



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**LAND AND ENVIRONMENT COURT**  
**CIVIL CASE NO.52 OF 2007**

**JOYCE WAIRIMU MURIRA.....PLAINTIFF**

**VERSUS**

**NDEGWA GITU.....DEFENDANT**

**J U D G M E N T**

By Originating Summons dated and filed on the 5th of July 2007, the plaintiff claims against the defendant Land Parcel **Loc.3/Gichagini/250** measuring 1.44 acres or thereabouts situated within Murang'a District.

She claims that she is entitled by adverse possession of the suit land having been in possession of the land for a period more than twelve years. She claims that the suit parcel of land known as **Location 3/Gichagini/250** should be registered in her name as the sole proprietor absolutely in the place of the defendant and prays for costs of the suit.

The grounds for the claim are that she has been in continuous, uninterrupted, exclusive occupation of parcel of land since 1969.

The Originating Summons is supported by the affidavit of Joyce Wairimu Murira who reiterates that she has been in continuous uninterrupted exclusive possession/occupation of parcel land number **Location 3/Gichagini/250** located within Murang'a District since 1969 where she built her family home and does small scale farming. That the said occupation has been done continuously as of right, openly, quietly and without force and without permission from the defendant and or his representative and without any hindrance from the defendant.

That she came into possession of the said property on 19th September, 1969 when she jointly bought the said parcel of land with her said late husband from the defendant. The plaintiff entered into a sale agreement with the defendant herein dated 19th September 1969 which sale agreement she eventually misplaced. That after the said purchase and having taken possession of the property immediately after the said purchase, they inadvertently failed to cause the property to be registered their names hence the said parcel of land continues to be registered in the name of the defendant. That she had invested in the said land and planted crops and trees and built her family home thereon. That she had occupied the said parcel of land continuously without interruption for about 38 years and has acquired title to the same by adverse possession and prays that the originating summons be allowed.

The summons to enter appearance were served through substituted service in the Daily Nation of 16/6/2008 at page 51. However, the defendant failed to respond to the said summons and fourteen days

after the lapse of the service of summons the plaintiff's advocate applied for an interlocutory judgment which was granted on 27/7/2009 and the plaintiff was allowed to proceed with formal proof.

The matter came up for formal proof on the 4/12/2012 when the plaintiff gave her testimony and stated that she bought the parcel of land in dispute with her husband in 1969 and took possession immediately. She has been in possession since then and has developed the same and planted tea bushes. She has lived in the parcel of land for 49 years. She produced a certificate of official search indicating that the parcel of land is in the defendant's name. Nobody has ever claimed the land and therefore she prays that she be registered the owner of the land.

The law on adverse possession is very clear and has now been settled as follows;

The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely **(a) open and notorious use of the property**. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. **(b) Continuous use of the property** – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. **(c) Exclusive use of the property** – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. **(d) Actual possession of the property** – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by ***clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings*** or other improvements. If the property is residential, such actions may include ***mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures*** (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. **(e) Non-permissive, hostile or adverse use of the property** – The adverse party entered or used the land without permission. Renters, hunters or

others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: **Objective view**—used without true owner's permission and inconsistent with true owner's rights. **Bad faith** or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. **Good faith** view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.

Turning to the originating summons I do find that the plaintiff has proved his case on a balance of probabilities that she has been in continuous and uninterrupted possession and occupation of the suit land parcel **Loc.3/Gichagini/250** for a period in excess of 12 years and has therefore satisfied the five basic conditions and specific requirements of adverse possession hence is entitled to be registered as the proprietor thereof in the place of the defendant herein by adverse possession .

I have considered the evidence given by the plaintiff and the law on adverse possession and do find that the plaintiff has satisfied the said principles and do grant prayers 1, 2 and 3 of the Originating Summons. Orders accordingly.

***Dated, signed and delivered at Nyeri this 25th day of September 2013.***

**A. OMBWAYO**

**JUDGE**