IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0086 of 2016
(High Court Civil Appeal No.04 of 2016)

BETWEEN	:	**I- TAUKEI LAND TRUST BOARD**
		Appellant
AND	:	**1. JOSAIA COKOTIONO**
		2. JOANA SEKINAIRAI
		Respondents
Coram	:	**Chandra JA** **Basnayake JA** **Almeida Guneratne JA**
Counsel	:	**Ms. L. Komaitai for the Appellant** **Mr. N Tuifagalele for the 1st and 2nd Respondents**
Date of Hearing	:	**10 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasoning, conclusion and the proposed orders made by Almeida Guneratne JA.

Basnayake JA

[2] I agree with the conclusion of Almeida Guneratne JA.

Almeida Guneratne JA

Introduction and Chronology of Events

[3] This is an appeal against the judgment of the High Court of Fiji at Suva. By that judgment the High Court in the exercise of its appellate jurisdiction set aside a ruling dated 2nd March, 2016 of the Magistrate's Court at Nasinu. The Magistrate's Court by its said ruling had set aside an earlier ruling given by it on 22nd December, 2014 when it had entered what it regarded as a default judgment in favour of the Respondents (original plaintiffs) for want of appearance of the Appellant (original defendant). That second (impugned) ruling dated 2nd March, 2016 had been made by the Magistrate in setting aside an antecedent ruling dated 18th March, 2015 by which the Magistrate had refused to set aside the "default Judgment" dated 22nd December, 2014.

[4] The ruling dated 22nd December whereby the said "default judgment" had been entered is at page 246 of Vol. 2 of the Copy Record of the Magistrate's Court and the ruling dated 18th march, 2015 referred to above is at pages 7-8 of Vol.1 of the Copy Record of the Magistrate's Court. The impugned ruling of 2nd March, 2016 against which the Respondents (plaintiffs) appealed to the High Court is found at pages 4 – 6 of Vol.1 of the Copy Record of the Magistrate's Court. The judgment of the High Court dated 21st June, 2016 which has been appealed against to this Court is at pages 4 – 6 of the Record of the High Court (RHC).

Notice and Grounds of Appeal filed by the Respondents in the High Court

[5] In order to ascertain and determine whether the judgment of the High Court bears scrutiny, I thought it best first, to look at the grounds of appeal urged by the Respondents in the High Court and then see as to how the learned High Court Judge responded to and dealt with the same.

[6] The said grounds of appeal are contained at pages 1 -2 of Vol.1 of the Copy Record of the Magistrate's Court. They are:

> *"1. That, the learned Magistrate erred in law and in fact when she allowed the Respondent (Appellant before this Court) – to file its setting aside of default judgment application for the second time after she made a ruling to dismiss the Respondent's first setting aside application.*
>
> *2. That, the learned Magistrate erred in law by misinterpreting Section 36(1)(b) of the Magistrate's Court Act (Cap 14, allowing the Respondent to file its second setting aside application after the first setting aside application was dismissed when the only option available to the Respondent was to appeal the learned Magistrate's ruling to the High Court.*
>
> *3. That, the learned Magistrate erred in law by continuing to preside over the proceedings in the Magistrate's Court making her functus officio under Section 36(1)(b) after she delivered her ruling by dismissing the Respondent's setting aside application."*

The High Court Judgment

[7] Having recounted the proceedings in the Magistrate's Court in their chronological order of events, the learned Judge in allowing the appeal had held thus:

> *"9. The grounds of appeal raise the simple question whether the Learned Resident Magistrate could have entertained the respondent's second notice of motion and set aside the default judgment, when her first Order of 18th March, 2015, dismissing the motion was not vacated.*

10. At the hearing, Mr Tuifagalele, Counsel for the Appellants submitted that the lower court was functus and the only option available to the respondent was to appeal from the order of 18th March, 2015 under Section 36(1)(b) of the Magistrate's Court Act.

11. The riposte of Ms Vokanavanua, Counsel for the Respondent was that multiple applications could be made by a defendant to set aside a default judgment.

12. I disagree. In my judgment, the Learned Resident Magistrate was functus and could not entertain the second application, as her Ruling of 18th March, 2015 was not set aside.

13. In my judgment the appeal succeeds on the first ground of appeal.

14. I do not find it necessary to deal with the second and third grounds which urge that the lower court misinterpreted Section 36(1) (b) of the Magistrate Court Act. I find that the Learned Resident Magistrate had not considered that provision in her Ruling."

A brief reflection at this point on two aspects of the said Judgment of the High Court

[8] At this juncture I felt it necessary to reflect on two aspects of the Judgment of the High Court which the Court itself made reference to, in as much as, in my final assessment and determination those two aspects would have a bearing.

