

St. Mary's University College

Faculty of Law L.L.B Thesis

*Practical Problem in Applying Rule of Pendency Under Article
8 of Ethiopian Civil Procedure Code of 1965 Case Based Study*

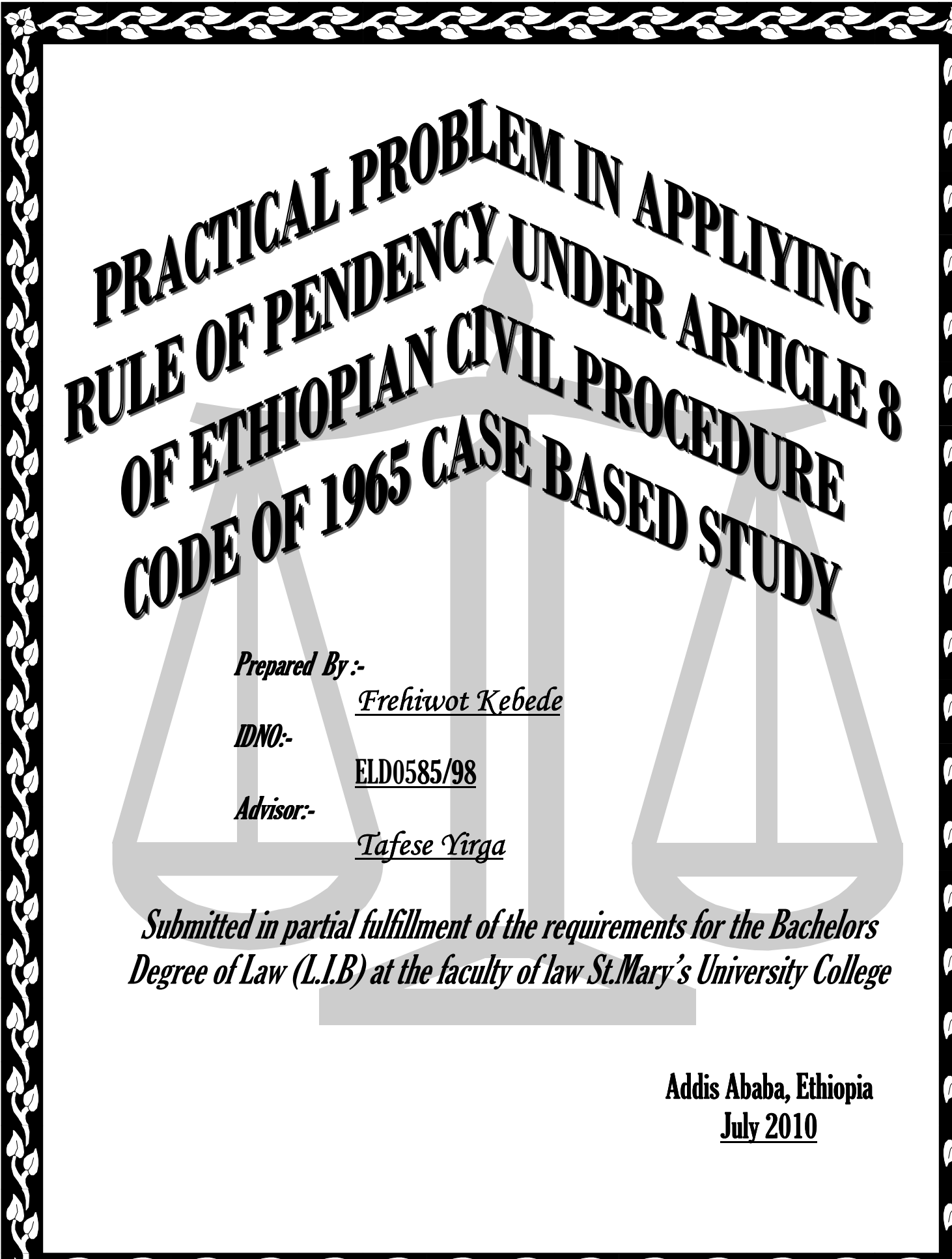
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Addis Ababa, Ethiopia
July 2010



**PRACTICAL PROBLEM IN APPLYING
RULE OF PENDENCY UNDER ARTICLE 8
OF ETHIOPIAN CIVIL PROCEDURE
CODE OF 1965 CASE BASED STUDY**

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*Submitted in partial fulfillment of the requirements for the Bachelors
Degree of Law (L.L.B) at the faculty of law St.Mary's University College*

Addis Ababa, Ethiopia

July 2010

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Acknowledgement

Acknowledgement

1. God, you are owner of health wealth, success and etc or all thanks for all for ever.
2. Thanks to my parents my mother Aduny Bekuma & specially my sister Maskerm Kebede thank you for all you have contributed that time.
3. My advisor Ato Tafese Yirga thank you for all your comments on my research paper and to your smooth and politely approach.
4. My friends 1st Gezahnge Mulisa 2nd Meron Tesfaye 3rd Mastwale Belay thank you for all you have contributed to me in conducting this research.

Introduction

In Ethiopia before the organization of regular courts there was judicial system in which civil litigation and decision had been conducted. Besides this there was non formal procedural rules by which the disputes had been handled.

In Ethiopia regular courts has been established in 1942 under the proclamation No 2/1942. The proclamation also authorizes the courts to enact the procedural rules to be followed in the courts. Following this proclamation in 1953 the courts enacted procedural rules which govern both civil and criminal cases. In addition to these rules, in 1943 the imperial judicial rules also enacted to govern criminal and civil litigations. However, all these rules the rule pendency was not clearly stipulated.

Finally in 1965 the Ethiopia civil procedure law was enacted in dependently from criminal procedure laws. The law also clearly provided the rule of pendency under Art. 8 of the code.

The existence of such rule is very important in civil ease administration. Because when different judgment has given for two the same cause of action and the same parties it is difficult in execution, so that the rights of parties affects.

