

## **The Matrix of Usucaption Modality under Ethiopian Property Law Zemenu Tarekegn Y. Debre Markos Un, t\***

### **Abstract**

*Usucaption is recognized as one modality of acquiring sole ownership under Ethiopian property law. However, there is lack of clarity on the applicability and the subject matter of the doctrine of usucaption. The issues, especially, whether the adverse possessor can be an owner of the immovable automatically at the end of 15<sup>th</sup> years and on other cautions to invoke usucaption make the subject matter unclear and the applicability uncertain. The objective of this article is to implicate and fill the conceptual gaps in the incorporation and application of usucaption under Ethiopia property law. To meet this objective, the article assesses different related literatures, laws and federal cassation decisions particularly file nos. 53328 and 89148 from vol. 11 and 16, respectively. It specifically examines article 1168 of the 1960 civil code of Ethiopia critically. By doing so, it addresses different questions on usucaption. Such as, how can the adverse possessor acquire title deed after the fulfillment of the required components of usucaption? The law sets 15 years as statute period. However, it may not secure the adverse possessor's right as far as s/he does not possess the immovable at the time of dispute. Therefore, how long should the adverse possessor remain with his possession, even after the lapse of the statute period, is another pertinent issue. The article ultimately reveals that adverse possessor shall always remain in possession even after the lapse of statute period. Continuous possession, even after those 15 years of statute period, is indispensable as the doctrine of usucaption is applicable only for those who are in possession. The adverse possessor cannot require title deed, from concerned authority, for the mere fact that he /she met the requirements of usucaption. In practice, courts used to cite article 1168 for possessions that are not hostile. The requirement of*

*adversity of the possession (hostile possession), as witnessed in the decision of cassation division of the federal Supreme Court of Ethiopia, under file no. 89148, is overlooked. The court cited article 1168 as relevant provision for possession that is not hostile. Thus, the practice is in discordance with the theoretical framework of usucaption. Hence, courts shall apply the concept of usucaption properly.*

**Key words:** usucaption, adverse possession, acquisition, ownership, immovable objects

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## Introduction

It is under the profession's domain that acquisition or transfer may create ownership. Unlike to transfer, acquisition enables the acquirer to establish ownership right that is free from defects and original. Usucaption is an acquisitive prescription model that the adverse possessor acquires new title of defect free ownership for the fact that a certain period is lapsed to his/her favor.<sup>11</sup>

Many legal scholars wrote on usucaption. They mainly concentrate, however, on the adversity nature of usucaption, validity test and intention requirements. Professor Helmholz, in the article titled as "Adverse Possession and Subjective Intent"<sup>12</sup> underlines the necessity of fulfillment of the required period of statute limitations and the motives or the state of mind of the possessor does not matter.<sup>13</sup> Helmholz further notes the requirement of hostility, however, under good faith sentiment in usucaption.<sup>14</sup> The Ghent University's Bouckaert and Depoorter underscore that "for the rules of adverse possession to apply...the possessor must hold the property actually, exclusively, continuously, openly and notoriously, adverse to the owners, for the statutorily defined time period."<sup>15</sup> Sirmans and Miceli discussed the economics of adverse possession.<sup>16</sup> However, the aforementioned scholars and others focus only on the requirements to be met to invoke usucaption. However, different issues remained untouched. For example, holding/ possessing the immovable cannot be a ground by itself to require title deed. The adverse possessor either may get title deed with the help of wrong hands or shall wait for a court decision in his favor to

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<sup>11</sup> Garner Bryan A, Black's Law Dictionary, 8th ed., Thomson West, 2004, (first published in 1891) p. 1762 However, this definition is misleading as it only concentrates on time framework only. It should be clear that usucaption is not only about the lapse of time. The spirit of article 1168 tells us that the mere lapse of time may not entitle an adverse possessor to claim usucaption. The statute period of usucaption may not debar from bringing lawsuits. It, rather, enables the adverse possessor to plea for the court, as time of hearing, that he fulfilled the elements of usucaption. Thus, this statute period is enabling point for the adverse possessor to claim ownership for that he fulfilled the requirements of usucaption. Therefore, s/he must possess for 15 years without interruption, the possession shall be adverse and pay taxes in his/her own name for fifteen years continuously.