[9] They are:

(i) *the observation made by the learned Judge that, "on 2nd March, 2016, the Learned Resident Magistrate allowed the second application and set aside the judgment by default on the ground*

that the respondent had a satisfactory explanation for non-appearance on the day default judgment was entered and a substantial ground of defence (paragraph 7 of the Judgment) and,

(ii) the Statement made by the learned Judge that, the grounds of appeal raise the simple question whether the Learned Resident Magistrate could have entertained the respondent's second notice of motion and set aside the default judgment, when her first order of 18th March, 2015 dismissing the motion was not vacated". (Paragraph 9 of the Judgment).

Notice and Grounds of Appeal before this Court (at Pages 1-2 of the Record of the High Court

[10] Before I deal with the grounds of appeal urged before this Court, I cannot help but make a comment in regard to the non-diligent manner in which the Notice and Grounds of Appeal have been drafted. Not only is the caption misleading and defective (making reference to the High Court of Appeal Fiji Islands Appellate Jurisdiction) but also repeatedly making reference to a Magistrate's Court Ruling dated 30th May 2016, whereas the reference ought to have been to a Magistrate's court ruling of 2nd March, 2016. The date 30th May, 2016 was in fact the date of hearing of the Appeal before the High Court.

[11] I dare say that, I am aware of some jurisdictions where for such lapses; superior Courts have rejected appeals *in limine.* However, in the absence of any point being made by learned Counsel for the Respondents in that regard, I shall overlook these lapses while cautioning the Appellant's lawyers and legal practitioners in general to be diligent in drafting papers on behalf of their clients. Failure to do so could very well entail dire consequences.

Consideration of the Grounds of Appeal in the light of the Submissions made by the respective Counsel

[12] In regard to Ground 1, it cannot be said that, the learned Judge erred in law in failing to assess the circumstances in which the "default judgment" had been entered. The default judgment had been entered simply for non-appearance of the defendant (appellant) on 22nd December, 2014 (Page 246 of Vol.2 of the Copy Record of the Magistrate's Court).

[13] In regard to Ground 2, I am of the view that, this ground is entitled to succeed for the sole reason that, the learned judge himself observed that, on 2nd March, 2016, the Magistrate had allowed the second application and had set aside the judgment by default on the grounds that, inter-alia the Respondent had a satisfactory explanation for non-appearance on the day default Judgment was entered..."

[14] If one were to pause there, it is to be noted that there is nothing to be gathered from the Copy Records of both the Magistrate's Court and the High Court that, it was not so and indeed the learned High Court Judge appears to have proceeded on the basis that, the respondent had had a satisfactory explanation for non-appearance on the day the default judgment had been entered.

[15] It is correct, as the learned Judge had observed that, there is no order seen in the proceedings before the Magistrate's Court that, the first order refusing to set aside the default Judgment had been vacated.

[16] No doubt, there is no formal order indicating the same in the proceedings before the Magistrate's Court. But, going through those proceedings I could also not see any argument on the part of the Respondents (plaintiffs in the Magistrate's Court) to that effect, their bone of contention being that, the Magistrate's Court was "functus" after it gave its first ruling of 18th March, 2015 in refusing to set aside the said "default Judgment".

The basis of the Magistrate's Court Ruling dated 18th March, 2015

[17] The learned Magistrate had correctly looked at the applicable provisions in the Magistrates' Court Rules impacting on the matter, namely;
Order xxxll Rule 11 of the Magistrate's Court and Order xxx Rule 5 of the said Act.
"Order xxxll Rule 11: Any judgment by default may be set aside by the Court or a Magistrate upon such terms as to costs or otherwise as the Court or Magistrate may think fit."
"Order xxx Rule 5: Any judgment obtained against my party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit."

[18] As the said Ruling reveals, the Defendant's (the present Appellant's) application had been apparently made under Order xxxll Rule 11 and not under Order xxx Rule 5.

[19] It is on that basis that the Magistrate in the said Ruling had made the following orders (viz):

> "(i) The motion filed by the Defendant for this matter to be re-instated pursuant to Order xxx11 Rule 11 is procedurally wrong.
>
> (ii) Therefore, the motion filed by the Defendant for this matter to be re-instituted is dismissed." (pages 7 to 8 of Vol.1 of the Copy Record of the Magistrate's Court).

[20] In that background I looked at the basis on which the Magistrate had made his Ruling of 2nd March, 2016.

The basis of the subsequent Ruling of the Magistrate dated 2nd March, 2016

[21] The learned Magistrate laid down three principles in making the said Ruling that was appealed against to the High Court as being the applicable principles to consider the setting aside of a default judgment. They are:-

(i) Whether the defendant has an arguable or triable issue as a ground of defence to the action.
(ii) Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ.
(iii) Whether the plaintiff will suffer irreparable harm if the (default) Judgment is set aside."

