REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 171 of 1989

JOSEPH WACHIRA MWANGI..... PLAINTIFF

VERSUS

JOHANA KAMAU WAMBUGU ..... 1ST RESPONDENT

SAMUEL PETER KANURU KAMAU ..... 2nd RESPONDENT

J U D G M E N T

By an originating summons filed in court on 14th December 1989, and taken out by Joseph Wachira Mwangi, hereinafter referred to as "*the applicant*" as against Johana Kamau Wambugu and Samuel Peter Kanuru Kamau, hereinafter referred to as "*the respondents*", the applicant claimed ownership of land parcel Mahiga/Kamoko/489 hereinafter referred to as "*the suit premises*" by virtue of having been in continuous, uninterrupted and peaceful occupation of the same for a period in excess of 12 years. He therefore contended that the respondents' title had been extinguished and that he should instead be registered as absolute proprietor thereof in place of the Respondents.

The respondents filed a replying affidavit disputing the applicant's claims aforesaid. Their position was that the applicant's entry, possession and use of the suit premises had been with the 1st respondent's express permission. That during the period of occupation of the suit premises, that is between 1970 and 1989, the applicant had been a licencee and therefore his possession had never been adverse to their ownership of the suit premises. They further claimed that just one year before the applicant filed this suit, they agreed to rescind the entire agreement but the applicant had refused later to collect the amount of money they had agreed as a refund and compensation for his developments on the suit premises. The applicant having refused to accept the refund, the respondents filed HCCC No. 124 of 1990 seeking the eviction of the applicant from the suit premises on account of his failure to pay in full the purchase price.

The applicant in response reiterated what he had deponed to in his affidavit in support of the originating summons that he had acquired the suit premises by way of adverse possession. He denied entering into an agreement dated 7th December 1988 for the refund of the purchase price of the suit premises. He also added that the said agreement could not have been binding on him as it was null and void.

These two cases were on 8th February 1991 by consent of the parties consolidated by consent. When they came up for hearing on 9th June 2009, this court directed that this case would be the leading file as it had been filed earlier. It should also be noted that the 1st respondent passed on during the pendency of this suit and was substituted by the 2nd respondent.

The applicant testified that sometimes in 1970 he bought the suit premises from the 1st respondent for Kshs.2000/= whereupon he allowed him to take possession pending completion. He borrowed the purchase price aforesaid from standard chartered bank and passed the same over the 1st respondent in the presence of an old man by the name of Henry Njoroge somewhere in free area, Nakuru. The late 1st respondent was at the time accompanied by his son, Kariuki Wambugu. An acknowledgement note was duly written. When he took possession of the suit premises as aforesaid he found an old man called King'ori Mbumbuya who had been taking care of the same since the 1st respondent was by then staying in Nyahururu. He fenced the suit premises and in 1974, he planted tea bushes. He then requested the 1st respondent to transfer the suit premises to him but he refused. Again in 1975 he planted 3,500 tea bushes which to date has been plucking and taking to Gitugi tea factory. In June 1984, the 1st respondent called him and asked for Kshs.7000/= which he paid again in the company of Mwangi Kingori. Thereafter he agreed to transfer the suit premises to him. The transaction was reduced into writing and was witnessed by Mwangi King'ori for the applicant whereas the 1st respondent's wife and son witnessed for him. He tendered in evidence that agreement. To date the transfer has not been effected nor have the parties been to the relevant land control board. Nonetheless since 1970, the applicant has been in occupation of the suit premises, a period in excess of 39 years. When the 1st respondent refused to effect the necessary transfer, he filed this suit. He would have refused to take back the purchase price in view of the developments he had effected on the suit premises. Accordingly he prayed that the suit premises be transferred and registered in his name by virtue of adverse possession. He also prayed for costs for both cases.

