Issue Framing and Allocating Burdens of Proof in Civil Cases: ***A Comment on Ato Gebru G/Meskel V Priest G/Medhin Reda Case*** [*]

Worku Yaze [**]

1. Synopsis of the Case[1]

Plaintiff Ato Gebru G/Meskel instituted a claim before the High Court of Mekele Zone, Tigray Regional State, asserting that a loan contract had been entered into between him and defendant priest G/Medhin Reda. He averred that he, upon request for loan by defendant through telephone, transferred 50,000 Birr through Wegagen Bank from Addis Ababa to Mekele which he said defendant collected in due time. Expressing that defendant failed and refused to pay back the loan money, he requested the court to give an order that compels defendant to perform his obligation including payment of legal interest, lawyer's fee and other litigation costs.

In his statement of defense defendant denied existence of the alleged contract of loan but admitted collecting the alleged sum of money. The defendant said that plaintiff had taken 50,000 Birr from him in loan some time before; that the money he collected from the bank was that which plaintiff owed to him. He thus asked the court to dismiss plaintiff's claim as baseless and unacceptable.

The High Court examined the matter and identified the main issue to be: *which party bears the burden of proof?* It then held that burden of proof lies on the defendant. Further, it maintained: "defendant didn't adduce any evidence that proves pre-existing debt which plaintiff had to pay; thus he should pay 50,000 birr with legal interest."

Defendant appealed to the Regional Supreme Court stating that the High Court wrongly held him to bear the burden of proof and to pay

---

[*] The author would like to express his gratitude for the Editorial Committee and for those who offered constructive comments on the earlier draft of this work. Any error remains the responsibility of the author.

[**] Director and Lecturer, Law School, Bahir Dar University

[1] *Ato Gebru G/Meskel V Priest G/Medhin Reda,* Federal Democratic Republic of Ethiopia Supreme Court Cassation Division, File No. 31737 (Decided on 27 Yekatit 2000, E.C).

a debt that didn't exist. However, the Supreme Court didn't accept his argument and it confirmed the decision of the High Court.

Next, defendant/appellant petitioned to the regional Supreme Court's Cassation Bench alleging that the High Court and the regular division of the Supreme Court committed fundamental error of law. In this Bench, respondent/plaintiff argued that the two courts didn't commit any error and prayed for confirmation of the decisions.

After thorough examination, the Cassation Bench held:

> *The bank transfer document couldn't be evidence of the alleged contract of loan. The fact that defendant admitted collecting the stated sum of money couldn't be taken as an admission of plaintiff's claim since he said that it was what plaintiff owed to him. As defendant denied of the alleged contract of loan, plaintiff bears burden of proving its existence. To hold that defendant bears burden of proof in this circumstance is wrong.*[2]

Thus, the Cassation Bench reversed the decisions of the two courts and dismissed plaintiff's claim.

Again, plaintiff petitioned to the Cassation Division of the Federal Supreme Court. He alleged that the Cassation Bench of Tigray Regional Supreme Court committed fundamental error of law. Respondent, on his side, said that there was no ground to interfere with the Bench's decision. Generally both of them reinforced their side repeating those previously expressed facts and legal arguments.

2. Holding of the Cassation Division

The Cassation Division of the Federal Supreme Court, on its part, examined the matter and arguments of the parties' thoroughly in light of Art 2472(1) of the Ethiopian Civil Code (1960). And there was no unanimity in this panel. The majority (4 of the 5 judges) held that:

> *Though respondent said he lent the stated amount of money to the petitioner, he didn't prove it with any of the means provided under*

[2] Translation mine

> *Art 2472(1) of the Civil Code; he didn't discharge his burden of proof. On the other hand, petitioner adduced a bank transfer document that also proves the existence of contract of loan; thus, petitioner has discharged his burden of proof.*[3]

In conclusion, the majority held that the Cassation Bench of Tigray Regional Supreme Court committed fundamental error of law and thus it reversed its decision. On the other hand, the dissenting judge (the minority) maintained that the existence of contract of loan has to be proved in writing, or through formal admission or oath taken in Court (Art 2472 (1) of the Civil Code) and held that the bank transfer document couldn't be evidence. He stated that 'the respondent didn't deny collecting the money from the bank; yet respondent said that it was a payment for a pre-existing debt.' According to this judge the issue in this case should have been '*whether there was contract of loan as alleged by the petitioner or not;* and the *party that bears the burden of proof should have been the plaintiff*'. In his opinion, therefore, the decision of the Cassation Bench of Tigray Regional Supreme Court should have been maintained and confirmed.

