



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, OMOLO & KEIWUA, J.J.A.)
CIVIL APPEAL NO. 41 OF 2000

BETWEEN

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION.....APPELLANT

AND

DABER ENTERPRISES LIMITED.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at
Milimani (Lady Commissioner of Assize Gacheche) dated the 5th day of August, 1988

in

H.C.C.C. NO. 113 OF 1999)

JUDGMENT OF THE COURT:

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 W.L.R. 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. (U.K.) Ltd. (In Liquidation)*, [1990] 1 W.L.R. 153, 158 and *Balli Trading v. Afalona Shipping, The Coral*, [1993] 1 Lloyd's Rep. 1, C.A. 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) L.T. 262 H.L.

The genesis of the subject-matter of the appellant's appeal to this Court was a letter dated 23rd 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 NO. 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 seven 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 sixty 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 9th 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 17th September, 1997 at 11.00 a.m. by the appellant's agents, M/S. Nadhia Ltd., 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. The 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. Sale 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, M/S. Nadhia Ltd., Auctioneers at their above mentioned premises in Mombasa on 17th September, 1997. At that sale, the respondent was the highest bidder at K.Shs. 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, K.Shs. 800,000/- and was subsequently issued with a certificate of sale. The balance of the purchase price amounting to K.Shs. 2,400,000/- was to be paid by the respondent to the appellant within thirty (30) days from the date of the auction sale - 17th September, 1997. Six (6) days later, the respondent wrote the letter referred to above to the appellant. In its letter dated 24th September, 1997, the 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."

Subsequent to this letter, the appellant and the respondent met and from their meeting, it would seem from the letter dated 26th 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 K.Shs.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 No. 294 of 1998 in the superior court on 10th February, 1998. On 12th 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 suit property which was unacceptable to the appellant.

By a notice of motion dated 4th 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 in the sum of K.Shs.11,800,000/= prayed in its plaint as special damages for loss of bargain being the difference of the re-sale price of K.Shs.15,000,000/= offered to the respondent and the auction sale price of K.Shs.3,200,000/=. The respondent also sought to have the appellant's defence struck out under **Order VI 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 re-sale and had indeed secured buyers for the same amongst them being **Githere Investments Ltd.** which had offered to purchase the suit property at K.Shs.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 K.Shs.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.

In its ruling dated and delivered at Nairobi on 5th day of 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 K.Shs.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 30th November, 2000, the force of the submission of counsel for the appellant, Mr. Ougo, was that the respondent's letter dated 23rd September, 1997 and addressed to the appellant, the pertinent parts of which are set out in this judgment, amounted to a counteroffer 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 K.Shs.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 nonacceptance 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 K.Shs. 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 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.

Dated and delivered at Nairobi this 15th day of December, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR