**Industrial and Commercial Development Corporation**

**v Daber Enterprises Ltd**

[2000] 1 EA 75 (CAK)

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 15 December 2000

**Case Number:** 41/00

**Before:** Gicheru, Omolo and Keiwua JJA

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Summary judgment – Matter not plain and obvious – Defence showing a* bona fide *triable issue –*

*Whether Defendant should be allowed to defend unconditionally – Order 35 – Civil Procedure Rules.*

*[2] Summary procedure – Circumstances under which summary procedure is suitable.*

*[3] Summary procedure – Sale of land by public auction – Purchaser at the auction purportedly varying*

*terms – Vendor refunding sale deposit to purchaser – Purchaser filing suit against vendor and seeking*

*summary judgment – Whether summary procedure suitable.*

**Editor’s Summary**

On 17 September 1997 the Appellant’s agent sold the suit property by public auction in exercise of the

Appellant’s statutory power of sale. The Respondent was the highest bidder at KShs 3 200 000 and the

property was knocked down to them on condition that the Respondent would immediately pay 25% of the

sale price and the balance to the Appellant within 30 days from the date of sale. The Respondent paid the

25% deposit and agreed to pay the balance of KShs 2 400 000 within 30 days.

Six days later the Respondent wrote to the Appellant informing the Appellant *inter alia* that they

needed 60 days to arrange to pay the balance. The Appellant rejected this suggestion by the Respondent.

There was a subsequent meeting between the Appellant and the Respondent. After the meeting, the

Respondent wrote to the Appellant stating that the Respondent would pay the balance within 30 days of

receiving from the Appellants documents of title, discharge of charge and a duly executed transfer and

that the period of 30 days would be extended by consent and on good grounds. The Appellants reacted to

the said letter by refunding to the Respondents the 25% deposit.

Consequently, the Respondents filed suit in the High Court for breach of contract and other liquidated

sum. The Appellant filed a defence, the main basis of which was that the Respondent had made a counter

offer which was unacceptable to the Appellant hence the earlier offer to the Respondent had lapsed.

On 4 June, 1999 the Respondent applied for summary judgment under Order 35 Rules 1(1), 2 and 3 of

the Civil Procedure Rules and for the defence to be struck out under Order 6 Rule 13(1)(*c*) of the said

Rules for the reason that it might prejudice, embarrass or delay the fair trial of the action. The High Court

gave summary judgment and struck out the defence, giving rise to this appeal.

Page 76 of [2000] 1 EA 75 (CAK)

**Held** – The correspondence between the Appellant and the Respondent after the public auction of the

suit property seemed to vary the conditions of the original offer. There was an issue as to whether that

amounted to a counter-offer the non-acceptance of which terminated the original offer.

Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to

have his case tried by a proper trial. *Wenlock v Moloney and others* [1965] 1WLR 1238 followed.

Summary procedure is applied to enable a Plaintiff to obtain quick judgment where there is plainly no

defence. Where the defence is a point of law and the court can see at once that the point is misconceived

or, if arguable, plainly unsustainable, summary judgment will be given. Summary procedure should not

be used for obtaining an immediate trial; the question must be short and dependent on few documents;

*Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liquidation)* [1990] 1 WLR

153 and *Balli Trading v Afalona Shipping The Coral* [1993] 1 Lloyd’s Rep 1 followed. A defendant who

can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without

condition; *Jacobs v Booth Distillery Co* (1901) LT 262 followed. The appeal was allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***United Kingdom***

*Balli Trading v Afalona Shipping and another* [1993] 1 Lloyd’s Rep 1 – F

*Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 – F

*Jacobs v Booth’s Distillery Co* (1901) LT 262 HL – A

*Wenlock v Moloney and others* [1965] 1 WLR 1238 – F