The Ethiopian civil procedure provides the rule of pendency as aright to the parties. Where the claims of the parties are separate, but the matter in issue in one suit is connected with a suit pending in another court, that it may be tried separately. Two judgments or different decisions were rendered on the cases of some cause of action, and between some parties, has faced great problems in the execution of that judgment, as result the right of parties affected substantially.

However, in practices the existence of this rule in civil procedural law of Ethiopian does not totally avoid this problem. Because in some cases there is a situation in which our courts rendered different judgments for some cases.

Such problem occurred from different reasons, may be the failure of the parties to executrices the right provided in raising preliminary objection or absence mechanism to tied causes of the same causes action in courts.

The research paper focuses on the practical and legal problems of the rule of pendency and addresses the probable remedies.

The paper has four chapters.

The first Chapter attempts to show the General Concept of pendency.

The second chapter is concerned with the Practical Problem Exist with the Application of Rule of Pendency

The third chapter is concern with case Analysis or Problem of the cases

Chapter Four concern is Conclusion and Recommendation parts.

CHAPTER ONE

1. General Concept of Pendency

1.1 Definition

In 1965 civil procedure code of Ethiopia it is provided that under what conditions a case said to be pendent and not regarded as pendant and the remedy there on but it does not define the word pendency even though we can find it in different dictionaries, in 4th edition of black law dictionary .

The tern “pendency” defined as suspense the state of action etc after it has been began and before the final disposition of it.

Pending is while waiting for some thing to happens waiting to be decided settled.

In 2nd edition of same dictionary.

Pending begun but not yet completed; during; before the conclusion prior to the completion of unsettled undetermined in process of settlement or adjustment awaiting an occurrence conclusion of action period of continuance or indeterminacy this an action or suit is pending from it’s inception until the rendition of final judgment.

The two editions of the dictionary defined the term in different approaches but both tell about case instituted in the court and waiting final judgment.

Legal suits which are instituted in a court and not settled or litigation started but not completed. In our civil procedure code approach as it is provided under article 8 of the code it governs the situation in which suit previously instituted shall not be tired again if is between the same parties or between parties under whom any at them claim under same title where suit is pending in the same court or any other court in

Ethiopia generally the dictionary defined the word as started but not completed processes of litigation but our civil procedure code puts down the provision that govern the suit pending the second time.

1.2 Background of the study

The civil procedural law is law which incorporate different rules that provided the steps and procedures to be followed, during civil litigation including its initial steps. Before the establish modern or regular courts in Ethiopia there was judicial proceedings in different manners. At that time there was no enacted legal procedures to be followed by irregular courts and parties.

However. Starting from the establishment of regular courts in Ethiopia in 1934, courts authorized to enact procedural rules to be followed in civil litigation under the proclamation No 2/1934. The proclamation also establishes four level of courts. These courts are imperial court at supreme level, single high court, Awuraja court at different Awuraja level, and woreda courts at different district level.

The proclamation also provides the selection of judges and empower them to enact the procedures to be followed in courts.

Based on this proclamation different procedural laws were enacted by courts. The first procedural laws which incorporate different civil and criminal procedures was enacted in 1943 under the proclamation No.33/1943. It was the first written procedural laws in Ethiopian judicial history. The procedural rulers are taken from India procedure rules. However the procedural lows were not in corporate the rule of pendency. Like wise in 1957 the supreme court judicial procedure also enacted. Under the proclamation No.155-1953. The procedural law was contains 45 articles among which 36 of them are civil procedural rules. This

procedural rule also did not contain the rule of pendency in its provisions.

In 1965 the Ethiopia civil procedural law enacted and codified independently of criminal procedural rules. The code also incorporate different procedural rules among which the rule of pendency is stipulated under Art.8 of the code. It is the first code that bears the rule of pendency in Ethiopian procedural laws.

1.3 Statement of Problem

If the parties do not object pendency and the court is not also aware of the situation and if as single case between the same parties or between parties under whom they or any of them claim under the same title was decided on two files an opposing judgment would be in such away that the party judgment creditor on one of the files is judgment debtor on another file on the same issue and vice versa then there would be two opposing judgment I which a single person become both judgment debtor and creditor then under such circumstance it is difficult to execute the judgments or one of the judgments because both are court decisions both are decided at the same level on the same issue on two files different or opposing Judgments in which the party which is judgment creditor on 1st file is the judgment debtor on 2nd file under the same title since there is no clear provision of the law which govern the situation how can the judgments possibility executed.

1.4 Objective of The Study

Since pendency is one of elements of civil procedure to ensure general objective of civil procedure which is legal dispute will handled in affair

and orderly way as expeditiously and economically as possible the rule of pendency shall be established and interpreted in the effective and practicable manner otherwise the general objective of the law can not be maintained thus one of the objective is to maintain general objective of civil procedure law identifying the nature and causes of practical problems in applying rule of pendency.

The other specific objective of the study is to minimize the multiplicity of the suit and the complexity of the cases in the court and at the same time give an awareness as to the problem comes with in properly applying of rule of pendency and proposing the probable remedies to overcome such problems in our country.

1.5 Significance Of The Study

The reason that motivate me to conduct research on this title is that in my locality the courts rendered two different opposite judgment on the same case of same cause of actions and between the same parties as result it became difficult and impossible to execute the decision finally the parties remain with only decision paper without practical effect of judgment. So that the right of parties was inevitably affected.

1.6 Research Methodology

In conducting this research.

A. The files of courts, kersa malima woreda courts file No362/97 and363/97

Woliso woreda courts file No10820 and10832

Were analyzed related to the text in issue.

- B. Reference books and dictionaries were used to elaborate the concepts. Ethiopian civil procedure law and constitution Indian civil procedure law and its Illustration had been discussed.
- C. Discussion with friends and class mates.
- D. Interview to different groups of society; judges of woreda courts public prosecutor, advocates, and residents of areas where the problem or difficulty occurred regarding the cause of the problem and the possible remedies.

