

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 273 of 2012

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji.

PLAINTIFF

AND : **RESHMI LATA LAL** of 18 Vunivivi Hill, Nausori, Businesswoman

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : N. Lajendra for the Plaintiff
No Appearance for Defendant

DATE OF HEARING : 1st August 2013

DATE OF JUDGMENT : 28 August 2013

JUDGMENT

1.0 INTRODUCTION

1.1 On 13 February 2013 Defendant filed Notice of Motion dated 12 February 2013 for following Orders:

“1. **THAT** Default Judgment obtained against the Defendant on the 4th

December 2012 by the Plaintiff in the sum of \$66,366.87 (Sixty-Six Thousand Three Hundred Sixty-Six Dollars and Eighty Seven Cents) be set aside as judgment is irregular.

2. THAT the Plaintiff's Judgment Debtor Summons filed in the Magistrate's Court via Civil Action No. 5 of 2013 and being assigned to be heard on 13th February 2013 be stayed under this Honorable Court determines the status of this action through normal process and procedures under its jurisdiction.

3. THAT the Defendant be granted leave of this Honorable Court to file Statement of Defence.

4. Costs.

5. Any other or further relief that this Honorable Court may deem just."

1.2 Defendant relied on the grounds stated in her Affidavit sworn on 12 February 2013 filed in Support of the Motion.

1.3 On 28 March 2013 the Application was listed before His Lordship Justice Balapatabendi when Defendant appeared in person and Plaintiff was represented by its Counsel.

1.4 On that day the Plaintiff's Counsel informed the Court that Plaintiff does not wish to file Affidavit in Opposition and requested for a hearing date for Defendant's Application.

1.5 Accordingly the Defendant's Application in paragraph 1.1 was adjourned for hearing on 1st August 2013.

1.6 On 1st August 2013 Defendant failed to appear in Court even though her name was called out by the Court Clerk. I also caused the Court Clerk to check His Lordship Justice Balapatabendi's Court to ensure that Defendant was not waiting in that Court. Even though the Defendant failed to appear at the hearing I will consider the Affidavit evidence filed by her.

- 1.7 Plaintiff's Counsel submitted written submissions and informed the Court that Plaintiff relies on the written submissions.

APPLICATION TO SET ASIDE DAFALT JUDGMENT

2.0 IRREGULAR JUDGMENT

- 2.1 At paragraph 1 of the Notice of Motion dated 12 February 2013 Defendant alleges that the Judgment by Default is irregular.

- 2.2 Order 2 Rule 2(1) and (2) of the High Court Rules 1988 provides:-

“2.-(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”

- 2.3 The Judgment by Default was entered on 4 December 2012 and the Plaintiff became aware of the Judgment on 15 January 2013 when she was served with the Judgment Debtor Summons.

- 2.4 In the absence of any opposing Affidavit I accept that the Defendant only became aware of the Judgment by Default on 15 January 2013.

- 2.5 Therefore the Application to set aside Judgment on the ground of irregularity was made within reasonable time (i.e. 13 February 2013).

- 2.6 Defendant however has failed to state the grounds of objection as required by Order 2 Rule 2-(2).

2.7 Order 2 Rule (1)-(1) of the High Court Rule provides:-

“1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”

2.8 Accordingly I will deal with the Application to set aside the Judgment by Default even though Order 2 Rule 2-(2) of the High Court Rules has not been complied with.

2.9 If it is found out that the Judgment by Default entered is irregular, the defendant is entitled to have it set aside *ex debito justitiae* (as of right) unconditionally. Para. 403 Halbury’s Law of England, Vol 37 4th edition; para 13/9/8 of Supreme Court Practice 1991 Vol 1 page 157.

2.10 Order 13 Rule 1-(1) of the High Court Rules provide:-

“1.-(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.”

