድ

<u>ለወይዘሮ ጽጌሃና አቤቱ□ □□ቅላጁ ወቃቤ ህ□ ምላሽ</u>

ቁዓ ር 4218/□/ወ78

ኅዳር 14 ቀን 1981

ለወይዘሮ ጽጌሃና ዳኜ

የአቶ ዳንኤል ልዑልሰገድ ወኪል

በከፍተኛ 21 ቀበሌ ወ፱ የቤት ቁጥር 054

<u>አዲስ አበባ</u>

ነሐሴ 11 ቀን 1980 በተሻፈ ማመልከቻ የጠቅላይ ፍርድ ቤት ችሎት ሰኔ 30 ቀን 198ወ በፍትሐብሔር ይግባኝ መዝገብ ቁጥር 507/80 ሚች ኮሎኔል ልዑልሰገድ ጁሌ ጸረ-ት ኑዛዜ በሕጉ መሠረት የተደረገ በመሆኑ ይፀናል በማለት የሰጠው ውሳኔ በሰበር ንዲጁ ጥያቄ ይቅረብልኝ በማለት አቤቱ ማቅረብዎ ጁ ሳል።

ከዚህ አቤቱ ጋር የአዲስ አበባ አውራጃ ፍርድ ቤት በፍትሐብሔር መዝገብ ቁጥር 5741/77 በመጀመሪያ ደረጃ የሰጠውን ውሳኔ ትክክል ግልባጭ ሰባት /7/ ገጽ የአዲስ አበባ ከፍተኛ ፍርድ ቤት በፍትሐብሔር ይግባኝ መዝገብ ቁጥር 660/79 በይግባኝ የሰጠውን ፍርድ አሥራ ሁለት /12/ ገጽ ፎቶ ኮፒ ና ጠቅላይ ፍርድ ቤት በፍትሐብሔር ይግባኝ መ ብ ቁጥር 5ወ/8ወ ሰ ን ፍርድ /5/ ገጽ ፎቶ ኮፒ አያይዘዋል።

በበኩላችን አቤቱ ን ከሕጉ ጋር አገናዝበን መርምረናል።

ጠቅላይ ፍርድ ቤት በሰጠው ከዚህ በላይ በተጠቀሰው ፍርዱን ንዳተተው ሁሉ ሕፃዊ አይደለም በማለት ርስዎ ተቃውሞ ያቀረቡበት የሚች የኮሎኔል ልወልሰ ጁሌ ኑዛዜ 1ኛ/ በተናዛዡ የፀ ሐ ተ ሳ 2ኛ/ ኑዛዜም መሆኑን በማያሻማ መንገድ የሚገልጽ 3ኛ/ በአንደኛው ገጽ የተዘጋጀበት ቀን የተገለጸበትና 4ኛ/ በአግባቡ የተፈረመ በመሆኑ በፍትሐብሔር ሕግ ቁጥር 884 የተደነገገውን በአብዛኛው የሚያሟላ ሕጋዊ ኑዛዜ ነው።

ከአቤቱ ንደ ው ኑዛዜው ቅር የተሰኙት ኑዛዜው ❸በፍትሐብሔር ሕግ ቁጥር 881 /1/ መሠረት የተፈጸመ መሆኑን የሚያመለክት ቢሆንም ድርጊቱ በፍትሐብሔር ሕግ ቁጥር 881/2/ መሠረት በአራት ምስክሮች❾ ወዲያውኑ መፈረሙን የማይገልጥ በመሆኑ ፈራሽ ነው። በሚል ምክንያት ነው።

በፍትሐብሔር ሕግ ቁጥር 884 መሠረት የሚደረግ ኑዛዜ አንድም ምስክር ሳያስፈልግ በተናዛዡ በግሉ የሚዘጋጅ ኑዛዜ ነው። ይህ ተናዛዥ ኑዛዜውን በግሉ ጽፎ ካኖረ በኋላ ባንድ ምክንያት ወይም በሌላ ምስክሮችን በተናጠል ወይም ሁሉንም ባንድነት ጠርቶ ኑዛዜው