Cross-examined by Mr. Wachira, learned counsel for the respondents, he stated that it is the 1st respondent's wife who first approached him with an offer to sell the suit premises to him. Later he saw the 1st respondent and agreed on the purchase price of Kshs.2000/= which he

paid and thereafter entered the suit premises. Four years later he demanded title to the suit premises from the 1st respondent to no avail. In 1984, the 1st respondent demanded for a further Kshs.7000/= which he again paid. He denied having paid the money in instalments. He only paid twice, in 1970 and 1984. This time around they had agreed on a purchase price of Kshs.9000/= and Kshs.5000/= for the transfer. He has yet to pay Kshs.5000/= though. He denied further that in 1988 they sat and agreed that the 1st respondent would refund the purchase price paid as aforesaid together with compensation for the developments he had effected on the suit premises in the total sum of Kshs.44,000/=. He further denied that the then 1st respondent's advocate, Mr. Mindo Esq. had written to him requesting him to go and collect a cheque for Kshs.44,000/=.

The first witness called by the applicant was John Mburu Mwangi. He was a brother to the applicant. He was aware that in 1970, the 1st respondent sold to the applicant the suit premises at a consideration of Kshs.2000/= which amount the applicant duly paid. He was a witness to the payment. Thereafter the applicant was given possession thereof and grew thereon tea bushes. Four years later, the 1st respondent requested the applicant to pay him more money as his land in Nyandarua was threatened with auction. This money was never part of the purchase but was merely to assist the 1st respondent to save his land from the auctioneers hammer.

Under cross-examination he stated that the applicant entered the suit premises in 1970. He was the one who carried the purchase price. The transaction was subsequently reduced into writing in 1984. The purchase price was now Kshs.14,000/=. There is still an outstanding balance of Kshs.5000/=. He denied that between 1970 and 1984, they were negotiating the purchase price. Indeed the full purchase price had been paid in 1970. In 1984, the applicant sought and was given permission by the 1st respondent to plant tea bushes. He was not aware that the 1st respondent backed out of the agreement in 1988.

PW3 Mwangi Kingori testified that in 1970 a lady by the name of Wanjiru Kamau Wambugu came visiting and told him they wanted to sell the suit premises. He informed the applicant who instantly agreed to buy the same at Kshs.2000/=. He accompanied the applicant to Nyahururu and thence to Nakuru free area where the purchase price was handed over to the 1st respondent in the presence of one, Njoroge. The applicant was then given possession of the suit premises. The 1st respondent agreed to come later for purposes of transfer. As far as he was concerned the Kshs.2000/= paid as aforesaid was the full purchase price. What was left was for the parties to appear before the land control board for the necessary consent.

Under cross-examination he stated that the respondent's son, Kariuki Kamau was present. He did not sign a note concerning the transaction. He did not know whether in 1974, the applicant had sought the permission of the 1st respondent to plant tea bushes. He did not know as well whether the applicant ever demanded title deed from the 1st respondent. In 1984, the 1st respondent sought assistance from the applicant as his land at Nyahururu was being auctioned. He was paid Kshs.7000/= not as purchase price but merely to assist the 1st respondent secure his land from possible auction. There was no agreement in 1988 that the purchase price be refunded.

The final witness called by the applicant was Grace Muthoni Wachira. She was the wife of the applicant. She testified that her husband had been blind since 1985. That she normally takes him wherever he wants to go. She could not recall having taken him anywhere to sign any documents from 1985 to date.

Cross-examined, the witness categorically stated that the applicant is totally blind. He had been an agricultural officer. He retired after he became blind in 1985. However she had nothing to show that the applicant became blind in 1985. She was not aware of the agreement entered into in 1984 nor the one of 1988 between the applicant and the respondent. With that the applicant closed his case.