[22] In regard to (i) above, the learned Magistrate had looked at the Statement of Claim of the plaintiff, and the statement of defence of the defendant and found that, the averments contained in the Statement of Defence "were arguable". (At paragraph [10] of the Ruling, vide: page 5 of Vol.1 of the Copy Record of the Magistrate's Court).

[23] Having perused the said pleadings, I myself found that, the averment in the Statement of Defence as to whether compensation was owing and due to the Respondents as being the foundation of the plaintiff's action, the defendant's position being that the Crop Compensation was duly paid to the 1st Respondent. This was an "arguable matter" for which evidence would be required at a trial.

[24] In so far as (ii) above is concerned, the learned High Court Judge himself in his Judgment had not faulted the learned Magistrate's finding that the Appellant (Respondent in the High Court) had offered a satisfactory explanation for the non-appearance on the day the default judgment had been entered.

[25] In the context of (iii) above, I have to say that we are here not dealing with an injunction application or an order to stay execution of a Judgment, the usual and/or common reasons that a Court is faced with in having to deal with contentions as to what is "irreparable loss".

[26] In contrast, the instant case is one where, as the proceedings in the Magistrates Court reveal, though statements of claim and defence had been filed, there had been an application to file an amended Statement of Defence which the learned Magistrate had no occasion to go into on account of the intervening circumstances resulting in a "default judgment" being entered on a mention date.

[27] Certainly, that is a matter that has caused 'delay' in the prosecution of this action. But, that is a matter that could be responded to in an appropriate order for costs.

Did those principles as enunciated by the learned Magistrate accord with the applicable statutory provisions?

[28] In that regard, I hark back to the terms of Order xxxll Rule 11 and Order xxx Rule 5 which I have referred to at paragraph [17] above in this judgment.

Could it be then said that the Judgment of the High Court bears scrutiny?

[29] With all due respect to the learned High Court Judge's approach to the matter, I do not think so and I lay down my reasons for saying so as follows:-

(a) The learned High Court Judge, as is apparent from his judgment went on the basis that, when the Magistrate had given her first order of 18th March, 2005, she was rendered 'functus'.

(b) But then, it was an order made by the Magistrate on the basis that, the application to have the default judgment in question set aside was based on the wrong Rule, namely, Order xxx 11 Rule 11.

(c) That being regarded as an inadequate provision, for the Appellant to have relied on (while I reserve any comment in regard to the adequacy or otherwise for the Appellant to have come under that provision) what had been left on foot was the question that, in consequence, whether the Appellant could have moved under the correct Rule, namely, Order xxxRule 5 of the Magistrate's Court Act.

(d) That, the Appellant had pursued with no provision of the Magistrate Court Act that suggests otherwise taking into consideration the added fact that, the substantive matter had not been fixed for trial, the pleadings being settled, (although an application for the amendment of the Statement of Defence was still on hold) when the present dispute had arisen.

[30] Taking into consideration the aforesaid facts, I am inclined to the view that, the basis on which the learned High Court Judge had allowed the Respondent's appeal on the basis that, the learned Magistrate was 'functus' when she made the Ruling on 2nd March, 2016 does not bear scrutiny while hastening to add that, the contention advanced on behalf of the appellant that multiple (repeated) applications to have a default judgment set aside could be made is not one that could be subscribed to in general but confined to the particular circumstances of this case for the reasons I have stated above at paragraph [29] of the this judgment.

Re: The Scope and Contract of the 'functus officio' principle

[31] That Latin phrase meaning that, "no longer having power or jurisdiction because the power has been exercised" (Vide: Law Dictionary, 2nd Ed. P.H. Colling, page 104), in its application to the instant case, may have been applicable at the stage of the Magistrate's

Ruling of 18th March, 2005 on Common Law principles. But, here we are dealing with the statutory provisions contained in Order xxx Rule 5 of the Fijian Legislation (the Magistrate Court Act), which the learned High Court Judge, respectfully, has failed to give adequate consideration.

Conclusion

[32] For the aforesaid reasons having gone through the written submissions and having heard the oral submissions made by the Counsel, I allow this appeal and set aside the Judgment of the High Court dated 21st June, 2016 in consequence of which I propose the following Orders.

The Orders of the Court are:

1. *The Appeal is allowed and the Judgment of the High Court dated 21st June, 2016 is set aside.*

2. *The Registrar is directed to remit this matter to the Magistrate's Court to consider and determine whether the Amended Statement of Defence should be allowed or not and to take all necessary and consequential steps thereafter.*

3. *In all the circumstances of this Case, the parties shall bear their own costs of this Appeal.*

.....
Hon. Justice S. Chandra
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL