



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE NO. 13 OF 2001**

**R.H.N.....1<sup>ST</sup> PLAINTIFF**

**H.J.N(Suing through her mother  
and next friend R.H.N.....  
.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DAVID KIMANI MACHARIA.....DEFENDANT**

**JUDGMENT**

This action has been brought by way of originating summons in which the plaintiffs seeks the following relief:

**“1. THAT this Honorable court be pleased to direct the**

**defendant to sign all relevant transfer forms to transfer the property known as Land Parcel Number Nakuru Municipality Block [...] and all structures erected thereon to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to be lawfully registered as joint owners of the said property.**

**IN THE ALTERNATIVE this Honourable court be pleased to authorize and direct that the Deputy Registrar of the High Court to sign the relevant transfer forms in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.**

**2. THAT the Defendant do honour terms of the agreement**

**entered into with the Plaintiffs on 9<sup>th</sup> June, 1998.**

**3. THAT the Defendant do refund to the 1<sup>st</sup> and 2<sup>nd</sup>**

**Plaintiffs sums of Kshs.300,000/= which sums were paid in excess of the agreed purchase price.**

**4. THAT the costs of this application be awarded to the 1<sup>st</sup>**

**and 2<sup>nd</sup> Plaintiffs.”**

The Summons is grounded on the fact that by a written agreement dated 9<sup>th</sup> June 1998, the parties agreed, among other things that the defendant would sell to the plaintiffs his residential property on NAKURU MUNICIPALITY BLOCK [...] (the suit property) at a consideration of Kshs.2.1 million. Upon execution of the agreement, Kshs.800,000/= was paid to defendant and the balance was to be paid to HFCK to settle a loan taken on the security of the suit property.

It was the plaintiffs' evidence that the full purchase price was paid and the discharge of charge granted by HFCK. The plaintiffs further contended that they have paid the purchase price in excess of Kshs.300,000/=. All this time the defendant had not given vacant possession. Ultimately on 15<sup>th</sup> March 1999 he did so. He has, however, since that date failed and/or refused to effect transfer of the suit property to the plaintiffs.

In his reply to the summons, the defendant argued that the plaintiffs were in violation of the agreement for the reason that the payment to HFCK was made well after the stipulated period and for that they ought to pay to the defendant Kshs.210,000 as stipulated in the agreement; that the plaintiffs have not paid the balance of Kshs.190,000/=; that if there was any overpayment, the plaintiffs are to blame for paying HFCK after the agreed period and were therefore responsible to any interest charged for the late payment; that the plaintiffs also owe the defendant Kshs.300,000/= being the value of the building materials

unlawfully detained by the plaintiffs.

These grounds were presented by oral evidence before me and may briefly be stated. H.A.A.N decided to purchase the suit property to his wife, R.N, the 1<sup>st</sup> plaintiff as a gift. The agreement was entered between R and her minor daughter, N.J.N, on one hand and the defendant on the other hand at a consideration of Kshs.2.1m. Kshs. 800,000/= was paid to the defendant upon execution of the agreement. It was explained that after execution of the agreement, the plaintiffs made payments as follows:

1. Kshs. 300,000/= to HFCK – deposit slip – Pexh.7
2. Kshs. 235,000/= - which the defendant asked to enable him purchase

a pick-up – Cheque – PExh.8

3. Kshs. 184,330/= - to HFCK – Bankers Draft – P.Exh.9
4. Kshs. 402,519.50 - to HFCK - Bankers draft – P. Exh.10
5. Kshs.200,000 – to HFCK – Deposit slip – P. Exh.11.

Apart from the above payments which amount to Kshs.2, 121,814/=, the plaintiffs claim that they also paid:

1. Kshs.24,567.20 – water bill – P.Exh.12
2. Kshs.9,995/= to HFCK – Deposit slip –P. Exh.13
3. Kshs.2,500/= - to HFCK – Deposit slip – PExh.14
4. Kshs.4,750/= -for Electricity – P Exh.15
5. Kshs.5,800/= - to Wathigo, Advocate for HFCK – P. Exh.16
6. Kshs.162,579/= – rate arrears to Municipal Council Nakuru – Receipts P. Exh.17 and

7. Kshs.30,000/= a loan to Defendant to assist him move out.

In total the plaintiffs contended they paid Kshs.2, 451,563.80, which is in excess of the purchase price by Kshs.351, 563.80. It was further the plaintiffs' case that pursuant to the agreement, the defendant did not immediately give vacant possession and remained in the suit property as a tenant; that the defendant did not vacate within the time agreed forcing the plaintiffs to seek the intervention of their mutual counsel, Ochieng' Odhiambo & Company advocates.

Finally the defendant vacated the premises on the 15<sup>th</sup> March 1999. It is not denied that although the plaintiffs have the discharge of charge and the title deed from HFCK, the defendant has refused to transfer the property to the plaintiffs.

For his part, the defendant concedes that although the purchase price was fully paid, the plaintiffs had not complied with the terms of the agreement; that instead of payment of the balance of the purchase price within 60 days to the HFCK, the plaintiffs made instalment payments over a period beyond the 60 days, thereby attracting interest; that the plaintiffs also detained the defendant's building material.

I have duly considered the foregoing together with the authorities cited by both learned counsel in their written submissions, namely:

**Surgipharm Limited V. Awuondo & Another**, Nbi. HCCC No.1522 of 2001, (2003) KLR, **Gurvin Signbirdi & Nairinder Singh Ghatora V. Abubakar Madhbuti**, Nbi. H.C. Civil Appeal No.165 of 1996, **Samuel Nyakenogo V. Samwel Orucho Onyaru**, Ksm. Court of Appeal C. A. No.24 of 2004, **Elijah Kipkorir Barmalel & Another V. John Kiplagat Chemweno & 4 others**, Eld. Court of Appeal C.A. No.19 of 2005 and **Joel Mutunga Ngundo V. Thomas Munguti Nzengu**. Nbi H.C.C.A. No.877 of 2003.

The relationship of the parties in this dispute was governed by an agreement whose terms were clear. It stipulated in part (clause 2(b)) that:

**“(b) the balance to be paid upon the vendor giving the purchaser vacant possession of the suit property. Such vacant possession shall be given not later than 31<sup>st</sup> October 1998”**

(Emphasis mine)

Pausing at this stage, it will be recalled that the defendant did not give vacant possession until 5<sup>th</sup> March 1999. It has also been noted earlier that the plaintiffs finally paid HFCK in April 1999 - one month after vacant possession was given. Although time was of the essence by the parties' own agreement that vacant possession would be given not later than 31<sup>st</sup> October 1998, by their conduct they agreed that time would

not be of essence. Time ceased not to be of the essence due to difficulties of the defendant. For instance, he was involved in a road accident and secondly he had a child in school. Clause 4 of the agreement provided that:

**“4. THAT out of the balance due from the Purchasers to the Vendor, the purchaser shall first settle the amount outstanding on the loan account at the Housing Finance Company of Kenya Limited aforesaid, such payment to be made within 60 days hereof”**

(Emphasis mine)

This clause must be read with clause 2(b) - reproduced above. The payment to HFCK although agreed to be made within 60 days, it was dependent upon the defendant giving vacant possession. Clause 12 on the other hand provided that:

**“12. That the completion date is the 31<sup>st</sup> day of October 1998”**

Once again the parties by their conduct waived that time line. So the plaintiffs having settled the purchase price, what is the defendant’s claim? In his own words before the court, he said in part:

**“I seek that I refund within 90 days and I get my house and my material (or Kshs.300,000/=)”**

In cross-examination he went to say:

**“I moved out on 3/3/1999. At this time I was a tenant of the plaintiffs. As I moved out I had no claim to the suit property..... The purchase price was fully paid. .... HFCK is not claiming anything from me. I do not owe HFCK in respect of this house any money”**

He then explained the two reasons why he has refused to transfer the property, namely that the plaintiffs did not pay to HFCK within the stipulated time & secondly that his building material which he left in the property disappeared. Having admitted that the purchase price was fully paid and HFCK loan finally settled, the defendant’s refusal, on the above grounds to transfer the property can only be described as malicious. In his affidavit sworn on 22<sup>nd</sup> June 2005, the defendant demonstrated this malice by stating that upon payment of Kshs.300,000/=, he would sign the relevant transfer documents.

In the first place, it was his responsibility to ensure he moved out with all his belongings. Secondly the defendant has neither proved the existence of the building materials on the suit property nor their

value. R.N denied that building materials were left by the defendant. According to her, only structures for poultry were left and since they did not need them, they cleared them.

Turning to the plaintiff's claim of Kshs.300, 000/= as pleaded, from the receipts produced, amounting to Kshs.210, 191.20, all relating to expenses which ought to have been met by the defendant, plus additional of Kshs.21,349/= paid over and above the purchase price, I find the claim proved to the extent of Kshs.232,040.20.

From what is stated in this judgment, it is clear that the plaintiffs are entitled to specific performance and special damages. It is consequently ordered that:

i) the defendant shall sign the relevant transfer documents to facilitate the transfer of the suit property to the plaintiffs within fourteen (14) days hereof, failing which the Deputy Registrar is authorized to sign them on his behalf;

ii) judgment is entered for the plaintiffs in the sum of Kshs.232, 040.20 with interest from the date of filing this suit;

iii) costs of the suit to the plaintiffs.

**Dated, Signed and Delivered at Nakuru this 13<sup>th</sup> day of February, 2012.**

**W. OUKO**

**JUDGE**