The 2nd respondent whom as I have already pointed out substituted the deceased 1st respondent called Duncan Mindo, learned advocate as a witness. Mr. Mindo testified that he had been practising law for well over 40 years. On 18th September 1990, the 1st respondent came to his chambers in Othaya town with Kshs.44,000/= in cash that he wanted forwarded to he applicant. He drew a cheque for the amount and forwarded the same to the applicant with a covering letter. He gave the letter with the cheque to the 1st respondent to deliver it personally to the applicant. Later the 1st respondent came back and told the witness that the applicant had refused to accept the cheque. 1st respondent thereafter instructed him to file HCCC No. 124 of 1990 for the eviction of the applicant from the suit premises. The money being refunded was in respect of purchase price of the suit premises whose agreement had been rescinded. The cheque was later returned to him.

Cross-examined by Mr. Mukunya, learned counsel for the applicant, he stated that previously he acted for the respondent in the two suits. However he was not aware of this O.S when he filed the suit aforesaid. He further stated that he was not instructed to send the cheque to the applicant's lawyer.

The 2nd respondent then took the stand. He testified that the 1st respondent was his late father. He passed on and he was substituted in his place by him in these proceedings. The deceased owned the suit premises. In 1970 he decided to sell it. Initially he was paid Kshs.2000/= by the applicant. In 1975, the applicant and his elder brother (PW2) paid the deceased a further Kshs.5000/= as part payment of the purchase price. No agreement was written though. In 1977 the applicant now in the company of PW3 again came to the house of the 1st respondent in Nakuru and paid a further Kshs.2000/= to the deceased. At this juncture they sat down and negotiated the purchase price at Kshs.14,000/=, out of which he acknowledged receiving Kshs.9000/= leaving a balance of Kshs.5000/=. In 1988 the deceased's family sat and prevailed on the deceased not to go through with the transaction. The deceased contacted the applicant over the issue and it was agreed that the purchase price of Kshs.9000/= already received be refunded together with the value of the developments effected on the suit premises by the applicant all totalling Kshs.44,000/=. This money was later given to Mr. Mindo Esq, for onward transmission to the applicant. Later the witness learned that the applicant had refused to accept the refund. The deceased then filed a suit for his eviction. It was his further evidence that no one stays on the suit premises as the applicant had vacated the same. There was no agreement entered into on 10th November 1984.

Cross-examined, he stated that the deceased decided to sell the suit premises in 1970. In 1970, 75 and 77 the deceased was paid by the applicant the sum o Kshs.2000/=, 5000/= and 2000/= respectively. From 1977 upto 1989, when the case was filed, the applicant was in default. He denied that the applicant sought the deceased's permission to plant tea bushes. He did so however without the authority of the deceased. He was aware that the applicant refused to accept a refund of Kshs.44,000/=. However the deceased never collected the 44,000/= from Mr. Mindo Advocate. The money is still with the advocate pending his collection.

The 2nd witness called by the respondent was Ndungu Macharia. He was a nephew to the deceased. On 7th December 1988 the deceased requested him to accompany him for purposes of refunding the money paid to him by the applicant. He had come from Nakuru where he resided. They met the applicant's brother, Joseph Kamara Mwangi. Together they proceeded to the applicant's home where they met the applicant and his wife. After discussions it was agreed that Kshs.9000/= paid to the deceased by the applicant be refunded and the value of the tea bushes valued at Kshs.44,000/= be paid as well. The applicant agreed that upon refund, he would move out of he suit premises. He reduced the agreement into writing which was signed by both the applicant and the respondent. He tendered into evidence the agreement. After the agreement, the deceased went back to Nakuru to look for the money. Later he came back with the money and they proceeded to Mr. Mindo's office and handed over the money for onward transmission to the applicant. Mr. Mindo issued them with a cheque for the amount with a covering letter which they took to the applicant. The applicant refused to accept the cheque however. Thereafter they took the cheque back to Mr. Mindo and requested him to open a file.

Cross-examined, he stated that he was conversant with the transaction which started in 1970. That the applicant entered the land in 1972 and planted tea bushes. He had by then paid Kshs.2000/= as part purchase price. Problems began in 1988 when the deceased changed his mind and wanted to refund the purchase price. The deceased decided to take the money to the advocate instead of the applicant directly because he suspected that he would refuse. He denied that the applicant had lost his eyesight as he used to write receipts for them for fertilisers. The money is still with the advocate.

