



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC. SUIT NO.382 OF 2017

(FORMERLY CIVIL SUIT NO.1062 OF 2012 [O.S] NAIROBI)

MARY NYAMBURA WAIME.....PLAINTIFF

-VERSUS-

ERIC MUTUNGA MWANGI.....1ST DEFENDANT

JANE MUTHONI MUTUNGA.....2ND DEFENDANT

AND

ROSE ASALACHE ANUSU.....3RD PARTY

JUDGEMENT

By an **Originating Summons** dated **24th December 2012**, the Plaintiff herein **Mary Nyambura Waime**, has sought for determination of three questions by the Court. The claim is against the Defendants herein and the Plaintiff claims to have acquired title by adverse possession of all that portion of land known as **LR.No.13748**, registered in the names of the Defendants. The questions for determination are:-

i. Whether the Plaintiff is entitled by adverse possession under Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya, to be registered as the proprietor of all that parcel of land known as LR.No.13748.

ii. Whether the Defendants should execute all necessary documents and to do all acts necessary to have the Plaintiff registered as owner of the parcel of land known as LR.No.13748, and in default thereof the Deputy Registrar of this Court be authorized to execute all necessary documents and to do all acts necessary on behalf of the Defendants.

iii Who pays the costs of this suit?

The **Originating Summons** is supported by the affidavit of **Mary Nyambura Waime**, and *the viva voce* evidence adduced in court.

In her **Supporting Affidavit**, the Plaintiff alleged that she has been residing on the suit property **LR.No.13748**, since **1973**. She further averred that she started residing on the said land parcel following an allocation by the Government of Kenya in the **year 1973**. Further that this land is clearly identifiable and well demarcated and it measures **0.02024 Hectares**. She also alleged that after entering and occupying the said land, she constructed a residential house and has been residing and carrying out cultivation thereon ever since.

It was her further contention that at no time did anybody raise any issue regarding her occupation of the land until **21st December 2012**, when hired goons descended on the property and destroyed her house flattening it to the ground. She further contented that prior to the time the goons descended on the land, her occupation had never been interfered with and her peaceful enjoyment had not been disturbed. The Plaintiff also averred that at the time of demolition of her property, she was shown a copy of the title which had allegedly been issued to the Defendants in the **year 2005**. Further that from the said title, it was shown that the Defendants had purportedly purchased the suit property from one **Rose Asalache Anusu**, who was the allegedly previous registered owner and the said alleged transaction was done in the **year 2005**.

She reiterated that she has been residing on the suit property since the **year 1973**, and she was even issued with allotment letter by the Government. However, her copy of the said allotment letter was destroyed together with other documents during the demolition of her property. She further contented that she derives her livelihood from the suit land as opposed to the Defendants who have other places of

abode. The Plaintiff urged the Court to declare that she is the lawful owner of the suit land by way of *adverse possession*, and that the court should direct that she be registered as so.

This *Originating Summons* is contested and **Eric Mutunga Mwangi**, the 1st Defendant herein swore a *Replying Affidavit* on **17th January 2013**, on his behalf and on behalf of the 2nd Defendant who is his wife and contended that they are the registered proprietors in possession of all that property known as **LR.No.13748**, situated in **Karen Brooks** area of **Karen, Nairobi** as is evident from the *certificate of title marked EMM1*. He also averred that he bought the said property in the **year 2005** from **Rose Asalache Anusu** for **Kshs.2,400,000/=** as is evident from the *Sale Agreement and transfer marked EMM2(a) and 2(b)*. He further averred that the property was sold to them and they were handed vacant possession by the said vendor and there was no development on the said property. He refuted any claim that the Plaintiff was residing on the suit land at the time of purchase but alleged that he and acquired the land in vacant possession and Plaintiff never resided thereon.