<sup>12</sup> Helmholz Richard H., Adverse Possession and Subjective Intent, Washington law review, vol. 61 issue 2,1983, P 331-358

<sup>13</sup> Id p. 331

<sup>14</sup> Id p. 337-338

<sup>15</sup> Depoorter Ben W.F., Bouckaert Boudewijn, Adverse Possession - Title Systems. P.19. Available at: <https://reference.findlaw.com/lawandeconomics/1200-adverse-possession-title-systems.pdf>. Accessed on: 9/19/2019

<sup>16</sup> Sirmans and Miceli, an economic theory of adverse possession, international review of law and economics. Vol. 15, 1995, pp. 161-173

apply for title deed. In the later case, the only option for adverse possessor is to wait for until record owner brings an action against him. This, in turn, needs to know the right time for the adverse possessor to acquire title deed and the necessity of continuous possession even after the lapse of statutory period.

On the other hand, when we see Ethiopian property law, Usucaption is one modality of acquiring sole ownership under Ethiopian property law.<sup>17</sup> It is noted that the legal provision governing usucaption is not transplanted from the continental legal system. Rather, the concept is adapted from Ethiopian customary law<sup>18</sup> and considered as an exception to “the things of the past” captivation.<sup>19</sup> However, the matrix of usucaption is not well established and there is a dearth of literature, in this regard, in Ethiopian legal discourse. Similarly, when we see the legal framework coverage, it is only a single provision that is devoted to the concept. As a result, it remains one of the confusing concepts under Ethiopian property law.

To address the issues meaningfully, the remaining part of this article is organized in to two sections. The notion of usucaption /acquisitive prescription is briefed under section 1. Section 2 discusses the matrix of usucaption under Ethiopian property law. Finally, it has concluding remarks and indicates ways forward.

### **1. The notion of usucaption/acquisitive prescription/**

Prescriptions may be acquisitive or extinctive in its nature.<sup>20</sup> Acquisitive prescription enables the defendant to acquire a certain right after the lapse of period of time that is legally specified in advance whereas extinctive prescription entitles the defendant to be liberated from his obligations towards the plaintiff.<sup>21</sup> Acquisitive prescription, by its nature, requires the existence of uninterrupted possession by the defendant for a given period without creating any legal relationship with the plaintiff over the subject matter.<sup>22</sup> On the other hand, extinctive prescription requires prior legal relationship between the defendant and plaintiff in which the later has created right over the former and the former owe obligation to the later. Moreover, unlike to the case of transfer of ownership in which the title of the transferee is dependent upon the title of the transferor, the right that is acquired by acquisitive

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<sup>17</sup> Civil code of the Empire of Ethiopia, 1960, , Article 1168 , proc. No. 165/1960, fed. Neg. Gaz. (Extraordinary issue) 19<sup>th</sup> year, no.2. According to Ethiopian civil code, there are four modalities of acquisition of sole ownership. These are occupation, possession in good faith, usucaption and accession.

<sup>18</sup> Aubry and Rau, v.2 p. 354 & ff. as cited in Dunning, property law of Ethiopia: materials on the study of book III of the civil code, H/Sillasie I University, Addis Ababa, p. 67. The reader may see also prescription proclamation in civil matters, 1948, article 17, proc. no. 97/1948 fed. ,Nega. Gaz. , year 7, no. 6

<sup>19</sup> Schiller A.Arthur, customary land tenure among the highland peoples of the northern Ethiopia, a bibliographical essay, The Journal of Legal Pluralism and Unofficial Law, vol. 1 issue 1, 1969, P. 2

<sup>20</sup> Supra note 8

<sup>21</sup> Supra note 8

<sup>22</sup> Adversity or hostility of possession is mandatory to invoke usucaption. The possessor should not get the possession through permission from record owner. He shall possess without any permission from the owner but with good faith belief that he has a right to do so. Please see Helmholtz Richard H., Adverse Possession and Subjective Intent, Washington university law review, vol. 61 issue 2. Pp. 337-338. This means usucaption is not a defense when possession originates from true record owner. However, as indicated somewhere below, the adversity or hostility requirement of usucaption is overlooked in Ethiopian courts. Please see *ዓብዱል መሐመድ እና ወ/ሮ ዘበነይ ሃይለ ፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 53328, 2003 ዓ.ም* and *አቶ ክፍለ ገማርያም እና ወ/ሮ አስመራት መኮነን፣የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 89148, 2006 ዓ.ም*.