The last witness called by the respondent was Githaiga Mathenge, a former Assistant Chief for Kamoko sub-location. He knew both the applicant and respondent. On 6th December 1988 the respondent came to him and requested him to assist him to have the applicant removed from the suit premises. All along he thought that the applicant had bought the suit premises. He went away and later in the evening on his way home he told him that he had met with the applicant and they had agreed.

Cross-examined, he responded that the applicant has been cultivating the suit premises from 1970. However nobody stays on the same. Though there is tea belonging to the applicant on the suit premises the respondent has since put up a house. That brought to the conclusion, the respondent's case.

Thereafter parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them together with the authorities cited therein.

As I see it the issue for determination by this court is fairly simple and straight forward and is whether the applicant has proved his claim to the suit premises on the basis of adverse possession to the required standard. If not then he is entitled to be evicted from the suit premise as sought by the respondent in Nyeri HCCC No. 124 of 1990.

So what is the law on adverse possession? It is by and large settled. It was succinctly re-stated by my brother Kariuki J. in the case of Omukaisi Abulitsa v/s Albert Abulitsa Shitseswa, in Kakamega HCCC No. 86 of 2005 (UR) thus:-

"*Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of law, see Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Waweu v/s Kiu Ranching (1982-88) 1KAR 746, – "see Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002) ".* On this I would also add Kasuve v/s Mwaani Investments Ltd & 4 others (2004) KLR 184, Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR.

I need not add anything as far as this elucidation of the law is concerned. It is common ground that the applicant has been on the suit premises since 1970 or thereabouts. However was the applicant's entry into the suit premises as aforesaid adverse to the respondent's claim to the same? The applicant maintains that his entry to the suit premises was pursuant to a sale agreement between him and the late 1st respondent. However if that be the case then his entry to the suit premises was with the permission of the owner and was thus not adverse to the respondent's little to the suit premises. Possession can only be adverse if it is inconsistent with and in denial of the title of the owner in

form of want of permission. By claiming therefore that he bought the suit premises, the applicant has failed to prove that he had no colour of right to be on the suit premises other than his occupation and possession by permission of the vendor. In the cases of Waweru v/s Richu (2007) EALR 403 and Wanje v/s Saikwa (supra) it was held that a claim for adverse possession cannot succeed if the person asserting it is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. The court went on to hold that for uncontrolled transactions pending completion one cannot lay a claim of adverse possession of such land during validity of the contract until the same has been repudiated or rescinded by the parties in which case adverse possession starts upon termination of the contract. However for controlled transactions such as the case herein possession becomes adverse when the contract becomes void by operation of law under section 6(1) of the land control Act that deals with consent to controlled land transactions.

It is the case of the applicant that having entered the suit premises in 1970 pursuant to a purchase agreement his occupation became adverse after three months (it should actually be 6 months) when the purported sale agreement became void pursuant to the provisions of the land control Act. The argument of the applicant then is that his occupation of the suit premises became adverse to the respondent's interest, 3 months thereafter following failure to obtain the necessary land control board's consent. Thereafter the 12 years elapsed on or before 31st December 1982. So that when the respondent decided he would no longer go through with the transaction, the suit premises had already reverted to the applicant 6 years before and all that was required was the applicant to go to court for such declaration which he did on 14th December 1989 by commencing these proceedings. There is however no evidence that the consent of the relevant land control board was ever sought and obtained. Accordingly time started running in favour of the applicant the moment the agreement became void for want of consent of the land control board, three or is it six months following the agreement of sale in 1970. That being the case then the applicant would have been in continuous and uninterrupted occupation of the suit premises for a total of 19 or so years by the time he lodged the instant originating summons. That is way above the threshold of 12 years required under the Limitation of Actions Act. In law therefore he is entitled to an order of adverse possession.