የራሱ መሆኑን ብቻ □ንዲያውቁለት ነግሮ □ንዲፈርሙለት ቢያደረግ የሚከለክለው ሕግ □ለም።

በኑዛዜው በገጽ ሁለት ላይ ቀን ያልተጠቀሰ ቢሆንም ተናዛዡ የፈረሙበት መሆኑ ሲ□ጁ የተሳሳተ ቀን የያዘ ኑዛዜ □ንኳ በዚህ ምክንያት ብቻ በፍትሐብሔር ሕግ ቁጥር 887 ፈራሽ □ንደማይሆን ስንገነዘብና የዚህ አጭር የኑዛዜ ሰነድ የተዘጋጀበት ዕለት በገጽ አንድ ላይ በማያሻማ መንገድ ተቀምጦ ሲ□ይ በዚህ ምክንያት ኑዛዜው ፈራሽ □ንደማይሆን ግልጽ ነው።

ኑዛዜው ያስቀመጣቸው ገደቦችም ቢሆኑ ሊፈጸሙ የማይችሉ ገደቦች አይደሉም። የ□ርስ □ር□ር □ዚህ ገደቦች አይደሉም። የ□ርሶ □ር□ር እነዚህ ገደቦች ዛሬ በሀገራችን በተጨባጭ ከሚ□□ የቤት ችግር አኳያ አፈጻጸማቸው የማይቻል በመሆኑ ኑዛዜው ይፈርሳል የሚል ነው።

ኑዛዜውን የተውት ኮሎኔል ልዑልሰገድ □ይሌ በከተማችን ያለውን የመኖሪያ ቤት ችግር በመመልከት ቤተሰቦቻቸው በሆኑት በ□ነ ሃይማኖት ታዬ ላይ ሊከተል □ሚችለውን ችግር በቅድሚያ በማሰብ ለተወሰነ ጊዜ በቤቱ □ንዲገለገሉ ማድረጋቸው አርቆ ከማስተዋልና ከቸርነት የመነጨ ነው። ያም ቢሆን ለኑዛዜው ተጠቃሚች የሰጡትን መብት ሕጋዊ ትርጉም በተቀዳሚ በሚገባ ማጤን ያሻል።

ማንም ሰው ንብረቱን ወይም ሀብቱን በኑዛዜ ለሌላ ሰው ማስተላለፍ □ንደሚችል በፍትሐብሔር ሕግ ቁጥር 1184 ተደንግጎ ይገኛል። በ□ሁ መሠረት ሟች ኮሎኔል ልወልሰ□□ □ይሌ በመኖሪያ ቤታቸው ላይ የነበራቸውን የባለቤትነት መብት ለልጃቸው ለዳንኤል ልዑልሰገድ በኑዛዜ አስተላልፈዋል።

ሃይማኖት □ጽ □□ሞ ❸ራሷን ችላ ቤት □ስካ□ኘች ድረስ አሁን አለችበትን አንድ ክፍል □ንደያዘች ትቀመጥ . . . ለሌላ ማስተላለፍ አይቻልም❾ በማለት ኮሎኔል ልዑልሰገድ በፍትሐብሔር ሕግ ከቁጥር 1309 ጀምሮ በተመለተው መል□ በቤቱ የመገልገል መብት ለ□ለሰቧ ሰዓተኛ□ል። ይህ መብት ለሌላ ሊተላለፍ የማይችል <u>□□ጸዊ</u> መብት ሲሆን በዳንኤል ልዑልሰገድ የባለቤትነት መብት ላይ ጊዜያዊ ገደብ የሚጥል ነው።