prescription is original and is free from any defects that may be a stumbling block for the record owner. What makes the two forms of prescriptions similar is that both require the lapse of time that is uninterrupted. The justifications behind such prescriptions are also similar. The morale of these prescriptions is to make favour towards an active and vigilant possessors over an imprudent and inactive owners who have slept over their right for such long period of time and to minimize the fabrication of false evidences as time lapses.<sup>23</sup> One can name these persons as defecato and dejure owners. The former is an active one that he controls the immovable and take care of it, pays tax, whereas the later is ignorant one who never knows what is going on his property for that long period. Therefore, it is justifiable for the legislator to favour the defacto owner over the dejure owner.<sup>24</sup>

When we trace it back, Romanian law originally introduced acquisitive prescription, “longi temporis praescriptio”, before 4<sup>th</sup> century in which an original entitlement over a plot of land is barred by uninterrupted possession of the same by the defendant for 10 or 20 years<sup>25</sup>. It is also believed that the concept of acquisitive prescription was introduced to other common law countries, like UK, in higher middle ages around 12th century<sup>26</sup>. It is also recognized as a major means of obtaining property right under Spanish law.<sup>27</sup>

## **2. The matrix of Usucaption**

As noted above, unlike to many of the provisions of the civil code, article 1168 was not directly transplanted from French civil code. It took rather the precedent of the customary law of Ethiopian people.<sup>28</sup> This makes usucaption an exception to other customary laws of Ethiopia that are made “a thing of the past”<sup>29</sup> by the 1960 civil code of Ethiopia.

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<sup>23</sup> Andualem Eshetu Lema, Revisiting the Application of the Ten Year General Period of Limitation: Judicial Discretion to Disregard Art 1845 of the Civil Code, bahirdar university journal of law, vol. 6 no. 1 p. 11-12. The university of Connecticut’s Sirmans and Miceli put four justification /standard reasons for usucaption. These are evidence decays over time, record owners shall face penalty for being imprudent, transaction costs are reduced and protection of reliance for adverse possessors. See Sirmans and Miceli, an economic theory of adverse possession, international review of law and economics, vol. 15, 1995, p.161

<sup>24</sup> Dunning, property law of Ethiopia: materials on the study of book III of the civil code, H/Sillasie I University, Addis Ababa, p.66.

<sup>25</sup> Neil Duxbury, Acquisitive Prescription and Fundamental Rights, University of Toronto Law Journal, Volume 66, Number 4, 2016, p. 476. It is 10 years if parties are living in same district. It is 20 otherwise. It is noted that different countries endorsed the concept of acquisitive prescription though the length of time for prescription differs across jurisdictions.

<sup>26</sup> Ibid

<sup>27</sup> Spanish Civil Code. 2013, Art. 609 para. (3).

<sup>28</sup> It is clear that, from the reading of article 3347(1) of the civil code, customary law of Ethiopia has been expressly repealed. The author is of opinion that article 3347 has killed the original and indigenous legal cure of disputes in Ethiopia. It has brought a tendency among Ethiopian that the customary law was barbaric and adherence to that is same. However, the key for dispute settlement is still in the custom, which is made inapplicable in the civil code of Ethiopia.

<sup>29</sup> Supra note 9

## 2.1. Basic elements of usucaption

In this section, the paper addresses the basic elements of defense of usucaption under Ethiopian law. It scrutinizes the entirety of the elements in detail.

### A. Immovable good

Usucaption as a modality of acquiring sole ownership, it is applicable only on immovable goods.<sup>30</sup> When we see article 1168 of the civil code, it states that usucaption is applicable on immovable goods. When we, in return, see the definition of immovable goods, it includes buildings and land.<sup>31</sup> However, land is under public ownership<sup>32</sup> and, therefore, it cannot be acquired by usucaption<sup>33</sup> modality. Therefore, it is only applicable on other immovable, buildings.<sup>34</sup>

### Adverse possession

Possession is key requirement to acquire ownership via acquisitive ownership model. However, it is not only possession required but the nature of the possession matters too. Legally speaking, when we utter the word possession we think that the possession is legal one fulfilling the requirements of enforceable possession. However, legally established possession is not relevant here for acquisitive possession, usucaption. If there is a legal relationship between the defacto and de jure owners in creating the possession, we cannot invoke article 1168. Moreover, we cannot argue that the owner is imprudent /inactive on his property and ultimately we cannot find a justification to bar an entitlement against one to create new ownership title to other. Thus, the defendant has no ground to invoke usucaption on legally established possession.