However has his occupation been continuous and uninterrupted? I do not think so. The evidence on record suggests that much as the applicant took possession of the suit premises the purchase price was never agreed. Various payments on account of the purchase price were made between 1970 and 1977. Indeed to date there is still an outstanding sum of Kshs.5000/= on that account. The applicant wants this court to accept that the agreed purchase price was Kshs.2000/= which he duly paid and that subsequent payments he made to the respondent was merely ex-gratia. I find it hard to believe this testimony considering that the payment of Kshs.7000/= which he paid in 1984, was much higher than the supposed agreed purchase price. Further the applicant agreed in cross-examination that the agreement of 1970 was subsequently replaced by the one entered into on 10th November 1984. In this said agreement, it is specifically provided therein that since 1970, the deceased had been selling the suit premises to the applicant. To my mind therefore the provisions of the land control Act could not apply to this transaction since the applicant was paying for the suit premises in instalments. Indeed as at 10th November 1984, there was still Kshs.5000/= outstanding. That amount has to date not been paid. Had the applicant demonstrated that he had fully paid purchase price upon his entry into the suit premises as aforesaid, I would have been prepared to hold that time started to run 6 months thereafter for want of consent. Yet this is not the case here. Indeed it is difficult to tell whether or not the applicant actually paid the full purchase price. The evidence on record clearly show that Kshs.2000/= was not the agreed purchase price. And even if it was, I think that the respondent asserted his claim to the suit premises when on 10th November 1984 he renegotiated afresh the purchase price which agreement was reduced into writing. Thereafter time for purposes of adverse possession started to run afresh. That being the case, by the time this originating summons was filed, the threshold of 12 years had not been met. Further the respondent rescinded the agreement on 7th December 1988 when he decided to refund the applicant Kshs.9000/= paid as part purchase price plus Kshs.44,000/= being compensation for the developments effected by the applicant on the suit premises. By this very action, the respondent again asserted his claim to the suit premises thereby curtailing and bringing to an end the applicant's claim to the same way of adverse possession. In other words, time stopped running in favour of the applicant in terms of adverse possession again the moment the respondent took the aforesaid steps to assert his title to the suit premises. It then started running all over again when the applicant refused to accept the refund. Of course the applicant has denied being part of that agreement. However there is the unchallenged independent evidence of DW4, a former Assistant Chief of area which I accept as truthful on the issue. The applicant claims that by then he was blind. However there is no solid evidence to that effect. Further there is nothing to suggest that the applicant had any disagreements with the witnesses who testified on this issue in favour of the respondent to compel them to gang up with the respondent so as to falsely testify against him. Mr. Mindo's evidence on this aspect of the matter is telling. He is an advocate of this court. He had nothing to gain by falsely testifying against the applicant. I observed his demeanor as he testified and found him a honest and truthful witness. In any case if indeed the respondent had paid for the suit premises fully as he claimed, why was it necessary for him to again seek permission from the respondent to plant tea bushes?

In the case of Githu v/s Ndete (supra), it was held thus:-

"…. Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of the right for the purpose of stopping the running of time under the limitation of Actions Act..."

If I got the applicant's argument right, he is saying that he has been in adverse possession of the suit premises in excess of 12 years as stipulated by law and the respondent's rescinding of the agreement in 1988 did not affect the right which had already accrued to him as aforesaid. That argument may have held him in good stead had he taken steps by filing this suit ahead of the respondent's actions aforesaid. As it is, the applicant had not taken steps under the limitation of Actions Act to assert his claim to the suit premises by way of adverse possession. Instead he only rose to the occasion when the respondent beat him to game. That would have shown that as person in possession je had taken steps under the Limitation of Actions to assert his claim. He did not do so. So that to my mind time started to run adversely against the respondent either from 10th November 1984 or 7th December 1988. Whichever the case therefore by the time this originating summons were filed on 14th December 1989, twelve years had not elapsed. Again even if one was to compute 12 years from 1970 the period was interrupted when the respondent asserted his title to the suit premises when he decided to refund the purchase price to the applicant long before the applicant filed the instant suit. It should be appreciated that a part from planting tea bushes in the suit premises, the applicant never actually physically occupied the suit premises. So that the act of refunding the purchase price to the applicant was to my mind sufficient assertion to title by the respondent. Had the applicant been in physical occupation, other considerations would perhaps have come in to play.