He further alleged that he was only informed by his caretaker in the **year 2006**, that some people were putting up temporary structures on their land. He also alleged that he reported the matter to the area chief and he used some workers to demolish the said structures on the suit land and remove the debris and other materials which were taken to the chief's camp. It was his further contention that after the demolition, the Plaintiff caused his workers to be arrested and they were booked in at Karen Police Station. However, after the 1st Defendant produced his certificate of title, and the Plaintiff failed to produce any document to prove ownership of the land, the workers were released without any charges.

He also contended that the Plaintiff again invaded his parcel of land in **December 2012**, and put up other structures but after reporting the matter to the area Assistant Chief, the said structures were brought down. He further disputed that the Plaintiff resides on the said property as claimed by her and that she does not carry any peasant farming thereon. It was his contention that the suit land is vacant, undeveloped and unoccupied and that the Defendants are the legitimate owners of the said suit property **LR.No.13748**. He urged the Court to dismiss the instant Originating Summons.

On **19th March 2014**, the Defendants filed an application seeking to enjoin **Rose Asalache Anusu** as a third party in these proceedings. Consequently, the *Third Party* filed her *Defence* on **7th November 2014**, and averred that the suit property was allocated to her deceased husband in **1986**, by the Ministry of Lands. However, her husband died before completing the processing of the title and upon the said demise, the third party as a beneficiary applied and was issued with a title deed in her name in the **year 2005**.

Further that the third party sold the suit property to the Defendants and handed over vacant possession to them. She therefore denied selling the suit property to the Defendants when the Plaintiff had already acquired right of ownership over the said property. The third party also averred that the Plaintiff's claim on adverse possession is untenable as she alleged that she was residing on the suit land from **1973**, as an allottee from the Government and yet adverse possession presupposes an uninterrupted **12 years** occupation without right of ownership and without consent of the registered owners. Further that a period of adverse possession against the registered owners (Defendants) can only start counting from the **year 2005**, when the Defendants became the registered owners and which period is less than **12 years**. She therefore stated that she is not liable to the Defendants as claimed in the third party Notice. She urged the Court to dismiss any claim against her with costs.

The matter commenced for viva voce evidence on **7th June 2016**, wherein Plaintiff herein gave evidence for herself and called two more witnesses.

The Plaintiff's Case

PW1- Mary Nyambura Waime, testified that she lives in Karen area and she is a retired *Civil Servant*, wherein she was working as a driver with the Ministry of Health. She testified that the suit property **LR.No.13748**, was allotted to her by the Government in the **year 1973**. She also testified that she has lived on this suit property since then. It was her further testimony that she entered into the suit land without permission and no one asked her to move out and even evicted her. That the suit land was surveyed and demarcated in the **year 1985**, while she was still residing thereon. Further, that she was issued with an allotment letter but in the **year 2005**, some people destroyed her property and the said allotment letter was also destroyed. She also testified that after the said demolition of **2005**, she lodged several complaints with the Provincial Administration as was evident from some of the letters attached to the bundle of documents. She also wrote a complaint to the Attorney General and the said office responded by a letter dated **6th October 2006**, and the harassment on her stopped.

She also testified that she lived peaceful until **19th December 2012**, when some goons invaded her home and destroyed all the houses thereon. Again the invasion continued on **24th December 2012**, and her *Kei Apple fence* was destroyed. Then she met the 1st Defendant who told her that he owned the suit property and he destroyed her structures that were on the suit land and there was no Court Order authorizing him to do so. She then consulted her advocate and filed this suit. She urged the Court to allow her claim as she has been on the suit land since **1973**.

It was her further testimony that she has never seen **Rose**, the Third Party herein and that she saw the title deed of the parcel of land for the first time in court. In cross-examination, she denied that she put up her house on the suit land during the subsistence of this case, though she admitted that she wrote a letter to her employer in **October 2014**, requesting them to allow her to stay in the Government Quarters for a little while to allow her complete putting up of her house. She also admitted that during the duration of her employment, she lived in Government Quarters though her house was in Karen.