3. Comments

a) Issue Framing

Before talking about the party that bears burdens of proof in a given judicial proceeding, it is first necessary to identify the fact or facts that need to be proved. Introduction of evidence presupposes such an identification of the facts that are objects of proof. The facts that are objects of proof are those facts that appear in the pleadings and oral allegation of parties. But every such fact is not an object of proof. It is only facts in issue, facts relevant to the facts in issue and collateral facts that are objects of proof.[4] It is thus necessary to identify

---

[3] Translation mine.

[4] See D.W. Elliott, Phipson and Elliott Manual of the Law of Evidence, 11th ed. (First Indian Reprint 2001), at 15. The expression "facts in issue" denotes to those facts, which the plaintiff must prove in order to establish his claim or the defendant must prove in order to establish his defense. On the other hand, "relevant facts to the fact in issue" is referring to those other facts that have some connection, such as in cause and effect or any other relation, with the fact in issue in a case. "Collateral facts" are those other facts that relate to other side

the fact(s) in issue in a case, and/or depending on the unique feature of each particular case and the nature of the dispute those other relevant facts to the issue and collateral facts, if any.

Courts do play vital roles in identifying such facts that need to be proved through relevant and admissible type of evidence. As provided under Art 241(1) of the Ethiopian Civil Procedure Code (1965), at the first hearing the court reads the statement of defense of the defendant in the case, conducts oral examination and determines their respective positions. If the case is such a nature that it cannot be resolved at that first hearing, the court needs to frame the issue(s) that should be resolved through evidence at trial. Art 246(1) Civil Procedure Code provides:

> *"...the court shall ascertain upon what material propositions*[5] *of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

When courts are faced with different versions of a fact or law by litigating parties, it is necessary to frame and record that disputed fact or law as an *issue*.[6] As Sedler correctly observed and as Art 247(1) of the Civil Procedure Code expressly provides an *issue arises when a material proposition of fact is affirmed by one party and denied by the other.*[7] Art 248 of the same Code has provided guidelines for courts regarding materials from which issues may be framed.[8]

In the case at hand, plaintiff requested repayment of loan money. He alleged the existence of contract of loan that served as a ground for him to transfer 50,000 Birr through bank to the defendant. But,

---

issues such as relating to competence or credibility of a witness, admissibility of evidence, cogency of evidence.

[5] Art 247 (2) of the Civil Procedure Code provides:
"*Material propositions are those propositions of fact or law which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense."*

[6] Briefly stated, an *issue* in litigation refers to the *point on which disputing parties disagree*. See Robert Allen Sedler, *Ethiopian Civil Procedure* (1968), at 121.

[7] Id, at 178.

[8] These are:
(a) allegations made in the pleadings,
(b) the contents of documents produced by either party, or
(c) Allegations made by parties, or representatives or pleaders during oral examination at the first hearing.

defendant denied the existence of such a contract saying that the transferred money was rather a repayment of a debt plaintiff owed to him (defendant). Admission of receipt of the money on the part of the defendant should not be confused with admission of the alleged contract of loan. These are two distinct and separate *material propositions*. Denying the alleged contract, defendant admitted collecting the stated amount of money from the bank. It was clear that he expressly denied the existence of such a contract. In effect, he alleged non-existence of obligation. This was a crucial point where the two litigating parties were in disagreement.

Art 2471 of the Ethiopian Civil Code (1960) provides a definition for loan of money. It is defined as a contract whereby a lender undertakes to deliver to the borrower a certain amount of money and to transfer to him the ownership thereof on the condition that the borrower will *return* to him that same amount. Defendant denied of the existence of such a contract alleged by plaintiff and thus contended that he didn't bear any obligation to return the money he collected from Wegagen Bank. All the courts from the High Court through the Cassation Division of the Federal Supreme Court recognized that defendant expressly denied the material proposition of the plaintiff relating to existence of loan of money. It was for that reason that the High Court didn't give judgment on the basis of *admission* as provided under Arts 242 and 254 of the Civil Procedure Code.

As the defendant unequivocally denied of the alleged loan of money, the High Court at Mekele zone should have, therefore, first framed and recorded the issue of *whether there was loan of money between them as alleged by plaintiff.* To our understanding that was the very issue upon which the right decision of the case depended. Plaintiff's request to recover the stated amount of money and its legal interest presupposed existence of valid and enforceable contract, i.e., loan of money. And it was when breach of the alleged contract was proved that the court would go on determining in accordance with plaintiff's prayer, save any other lawful reason or defense.

Defendant's allegation that there was prior contract of loan, i.e., loan of money, entered into between him as lender and plaintiff as borrower was quite another factual allegation called in defense - different from the present fact in issue. This was not raised as an

affirmative defense. It was not a counterclaim or set-off.[9] Defendant totally denied the existence of that contract of loan alleged by plaintiff. He contended that plaintiff had no legally recoverable money and posed a separate allegation that attempts to bring justification for the receipt of the alleged money.

It appears that the regional High Court failed to identify and properly record the *issue* in the case. It proceeded without appreciating the material fact on which the plaintiff relied for his very claim and without giving due attention for the material fact on which defendant purported to rely for his defense. Out of the blue, it can be said, it simply framed burden of proof as an issue- a point which was not raised by any of the parties, or which couldn't be extracted from the only documentary evidence, i.e., from the bank transfer paper. It is also clear from the file that subsequent courts were wrongly taken away by the erroneously framed issue of the High Court. The observation of the dissenting judge in the Federal Supreme Court Cassation Division on this point is correct and it goes in line with Arts 246 (1) and 247(1) of the Civil Procedure Code.

As mentioned above, the High Court framed "who bears burden of proof?" as an issue in the case. Nevertheless, the idea of burden of proof cannot come into the picture without first identifying and framing an issue in the case. Burden of proof cannot arise in the vacuum. It at least presupposes one contested issue of fact. As Christopher Allen observed "talk about the burden of proof in any given case makes no sense unless you relate that burden to a particular issue of fact."[10] In the case at hand, the contested issue of fact was whether there was loan of money as was alleged by the plaintiff. Determination of the party that ought to carry burdens of proof in such disagreement was an attendant matter to follow during the trial stage. What the High Court did, with due respect, amounts to putting 'the cart before the horse.'

b) The party who bears the burdens of proof

Once the proper issue is identified, framed and recorded at the pleading and pre-trial stage, the next activity during the trial phase is to

[9] Read Arts 234 (1), (f), 234-239 of the Civil Procedure Code; Sedler, note 4, at 129- 132.
[10] Christopher Allen, *Practical Guide to Evidence*, 2nd ed. (2001), at 99.

require litigating parties to introduce evidence in support of his side.[11] This cannot be accomplished simultaneously or haphazardly. It has its own principles and rules. This brings us to the idea of *burdens of proof.*

As so many legal scholars observed, the term "burdens of proof" has at least two principal senses.[12] In one sense it refers to *the obligation* (it can be also treated as a right) *of a party to lead evidence of a particular fact in issue*. It signifies "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation."[13] This is commonly referred to as the '*burden of going forward with evidence'* or as '*burden of production of evidence'* or simply as the *'evidential burden'*.[14]

The other and commonly used sense refers to *the obligation* (or right) *of a party to persuade the existence or non-existence of a disputed matter of fact to the satisfaction of the judge with the necessary amount and quality of evidence.* It denotes "the obligation of a party to meet the requirement that a fact in issue be proved (or disproved) either by a preponderance of the evidence [in civil cases] or beyond reasonable doubt [in criminal cases]…."[15] It is also known by a number of other names including '*burden of persuasion', 'risk of non-persuasion', 'probative burden', 'ultimate burden', and 'legal burden'.*[16]

The obligation of a litigating party in the first sense of burdens of proof signifies *the duty of that party to introduce some evidence in*

---

[11] Sedler notes that Ethiopia follows a common law approach to litigation and procedure and that the hearing process involves two well-defined stages, i.e., (i) the pleading and pre-trial stage, and (ii) the trial stage. See Sedler, note 4, at 120.

[12] Read for instance Raymond Emson, *Evidence,* 2nd ed. (2004), at 420-421; John W. Strong, McCormick On Evidence, 4th ed. (1992), at 568-569; D.W. Elliott, Phipson and Elliott Manual of the Law of Evidence, First Indian Reprint 2001, at 51-64; Colin Tapper, Cross and Tapper On Evidence, 9th ed. (1999), at 106-115. There are other less commonly known burdens of proof such as the so-called *tactical or provisional or forensic burden* and *burden of proving the admissibility of evidence*.

[13] Tapper, note 10, at 109.

[14] Id; Allen, note 8, at 99,116-118; CRM Dlamini, *the Burden of Proof; Its role and Meaning*, 14 S*tellenbosch. L. Rev*. (2003), at 68 ff.

[15] Tapper note 10, at 108.

[16] Emson, note 10, at 419.

support of a particular issue to make it a live one.[17] The burden of persuasion, on the other hand, *is the duty the law imposes on a party to prove or establish a particular fact in issue.*

In the case of persuasive burden, the party is expected not only to support his assertion of a fact in dispute with evidence but also he has to establish or prove its existence or non-existence to the required degree to the satisfaction of the judges. Mere introduction of *prima facie* evidence doesn't suffice; one has to prove with the required degree of proof.[18] The party that bears this burden in a civil proceeding carries *the risk of losing on that issue* if the evidence is evenly balanced or non-existent.[19] Such burden, which mostly is determined and allocated by the legislature in making substantive laws,[20] determines *which party will lose if the court is not satisfied that the fact under investigation has been proved to the standard required*.[21] It should be also mentioned that such burden necessarily presupposes the adduction of *relevant* and *admissible* type of evidence. It is essential, therefore, to bear in mind that determination of the party that bears the persuasive burden on a particular fact in issue has serious legal consequence.

---

[17] Strictly speaking it is not a burden of *proof*. It is "an obligation *to demonstrate that sufficient evidence* has been adduced or elicited in support of an assertion of fact so that it can become a live issue." (Id, at 420). This is particularly important in a legal system that involves dual tribunals (tribunal of fact- the jury system- and tribunal of law- judge of law) to pass the tribunal of judge successfully and get reference of ones case to the tribunal of fact for final determination on the basis of evidence to be adduced before the juries. In non-jury trials such as ours, the burden of persuasion, which also consists of burden of production, is the most important and determinative one.

[18] As is well known, there is difference in respect of required degree of proof in criminal and civil cases. 'Proof beyond reasonable doubt' standard is applicable in criminal cases while 'preponderance of the evidence' is the required standard in most civil cases. Sometimes a higher degree of proof- i.e., clear and convincing standard of proof- may be required in some civil cases such as disowning of a child.

[19] Emson, note 10, at 419.

[20] The legislature apportions burden of persuasion taking into account various factors. Quoting another author Stephen I Dwyer has listed the following factors that are to be taken into consideration in the allocation of burden of proof as between parties:

(1) the natural tendency to place the burdens on the party desiring change (i.e. on the plaintiff);

(2) special policy considerations such as those disfavoring certain defenses

(3) Convenience (4) fairness (5) The judicial estimate of the probabilities. See Stephen I. Dwyer, *Presumptions and Burden of Proof*, 21 *Loy. L. Rev.* (1975), at 380.

[21] Andrew Palmer, *Principles of Evidence* (1998), at 33.

Thus, judges of courts must identify and determine which party to the dispute bears the persuasive burden on *a particular fact in issue* under that risk of losing on that particular issue. Judges must also properly identify and determine which other party bears the burden of persuasion on another particular issue, if any, under risk of losing on that other fact in issue. It is wrong to simply talk about burden of proof in a case as such. Generally speaking, however, the burden of proving of a disputed fact is on the party pleading or asserting it. Plaintiff *has to prove allegations in his statement of claim and defendant has to prove affirmative defenses or any other grounds of defense averred in his statement of defense;* [22]*he who asserts shall prove it* is the general premise. When it comes to an actual civil case, it is always necessary to identify the party that bears burden of persuasion on such identified specific and particularized fact(s) in issue in the case. If there is more than one fact in issue, one party may bear such burden on one issue and the other party may bear on another issue.

Coming to the case at hand, one of the parties, either plaintiff or defendant is necessarily under duty to bear the burden of persuasion on the fact in issue. As made clear above, the fact in issue is *whether there was contract of loan between the parties as alleged by plaintiff.* So we need to determine which party bears the burden of persuasion under risk of losing his case on that issue. Arts 258(1) and 259 (1) of the Civil Procedure Code provide that the plaintiff shall be entitled *to begin his case* and *to produce his evidence* in support of the issue *which he is bound to prove*. If the type of evidence introduced by any of the parties is documentary evidence or if that is what is required in law, the court has to examine such adduced document(s) bearing in mind the party that bears burden of persuasion in respect of a particular issue of fact. The court should not act arbitrarily or as any document is available to it by any of the parties. Also, Art 2001(1) of the Civil Code provides that "*He who demands performance of an obligation shall prove its existence*."

By virtue of these provisions it is pretty clear that the plaintiff is the party that bears burden of persuasion on the issue of whether there was loan of money as he was the one who demanded performance. It is the plaintiff that carried the risk of losing on this issue (and for that

[22] See Dwyer, *note 11,* at 379.

matter on the case as a whole) *if no evidence* or if *no sufficient evidence* was introduced on this issue at the end of the proceeding.

Furthermore, the type of evidence that can be introduced in this case to prove the identified fact in issue is determined by the Civil Code. Clearly, it cannot be proved or disproved with witnesses' testimony as Art 2472 of the Civil Code specifically enacts the type of evidence or mode of proving/disproving of a loan of money that involves an amount of more than 500 Birr. Sub (1) of this article provides that the contract of loan may only be proved in *writing* or *by a confession made or oath taken in court.*

The holdings of the High Court, the regular division of Tigray Regional Supreme Court and majority of the Cassation Division of the Federal Supreme Court in respect of the party that borne burden of proof were thus contrary to what is provided under Art 2001(1) of the Civil Code. It appears that these courts erred on this point for two reasons: Viz.,

(a) They failed to identify the particular issue of fact, and

(b) They didn't test who would lose the case if no evidence or no sufficient evidence were adduced- to determine the party that carried burden of persuasion.

Perhaps these courts were also taken astray by the admission of receipt of the money on the part of the defendant. It should be clear that the facts of transferring money through Wegagen Bank and collection of that money by defendant were not facts in issue. As both parties agreed on these facts, there was no need to waste time and energy in examining such already admitted facts.

As the only issue in the case was *whether there was a loan of money as alleged by the plaintiff*, it is completely wrong to talk about the defendant's burden of proof to establish another pre-existing loan of money which was alleged by the defendant. It is wrong because:

(a) whether there was a pre-existing contract as alleged by the defendant was not at issue in the case: and,

(b) to require the party that denies existence of contract to bear burdens of proof is contrary both to the general principle of law of evidence and to Art 2001 of the Civil Code.

Whether there was a pre-existing contract as alleged by defendant could have been an issue to be investigated if the suit was one of say, unlawful enrichment or undue payment made to the

defendant. Or, it could have been an issue in defense to be investigated by the court if plaintiff adduced sufficient evidence of the existence of loan of money as he alleged and made the issue a live one. If that was the case, the defendant that admitted receiving of the money could have been required to prove its background, i.e., his alleged pre-existing contract or any other lawful ground that enabled him to collect the sum of money.

4. Conclusion

In the case under discussion, the judges that seized the case from the High Court through the Cassation Division didn't properly attempt at identifying the *issue* in the case. The only exception is the dissenting judge in the Cassation Division of the Federal Supreme Court. In the opinion of this writer that was the serious flaw that entailed attendant wrong analysis of the case and wrong allocation of burden of proof. Though the Cassation Bench of Tirgay Regional Supreme Court shares this blame, as it didn't rectify the wrongs of the other courts in this regard, it has properly addressed the party that carried burden of proof in the case. The analysis of this Bench and the dissenting judge in the Federal Supreme Court is thus commendable. It goes in line with the general principle of Law of Evidence and Art 2001(1) of the Civil Code.

In civil proceedings, unless there are presumptions in favor of plaintiff or unless otherwise the other party admits the factual allegations of the plaintiff, the plaintiff bears burden of proving the facts pleaded in his statement of claim, i.e., his cause of action. On the other hand, defendant carries the burden of proving any other facts pleaded in his statement of defense such as affirmative defenses – and not the non-existence of the facts asserted by plaintiff.

With regard to issues that involve contractual matters, the legislature in Ethiopia has already apportioned burden of proof as between parties. As clearly enacted under Art 2001 of the Civil Code, a party that demands performance of an obligation that arises from a contract shall bear the *burden of proving of the existence of the alleged contract*. On the other hand, a party that admits the existence of a contract asserted by the other party and intends to avoid liability bears *the burden of proving the nullity, variation or extinction of that contract* as provided under Art 2001(2) of the Civil Code.

Judges of the Cassation Division of the Federal Supreme Court, the High Court at Mekele zone and those that entertained this case in the regular division of Tigray Regional Supreme Court, with due respect, need to revisit their stand in light of authoritative rules of both the Civil Procedure Code and the Civil Code. Finally this writer would like to underscore the importance of *issue framing* and *determination of the party that bears burden of proof* in civil proceedings. Partly, the correctness and propriety of court decisions are greatly dependent upon the handling of these points.