በአንፃሩም ሃይማኖት □ዬ ከተሰጣት መብት ጋር አብሮ የሚሄድ የተለያየ ግዴ□ ያለባት ሲሆን በተለይም ቤት ፈልጋ የመውጣት ግዴ□ አለባት። ይህ ግዴታም ከተሰጣት መብት ባህርጁ የሚመነጭና ከኑዛዜው የሚነሳ ነው። በተጨማሪም ሕግ ግዴ□ ጁዓልባ□ል። ለምሳሌ በፍትሐብሔር ህግ ቁጥር 1309 መሠረት ያለችበትን ቤት በነበረ መልኩ የማቆየት □ጻ□ በቁጥር 1313 መሠረት ደግሞ ቤቱን የመንከባከብ ግዴ□ አለባት።

በሌላም በኩል ፩ የኑዛዜው ሙሉ ባለመብት ዳንኤል ልዑልሰገድ □ሀ ሃይማኖት ታዬ ቤት □ል□□ □ንዲወጡ በሕግ ማስገደድ ይችላል። ቤት ፈልጐ አግኝቶ □ንዲወጡለት መጠየቅም ይችላል። በተጨማሪም ሃይማኖት ያለችበት ቤት በ□ርጅና ወይም በሌላ ምክንያት እድሳት ቢጸስ□ል□□ ወጭውን □ንድትችል መጠየቅ ይችላል።

ስለዚህ በኰሎኔል ልዑልሰገድ ኑዛዜ ወስጥ የተጠቀሰው ከላይ የመረመርነው ገደብ ለማስፈጸም አዳጋች ይሆን □ንደሆን እንጂ በፍትሐብሔር ሕግ በቁጥር 879/1/ አነጋገር ❽ ሊፈጸም የማይችል ❾ ገደብ አይደለም።

ስለ□ህ □ርስ በሰበር □ንዲ□ጁል ለመሥሪጸ ቤታችን አቤቱታ ባቀረቡበት የጠቅላይ ፍርድ ቤት የመጨረሻ ፍርድ የሕግ ስህተት አለበት ለማለት የሚያስችል ሁኔ□ አላገኘንም።

በአንጻሩ የኢትዮጵያ ሕዝባዊ ዲሞክራሲያዊ ሪፑብሊክ ጠቅላይ ዐቃቤ ሕግ በጠቅላይ ፍርድ ቤት ማቋቋሚያ አዋጅ ቁጥር 9/1980 በአንቀጽ 5/1/ □ና በዐቃቤ ሕግ መሥሪያ ቤት ማቋቋሚያ አዋጅ ቁጥር 11/1980 በአንቀጽ 13/4/ መሠረት በማናቸውም ደረጃ የሚገኝ ፍርድ ቤት የሰጠው ይግባኝ የማይባልበት የመጨረሻ ፍርድ በሰበር □ንዲ□ይ ተቃውሞውን ለ□ቅላይ ፍርድ ቤት ለማቀረብ ሥልጣንና ተግባር የሚኖረው ከላይ በተጠቀሰው ጠቅላይ ፍርድ ቤት ማቋቋሚያ አዋጅ ቁጥር 9/1980 በአንቀጽ 4/4/ በግልጽ □ንደተደነገገው □መሬ ረሻ □ርዐ <u>መሠረ□ዊ የሆነ የሕግ ስህተት</u> ያለበት ሆኖ ሲያገኘው ነ□።

በመሆኑም የሰበር ጥያቄን ያልተቀበል ነው መሆኑን □ንገልጻለን።

□ልባ□ ፩

ለጠቅላይ ፍርድ ቤት

<u>አዲስ አበባ</u>

* * *

አባሪ ሁለት

<u>የኰሎኔል ልዑልሰገድ ኑዛዜ</u>

የተጻፈው አዲስ አበባ

የተጻፈበት ቀን ጥቅምት 22 ቀን 77 ዓ.ም.