A party is normally bound by his pleadings. In his statement of defence filed in HCCC No. 124 of 1990, the applicant admits the existence of the agreement to cancel the transaction. However he avers that it was not binding upon him and that it was null and void without giving reasons. Yet in his evidence he denied the existence of such an agreement. Clearly in asserting so, the applicant is not being truthful and candid to the court. Evidence was abound on how and where the negotiations took place and even the valuation of the tea bushes. I have no doubt in my mind that the applicant agreed on a refund and compensation. As correctly submitted by Mr. Wachira, the applicant only changed his mind when the cheque was presented. The applicant's contention that in 1988 he was blind and which allegation was supported by his wife and therefore he could not enter into an agreement is neither here or there as has been demonstrated elsewhere in this judgment.

The upshot of all am saying is that the entry of the applicant into the suit premises was not adverse to the respondent's title but with the consent of the respondent. It was pursuant to a sale agreement. However the sale agreement was a long drawn out affair lasting between 1970 until 7th December 1988 when the respondent rescinded the same. In between the applicant had made payments intermittently. The last of such payment being Kshs.7000/= made on 10th November 1984. Indeed there is even still an outstanding sum of Kshs.5000/=. I am unable to agree as urged by counsel for the applicant that the entire purchase price was Kshs.2000/= that was fully paid by the applicant in 1970 and that any subsequent payments by the applicant to the respondent was ex-gratia. In the premises it cannot be claimed that pursuant to the provisions of the land control board the transaction became void after 6 months for want of consent by the relevant land control Act and thereafter the applicant's continued occupation of the suit premises became adverse. And even if it was, I would imagine that the same came to an end when the respondent asserted his claim to the suit premises when in 1984 he entered into fresh negotiations with the applicant and in 1988 when he repudiated and or rescinded the agreement and thereafter opted to refund the purchase price received inclusive of compensation for the developments effected on the suit premises by the applicant. Accordingly time on both occasions ceased to run under the Limitation of Actions Act in favour of the applicant. The period of adverse possession having been broken by the respondent's action aforesaid it had to start all over again. So that by the time the applicant initiated this suit on 14th December 1989, his adverse possession had already come to an end. Indeed time could again only have started to run in his favour of the applicant after 1984 and 1988. The bottom line then is that by the time he filed this originating summons he had not attained the threshold of 12 years. As already stated the story would perhaps have been different had the applicant initiated these proceedings earlier than 7th December 1988.

Accordingly the applicants' claim must fail. I have no doubt that this decision shall pain the applicant who has been in occupation of the suit premises for close to 19 years. He has made substantive investments and developments thereon. However the law is no respecter of emotions and sentimental feelings. Harsh as it may appear to be, it has to be applied and obeyed.

The applicant having failed to prove his claim of adverse possession the same is dismissed with no order as to costs. As for HCCC No. 124 of 1990 I grant prayers (a) and (b) sought therein. The applicant shall have sixty (60) days from the date hereof to voluntarily vacate the suit premises and hand over the same to the respondent failing which he shall forcefully be evicted. However, the respondent shall retrieve the sum of Kshs.44,000/= deposited with Mr. Mindo Esq, advocate within the same period of time and pay it over to the applicant. As there was insufficient material laid before me on the question of mesne profits, I decline to make such an award as well as costs of the suit. Those shall be the orders of this court in the two suits.

Dated and delivered at Nyeri this 8th day of October 2009

M. S. A. MAKHANDIA

JUDGE