PW2 – Thomas Mukiri Mburu, told the Court that he lives in Karen Brooks and was even born there. He adopted his witness statement dated **14th February 2013**, as his evidence in court. It was his testimony that his parent's parcel of land was **LR.No.13573**, in Karen Brooks and the Plaintiff was their immediate neighbor. That the said plots were issued to the owners by the Government and subdivision was done in the **year 1985** and individuals were allotted their individual plots and issued with letters of allotments. He also testified that the Plaintiff has been their neighbor since **1973**, and she was a close friend of his mother **Miriam Wangari Munyiri**. He further stated that they have co-

existed with the Plaintiff since then and she constructed her home on the suit property and even brought up her children therein. Further that the Plaintiff had lived on the suit property without interruption but on the night of **19th December 2012**, the Plaintiff's premises was invaded by hired goons who demolished her houses and all the structures on the suit land. Again the premises was invaded on **24th December 2012**, by the same people who destroyed the perimeter fence of barbed wire. It was his testimony that the Plaintiff's acquisition and occupation of the suit property is similar to theirs and he would have known if there was anyone else owning it.

PW3 – Ronald Ndwiga Njagi, also adopted his witness statement dated **12th February 2013**. He stated that he has known the Plaintiff herein since **1973**, when she settled at Matopeni slums now known as Karen Brooks, which was a portion of **Trust land**, off Langata Road. He was by then working as a Police Officer attached to Karen Police Station. That the two notable settlers of Matopeni Slums were **Miriam Wangari Munyiri** and the Plaintiff herein. It was his further testimony that Matopeni slums area was suspiciously demarcated in 1985, into various plots and was dished out to politicians and powerful individuals in Government. That by then, the Plaintiff and **Miriam Wangari Munyiri** had semi-permanent residential structures on the said slum as they were pioneer settlers. He further testified that he left the police force in **1984** and moved to **Ngando Estate**, but he is aware that the Plaintiff built her residential structures on the suit property.

The Defendants' Case

DW1 – Eric Mutunga Mwangi, told the Court that the 2nd Defendant **Jane Muthoni Mutunga** is his wife. Further that they jointly own the suit property which is in Karen Brooks after purchasing the same from **Rose Asalache Anusu** in the **year 2005**. He further testified that the Plaintiff invaded this suit property in the **year 2006**, but his workers removed the structures that the Plaintiff had erected. The Plaintiff thereafter caused his workers to be arrested and taken to Karen Police Station, but when he produced certificate of title for this parcel of land **LR.No.13748**, the police released the said workers without charges. Further that the Plaintiff invaded the property again in **December 2012**, and built some structures thereon. That he reported the matter to the authority and the said structures were removed. Thereafter the Plaintiff filed this suit and she reconstructed the temporary structures in the **year 2014**, even while there was in existence interim orders in his favour. He denied that the Plaintiff had lived on the suit property since **1973**. He alleged that when he purchased the suit property it was vacant.

DW2 – Jackson Tuwei, a retired **Military Officer**, told the Court that he lives in Karen Brooks. He further told the court that he bought his property in Karen Brooks in the **year 1996**, and began construction of his home. That the Defendants' property is next to his plot and that Plaintiff has never lived on the said property **since 2000**, when he started the construction. It was his further testimony that during the construction of his house, the Defendants' property was empty and he never saw the Plaintiff living therein. That he moved into the said house in the **year 2007** and he did not see anyone on the Defendants' land. However, he saw construction of temporary structures in the **year 2012**, and when he called the 1st Defendant to inquire about the said construction, 1st Defendant said that he was not aware of such construction. It was his testimony that he has never seen the Plaintiff on the suit property. He reiterated that he began construction of his house in the **year 2000** and there was no one on the suit property.

