



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 533 of 2006**

**SIMON GATHUKU.....PLAINTIFF**

**VERSUS**

**JAMES NJUGUNA MWANIKI.....DEFENDANT**

**JUDGMENT**

By plaint dated 23<sup>rd</sup> May 2000 and filed the same day the plaintiffs sued the defendant seeking the following orders:

- (a) An order of vacant possession of LR NO. 4894/189
- (b) Mesne profits
- (c) Costs and interest

The defendant was served with summons but failed to enter appearance nor file a defence. The plaintiff applied and obtained interlocutory judgment on 8<sup>th</sup> June 2006. The matter came before me for formal proof.

The plaintiffs sued through Simon Gathaku pursuant to Power of Attorney Registered as number P/A 42860/1.

PW1 SIMON GATHAKU in his evidence told the court that he brought this suit on behalf of the plaintiffs under a Power of Attorney dated 5<sup>th</sup> May 2006 donated to him and was registered on 15<sup>th</sup> May 2006 under NO.42860/1. He told the court that the plaintiffs had purchased the suit land through public auction. The suit property was being auctioned by Standard Chartered Bank to recover their loan. The suit property was advertised in the Daily Nation by Dalphine Auctioneers and it appeared on page 35 of the Daily Nation of 4<sup>th</sup> March 2002 as LR NO 4894/189 (originally LR NO. 4894/2/3) and the chargor was James Njuguna Mwaniki the defendant herein. The suit property was to be auctioned on 8<sup>th</sup> March 2002 and the auction was held at Dalphine Premises at Forest Road. The plaintiffs attended the auction and were declared the highest bidders and at the fall of the hammer they purchased the suit property at Shs.3,750,000/= as indicated at the Memorandum of Sale P.Exh.3.

The plaintiffs did comply with the terms and conditions of sale. They paid a sum of Shs.1,000,000/= at the fall of the hammer and the balance on 14<sup>th</sup> June 2002 by 3 cheques of Shs.475,000/= each Ex. 4(a-c). The payment was made directly to the bank on 14<sup>th</sup> June 2002, and on the same day the bank

confirmed of the payment to their lawyers vide their letter dated 14<sup>th</sup> June 2002.

The letter read:

**14<sup>th</sup> June 2002**

Omamo & Omamo Advocates

Jubilee Insurance House

Wabera Street

**NAIROBI.**

Attention: MS RAYCHELLE OMAMO

Dear Madam,

RE-SALE OF LR NO. 4894/189 NAIROBI

TO WILSON GACHAGWI AND PETER KABAYA

Further to our letter of today 14<sup>th</sup> June 2002 we write to advise that the purchasers have now fully paid the balance of the purchase price. They brought a cheque for Shs.475,000/= today. We have deposited the same to the debtor's account in our books.

You may release the documents to them.

Meanwhile we enclose our cheque for Shs.94,420.30 in settlement of our fees.

Yours faithfully,

GRACE MUKULU

ACCOUNT MANAGER

GROUP SPECIAL ASSETS MANAGEMENT

The suit property was registered in the names of the plaintiffs on 27<sup>th</sup> June 2002 but the defendant declined to give vacant possession of the suit property and hence this suit.

There are two Memorandum of Sale in the court file – one dated 8<sup>th</sup> March 2001 and the other 8<sup>th</sup> March 2002 and both bear the signatures of the auctioneer and the purchasers.

Clause 4 of the conditions of Sale state as follows:

“4” The purchaser shall immediately after the sale pay the auctioneer a deposit of 25% of the amount of the purchase money and shall execute an agreement in the form subjoined for the completion of the purchase and shall pay the balance of the purchase money to the mortgagee's Advocate Messrs Omamo & Omamo Advocates, 4<sup>th</sup> Floor Jubilee Insurance House Wabera Street P.O. Box 48044 Nairobi within 30 days of the date of execution of such agreement for sale (as to which time is of essence of the contract) and such deposit together with the balance of the purchase price aforesaid shall forthwith be paid in full to the mortgagee's Advocates irrespective of whether or not the Transfer in favour of the purchaser shall then have been registered.

It is not explained why there are two Memorandum of Sale bearing different dates but let me refer specifically to the one which the witness produced in court Ex.3 dated 8<sup>th</sup> March 2002.

The purchase price was Shs.3,750,000/= at the signing of the agreement. And according to him the balance of the purchase money was paid by 3 cheques of Shs.475,000/= each dated 14<sup>th</sup> June 2002, Exh.4 a-c which was paid directly to the bank and the bank notified its advocate through a letter dated 14<sup>th</sup> June 2002 referred to above.

A glance at the said 3 cheques (photo copies) they all bear the same amount, the same date and the same number. The photo copies are not of 3 cheques. This is confirmed by the letter by the bank to its advocate dated 14<sup>th</sup> June 2002 above which speaks of a cheque for shs.475,000/=.

Secondly, there is no explanation why the payment was made directly to the bank contrary to the terms and conditions of Sale which required that payment shall be made to the Chargee's Advocates. Further accordingly to the terms and conditions of Sale the balance of the purchase money was to be paid within 30 days of the date of the execution which was 8<sup>th</sup> April 2002 but the balance of the purchase money was paid about on 14<sup>th</sup> June 2002 which violated the terms and conditions of Sale as time was of essence.

From the evidence it is very clear that the whole of the balance was not paid and the portion which was paid was paid contrary to the terms and conditions of the Sale.

The plaintiffs having failed formerly prove that they paid the whole of the purchase money, their claim cannot succeed and must fail.

The suit is therefore dismissed with no order as to costs.

Dated and delivered at Nairobi this 3<sup>rd</sup> day October 2006.

**J.L.A. OSIEMO**

**JUDGE**