2.11 Order 13 Rule 4(a) of the High Court Rules provide:-

*“4. References in these Rules to the time limited for acknowledging services are referenced:-
(a) In the case of a writ served within the jurisdiction to fourteen days...”*

2.12 Order 13 Rule 8-(1) (b) further provides:-

“8.-(1) Judgment shall not be entered against a defendant under this Order unless-

(a) the defendant has acknowledged service on him of the writ; or

(b) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or

(c) the plaintiff produces the writ indorsed by the defendant’s solicitor with a statement that he accepts service of the writ on the defendant’s behalf.”

2.13 In the instant case:-

(i) Plaintiff’s claim is for debt and interest owed by the Defendant to Plaintiff which is a liquidated sum.

(ii) The Writ of Summons was served on the Defendant on 11 October 2012 as appears from the Affidavit of Service of Dewa Nand sworn on 16 October 2012 and filed herein and admitted by the Defendant at paragraph 2(a) of her Affidavit in Support where she states:-

“2. (a) THAT approximately on 12 October 2012 I was personally served with the Writ of Summons by the Plaintiff. Annexed herewith and marked with letter “RL 1” is the copy of Writ of Summons.”

(iii) The time for acknowledging service expired on or about 26 October 2012.

2.14 At paragraphs 6 and 7 of her Affidavit in Support Defendant states as follows:-

“6. THAT after consulting my Solicitors, it was brought to my attention that the Default Judgment was obtained without following proper procedures in terms of service as I was not served with Notice of Adjournment nor any motion to judgment.

7. ***THAT I have reasons to believe that the Default Judgment is an administrative means of moving cases pending in Court, however, ample notice must be given to the Defendant. In this case I was not given any opportunity or notice to appear in Court before the Default Judgment made respectively.***

2.15 As rightly stated by the Plaintiff at paragraph 22 of its Submission there is no need to give any Notice to any party for entry of Judgment in Default of Notice of Intention to Defend or Defence.

2.16 In fact the Writ of Summons on the first page clearly provides as follows:-

“Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the registry mentioned below the accompanying ACKNOWLEDGEMENT OF SERVICE stating therein whether you intend to contest the proceedings.

If you fail to satisfy the claim or return the ACKNOWLEDGEMENT within 14 days or if you return the ACKNOWLEDGEMENT without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.”

2.17 Defendant therefore had notice of the fact that judgment will be entered against her if she failed to file Acknowledgment of Service.

2.18 Accordingly I find that the Judgment by Default entered against the Defendant has fully complied with the High Court Rules and is regular.

3.0 REGULAR JUDGMENT

3.1 Having found that Judgment by Default entered was regular I will now consider whether it should be set aside.

3.2 At paragraph 403 of Halsbury's Law of England Volume 37, 4th Edition, it is stated as follows:-

“In the case of a regular Judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits...For this purpose it is enough to show that there is an arguable case of a triable issue.”

3.3 Also at paragraph 13/9/7 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated as follows:-

*“Regular Judgment - If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating the facts showing a defence on the merits (Farden v. Ritcher (1889) 23 Q.B.D. 124. “At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason”, per Huddleston, B., *ibid.* P.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. 126n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183 at 363).*

*For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, CA, and note 13/9/18, “Discretionary power of the Court”, below. On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reason given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; (1986) *The Times*, April 23, CA). The facts that he has told lie in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/18, below).”*

3.4 In **Ratinam v Cumaraswamy & Anor** [1964] 3 ALL ER 933 in dealing with an Application for extension of time to file record of appeal out of the prescribed time, Lord Guest at page 935 paragraph A stated as follows:

“The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, the party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

3.5 From the above it can be said the factors to be taken into account in dealing with the application are:-

- (i) Whether the Applicant has reasonably explained the delay; and
- (ii) Whether Applicant has shown by way of Affidavit evidence that he has defence on merit which has some prospect of success (**major consideration**); and
- (iii) Whether Plaintiff will be prejudiced.

WHETHER THE DEFENDANT HAS REASONABLY EXPLAINED THE DELAY IN FILING ACKNOWLEDGMENT OF SERVICE

3.6 At paragraphs 2(b) to (f) of the Defendant’s Affidavit she states as follows:-

“2.(b) That on or about 15th October 2012 immediately after being served with the Writ of Summons I sought the legal services of Messrs. Nacolawa & Daveta, Solicitors of Nausori (hereinafter referred to “my Solicitors”) who then had the carriage of this matter after being instructed to defend my case.

(c) That on the 25th October 2012 I was advised by my Solicitors that Acknowledgment of Service was filed in the High Court at Suva.

- (d) *That I enquired the progress of my case with my Solicitors soon after Acknowledgment of Service was filed who advised me not to worry about anything as I still have (6) six months from 25th October 2012 upto April 2013 to file my Statement of Defence.*
- (e) *That on 24th December 2012 I withdrew my instructions from my Solicitors as I experienced some difficulties in the manner my case was being handled.*
- (f) *That on or about 15th January 2013 I was served with Judgment Debtor Summons that require my personal attendance at the Magistrate's Court sitting on 13th February 2013. Annexed herewith and marked with letter "RL2" is the copy of Judgment Debtor Summons."*

3.7 If the Defendant's former Solicitors did give the advise that the Defendant says they gave then that advise is obviously wrong.

3.8 It has been stated time and again that Solicitors negligence and misunderstanding of rules as reason for not complying with the time frame set by the High Court Rules is unsatisfactory.

3.9 The following explanation for delay has been held to be unsatisfactory and not a basis for enlarging time by the Fiji Court of Appeal:-

- (i) *Oversight by instructing solicitor due to Appellant's commitment in Australia even when the Appellant's solicitor was engaged in a Supreme Court (now High Court) criminal trial at relevant time for filing appeal. Jawant Singh v. Peter Francis - Civil Action No. 57 of 1973 (FCA)*
- (ii) *Misunderstanding as to when time for appeal started running. Tevita Fa v. Tradewinds Marine Ltd. & Anor. - Civil Appeal No. ABU0040 of 1994 (FCA).*
- (iii) *Misunderstanding of the effect of Court of Appeal's judgment concerning the Special Damages*

Attorney General of Fiji & Anor. v. Paul Praveen Sharma - Civil Appeal No. ABU0041/93S (FCA)

- (iv) *Applicant's solicitor mistakenly thought they had 30 days in which to appeal from the date on which judgment was served (Applicant's solicitors to be blamed – not applicant).*

Latchmi & Anor. v. Moni & Ors (1964) 10FLR 138

3.10 Defendant's assertion that filing of Judgment Debtor Summons in Magistrates Court is wrong is again not a reason to set aside Judgment by Default.

3.11 I therefore find that the reasons given by Defendant for failure to file Acknowledgement of Service are totally unsatisfactory.

WHETHER DEFENDANT HAS DEFENCE ON MERITS WHICH HAS SOME PROSPECT OF SUCCESS

3.12 Defendant apart from alleging negligent advise by her Solicitors or laxity on the part of the said Solicitors has not provided any evidence to suggest that she has any defence on merits to Plaintiff's claim which has some prospect of success.

WHETHER PLAINTIFF WILL BE PREJUDICED

3.13 Even though no evidence has been provided by the Plaintiff to show that it will be in any prejudice this Court takes notice of the fact that Plaintiff is a Bank and like any other commercial entity needs to recover its debts and run smoothly without the necessity of unwarranted litigations and to deal with the contingencies in respect to debts owed to it.

4.0 CONCLUSION

4.1 Having found that the reason for not filing the Acknowledgement of Service as unsatisfactory and no evidence of defence on merits being provided by the Defendant I make the following Orders:-

- (i) Defendant's Application to Set Aside Judgment by Default entered on 4 December 2012 and stay of Judgment Debtor Summons filed in Magistrates Court Civil Action No. 5 of 2013 by Notice of Motion dated 12 February 2013 is dismissed and struck out.

- (ii) Defendant do pay Plaintiff's cost of the Application in the sum of \$1,000.00.

.....
KAMAL KUMAR
JUDGE

At Suva
28 August 2013