1.7 Scope of The Study

The research concerned about rule of pendency under Ethiopian civil procedure code actually the problematic area is common on over whole Ethiopia where the code implemented but the place where the really my research focus on and the cases consumed are collected and used for elaboration of idea is from Oromia region south west shoa zone wolso Woreda and Kersa Mallima Woreda courts the research thatches up the condition under which two different judgments are going to given the legal provisions related to the issue giving remedy of and analysis of Worda courts decision .

CHAPTER TWO

Practical Problem Exist with the Application of Rule of Pendency

2.1 The Conditions Under Which A Case Pend Twice Before The Courts

Ethiopian civil procedure code of 1965 provides under article 8 where the case is said to be pendent or not:-

Art 8 pendency

1. No court shall try any suit in which the matter in issue is also is also directly and substantially in issue in a previously instituted civil suits between the same parties or between parties under whom they or any of them claim. Litigating under the same title. Where such civil suit in the same or any other court in Ethiopia having jurisdiction to grant the relief claimed
2. The pendency of a suit in a foreign court shall not preclude the court in Ethiopian form trying a suit found on the game cause of action
3. Where the matter in issue is also in issue in a suit pending in another court or is so closely connected a suit pending in another court that it can not properly tried separately the provision 2 of arts 11 or 244 and 245 as the case may be shall apply.

As it can be perceived form the sub article 1 of article 8

It say “no court shall try....’ This imply that the courts are mandated to reject case where

- The same case is previously instituted in the same or another court
- The case is between the some parties or one of them
- It is under the same title.
- In the fulfillment these requirements the court is not only empowered to reject the case but also obliged do so. Thus if the courts are aware

of situation that the case is being instituted twice it can reject the case without any objection by the parties.

The case can be instituted twice before the courts commonly under three situation.

1. Where a person (party) defendant institute. The same suit against prior plaintiff in the same court such situation mostly occurred by intentional act of defendant because most of the society understand as if plaintiff is better status in the litigation even though the reality is not
2. Where both parties institutes a suit against each other in different courts such situation mostly happens by negligence of the parties the parties may not aware of the institution suits even after they are aware of it they may not know legal consequence of pendency and continue claiming in both suits
3. In appeal case where both parties aggrieved by the decision. Of the court this situation is also happen by negligence of both parties. they appeal to the appellate courts then the case heard by the palpatate court a on two files this is the situation which I conduct the research

As clearly provided under sub article 2 of art 8 pending of a case in a foreign court is not regarded as pendent thus, to consider a case as a second suit the prior suit shall be instituted in Ethiopian as court.

Sub article 3 of art 8 provides that where the matter in issue in one court is also in issue in another court at the same time arts 11 or 244 and 245 as a case may be shall applicable. This sub article indicating legal remedies where the case pend on two different courts.

Article 11 to which sub article 3 of art 8 refer is provided as such

Art 11 consideration of suit

1. Where two or more suits or appeals are pending between the same parties in the same court, in which the same or similar question of law or fact are involved, the court may of it's own motion or on the application of either part order a consolidation of such suits or appeals on such terms as it thinks fit.
2. Where two or more suits are pending between the same parties in the same courts. In which the same or similar question of law or fact are involved, or where two or more suits pending between the same parties in different courts are so closely connected that they can not properly be tried separately, either the party may at any time before evidence is taken in any of such courts apply for an order that such suits be consolidate.
3. An application under sub art (2) shall be made to the high court, where the suits are pending in courts which are all subordinate there to, supreme court where one or more of the courts in which the suits are pending. To a division court on circuit,
4. The court to which the application is made shall, on granting the same direct by which the subordinate courts suits shall be tried.
5. The provision of sub article (2) and (4) or this article shall apply where two or more appeals in which the same or similar question of law factor involved, are pending between the same parties in different courts of the same trade.

When I see the provisions in this article one by one.

Sub article (1) of art 11 provides that consolidation of the suit or appeal shall be ordered where, there are two or more suits or appeal pending between the same parties in the same court there is the same or similar question of low or fact are involved.

In the fulfillment of these three elements the court can order the consolidation the suit or appeal by its motion or when the parties apply to this effect.

Therefore in the existence two or more suits or two or more appeal, with the same or similar question of law or fact between the same parties the consolidation of the suit or an appeal is order. The court can order it self while he aware of the existence of the situation.

Under sub article 2 of this article. The suits pending in different courts between the same parties are so closely connected that they can not properly tried separately it says this means the case is not necessarily the same. But need to be so closely connected which means the decision or order made on. One suit may change the claim in other courts, then to consolidate these suit the application of the parties made to high or supermen courts as a case may be as provided under sub article 3 .

If the suit is pending before two woreda or first instance courts the application made to high court but if the suit pends before two high courts between one high court and other first instance courts then the application is made to supreme court.

Sub article 4 is also consequence of sub article 2 and 3 which governs the order or the decision made on the application made under sub article 3.

Sub article 5 or this provision is the provision that incorporate the appeal which was clearly provided in the above sub articles except in sub article 1. It says the provision of sub article 2 and sub article 4 apply also in appeal case.

In general the provision of this article governs the pendncy of more than one suit or an appeal. If the parties are the same, if there is the same or similar question of low. If the cases are so closely inter related, the way in which the suit or an appeal is going to be consolidation and, the way an application of the parities will made is also provided regarding the suits brought (pending) of a case on different courts.

The other provision of civil procedure code to which sub article 3 or article 8 refers is article 244 and 245.

These provisions are provisions regarding preliminary objection in which the defendant object based on the grounds of objection provided under sub article 2 of article 244 listed form A to G and pending of a suit in another court is one

of the listed elements which is placed under C of the lists and therefore the court shall examine the objection of defendant of the second suit or by virtue of article 244(3) it (the court) can examine the situation because in the same suit decided on two files. The judgment may not be possible to be executed therefore the situation affects valid judgment thus by virtue of latter mentioned provision the court can consider the pending of a suit in another court, and as provided under article 245 making a necessary examination order consideration of suits or appeals or order an strike out of the latter filed suit as a case may be. In other legislation such as proclamation no 25/88 no governing rule is provided even though it is partially procedural law, especially regarding federal courts.

