**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.

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**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

**Judgment**

**GICHERU, OMOLO and KEIWUA JJA:** 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 where, if necessary,

there has been discovery and oral evidence subject to cross-examination – see the case of *Wenlock v*

*Moloney and others* [1965] 1 WLR 1238. The purpose of the proceedings in an application for summary

judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the

claim. And where the defendant’s only suggested defence is a point of law and the court can see at once

that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the

plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be

allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an

arguable question of law or construction is short and depends on few documents that the procedure is

suitable – see the cases of *Home and overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in*

*Liquidation)* [1990] 1 WLR 153, 158 and *Balli Trading*

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*v Afalona Shipping The Coral* [1993] 1 Lloyd’s Rep 1 CA. 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 – see the case of

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

The genesis of the subject matter of the Appellant’s appeal to this Court was a letter dated 23

September 1997 addressed to the Appellant by the Respondent seeking title documents, discharge of

charge, a duly executed transfer and rates and rents clearance certificates from the Appellant in respect of

all that parcel of land known as title number Mombasa/Block X/291 situate along Tom Mboya Avenue,

Mombasa together with all the buildings and other improvements being or erected thereon, hereinafter

called the suit property. That letter, where pertinent, also stipulated as follows:

“We shall hold the said documents upon our undertaking to release the balance of the purchase price (less

rates and/or rent currently outstanding, if any) within 7 days of registering the transfer aforesaid, or within 60

days from the date of receipt thereof, or in the alternative failing which the same will be returnable upon

demand in their condition of receipt.

Our clients require the 60 days to enable them organise the finance necessary but it is expected this will be

done much earlier”.

The Appellant as a chargee to the suit property had on 9 September 1997 in exercise of its statutory

power of sale advertised for sale by public auction the aforesaid property. That sale was to be conducted

on 17 September 1997 at 11:00am by the Appellant’s agents, Messrs Nadhia Limited auctioneers at their

premises situate along Meru Road, Mombasa. The conditions of sale were as follows:

“1. All intending purchasers are requested to verify the details for themselves as these are not warranted

by the auctioneer nor the chargee.

2. T he highest bidder shall be declared the purchaser and pay immediately a deposit of 25 per cent of the

sale price in cash or by banker’s cheque. The balance is to be paid within thirty (30) days from the date

of the sale to the chargee.

3. S ale is subject to reserve price and other requisite consent”.

As advertised, the auction sale of the suit property was conducted by the Appellant’s agents, Messrs

Nadhia Limited, auctioneers at their above-mentioned premises in Mombasa on 17 September 1997. At

that sale, the Respondent was the highest bidder at KShs 3 200 000 and at the fall of the hammer was

declared the purchaser. In accordance with the conditions of the auction sale of the suit property, the

Respondent made a down payment of 25% of the purchase price, that is to say, KShs 800 000 and was

subsequently issued with a certificate of sale. The balance of the purchase price amounting to KShs 2 400

000 was to be paid by the Respondent to the Appellant within thirty (30) days from the date of the

auction sale – 17 September 1997. Six (6) days later, the Respondent wrote the letter referred to above to

the Appellant. In its letter dated 24 September 1997, Appellant’s response to the Respondent’s letter

aforementioned was, where relevant, as follows:

“The above mentioned property was sold by public auction. It is a condition that the purchaser should verify

particulars pertaining to rates and ground rent as these are not warranted by the chargee.

In view of this we cannot release the documents as we are expecting to receive the balance of the purchase

price within 30 days”.

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Subsequent to this letter, the Appellant and the Respondent met and from their meeting, it would seem

from the letter dated 26 September 1997 that the Respondent accepted to pay to the Appellant the balance

of the purchase price of the suit property within thirty (30) days of receipt of the title documents, the

discharge of charge and a duly executed transfer. According to this latter letter, the thirty (30) days

period above mentioned could have been extended by mutual agreement and for sufficient reasons. The

Appellant’s reaction to the aforesaid letter was to refund to the Respondent the KShs 800 000 paid by the

Respondent at the auction sale of the suit property the same being the 25% of the purchase price of the

said property. While acknowledging the refund of this sum of money, the Respondent threatened to bring

an action against the Appellant for breach of contract which threat was carried out by the filing of civil

case number 294 of 1998 in the superior court on 10 February 1998. On 12 March 1998 the Appellant

entered appearance and filed a defence to the Respondent’s suit the gravamen of which was the

Respondent’s counter-offer varying the conditions of the auction sale of the property which was

unacceptable to the Appellant.