DW3 – Paul Mukabi Omende, told the court that he lives in Dagoretti but previously, he lived in Karen Brooks as a casual labourer. He further stated that he worked for the 1st Defendant as a casual labourer from the **year 2005**. He was taking care of his plot which was next to **John Tuwei's** plot. Then a lady invaded the said land and put up a temporary structure.

He informed the 1st Defendant about the said invasion. The lady who invaded the plot is the Plaintiff herein. He reported the said invasion to the 1st Defendant who organized for the demolition of the structures put up by the Plaintiff. Later the people who demolished the structures were arrested and taken to Karen Police Station. They were later released without charges.

DW4 – Patrick Kaburu Kibocha, told the Court that the 1st Defendant was his childhood friend. That in the **year 2006**, the 1st Defendant called him to assist him as some people had invaded his property and had erected structures thereon. He testified that he visited the suit property in **September 2006**, in company of two more workers. That they demolished the said structures and then they were arrested by Police Officers from Karen Police Station. Then the OCS asked 1st Defendant and Plaintiff to produce document of ownership. The 1st Defendant had a copy of title deed but the Plaintiff had none. After the production of title deed by the 1st defendant, the OCS released them without charges. He testified that the suit property belongs to the 1st Defendant.

The Third Party's Case

3rd Party – Rose Asalache Anusu, told the Court that she is known to the Defendants herein as she sold the suit land to them. She testified that the suit property was initially allocated to her husband who later died before the title was issued to him. That she acquired the title in her name in the **year 2005**, as a beneficiary of the Estate of her husband. She then decided to sell the suit property to the Defendants and after payment of the purchase price, she gave them vacant possession. It was her testimony that she gave the Defendants vacant possession of the suit property in the **year 2005**. She confirmed that she initially owned the property before selling it to the Defendants and that the plot was a new allocation which had been allocated to her husband **Henry Anusu**. That the plot was transferred to her after the death of her husband.

After the close of the viva voce evidence, parties filed their respective written submissions which this Court has carefully considered together with the cited authorities. The Court has also considered the evidence in its entirety and the exhibits therein and the Court renders itself as follows:-

There is no doubt that the suit property herein **LR.No.13748**, is now registered in the name of the Defendants herein. The said registration was done on **1st September 2005**, after the Defendants duly purchased this suit land from one **Rose Asalache Anusu** as is evident from the Sale Agreement dated **13th June 2005**, produced by the Defendants. There is also a transfer dated **15th August 2005**, which confirms that **Rose Asalache Anusu**, the 3rd party herein transferred the suit property **LR.No.13748**, **Grant No.IR 98162** to **Erick Mutunga Mwangi** and **Jane Muthoni Mutunga**, the Defendants in this suit. From the bundle of documents produced by the 3rd party, **Rose Asalache Anusu**, there is no doubt that **Henry A. Anusu** was allotted **plot No.56 of LR.No.2259/145**, in the **year 1985**. The 3rd party alleged that the said **Henry**

Anusu was her husband and since there was no evidence to the contrary, the Court believes that indeed **Henry Anusu** was a husband to the 3rd party herein.

There is evidence that after the said **Henry Anusu** passed on, the Commissioner of Lands allowed the suit land to be registered in the name of his widow **Rose Asalache Anusu**. The said authority is contained in the letter dated **11th May 2005**. From the index map attached to the bundle of documents produced by the 3rd party, it is evident that **LR.No.13748**, was a subdivision of **LR.No.2259/145**, wherein the said **Henry Anusu** had been allocated **plot No.56**. Indeed on the said index map plot **No.56** is indicated as **LR.No.13748**. The Court therefore finds that the root of this plot **No.13748** is traceable. It is also evident that the Defendants paid all the purchase price to the said vendor (**Rose Asalache Anusu**) to the tune of **Kshs.2,400,000/=**. Thereafter the certificate of title was registered in the names of the Defendants.