It does not have any provision related pendency therefore in this regard the provision of article 8 of civil procedure code is applicable when we see foreign legislation the most similar provisions the Indian civil procedure code. The provision and its illustration had put down by M.P Jain on 2007 edition of his book as follows:-

Section 510 no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in the previous previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court beyond the limit of (Indian) established or continued by the central government having like jurisdiction, or before (the supreme court).

This is the provision of Indian civil procedure code illustration and explanation are given by M.P Jain as follows :-

Explanation:- the pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action.

Comment:- object of the section the object of section 10 is to prevent court of concurrent jurisdiction from the simultaneously interfacing and

adjudicated up on two parallel litigations. In respect of same cause of action same subject matter and same relief what is contemplated by this section is that institution of the second suit is not barred, through the trial then of may not be proceeded with further more section 10 authorizes only stay of or proceeding not dismissal of proceeding.

For attracting the provision of section 10 the following conditions must be fulfilled

The suit must be between the same parties and or their successors.

- I. The matter in issue in the later suit must be directly and substantially the same as in the previous suit .
- II. Both the suit must be pending in court of law.
- III. The parties must be litigating under the same title in both suits.

As soon as the above conditions are fulfilled. The court shall not proceed with subsequently instituted suit the provisions contained in section 10 of the code are mandatory and modes creation is left with the court. The word trial this section has not been used in its widest since the concept is not applicable to subsequently instituted summary suits. The order of staying proceeding in the subsequent suit can be made at any stage.

Directly and substantially in issue means whole of subject of matter in both the proceeding is identical the fundamental test for applicability of sect 10 is whether the decision in provides suits operates as resjudicata in subsequent suit. The section applies to the suits instituted in civil court it can not apply to proceedings of other nature instituted under any other statute.

Illustration

Residing in Calcutta has an agent **A** at Calcutta employed to sell his goods there **A** sues **B** in Calcutta claiming a balance due up on an account in respect of dealing between him and **B** during the pendency of suit in the Calcutta court **B** institute a suit against **A** in Calcutta for on account and for damage caused by

A's alleged negligence. In this illustration all the conditions in this section are there namely the matter in issue in **B's** suit is directly and substantially the same as in **A's** suit further both the suits are between the same parties therefore if the court at Calcutta is a court of jurisdiction competent to grant the relief claimed in **B's** suit the Calcutta court must not proceed with the trials of **B'S** suit and the suit in Calcutta court being the one instituted prior in point of time should alone be proceeded with.

But if **A** was **B'S** agent at Colombo instead of at Calcut and the suit was brought by him in a Colombo court. The Calcutta court would not be precluded from proceeding with the trial of **B'S** suit the Colombo court being foreign court.

- I. Same parties for application of section 10 identify of parties is enough parties in two suits need not be the same. It is enough if previously instituted is between parties under whom they or any of them claim litigation under the same title. Fact that same parties are not parties in both suit will not stand in the way of the application this section.
- II. Matter in issue must be the same:- subject matter in dispute and matter in issue in two suits need not be identical in every particular. It is enough if the matter in controversy in two suits are substantially the same identity of relief too is not necessary for the applicability of this section. The order in matter in issue in section 10 of the code means the entire matter under controversy and not merely one of the several issues in suit.

The expression "is not equivalent" to any of the question in issue." Consequently whether the entire matter is not directly and substantially in issue in the previously instituted suit and it can be disposed on one of the points raised in the subsequently instituted suit. the provisions of section 10 of the code will not apply it is not however necessary for the applicability of this section that all the issues in the prior instituted suit should also be issued in the later suit.

Application by husband for judicial separation at Bombay subsequent application by wife for same relief in the court at Amritsar husband alleging

that his wife was immoral and had deserted him whereas wife alleging that her husband had deserted her and had also been cruel to her. Held matter in issue was directly and substantially the same and between the same parties proceeding in wife application should therefore stayed still disposal of the application of husband filed at Bombay court.

The Gujarat high court has however held in *Shoal Engg works V. Rustain Jehangir Vakil Mills* that section 10 would apply only if the whole of the subject matter in both the suits is identical and not merely where only one of the many issues in the two suits is identical.

- III. Suit must be pending:- section 10 only applies when previously instituted suit is pending. The Onus to prove that the previously instituted suit is pending lies up on the defendant in the latter suit. However, if a prior suit is pending in a foreign court section 10 does not apply. If there are two cross suits by two parties one for the nullity of marriage and the other for dissolution of marriage. The suit relating to nullity of marriage should be tried first.
- IV. Title must be the same:- the parties must be litigating under the same title in both the suits. It is not however necessary that the subject matter and the causes of action in the two suits should be the same provisions regarding appeal. It has been held by the Punjab high court that no appeal lies from an order passed under this section.

Provisions regarding letters patent appeal:-

The view taken by the high court of Bombay and Calcutta is that an order of staying or refusing to stay a suit under section 10 is a judgment within the measure of clause 15 of the letters. Patent and hence appealable under that clause. However, the high court of Madras and Andhra Pradesh have taken a contrary view.

Determination:- a decision rendered by the high court under section 19 (1)(f) of defense of Indian act is a determination it is within a competence of supreme court to grant special leave under Art 136 of the constitution.

Other provisions regarding stay of suits in the code are as follows:-

The court has inherent power to stay

- i) A suit which is an abuse of its process.
- ii) Cross suits on the ground of convenience.
- iii) Any suits even if it does not come under section 10 a high court has a power to stay a suit pending in another court (section 151).