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<sup>30</sup> Other modalities of acquisition do have different subject matter of property. Occupation and possession in good faith are applicable on only ordinary movable goods whereas accession is applicable on both movable and immovable goods. Please see supra note 7 articles 1152, 1161, 1168 and 1270.

<sup>31</sup> Supra note 7 Article 1130

<sup>32</sup> Constitution of the Federal Democratic Republic Of Ethiopia, 1995, articles 40(3) and 97(2), proc. No. 1/1995. Fed.Neg.Gaz., year 1, number 1.

<sup>33</sup> According to Article 1455 of the civil code, things forming part of public domain cannot be acquired by usucaption or possession in good faith. However, we may not totally outlaw the applicability of usucaption provision of the civil code on land. We may extend the rule to usufructuary rights of the farmers on the land. Please see supra note 13, p.7. It is also important to examine the prescription provided under Amhara regional state rural land administration and use proclamation (as amended). The repealed proclamation had provided 10 years of prescription. However, the recent rural land administration and use proclamation no. 252/2017 under article 55 prohibits invoking period of limitation. This may be taken as extended protection for constitutional rights of farmers against eviction.

<sup>34</sup> According to article 1130 of the Amharic version of civil code, it is land and house, which are regarded as immovable. The construction of this article indicates that it is exhaustive. Even though it is not authoritative, it is the English version of the civil code which gives a room for interpretation since the terminology is “building” unlike to its Amharic counter. Therefore, the term building could include houses and other works of art including canals, temples, bridges, etc.

Therefore, it requires the possession to be adversary. Adverse possession<sup>35</sup> is a kind of possession where it is made in an encroachment in hostile<sup>36</sup> manner. The possession should be made without getting any permission and at same time without any objection from. It is only when these requirements are fulfilled that we can genuinely argue that the owner was imprudent that he didn't know what is going on his property.

It should be noted that adverse possession is not similar with a possession acquired through violence. If there is violence, there is objection on the part of the owner. This in turn implies that the owner is not imprudent. Rather, the term adverse should be understood that the “visual manner that is inconsistent with the title of the owner”<sup>37</sup>. Therefore, the adverse possessor occupies the buildings without securing the consent from or extending compensation to the owner.<sup>38</sup>

## **B. 15 years of uninterrupted possession**

In this component, two points are relevant: specified time and continuance. Under Ethiopian property law, 15 years is specified.<sup>39</sup> These 15 years shall be counted continuously without any interruption. This means the possession should be uninterrupted. Possession may be interrupted in three ways. The first is when the owner brings an action against the adverse possessor within 15 years. The second ways of interruption occurs when the adverse possessor gives recognition to the owner in whatsoever form. Recognition may be given either by paying rent, paying tax in owner's name or giving hint to nearby residents that the adverse possessor is mere holder of the building. The third way of interruption is discontinuance of possession by the adverse possessor. In this case, even though there is no recognition to and action by the owner, mere discontinuance affects adverse possessors claim to be an owner after the lapse of that period. However, temporary hindrance shall not amount to interruption.<sup>40</sup>

## **C. The possession shall be defect free**

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<sup>35</sup> Acquisition by adverse possession is recognized under both common law and civil jurisdictions. Please See British institute of international and comparative studies, adverse possession, Report by the British Institute of International and Comparative Law for Her Majesty's Court Service, 2006, p.3.

