

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

Civil Case 533 of 2006

SIMON GATHAKU PLAINTIFF

VERSUS

JAMES NJUGUNA MWANIKI DEFENDANT

RULING

In this Notice of Motion brought under Order 44 of the Civil procedure Rules the Plaintiff seeks orders that the Judgment of this Honourable Court delivered on 13th October 2006 be reviewed and set aside. The application is based on the ground that certain evidence had inadvertently been omitted by the Plaintiff during formal proof of the case and that the new evidence which was not readily available at the formal proof of the case is now available.

The Applicant had purchased the suit land being L.R. No. 4894/189 at a public auction at a purchase price of Shs.3,750,000/=. The same was transferred to him. The Defendant who had mortgaged it to the bank which auctioned it after he has failed or refused to give vacant possession and the Plaintiff sued him for eviction. He also sought mesne profits and costs.

The Defendants after being served with summons failed to enter appearance nor file a defence and the suit proceeded by way of formal proof. In his evidence the Plaintiff told the Court that he had purchased the suit land at a price of Sh.3,750,000/= and had paid the money to the bank through 3 cheques. He produced copies of the 3 cheques which were marked as Exh. 4 (a-c). But the 3 cheques all bore similar numbers, similar amounts and paid on the same date. Further the last payment was made on 14.6.02 contrary to the conditions of sale. On those grounds the Court held that the Plaintiff had failed to formally prove its case and the same was dismissed hence this application.

In this Notice of Motion the Plaintiff seeks review of that dismissal order. Counsel for the Applicant submits that the Plaintiff has additional evidence in which was not readily available at the time of formal proof namely that the time for payment of the purchase price was extended on authority of the chargee. Further the Plaintiff realizes his mistake when through oversight he produced 3 copies of the same cheque to prove payment. He has now annexed copies of 4 cheques for the payment of the total purchase price and he would like to be accorded leave to adduce the additional evidence.

The second issue was the payment of part of the purchase money outside the stipulated time in the conditions of sale.

Paragraph 4 of the conditions of sale provides that the purchaser shall deposit 25% of the amount of the purchase money to the mortgagees Advocates within 30 days of the date of execution of such agreement for sale (as to which time is of essence of the contract).

It is conceded that part of the purchase money was remitted after the expiry of the 30 days as stipulated above but the Applicant avers in paragraph 4 of the Affidavit in support of this application that although time was of essence, time for payment of the purchase price was extended on authority of the chargee. In auction agreements non-compliance with the conditions of sale is fatal and goes to the root of the contract and has no room for private negotiations.

However this being review application and the Applicant having demonstrated that he is now in possession of the copies of the 4 cheques through which he made the payments and which could not be produced during the hearing of the formal proof, I allow the application and set aside the Judgment of this Court delivered on 13th October 2006.

I order that the suit be heard afresh to enable the Plaintiff to adduce additional evidence and the same to be heard by a different Judge.

DATED at Nairobi this 19th day of December, 2006.

.....

J.L.A. OSIEMO

JUDGE