□ኔ ኮሎኔል ልወልሰ□□ □ጁሌ ከዚህ የሚከተለውን ኑዛዜ አደርጌአለሁ፡፡ ያለፈው የኑ□□ ሰነድ ሁሉ በዚህ ተሽሯል፡፡

1. በከፍተኛ 18 በቀበሌ 18 ውስጥ ቁጥር 165 የሆነውን ቤቴን ቢበድለኝም መጠሪያዬ ዘሬ ነውና ለልጄ ለዳንኤል ልዑልሰገድ □ይሌ ሰጥቸዋልሁ □ስኪመጣ ድረስ ለቤቱ ጠባቂና አስተዳዳሪ ወኪል ጽጌሃና ዳኜን አድርጌአለሁ፡፡
2. □ጁማኖት □□ □ራሷን ችላ ቤት □ስካ□ኘች ድረስ አሁን ያለችበትን አንድ ክፍል □ንደያዘች ትቀመጥ ለሌላ ማስተላለፍ አይቻልም፡፡ ቤዛነህ □የ ድንገት ቤት የቸገረው □ንደሁ በፊት የነበረበትን አንድ ክፍል ቤት ሥራ ይዞ ቤት □ስካ□ኘ □ረስ ይቀመጥበት □ሱም ለሌላ ሰው ማስተላለፍ አይችልም፡፡
3. ጽጌሃና ዳኜ □ቤቱ ወስጥ ሆና ለመጠበቅ ብትፈልግ ሳሎኑንና የኔን መኝ□ ቤት ይዛ ትቀመጥ ወጥቤቱና ማድቤቱ እንዲሁም የመጸዳጃ ቤቱ የጋራ ይሁን፡፡ ሁለት ክፍል ሰርቪሶች በዋናው ቤት ለሚኖሩ ለ□□ □ኜና ለ□ይማኖት □□ ጁ□ቀሙበት በሰርቪስነት ብቻ ይጠቀሙበት፡ ፡
4. በዋናው ቤት የቡ□ ፉ□ □ንዳይነድበት ለቤቱ ደህንነት ጉዳት ያመጣልና ይህንን የማይፈጽም ቤቱን ለቆ ይውጣ፡፡
5. የዓመቱን ግብር በየዓመቱ ከቴነሽ ሐሰን በስተቀር በቤቱ ወስጥ የሚኖሩ ሁሉ ይክፈሉ ለመክፈል የማይተባበር ቤቱን ለቆ ይውጣ፡፡ የሚፈርሱ ወይም የሚበላሹ ነገሮችን በቤቱ የሚኖሩ ያስጠግኑ፡፡ ቤዛነህና □ይማኖት የዓመቱን ግብር ለመክፈል አቅም ቢያጡና ለመክፈል ባይችሉ ሥራ ገብተው ደመወዝ አገኙ ድረስ ዳንኤል □ያላከ ይክ□ል፡ ፡ ሥራ ካ□ኙ በኋላ ግን □ንደየይዞታቸው መጠን ይክፈሉ፡፡
6. □ቴነሽ ሐሰን □ንደልጄ ሆና አገልግላኛለችና ቤት አግኝ□ በ□ቃ□ ለቃ እስከሄደች ወይም ዳንኤል እስኪመጣ ድረስ ከሰርቪሶቹ አንዷን ክፍል አሁን ያለችበትን ትቀመጥበት፡ ፡ ማንም □ንዳይደርስባት በውጭው ማድቤትና ሽንት ቤት በጋራ ትጠቀም ለአንድ ለራሷ ብቻ፡ ፡ በወር ሁለት ብር □ያከፈለች መብራትና ውሃ ትጠቀም □ንዳትከለከል፡ ፡ የጋዝ ምድጃዋንና አንድ ትሪማይካ ሳህኖችንና አንድ የወጥ ማቅረቢያ ጉድጓዳ ሣህን አንድ ከፍ ያለና አንድ አነስተኛ ብረትድስት አንድ የሀበሻ ቢላዋና አንድ የማስ□□ቢጸ ኒኬል ሣህን የብረቱን ኮመዲኖና አንድ ብርድ ልብስ የመረጠችውን ትውሰድ የማይካ ኩባያችንና መናኛ ብር□ ቆችን ማስቀመጫውንና የሊጥ ማቡኪያውን አንድ ደህና ባልዲና የምትተኛበትን አልጋና ፍራሽ አንድ የብረት ሣጥን □ቴነሽ ሀሰን ትውሰ□፡ ፡ የልብስ ማጠቢያ ሳፋ በቴነሽ ሐሰን □ጅ ሆኖ በጋራ ይጠቀሙበት በጋራ ለመጠቀም ስምምነት ከጠፋ □ቴነሽ ሐሰን ትወሰደው፡ ፡ ንቦቼን በጠቅላላው ቤዛነህ □ጽ ጁ□ሰ□፡ ፡