<sup>36</sup> “For possession to be hostile in its inception, no spirit of animosity or hostility is required. The hostility requirement is consistent with belief on the part of the adverse possessor that the title is rightfully his. As long as the possession does not originate with the permission of the record owner, hostility, the first and seemingly negative requirement of the law on the subject, is perfectly compatible with a good faith belief on the possessor's part that he has a right to be there.” Please see supra note 2, p. 337-338. From Helmholtz assessment we understand good faith is one basic requirement of usucaption. However, this remains debatable as there are others who consider possessor's state of mind irrelevant to assess usucaption. Please see supra note 5, P.19

<sup>37</sup> Supra note 5,p.19

<sup>38</sup> Ibid

<sup>39</sup> Supra note 7. Please note that there is a difference in time interval across jurisdictions. For example, according to Romanian law, it may be 10 years or 20 years, as the case may be. See supra note 8. France -30 years, Spain and the Netherlands - 10-20 years, Germany -30 years, Canada - max 60 years, US – 5-40 years. see supra note 13, p. 4-12

<sup>40</sup> Supra note 7,Article 1142. We can also see supra note 7, article 1851 and *ወ/ሮ አልማዝ ተሰማ እና እነ አቶ በየነ ወ/ማካኤል ፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 43636, 2002 ዓ.ም ፡፡*

Even though adversity is required from the defendant, possession shall be free from any defects. There are different causes, which are commonly known as the defects of possession under Ethiopian law. These include interruption, clandestine, dubious, precarious, violence.<sup>41</sup>

As noted above, the 15 years period of possession shall be in uninterrupted way that the defendant shall always ascertain that the building is in his possession, either under his direct control or through third party mere holder who is controlling on behalf of the former. Therefore, by any means he should secure his continuous possession.

The possession may not be also clandestine or dubious. It shall be exercised in an open and clear way that the community should believe that the defendant has defect free possession over the building. Therefore, there shall be no confusion among the community that the possession by adverse possessor is whether mere holder or possessor. This requires the adverse possessor to act as if he is righteous person to avoid that confusion.

Similarly, the possession shall be free from violence. The adverse possessor may not enter in to the premise by force. Adverseness presupposes the absence of consent from the owner whereas violence presupposes use of force against the objection of the owner. Therefore, if the possession is acquired by violence, it is not defect free thereby the adverse possessor losses the entitlement.

#### **D. Payment of tax in one's own name for 15 years**

The last requirement of the modality is the payment of tax for 15 years in one's own name. This requirement is an indicative to the justification provided under mandating usucaption as ground to entitlement to the adverse possessor; promoting the one who is socially responsible over an imprudent owner. It is because this indicates that the adverse possessor has carried out social responsibility by paying different bills over the building. However, the paradox is how the adverse possessor can pay those bills in his name. It seems practically impossible to do so unless there is a short cut, corruption.<sup>42</sup> Generally, this requirement seems a complimentary requirement to other requirement, 15 years of uninterrupted possession.

### **2.2. Critical questions on usucaption**

We have very critical and debatable question on usucaption. These include can the adverse possessor be a plaintiff to require title deed? When shall the adverse possessor acquire title deed? Moreover, how long is possession required even after 15 years of statute period? Let us see these questions one by one in detail.

#### **2.2.1. Can the adverse possessor be a plaintiff?**

The critical question is that can the adverse possessor be a plaintiff over the building to claim title deed? Let us see the scenario here: assume that the adverse possessor has fulfilled all the elements prescribed under the code. He is in the 16<sup>th</sup> years of possession over the building. A negotiation took place between the adverse possessor and the record owner. They concluded lease agreement, the record owner being lessee. However, the owner refused to pay and even to leave the building. In this case, can the adverse possessor bring an action against the record owner? Can

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<sup>41</sup> Supra note 7, Articles 1146, 1142 and 1147

<sup>42</sup> It is clear that the bills are issued in the name of the owner and any subsequent payments follow that. Therefore, it is difficult for the adverse possessor to get the bills issued in his name unless there is a corruption. The corruption may be either helping adverse possessor to transfer the title deed to his own name or simply changing bill name.

he be a plaintiff? As it is a legal consonance, for a given person to be a plaintiff, cause of action and vested interest requirements, among others, are needed. The cause of action for petitory action is title deed<sup>43</sup> or administrative letter<sup>44</sup> given by concerned administrative officials. When we see the case, the adverse possessor lacks both. The lease agreement cannot serve as a cause of action to claim ownership over the building. The adverse possessor cannot also invoke possessory action, as he does not possess it. Therefore, He has no cause of action to institute an action against the true owner.