The Defendants through DW1, **Erick Mutunga Mwangi** alleged that after they purchased the suit property, they were granted vacant possession by the 3rd party. The 3rd party also in her evidence stated that after she sold the suit property to the Defendants, she ensured that the trespasser who had erected an illegal structure was removed and she handed vacant possession to the Defendants (purchasers). It was her testimony that the said trespasser was a young man and not the Plaintiff herein.

This suit property was registered in the name of the Defendants as **Joint Tenants** on **1st September 2005** and the said registration was done under "The Registration of Titles Act, Cap 281 Laws of Kenya" (now repealed). Under the said regime, Section 23(1) provides as follows:-

"The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all court as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the grounds of fraud or misrepresentation to which he is proved to be a party".

Therefore, *prima-faciely*, the Defendants are the absolute and indefeasible owners of the suit property. However, the said title can be challenged as stipulated in the above Section but none of the said exceptions have been used to challenge the Defendants' title to the suit property by the Plaintiff herein.

The Plaintiff has alleged that she acquired title to the suit property by virtue of adverse possession. She has also alleged that she entered into possession of the suit property in the **year 1973**, as a squatter since the land herein belonged to the Government. Later the said land was surveyed

and subdivided and Plaintiff together with other squatters were allocated the specific plots where they live in. That such other squatter who was allocated land was one **Miriam Wangare Munyiri**, the mother to PW2 and who later acquired title deed to her land. The Plaintiff in her evidence stated that she was issued with a letter of allotment to this suit property. However she allegedly lost the same in the **year 2012**, when her house was allegedly demolished. Therefore the Plaintiff did not produce any letter of allotment or any document of ownership of the suit property. Even if the Plaintiff's letter of allotment was destroyed during the alleged demolition of her home in the year **2012**, it was possible for her to obtain a copy from the Ministry of lands. She did not do so.

The above being the undisputed facts, the Court finds that the issues for determination are as follows:-

- i. Whether the Plaintiff has acquired title to LR.No.13748, by adverse possession.***
- ii Whether LR.No.13748 should be transferred and registered in the name of the Plaintiff.***
- iii. Are the Defendants entitled to seek indemnity from the 3rd party.***
- iv. Who should bear cost of this suit.***
- i) Whether the Plaintiff has acquired title to LR.No.13748 by***

Adverse Possession

This claim is anchored under Section 38 of Limitation of Actions Act, Cap 22 Laws of Kenya, which provides as follows:-

38(1) "Where a person claims to have become entitled by adverse possession to land, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land".

The Plaintiff herein has alleged that she is entitled to be declared the proprietor of the suit property having entered into the suit land in the **year 1973**. She alleged that she entered into the said property without permission but she was later issued with a letter of allotment after the land was surveyed around the **year 1985**. She alleged that she had put up her residential house on the suit land and had lived peacefully without any interruption or interference until the **year 2005**, when some people invaded the suit property and demolished her house. The Plaintiff has also hinged her claim on Section 7 of Cap 22 which provides that:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims".

The Plaintiff has claimed that since she has been in possession of the suit land since **1973**, without any interference, then the right of any person who was entitled to possession of the same was extinguished after the expiry of the prescribed period of **12 years**. She relied on Section 17 of Cap 22 which provides that:-

“subject to Section 18 of this Act, at the expiration of the period presented by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

So from the available evidence, has the Plaintiff herein proved that she has lived on the suit land without interference to warrant her acquire title by adverse possession?

Since the Plaintiff is the one who has alleged, then the onus was upon her to prove her claim of adverse possession. In the case of **Kimani Ruchine...Vs...Swift Rutherford & Co. Ltd (1980) KLR**, the court held that:-

“The Plaintiffs have to prove that they have used this land which they claim of right; *Nec vi, nec clam, nec precario* (no force, no secrecy, no evasion)..... so the Plaintiffs must show that the company had knowledge(or means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration”.