By a notice of motion dated 4 June 1999 and filed in the superior court on the same day the

Respondent applied for summary judgment against the Appellant under Order XXXV Rule 1(1), (2) and

(3) of the Civil Procedure Rules Chapter 21 Laws of Kenya in the sum of KShs 11 800 000 prayed in its

plaint as special damages for loss of bargain being the difference of the resale price of KShs 15 000 000

offered to the Respondent and the auction sale price of KShs 3 200 000. The Respondent also sought to

have the Appellant’s defence struck out under Order V1 Rule 13(1)(*c*) of the aforesaid Rules for the

reason that it may prejudice, embarrass or delay the fair trial of the Respondent’s action against the

Appellant. This application was supported by the Respondent’s affidavit annexed to which were, the

germane correspondence referred to above which were also annexed to the Appellant’s replying affidavit.

At the hearing of the Respondent’s application in the superior court, it was submitted on its behalf

that it was purchasing the suit property for resale and had indeed secured buyers for the same amongst

them being Githere Investments Limited, which had offered to purchase the suit property at

KShs 15 000 000. It was also submitted that the Respondent was not in breach of the thirty (30) days

period within which it was required to pay the balance of the auction purchase price of the suit property

since when the Appellant refunded to the Respondent the KShs 800 000 deposit of the purchase price of

the suit property, the thirty (30) days period had not expired. To this end, the Appellant was in breach of

the contract of sale of the suit property by public auction with the Respondent so that its defence to the

Respondent’s suit was a sham.

The submission of the Appellant in the superior court was that instead of paying the balance of the

purchase price within the stipulated thirty (30) days in the conditions of sale of the suit property by

public auction, the Respondent counter-offered and sought a sixty (60) day period within which to pay

the balance of the purchase price of the said property. This counter-offer was unacceptable to the

Appellant. It was not therefore in breach of the contract as alleged by the Respondent and its defence to

the Respondent’s suit disclosed a triable issue entitling it to have unconditional leave to defend the said

suit.

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In its ruling dated and delivered at Nairobi on 5 August 1999 the superior court found the Appellant to

have been in breach of the contract of sale of the suit property by public auction and proceeded to hold

that the Appellant’s defence to the Respondent’s suit disclosed no triable issue. In the result, summary

judgment in the sum of KShs 11 800 000 being special damages for loss of bargain was entered in favour

of the Respondent and the Appellant’s defence was struck out for the reason that it may prejudice,

embarrass or delay the remainder of the Respondent’s suit against the Appellant. Aggrieved by this

decision, the Appellant now appeals to this Court and has put forward seven grounds of appeal the centre

point of which is that having not been in breach of the contract of sale of the suit property by public

auction it was on that account entitled to unconditional leave to defend the Respondent’s action against it

in connection therewith. All other issues in the Appellant’s appeal are dependent on this one primary

issue.

At the hearing of this appeal on 30 November 2000, the force of the submission of counsel for the

Appellant, Mr *Ougo*, was that the Respondent’s letter dated 23 September 1997 and addressed to the

Appellant, the pertinent parts of which are set out in this judgment, amounted to a counter-offer which

was not acceptable to the Appellant with the result that the original offer of sale of the suit property by

public auction to the Respondent was terminated. According to Mr *Ougo*, these were matters that were

pleaded in the Appellant’s defence in respect of which the Appellant should have been allowed to urge in

the superior court. The position taken by counsel for the Respondent, Mr *Kamaara*, was however, that

both parties had a firm contract and the Appellant had acted in breach of it as was evident in the refund to

the Respondent by the Appellant of the KShs 800 000 being the 25% per cent of the purchase price of the

suit property even before the expiry of the thirty (30) days period within which the balance of, the

purchase price of the said property was to be paid. According to Mr *Kamaara* therefore, the superior

court could not be faulted in holding that the Appellant’s defence raised no triable issue and was a sham.

In whichever way one looks at the correspondence cited in this judgment and addressed to the

Appellant by the Respondent in relation to the contract of sale of the suit property by public auction

whose purport was to vary the conditions of the original offer of sale of the said property to the

Respondent, the same could have been construed as a counter-offer the non-acceptance of which by the

Appellant terminated the original offer and thus vitiating the contract of sale of the suit property by

public auction between the Appellant and the Respondent.

As pointed out at the beginning of this judgment, 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 determined by a proper trial where, if

necessary, there has been discovery and oral evidence subject to cross-examination for the scope of the

proceedings in an application for summary judgment is to enable a Plaintiff to obtain a quick judgment

where there is plainly no defence to the claim. This cannot be said to have been so in the circumstances

obtaining in the present appeal. In the result, we allow this appeal, set aside the order of the superior

court entering summary judgment for the Respondent in the sum of KShs 11 800 000 and striking out the

Appellant’s defence together with the award of costs of the suit with interest thereon at court rates and

order that the Appellant be and is hereby granted unconditional leave to defend the suit in the

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superior court and will have the costs of this appeal and those incurred in the superior court in the

defence of the Respondent’s application for summary judgment and for striking out its defence.

For the Appellant:

*J A Ougo* instructed by *Oraro and Co*

For the Respondent:

*P M Kamaara* instructed by *Ramesh Manek Adv*