An application for taxation of fair rent was made by tenant under Karnataka Rent Control Act 1961 subsequently the land lord filed an eviction suit against the tenant alleging that the protection of the act was not available to him. Then the tenant made an application for stay of suit pending disposal. It was rejected by high court in appeal the supreme court held that the application of the tenant if allowed and fair rent, if fixed he would be entitled to the protection of the act disposal of the application thus had impact on the suit. In the circumstances stay was granted.

The general over view of our civil procedural code and the Indian civil procedural code regarding pendency is almost the provisions are the same in that the conditions set down to consider a suit as pendent is all in all the same non applicability of pendency on suits pending in the foreign courts non applicability of pendency regarding cases pendent before other tribunal than courts and so on there is also a bit difference as put down by M.P Jain the Indian put the rule under section 10 of the code but in our code Provided under article 8 of the code. Under sub article 3 of Articles 8 of our civil procedure code the provision refer to Article 11, 244 and 245 of the same code, no such provision in Indian rules. It can also be observed from the comment of the mentioned writer that the suit is not rejected but stayed until the disposition of previous suit. In our case there is no provision that prohibit rejection of the suit and other remedies such as consolidation of suits is also available. Under article 245 of the code it says the court can order strike out of the case or make any other order if thinks fit. So the discretion provided under our law is not provided Indian law. It seems that Indian law presuppose that once the prior instituted case is decided then the party who defendant under subsequent suit can claim resjudicata and the suit can be rejected for identical

suits but rather doing so why not rejection ordered if the suits all in all identical since the relief expected to be given will be the same in both suits. The staying of suit may suppose the parties unnecessary suspense.

2.2 Practical Problem Exist With the Application of Rule of Pendency

As provided on the above mentioned provisions of civil procedure codes. The first measure to be taken what is provided under sub article 1 of article it says “No court shall try any suit in issue” the first clause imply that the courts are obliged not to try the case then what is going to done is the dismissed or strike out of the suit so in this situation the courts while aware of the suit being second pending in any manner should take either of these measures or the other measure which provided under Article 11 of civil procedure consolidation of the suit or an appeal. This can be operated under three conditions where the court aware and believe of it, where parties apply to the court in which suit pending. if it is in the some court, and where the parties apply to superior court of courts in which the suits are pending this is when the suits pending in different courts. The other and the last measure is the measure which is going to taken by - virtue of article 244 and 245 of civil procedure code. The objection of the defendant is required here or the court may be it self order what is provided under Art 245 sub 2 of civil procedure code but in practice all these legal provisions are not effectively implementing the factors can be :-

- i) Negligence of our courts.
- ii) Lack of legal knowledge of our society.
- iii) Non use and non availability of technologies which control unnecessary loading of prior pended suit.

As a result all the measure above mentioned remain not applicable then a court or the courts try the suit of the same cause of action between the same parties would be tried separately and judgment was given mostly the judgment is not same even it can be opposite under such situation the courts would be

in difficult condition to execute decisions since the judgments can not be executed simultaneously and selecting one of it and disregarding the other is not common as well as has no legal ground hence our courts are un able to execute the judgment they had given.

Since the provision our civil procedure code as mentioned above governs the situation before rendition of judgment but it say nothing after decision is made on two files regarding the same matter between the same parties or between their successors. Under same title claiming the same relief what is going to be done when the judgments can not be executed at the same time.

Pendency In Civil Litigation Is-Avis General Objective of Civil Procedure Law

As we can easily observe form the code, the 1965 Ethiopian civil procedure code it does not provided the general objective of civil procedure code. Even if the code does not say any thing about its general objective, in any legal system, the major objectives of civil procedure law is to settle or solve civil litigation in fair, economic and speedy circumstance.¹

Most of the civil procedural rules of Ethiopia are taken from the Indian civil procedure. The rule of pendency also provided under section 10 of the code of Indian civil procedure. The rule also borrowed from India civil procedure.

The rule of pendency is one of the ground of objection for the second suit on the same cause of action between same parties.

Similarly as provided in Robert Allen saddler: the purpose of procedure is to insure that legal disputes will be handled in affair and orderly way and as expeditiously and economically as possible.

Where a dispute is brought before a legal tribunal such as a court, it is the function of the court to perform properly that dispute, it must

operate under a well-defined and affective procedure. The claim of both parties must be heard in an orderly manner. The issue for decision, must be clearly presents to court's judgment must be enforced. It is the responsibility of lawyers and judges to see that the proper procedure is followed and that the litigation will end with a decision in accordance with the law.

If the general objective of civil procedure is to ensure that legal disputes will be handled in a fair and orderly way and as expeditiously and economically as possible, the rule of pendency also to achieve the same goal in civil litigation.

In addition to this the rule of pendency is to avoid conflict of to jurisdiction in civil litigation. To avoid multiplicity of the cases in the court which create the over lodde of the courts job and minimize their work quality and to avoid the impossibility of execution of judgment although it is provided that the same suit may not be instituted more than once it happens some times. There is also possibility that a suit will be instituted on the same claims in an Ethiopian court and foreign court. In such case the courts in which the statement of claim was first filed has jurisdiction. However, the pendency of a suit in court of foreign country does, not preclude the Ethiopian court from trying a suit funded on the cause of action; practically if we consider the rule of pendency in civil litigation in our court it faces two different problems. Because due to the failure of the courts in Ethiopia, our courts rendered two judgments on the issue of the same subject matter. For that matter we can refer two cases of file N0362/97 and 363/97.

According to this case, the case was first initiated at social court in rural Keble. Finally since the two parties aggrieved with the decision of the social court, they brought the cases to woreda court separately by appeal but the court treat/ both cases differently and the parts can not enjoy

their rights provided under the rule of pendency. So that the case does not executed yet, because both judgments careered to be executed.

Therefore, when we consider the general objective of civil procedure and the rule of pendency in civil litigation, it does not operate to ensure that legal disputes handled in a fair and orderly way according to the above cases.