As the Court observed earlier, the Defendants became registered as the proprietors of the suit property in the **year 2005**. It was evident from the Plaintiff's evidence that initially this suit property was a Government land and Plaintiff allegedly lived on the suit land as a squatter. PW3 told the Court that initially this suit property was a Trust land. If the said land was a trust land or Government land, then by virtue of Section 41 of the Limitation of Actions Act Cap 22, then the Plaintiff would not bring a claim to acquire title to land over Government land. Section 41(a) of Cap 22 provides that:-

“This Act does not;

a) Enable a person to acquire any title to or any easement over;

i . Government land or land otherwise enjoyed by the Government”.

Further, Section 42 (1)(c) of Cap 22 provides that”

“This Act does not apply to;

c) an action to recover possession of Trust land”.

Therefore even if the Plaintiff alleged that she entered into the suit land in **1973**, when the land was still a Government land, then time did not start running then. Time started running herein after the suit property was registered to a private individual and that was in the **year 2005**. Then if time started running in the **year 2005**, then by **the year 2012**, only 7 years had expired and not **12 years** as provided by Section 7 of Cap 22 Laws of Kenya.

It was claimed by the Plaintiff that the survey and subdivision of the initial Government property was done in **1985** and Plaintiff was issued with an allotment letter for the suit property. However she did not produce any and the Court finds and holds that the said evidence was just mere allegation without prove. However, it is evident that vide a letter of allotment dated **26th July 1985**, one **Henry Anusu** was allotted **Plot No.56**, which was later registered as **LR.No.13748**, the suit property.

Even then assuming the suit property was allocated to an individual in **1985** and it ceased to be a Government land, has the Plaintiff proved that she has been in continuous possession of the suit land to warrant her acquire title by adverse possession?

In the case of **Littledale...Vs...Liverpool College (1900) Ch.19, 21**, the Court held that:-

“In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.....the next question therefore is what constitute dispossession of the proprietor- acts must be done which are inconsistent with his (owners) enjoyment of the soil for the purpose for which he intended to use it”.

Further in the case of **Wambugu...Vs...Njuguna (1983) KLR 172**, the Court of Appeal held that:-

“In order for a person to acquire title by operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”.

The Plaintiff herein was therefore required to prove that she dispossessed the said allotted owner of the suit land and the said owner had discontinued possession of the same for a continuous period of **12 years** so as to be entitled to claim the title by virtue of adverse possession.

Further, the Plaintiff had to prove that she used this suit land *Nec vi, nec clam, Nec precario* (no force, no secrecy, no pevasion). The Plaintiff therefore needed to prove that the said **Henry Anusu** had knowledge that she was in possession or occupation of the suit land. The 3rd party herein **Rose Asalache** told the Court that after her husband was allotted the suit land, there was no evidence of anyone occupying the same. There was no evidence that the Plaintiff had dispossessed them. Further, the Plaintiff in her own evidence stated that she did not know of anyone claiming this suit property until **2005, 2006 and 2012** when her structures on the suit land were allegedly demolished. The Court cannot find and hold that the Plaintiff occupied the land *Nec vi, Nec clam, Nec precario*. Further the court cannot hold and find that the Plaintiff had dispossessed the said **Henry Anusu** and later **Rose Asalache Anusu** prior to **2005** when the suit land was sold to the Defendants. See the case of **Kasuve...Vs...Mwachi Investment Ltd & 4**

Others (2004) RKL 184, where the court held that:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

DW2 – Jackson Tuwei, had testified that he bought his parcel of land in the **year 1996** and the suit land was unoccupied and Plaintiff was not residing therein. Further that he constructed his house in the **year 2000** and Plaintiff was not an occupier of the suit land until **2005**, when she trespassed thereon. The Court has also seen a letter dated **24th September 2014**, from the Plaintiff to her employer wherein she was requesting her employer, **Director of Kenya Medical Training College**, to grant her extension of time of vacation of her institutional house – she was requesting for a period of **3 months** from **1st October 2014** to **1st December 2014**. That meant that she lived in a Government quarter and not on the suit property.