The other very important point with regard to the argument that the adverse possessor cannot be a plaintiff is the justification that emanates from the nature of acquisitive prescription itself. Acquisitive prescription, by its nature, is applicable to maintain a right that is in the control of the defendant; it is not to snatch away rights from holders.<sup>45</sup>

Moreover, prescription is a preliminary objection. As it is known, prescriptions can invoked only by defendants in a proceeding. Therefore, the adverse possessor can only raise usucaption when he is a defendant in a suit instituted by the owner over the building. This means the adverse possessor cannot be a plaintiff in whatsoever way.

### **2.2.2. When should so the adverse possessor acquire title deed?**

If the adverse possessor cannot be a plaintiff to the case, the other indispensable question to the issue at hand is so when should the adverse possessor acquire title deed over the building he adversely possessed? Certificate of ownership gives a guarantee to the owners. Same guarantee is desirable to the adverse possessor after those 15 years. To get that title deed, the adverse possessor should have a legitimate cause to bring before title deed issuing authorities. The mere lapse of 15 years is not sufficient to ascertain entitlement. The judicial body shall ascertain such an entitlement for the adverse possessor. This in turn requires an action before the court. The right person to bring such action is the owner. Therefore, the adverse possessor must wait for the true owner to bring an action against him. It is only where the true owner brings an action against the adverse possessor that the later could raise usucaption in preliminary objection form. If the court rules for the objection, the ownership title shifts. Now, it is right time for the adverse possessor to take the court's decision as a ground to require title deed before administrative body. This is the only way to acquire title deed over the building.

### **2.2.3. The necessity of possession even after 15 years**

The way of acquiring title deed stated above imposes additional burden on the adverse possessor to remain with his possession for indefinite period. The 15 years time is relevant as only where an action is brought against the adverse possessor who is still in possession of the building. It means usucaption cannot serve as cause of preliminary objection for an adverse possessor who is not in possession of the building right at that time. This makes possession relevant even after 15 years. Therefore, the lapse of 15 years does not give guarantee to adverse possessor. It, rather, requires the adverse possessor to be vigilant always and remain in continuous possession.

## **3. Conclusions**

<sup>43</sup> See supra note 7, Article 1195. A plaintiff claiming ownership right over a certain immovable shall have title deed issued in his name.

<sup>44</sup> ወ/ሮ ዘውዴ ገ/ስላሴ እና ወ/ሮ ህይወት ባህታ ፣ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ. 36320, 2001 ዓ.ም

<sup>45</sup> ዘመኑ ታረቆኝ ይመኑ፣ የኢትዮጵያ ንብረት ህግ መሰረተ ሃሳቦች፣ፋርኢስት ትሬዲንግ ኃ.የተ. ግል ማህበር፣ 2006፣ ገጽ113

Literatures on usucaption concentrate on the requirements to be met and debate on the state of mind required from adverse possessor. Many critical questions like whether the adverse possessor can be an owner of the immovable automatically at the end of 15<sup>th</sup> years and on other cautions to invoke usucaption such as the necessity of continuous possession even after the lapse of statutory period left unexplained. Ethiopia's legal literature and legal framework devotion to the doctrine of usucaption is shallow and ambiguous respectively. There is a need to wait for the record owner's action against the adverse possessor and thereby court's decision in favor of the later to acquire title deed. The adverse possessor cannot be a plaintiff and require title deed for the mere fact that he /she met the requirements of usucaption. Thus, continuous possession even after those 15 years of prescription (statute period) is indispensable.

Moreover, the relationship between record owner and the adverse possessor shall be hostile. Usucaption shall not also be understood as a mere period of limitation that bars claim solely based on the lapse of statute period.

When we see the practice, on the other hand, the requirement of adversity of the possession (hostile possession), as witnessed in the decision of cassation division of the federal Supreme Court of Ethiopia, under file no. 89148, is overlooked. The federal courts used to cite article 1168 of the civil code as relevant provision for possession that is not hostile. Thus, the practice is in discordance with the theoretical framework of usucaption. Hence, courts shall adhere to the conceptual framework of usucaption. Courts should particularly check that there exists hostile relationship between the record owner and the adverse possessor.