2.4 The Rule of Pendency And Interest of Parties

The rule of pendency is one of the ground to dismiss two cases on the same clause of action, That means when two files brought on the same issue, the court require to avoid either of the two suits and must decided on the facts in issue, in another file. Because the decision given on the facts in issue in one file can be a remedy for the facts in issue in other file.

On the other hand if a single cases brought to the court at different file different decision may be given by the court, such decision is highly affect the interest of both parties. Because it will difficult to implement or execute the decision, the right of both parties remains silent to exercise, so that it is better to care of such cases.

If the parties do not apply to the court the existence prior instituted suit or appeal and the cases tried separately and decided as the cases which will be discussed in chapter three then it is difficult or even impossible to execute the judgments or one of the judgments then the rights and interest of the parties could irrevocably affected.

Economically the parties expend their money such as court fee payment of statement of claim, may be payment to hire the lawyer transportation cost, properties subject to claim may be attached and expose to loss of interest or expense and so on suffered by the parties socially there is no good relationship between the parties because they each other even if there is no right enforced

by the court (s) the society may also decrease value of the parties in suit because the society do not support giving each other before courts rather taking the cases to arbitration is mostly supported in our society.

Politically the parties as well as all other citizens loose the confidence on the government they do not believe with supremacy of law. The constitutional rights of the parties which is provided under Article 37 of FDRE Federal Democratic Republic of Ethiopia is violated.

It is a democratic right provided as such Article 37

Right of Access to Justice

1. Every one has the right to bring a just cable matter to and to obtain a decision or judgment by a court of law or any competent body with judicial power
2. The decision or judgment referred to under sub article of this article may be also sought by
 - (a) any association representing the collective or individual interest of its members or
 - (b) Any group or person who is member of or represents a group with similar interests.

The rights provided in the article is going to be violated because taking, the cases before the court and getting a judgment is simply losing of money, time and moral unless the judgment is made according legal procedure and able to executed.

Therefore when more than one judgment made on a single suit between the same parties, the parties affected economically socially and politically and all rights incorporated in these interests would be violated as a result.

To avoid such problem the parties entitled the rights under Art 244(2) (c) and Art 245 of Ethiopian civil procedure code. The parties expected to raise the existence of such problem during litigation. As provided under Art 8 of the Ethiopian Civil procedure code, there is an exceptional situations at which two cases involving the same causes of action at

different courts. For instance plaintiff might sue an Ethiopian national in Ethiopia and the defendant might file a Suit involving the same case at the place the suit instituted in foreign court does not preclude the Ethiopian court from seeing the cases.

2.5 POLICY Reasons For Incorporation of Rule of Pendency

As we have discussed in chapter one, the Ethiopian civil procedure code was established in 1965, Many of the new provision where based on the provisions contained in other codes such as Indian code of civil procedure The code was not enacted by the parliament and there is no legislative debt nor is there published that would indicate the drafters interpretation of doubtful provisions. Although the rule of pendency was incorporated in Ethiopian civil procedure for the first time so the code does not say any thing the reasons of incorporation of the rule of pendency.

Even if the code does not say reasons of incorporations of pendency, as stated by Allen Sadler, Ethiopian civil procedure, when different judgments rendered on the same subject matter exists between parties, it is difficult to execute the judgments so that the right of either parties may be affected eventually In such case the purpose of civil law does not achieved.

Even it is possible to imagine from the contribution of provision in litigation and the feature of provision then incorporation of rule of pendency decrease the conflict of jurisdiction therefore the court in which the first suit instituted is supposed to have a jurisdiction.

It maintain the judgment valid in that if the rules are carefully implemented by the courts the judgment of the court would not have been oppose each other and become impossible to execution.

If two or more files brought to the courts by the same parties for the same matter then it create the over load of the courts job and the courts become beasyless functional and unable to discharge their duty effectively as expected thus to avoid these problems in litigation the rule shall properly interpreted and implemented by the courts.

Such problem may arise as a result of the parties failed to raise the issue of leniency or the absence of case flow management in Ethiopian courts may be one of the ground for the occurrence of two judgments on the same matter between the same parties. The same reasons occurred in the judgments attached to this paper.

There fore, the policy reason to incorporation of the rule of pendency in Ethiopia civic procedure is to avoid such practical problems to occur.

CHAPTER THREE

Case Analysis

3. Problem of The Case

3.1 Case1, Alemnesh Bedane Vs Abeynesh Chaka

The first file was instituted by W/ro Alemenesh Bedane against w/ro Abeynesh Chako at Goro Gebriel kebele social court, provided that the plaintiff claim that her mother w/ro workitu Dagata and her father Ato Bedane buli died in 1984 and 1985 respectively. As a result she was granted the right of succession by court order and require the releasance of her parents farm land amounted to 22 kart which was possessed by the defendant w/ro Abeynesh chaka.

W/ro Abeynesh chaka on her part respond to the case that, her mother's farm land is not under my possession, but concerning her father's farm land, in 1984 while he was alive, since he was incapable to pay tax of that land, He delegate my husband who was the son of Ato Bedane buli to pay tax of the land and took the possession. As result from 1984, we were paying the required tax of land for 13 consultative years. So the plaintiff has no right to obtain the possession. Having considering the litigation and evidences brought by both parties, the social court passed the judgment that both the plaintiff and the husband of the defendant are the descendents of the deceased, so that among 22 kert of the farm land the plaintiff w/ro Alemnesh Bedane shall entitled 8 kert and the remaining must remain in the hands of the defendant.

On the basis of this judgment both parties, took the appeal to kersa malima woreda court.

3.1.1 Case File No.362/97.

According to the detail of this file, the first plaintiff brought her grievances to the woreda court and claim that, the lawyer court with out considering the issue of the case decided that among 22 kert of the farm land only 8 kert possession must given to the plaintiff and the remaining must be in the hands of the defendant .So i require the court to invalidate the lawyer court decision and give the decision that all the farm land 22 kart transferred to me and the defendant bound to release the possession.

