



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL 197 OF 1998**

**PROVINCIAL INSURANCE CO. LTD ..... APPELLANT**

**VERSUS**

**DINERS CLUB AFRICA LTD ..... RESPONDENT**

**AND**

**PETER G. KAMAU ..... INTERESTED PARTY**

**(An Appeal from the Ruling of B. Rashid, SRM in**

**Nairobi Chief Magistrate's Court Civil Suit No. 1372 of 1995  
delivered on 25th April, 1997).**

**JUDGMENT**

By an Amended Plaintiff dated 8th July, 1996 and filed in the lower court on 9th July, 1996, the Respondent (Plaintiff in the lower court) claimed the sum of Kshs.99,638.80 from the Appellant and the Interested Party being charges incurred by them arising from the use of credit cards issued by the Respondent. The Appellant denied the charges, stating clearly in the defence that the Appellant had applied for one corporate card for use by the Interested Party, and had settled the charges in full in respect of that card. According to them the sum claimed related to a personal card issued to the Interested Party without the knowledge and authority of the Appellant, and in respect of which the Interested Party was personally liable.

Despite this clear defence, the 1st Respondent applied for Summary Judgment under Order 35 of the Civil Procedure Rules, on the grounds that the Defence was a "sham". The lower court agreed with the Respondent and in a brief, eight-line Ruling, entered Summary Judgment for the Respondent. It is against that Judgment that this appeal has been preferred. The only issue is whether the court was correct in entering Summary Judgment against the Appellant.

Summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can only be applicable in plain, clear and obvious cases. In **D. T. Dobie & Company (Kenya) Ltd vs Muchina (1982) KLR. 1** at p. 9 Madan JA (as he then was) said:

*"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way."*

Although Justice Madan said this in respect of an application for striking out a plaintiff, it would equally apply to an application to strike out a defence as was the case in the present appeal.

Now, was this a clear case where summary procedure could be invoked? In my view, definitely not. In its replying affidavit to the summary judgment application, the Appellant pointed out clearly how it had settled the bills in respect of its corporate card, and how the Interested Party was responsible personally in respect of a card issued to him personally. That to me is clearly a triable issue that could not have possibly

been decided in a summary manner. The trial magistrate wrongly relied on the case of ***Zola vs Ralli Bros. Ltd (1969) E A 691*** where the Court of Appeal held that the fact that a defendant might have a claim to contribution against another person did not entitle him leave to defend. Those facts are inapplicable to this case. Here, there is no claim for contribution. The Appellant had, for reasons explained in its deposition, denied liability, and was fully entitled to a hearing on merit.

Accordingly, this appeal is allowed with costs, both here and in the lower court. The lower court's Judgment is set aside and the Appellant is given unconditional leave to defend.

Dated and delivered at Nairobi this 16th day of September, 2005.

**ALNASHIR VISRAM**

**JUDGE**