

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 186 of 2012

BETWEEN : **TOSA BUSSAN (FIJI) LIMITED** a limited liability company having its registered office at Lot 15 Rokobili Sub-Division, Nabua, Suva in the Republic of Fiji.

PLAINTIFF

AND : **TADULALA TUINAMOALA** of Princess Road, Tamavua, Suva in the Republic of Fiji.

DEFENDANT

COUNSELS : **Ms Rakai M** for the Plaintiff
Mr Vosarogo F for the Defendant

DATE OF HEARING : **10th June 2013**

DATE OF ORDER : **10th June, 2013**

ORDER

1. Summons to enter Summary Judgment was filed by the Plaintiff on 26th September 2012 supported by the Affidavit sworn by KINIVILIAME KILIRAKI on 26th September 2012.
2. Summary Judgment was entered and Orders was made on 25th October 2012 considering the following grounds:
 - (a) *No appearance by the Defendant or her counsel;*
 - (b) *The Defendant's counsel defaulted the undertaking given to the court on 2/10/2012 to file the Affidavit in Response.*
3. The Order/Summary Judgment served on 21st November 2012 and Affidavit of Service was filed on 23rd November 2012 by the Plaintiff.

4. Inter parte motion dated 30th November 2012 and the Affidavit in Support sworn by Tadulala Tuinamoala (the Defendant) filed on 21st January 2013.
5. The Affidavit in Reply sworn by KINIVILIAME KILIRAKI, Director of the Plaintiff filed on 14th March 2012.
6. By the inter parte motion dated 30th November 2012, the Defendant sought:
 - (a) *That there be a Stay of Execution of the Order dated 25th October 2012 by this court;*
 - (b) *That the Orders of the Court dated 25th October 2012 to be set-aside;*
 - (c) *The Defendant be allowed to file their Statement of Defence unconditionally;*
 - (d) *That the cost be in the cause of the application.*
7. When the matter was taken up for hearing, the counsel for the parties made their submissions.
8. The Defendant's counsel stated:
 - (a) *Referred to Order 14 Rule 11 of the High Court Rules which states:*

“11. Any Judgment given against a party who does not appear at the hearing of an application under Rule 1 or Rule 5 may be set aside or varied by the court on such terms as it thinks just”.
 - (b) *Referring to paragraph 7 of the Affidavit of the Defendant's counsel stated that absence of the counsel to make representations was not intentional nor a tactic and it did not mean any disrespect to the bench or to cause undue delay to the proceedings;*
 - (c) *Referring para (ii) of the Order dated 25th October 2012 it was submitted that by the Statutory Provisions the Custom's Agent ID Card had to be returned to the Customs and Revenue authority and on the other hand the Defendant should adhere to the Court order which is contradictory.*

However, this was a statement made from the Bar table and not averred in the Affidavit of the Defendant;

(d) Further stated referring to paragraph 10 of the Affidavit that the Defendant has meritorious defence and the Defendant will be prejudiced by the default judgment and orders.

9. The Plaintiff's counsel made her submissions and stated:

(a) The Affidavit of the Defendant is not properly indorsed in pursuant to Order 41(9) (2) showing on whose behalf it is filed. Except for this lapse there are no other issues raised with regard to compliance and I conclude it's not fatal to the contents of the Affidavit. I accept the Affidavit to use in these proceedings. However, I draw attention of the Defendant's counsel to the Statement of His Lordship Justice Gates in Lautoka High Court Action No. HBC 179/2001L (24th August 2001) referring to Order 41 Rule 9(2) and not to repeat such errors/lapses:

“These mistakes are of little consequence to the actual litigation but since the setting of the formal of an affidavit vehicle for the presentation of sufficient evidence to the court, is a relatively simple exercise, these errors should no longer persist.”

(b) The counsel stated, the Defendant should have filed the defence for this Court to consider as to whether the Defendant has meritorious grounds. The Defendant failed to disclose the Defence. The Defendant filed her application after 3 months of the Default Judgment and the delay is prejudice to the Plaintiff;

(c) The Defendant didn't divulge the letter or any document from Customs and Revenue Authority pertaining to handover of the Customs Agents ID and submitted that application should be dismissed.

10. I observe the Defendant failed to file the Statement of Defence to date to consider whether she has any meritorious grounds to her defence. I concede with the argument by the Plaintiff's counsel.

11. The Defendant’s counsel submitted that the order was made by the court was only on the grounds of non-appearance of the counsel which is incorrect. Defendant was in default by not filing the Affidavit in Response as undertaken by his counsel.

12. Considering the submissions made by both the counsels to administer justice, I vary the Orders made on 25th October 2012 and Order:

(a) Order in para (i) stands unchanged;

(b) Order in para (ii) to be varied and replaced with the following Order:

(ii) the Defendant forthwith returns all the items and documents in her possession belonging to the Plaintiff and documentary proof of returning of the Customs Agent ID Card to any authority should be forwarded to this court within 21 days of this Order”.

(c) Order in paragraph (iii) is stayed.

I also make further Orders as follows:

(i) The Defendant should file and serve her Statement of Defence within 14 days of this Order and the Defendant should pay cost of \$500 to the Plaintiff within 7 days of this Order and any reply by the Plaintiff should be filed within 7 days after that;

(ii) Unless, the above Orders are complied, the Default Judgment/Orders dated 25/10/2012 remains unchanged and the inter parte motion filed on 30th November 2012 deemed dismissed.

Delivered at Suva this 10th Day of June, 2013.

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C KOTIGALAGE
JUDGE