Having considering the lower court decision: the first instance court give the order that, the lower court decision was valid by virtue of Art.337 Ethiopian civil code and no reason to enter into the merit of the case by ordering the appearance of respondent Abeynesh caka.

3.1.2 Case File No.363.97

According to the detail of this file the first defendant to the case brought the appeal to the same woreda court, and she claim In her grievance that' during the litigation at lower court, she has raised the issue of limitation of time and, the court reject this issue without any reason and gave the judgment to the case which bind me to loss 8 kert of may possession among 22 kart of farm land. So she require the appellate court to invalidate the lower court decision and give order the possession of all 22 kart farm land to her.

Having considering the grievances brought, the appellate court order the appearance of respondent with her response ,on the given date the respondent w/ro Alemnesh Bedane appeared before the court and respond that the decision of the lower court is valid ,and there i.s no reason to invalidate the decision.

After all the appellate court invalidate the lower court decision and give the order that ,all the farm land provided in the case shall be entitled to the appellant (w/ro Abeyinesh caka).

3.1.3 Reason of The Court

The appellate court has identified that, the issue of limitation which was raised by the defendant(now appellant) in the lower court was legal and require to be considered by the court by virtue of proclaim no.31/67(5) and Oromiya land proclamation 56(94). As the court stated' that according to proclamation no.31/67(5) land was only subject to succession through delegation, so that one can entitled this right only if he is the agent of the deceased. As a result the respondent (former plaintiff) has no such right to obtain the farm land from the defendant. So the decision of the lower court was not valid.

3.1.4 Comment On The Cases

As one can understand from the cases brought to the appellate court, no party to the case has raised the issue of pendency in the litigation. The court also did not say nothing about it in the case.

However in the second file cases the court itself stated in the judgment that both parties were aggrieved in the decision given in the lower court and took appeal to woreda court. But it did not consider any action to consolidate the two cases to fined the truth, rather it was negligent to consider the cases.

On the other hand in the first file (362/97) besides the saliency of the parties to the case, there was no opportunity to court to consider the issue of pendency, since the court was not interred into the detail or the merit of the case. But in the second file even if they were not considered it as their right the parties have raised that both of them brought appeal

to the court. In such situation the court should be wise to consider the issue- of pendency to give right decision, but it failed to considerer. Finally two judgments were given by the same court.

In the first file (362 /97) the court decided that the decision of the lower Court is valid and no reason to invalidate it. In the second file (363/97) the decision of the lower court ii not valid and it decided invalid. From this point of view, what we consider that, there is no experience developed in the society to raise the right of pendency as preliminary objection. Similarly there was no a mechanism to control the appearance of similar cases differently by the same parties. Father more, the judges are negligent to manage the cases even the issue of pendency raised by the parties indirectly' in the litigation.

In both cases the issue of pendency as a right of parties, is not well understood by the society. The court on its Part has no a mechanisms to control the appearance of two files which has the same cause of action and between the same parties. Even as we understood from the above files in a situation where the parties states the existence of two files, the judges did not gave attentions to the pendency and its effect.

Unfortunately the decision of both, files got validity before the high court and Supreme Court. Later when it comes to execution both decision faces a problem. So the right of parties still at stake.

So, in such case the law should give a remedy to solve execution problem.

3.2 Case 2 Mechessa Amena Vs Gizaw Angasu

The case was first brought before the social court of Desse Jabo Kebele Farmer Association.

As the fact in the case, the plaintiff Ato Mechessa Amena claim his possession of farm land which was transferred to the defendant Ato Gizaw Angasu through contract in 1990EC. The defendant was enjoying the possession until 1997E.C. But when the plaintiffs require the return of possession in 1997 E.E, defendant refused to return the possession of the land. Finally, the social court ordered the appearance of evidences from both parties. The plaintiff produced his evidences (written and eye witnesses) and has proved that he was the original possessor of the land from 1969 and the possession of land was transferred to the defendant through contractual agreement concluded between them in 1990 E.C. But rather than saying, he was the possessor of land from 1983, the defendant couldn't produce his evidence to prove the fact in issue.

After all the court pass a decision that the properties on the given land should be evaluated by professional and its value (price) shall be paid for the defendant, and the possession shall be returned to the plaintiff (Ato Mechessa Amena). Finally, both parties aggrieved in the decision of social court and brought the case to woliso wereda court at different files.

3.2.1 Case File No 10820

In file no 10820, the applicant was the plaintiff of the first suit (Ato Mechessa Amena) provides his complain that, he has not obliged to pay the values of the properties on that land, rather he want to obtain his possession with all the properties on it.

The defendants respond that by virtue of Oromia land proclamation No, 66195 Art 54(2) the plaintiff has no right to claim this land, due to period of limitation. Having considering the arguments from both parties the court decided that the decision of lower court is valid and no reason to invalidate the decision.

3.2.2. Case File No.10832

According to this file, the applicant or the defendant to the original case,(Ato Gizaw Angasu) claim that, there is no written agreement bin them. Was the possessor of land from 1983, the defendant couldn't produce his evidence to prove the fact in issue.

After all the court pass a decision that the properties on the given land should be evaluated by professional and its value (price) shall be paid for the defendant, and the possession shall be returned to the plaintiff (Ato Mechessa Amena). Finally, both parties aggrieved in the decision of social court and brought the case to woliso wereda court at different files. He occupied the possession in 1983 in legal way. So, I wouldn't obliged to release the possession.

The respondent (the original plaintiff) Ato Mechessa raise the pendency as objection. That means, the case was decided by this court in file no 10820. So no need to be considered again be virtue of Art 5 of Ethiopian procedure code.

The court reject the objection raised by the respondent with out any reason and entered in to the case and in validate, the decision of social court and ordered that the land (possession) shall be remain in the hands of the defendant of the original case.

3.2.3 Comment On The Case

Case file No, 10820 was the first file appear" before the Woreda court By appeal. At that time the second file was not brought before the court. So, the question of pendency does not expected from parties. So the decision of the appellate court was held procedurally.

However, case file No, 10832 was the second file appeared before Woloso Woreda court by appeal. During hearing of the case, the respondent has

raised the pendency as preliminary objection, by stating that, the court shall not proceed to consider the case, as it has been decided prior to this case in this court ,by virtue of Art 5 - of Ethiopian civil procedure code. But, the court really passed over the objection of parties without any reason and effort to check whether it has been decided or not. After all, the court, itself be comes the cause of problem to give different judgments on the same cause of action and between the same parties, which was difficult for the execution until the two judgments consolidated through the high court order. From this point of view, the problem of pendency is not only the result of the failure of parties to exercise this right, but also the inelegancy and, potential of our judges in civil litigation. Such problem leads to render injustice decision in which the society loss confidence from supremacy of the law. So, our courts should be careful not only in case flow management but also to consider what has been raised by parties during hearing.

3.3 Other Incidence of Application of Rule of Pendency

To identify the problem of the application of pendency as the right of parties, and to though the solution, i attempt to forward same questions, for judges, prosecutors and advocators. When two files opened on the some cause of action, if one judge gave judgment(decision) in one file and other judges in another file differently Regarding its effect, both judgments have equal binding power. Even if it decided by different judies, both judges follow the given civil procedure and pass a decision. Such problem may be result from different grounds.

For instance, the parties failed to raise the existence of pendency' during litigation.

The court also has no mechanisms to control the existence of two files in a court, the time and circumstances the cases -brought to the court. Really it is very difficult for execution. Because different judgment has given on a single cause of action between same parties. Executing one judgment affect the other. So it is impossible to execute the decisions. There is no remedy in civil procedure, that is one of the weak side of our civil procedure law. However, it is difficult it for the second judgment to be executed while in the first judgment execute before the second. Because the first judgment by itself is legal and binding. In such case there is no remedy in our civil procedure, so that the law must require a remedy for such problems. Otherwise it leads to social disturbances. So there should be legal remedy which allows both judgments to be considered together. Because the society loss the confidences in law, the supremacy of law itself become meaningless, and the society seek other remedy like using the force, and other behavior. 3 A remedy for the problem occurred with pendency generally, there should be inter reading between judges in the court. The Society require to be informed the existence or such right as objection.

The executive, the judiciary shall give information about the preliminary objection provided in the low, and remedies there should be case flow management control in the court which is support'ed by Computer .

Generally when we evaluate the practical problem with the application of pendency in our courts, the failure of the parties to raise the existence of such issue in same or different courts due, to the lack of legal a wariness in our society, and the absence of predicting the feature effect of judgments, the problem can occurred. The court also has its own role for the occurrence of problem. Finally, the absence of legal remedy in our civil procedure also contributes in the execution of tow judgments given on the same cause of action between same parties.

CHAPTER FOUR

4.1 Conclusion And Recommendations

4.1.1 Conclusion

To warm up the discussion, pendency is a right provided under Ethiopian civil procedure code for the-parties to the Suit. It is one of the preliminary objections required to be raised by parties while new Suits appear before the Court after the first Suit. However, in practices such legal prohibition is violated due to different reasons. But the law does not provided any remedy when two judgments have rendered on the same cause of action. Therefore, the writer proceeded to conduct a sort of opinion survey by interviewing Warktu Dagafa member of public prosecutor, judges, Lowers and peoples of South West Show Zone of different Weredas. The research shows that the parties to the Suit are not active to raise pendency as preliminary objection. Because most of our rural society are layman and has no such potential in civil litigation .Similarly, the court has no mechanism to control repeated files and the registrar of court simply accept the suits brought before it, if fulfills the formality required by law. So the parties' rights are affected substantially, and the objective of civil law does not achieve. So this research aims at to propose the addition of necessary provisions which govern such problem in civil procedure code and to address the practical problem arises with the rule of pendency in civil litigation. So the legislative bodies should focus on this problem.

4.1.2 Recommendation

The following recommendations are worth considering in relation to this all significant issue.

- Having regard to a single case brought to the court at different files different decision may be given by such court .So there should be case flow management in courts, which enable to control the existence of two files, the time and circumstances the cases brought to court. So the society had confidence in law and the supremacy of law respected.
- It is advisable for our courts to have case flow management which is supported by modem computer and data base. That means there should be a trained professional assigned on case flow management. The court should have mechanism I which it control the parties and the case H/n them. It must be easily picked out and make the two files to be considered together or to remove one of the file.
- It is common for our society that the parties in civil litigation are not so active to exercise preliminary objection as of right. because, most of our people are layman and there is a few legal advisors. So that, we have to teach our society about the rights and duties exists in civil procedure~ code and other laws (civil and criminal laws).

Even during litigation it is important for judges to inform the parties about the existence of either files pending in that court or in other courts. Because it is very important to give right decision.

- In the cases where the two files appear before court on the same cause of action bin the same parties are decided unfortunately and differently contributes to back log delay, there should be a legal provisions that govern such decision which are difficult to execute. That means there should be the opportunity to the court to consider the two cases together to give a single and enforceable decision.

Because the two decisions may be given at higher and final level of the court structure.

- The court also contributes for the occurrence of problem with pendency, due to the potential of our judges or their negligence in entertaining the cases. So that the government require to improve the potential of judges from time to time .through training. For those negligent judges, the judicial administration shall take necessary measures to avoid the problem and makes them careful in their jobs.

Finally if the above mentioned measures do not stop the existing situation and to opposing or different decision had been given the court should select one of the decisions and execute it rather leaving the parties with judgment papers. The way of selection shall be based. On the filing dates of the suits like during litigation the latter filed and decided suit shall be invalidated the judgment should not executed because from the very beginning the suit should not be heard with the existence of prior filed suit of the cause of action and between the same party or their beneficiary.

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*I hear by declare that this paper is my original work, and
I take full responsibility for any failure to observe the
conventional rules of citation.*

Name Frehiwot Kebede

Signed _____