7. የዘይት መጭመቂያው ተሽጦ ግማሹ ለቅድስት አያሌው ይሰጥ። ግማሹን አቶ አምባቸውና መቅደላዊት □□ ለሁለት ይካፈሉት፡ ፡
8. የሳሎን ቤት ምንጣፍና የምግብ ቤት ጠረጴዛና ወንበር □ንዲሁም □ቃቤት ያለውን የብረት ቡፌ የኤሌክትሪኩን ምጣድ □ይማኖት ትውሰ□፡ ፡
9. □ሪጁን የቡ□ፉ□ መብራት ከጉልቻዋ የሳሎን ሶፋ የ□ንግዳ መኝ□□ አልጋ ከነፍራሹ ሂተሩ ከቴነሽ አበበ በትወስት የመጣ ስለሆነ ለሷ ይመለስ፡ ፡ አልጋዬን ከነፍራሹ ከነኮመዲኖቹ ከሲኞሪና የተገዙትን ትልልቅ ድስት አንድ የከሮም ትሪና ባለመስተዋቱን ኮሞ ቅድስት አያሌው ትውሰድ፡ ፡ የኤሌክትሪኳን ምድጃ አቶ ዘውዱ አጐናፍር ይውሰድ፡ ፡
10. □ቅብሩ ሥነ-ሥርዓት በቀጨኔ መድ□ኔዓለም ጁ□□ም፡ ፡ በቅሎ ቤት ከሚባለው ሰ□ር □ቤተሰብ መረ□ጽ ማህበር □ድር ስላለ ከዚያ የሚ□ኘወን 2000 ሁለት ሺ ብርና ከሰፈር □ድራችን የሚሰጠውን የ□ድር ገንዘብ እቴነሽ አበበ ተቀብላ ለአስፈላጊ አፈጻጸም □□ል፡ ፡ ለገንዘቡ አሰባሰብ ባሻ ዓለማየሁ ከየቦ□□ □□ተቀበሉ ይስጧት፡ ፡
11. ምናልባት ለተወረሱ ንብረቶች መንግሥት ካሳ ቢከፍል ቤዛነህ □ይማኖት መቅደላዊት ይካፈሉት የኔወርቅም ትጨመር፡ ፡
12. ዳንኤል ዘር ሳይተካ ቢሞት ቤቱ ተሸጦ ሲሶው ለጽጌሃና ዳኜ ይሰጥ የተቀረውን □ሽለቃ □□ ኃይሌ ልጆች ቤዛነህ የኔወርቅ ኃይማኖት አዳነ ታደሰ ታየ ይከፋፈሉት።

ይህ የኑዛዜ ጽሑ□ በባሻ □ለማ□ሁ □ፀ ጁ□ኛል ኑዛዜው ከፈሰሰ በኋላ ለጽጌሃና ዳኜ ጁሰዓ

አንድ ግልባጭ ለአቶ ዘውዱ ይሰጥ።*

* በኑዛዜው ሰነድ በሁለቱም ገጾች የተናዛዥና የእጨኞች ስምና ፊርማ አለ።