Further the Court has considered the photographs attached to the Plaintiff’s pleadings which photographs are allegedly evidence of demolition of her house on the suit land. All the iron sheets and timber shown therein are new ones. There are no old iron sheets which could be prove of an old house. The Court will concur with the Defendants’ evidence that the Plaintiff invaded the suit property in **December 2012**, and constructed some structures thereon. In **2012**, the suit property was registered in the names of the Defendants and they were therefore the absolute and indefeasible owners. The construction of these structures in the **year 2012** is not evidence of continuous possession and occupation.

Having now considered the available evidence, the Court finds and holds that the Plaintiff has failed to establish that she was in possession of this suit property **LR.No.13748**, *Nec vi, Nec clam, Nec precario*, and that she had dispossessed the Defendants of the suit land for a period of **12 years** and that the Defendants’ right over the suit land had been extinguished. Therefore in answer to issue No.1, the Court finds and holds that the Plaintiff has not acquired title to **LR.No.13748** by adverse possession.

ii) Whether LR.No.13748 should be transferred and registered in the name of the Plaintiff.

Having found that the Plaintiff has not acquired title to the suit property by virtue of adverse possession, then the said property cannot be transferred and registered in her name. The Court traced the acquisition of this suit property by one **Henry Anusu** in **1985** from the documents produced in court. Later the suit property was registered in the name of the 3rd party herein, **Rose Asalache Anusu** in the **year 2005** and she sold the same to the Defendants. The Defendants thereafter acquired an absolute and indefeasible ownership by dint of Section 23(1) of the Registration of Titles Act Cap 281 (now repealed).

The Defendants are therefore the owners of the suit property and cannot be deprived of the same, unless by operation of law. Further the suit property can only be transferred and registered in favour of the Plaintiff if the registered owners sell and or transmit the same to her. Without the consent of the Defendants to transfer the suit land to the Plaintiff, this Court cannot issue such an order and since the Defendants are the registered

owners, the Plaintiff’s continuous stay on the suit land if any is an act of trespass. See the case of **Mbira...Vs...Gachuhi 2002 1 EA 138**, where the Court held

that:-

“Where there are two persons on a piece of land, one of whom was the registered proprietor and even asserted that the land was theirs and did some action in assertion of that right, then if the question was which of those two was in actual possession, the person with the title was in actual possession and the other a trespasser”.

The Court finds and holds that the Plaintiff herein is a trespasser and the suit land cannot be transferred and registered in her name.

iii) Are the Defendants entitled to seek indemnity from the 3rd party herein?

Having found that the third party sold the suit land to the Defendants and granted them vacant possession and the suit land is registered in their names and they are therefore the **absolute and indefeasible owners**, the Defendants are not entitled to any indemnity from the 3rd party herein.

Further the Court has found that the Plaintiff is not entitled to acquire title over to the suit property by virtue of adverse possession. If the

Plaintiff is still in occupation of the suit property, she is a trespasser and she should vacate the said property to allow the Defendants enjoy the rights of proprietorship as provided by Sections 24 and 25 of the Land Registration Act, 2012.

iv) Who should bear costs of the suit?

Section 27 of the Civil Procedure Act provides that costs of the suit is granted at the discretion of the court. However, it is trite that costs normally follow the event. The Defendants herein are the successful litigants. The Court finds that they are entitled to costs of this suit.

Having now carefully considered the available evidence, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has failed to prove her case against the Defendants on the required standard of balance of probabilities. Consequently, the Court dismisses the ***Originating Summons*** dated ***24th December 2012*** entirely with costs to the Defendants. Further the Court finds that the 3rd party herein is not liable to indemnify the Defendants herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Anyonje holding brief for Mr. Gakeria for Plaintiff

Mr. Kimathi holding brief for Mr. Kairaria for Defendants

Mr. Kimathi holding brief for Mr. Kisaka for 3rd party

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/2/2018