

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 160 of 2012

BETWEEN : **PETER ALLAN LOWING** trading as Lowing & Associates (formerly Lowing Nandan & Associates) of 10 Denarau Road, Nadi, Fiji
PLAINTIFF

AND : **YAUKUVE ISLAND RESORT LIMITED** a company incorporation in Fiji of 8 Telau Street, Laucala Bay, Fiji.
1st DEFENDANT

AND : **YAUKUVE HOLDINGS LTD** a Fiji incorporated company of 8 Telau Street, Laucala Bay, Fiji.
2nd DEFENDANT

AND : **YORK PROPERTIES LTD** of Ram Re Road, 2nd Floor 46 Reid Street, Hawton 12, Bermuda.
3RD DEFENDANT

AND : **ASPIRITUS HOLDINGS LTD** of Offshore Chaslars, PO Box 217, Apia, Western Samoa.
4TH DEFENDANT

AND : **CHRISTINE KENNEDY** of 63 Market Street #20-01 Republic of Singapore.
5TH DEFENDANT

BEFORE : **Acting Master of the High Court, Thushara Rajasinghe**

COUNSEL : **Ms. Vanua** for the Plaintiff

Date of Hearing : 23rd August, 2013

Date of Judgment : 11th October 2013

R U L I N G

1. The plaintiff filed this *ex parte* Notice of Motion dated 23rd August, 2013 seeking following orders *inter alia*;
 - i. A declaration that the Statement of Defence by the fifth defendant filed on 6th August 2013 was not dully filed upon leave of the court and that the same be struck out,
 - ii. A declaration that the acknowledgment of service by the fifth defendant, Christine Kennedy filed on 6th of August 2013 is defective and that the same be struck out,
 - iii. Cost on an indemnity basis,
 - iv. Such other orders the court deems just,

2. The plaintiff stated in the Motion that this application was made pursuant to Order 11 rule1 (3), Order 12 rule 2 (2b) (4), rule 4, rule 5 (2) of the High Court Rules.

3. Ms Nemani Vakacakau, a solicitor employed by the plaintiff filed an affidavit in support for this notice of motion. She deposed in her affidavit after providing a brief chronological back ground of this proceedings that she was informed by the Lautoka High Court registry that the fifth defendant has filed an acknowledgement of service and statement of defence when she tried to file a search and default judgment on 6th of August 2013. She further stated that she was further advised by the registry to amend the default judgment accordingly.
4. The deponent stated that the plaintiff had not been served with any acknowledgement of service or statement of defence by the fifth defendant. She stated that she tried to file a judgment by default but was prevented by the court registry on 6th of August 2013 that was the date stamped on the acknowledgment of service and the statement of defence.
5. The plaintiff contended that the acknowledgment of service and the statement of defence are defective and the obvious defects are that ;
 - i. Agent address on the acknowledgment of service is not with the Lautoka Jurisdiction,
 - ii. Left margin of cover and backing of acknowledgment of service is not 1.5 inches,
 - iii. The statement of defence of 5th Defendant was filled without proper leave of the court as the acknowledgment of service was filed out of time,
 - iv. Left margin of cover and backing of statement of defence is not 1.5 inches,
 - v. Agent address on acknowledgment of service and statement of defence are not the same even though both documents were filed on the same day,
6. This *ex parte* notice of motion was set down for the hearing on 23rd of August 2013 where the learned counsel for the plaintiff made oral submissions to support the

plaintiff contention in the motion. Subsequently, the plaintiff tendered written submissions which I duly considered in this ruling.

7. Having considered the Notice of Motion, affidavit in support, oral submissions of the learned counsel for the plaintiff and written submissions tendered, I now proceed to pronounce my ruling as follows.
8. For the convenience of this ruling, I first deal with the second order sought for that is a declaration that the acknowledgement of service by the fifth defendant, Christine Kennedy filed on 6th of August 2013 is defective and that the same be struck out.
9. The procedure for the filing of acknowledgment of service is stipulated under Order 12 of the High Court rules. A defendant to an action begun by writ may acknowledge service of writ and defend the action by a solicitor or in person (O12 r1). The defendant is required to acknowledge the service by properly completing an acknowledgment of service that is form 2 in Appendix A. It must be signed by the solicitor acting for the defendant specified in the acknowledgment or if the defendant is acting in person by that defendant (O12 r 1(3) and r2 (1). The Order 12 rule 2 (2) (a) requires that if the defendant acknowledge the service in person, he must specify the address of his place of residence and if his place of residence is not within the jurisdiction or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent.
10. In order to constitute an effective acknowledgment of service, it is a mandatory requirement for the defendant to serve or sent by post a copy of the acknowledgment of service to the plaintiff if the plaintiff sues in person but otherwise to the plaintiff's solicitors. (O 12r 3 (2)).

11. The time limit for acknowledgment of service stipulates under Order 12 rule 7, where it states that ;

“ References in these Rules to the time limited for acknowledging service are references-

(a) in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these Rules, to that time as so extended; and

(b) in the case of a writ served out of the jurisdiction, to the time limited under Order 10, Rule 2(2), Order 11, Rule 1(3) or, where that time has been extended as aforesaid, to that time as so extended.”

12. Order 11 rule 1 (3) states that ; “Where a writ is to be served out of the jurisdiction under paragraph (2), the time to be inserted in the writ within which the defendant served therewith must acknowledge service shall be 42 days”.

13. I now turn to examine whether the acknowledgment of service filed by the fifth defendant was in conformity with the rules mentioned above. The plaintiff was allowed to serve the writ on the fifth defendant by way of an e-mail and it was served on 7th of June 2013. The plaintiff filed an affidavit of service in respect of the service of the writ. Accordingly, pursuant to Order 11 rule 1 (3) the defendant was required to file her acknowledgment of service within 42 days from 7th of June 2013. However, the defendant managed to file her acknowledgment of service on 6th of August 2013 though the date of acknowledgment of service indicates as 15th of June 2013. The stamp of the Registry confirmed that it was filed on 6th of August 2013 upon the payment of fees. In view of these findings, I find that the acknowledgment of service was filed after the expiration of 42 days.

14. Order 12 rule 5 (1) states that “*Except with the leave of the Court, a defendant may not give notice of intention to defend in an action after judgment has been obtained therein*”. In view of the rule 5 (1), the defendant is not prohibited to file the acknowledgment of service and intend to defend after the expiration of the time stipulated under Order 12 rule 4 however, it must be filed prior to the plaintiff entered a default judgment pursuant to Order 13.
15. The plaintiff stated in the affidavit in support that he was prevented by the registry to file a default judgment on 6th of August 2013 and informed that an acknowledgment of service and statement of defence of the fifth defendant have been filed in the registry. In view of these facts, I am of the view that the defendant has filed her acknowledgment of service before the plaintiff entered a default judgment against her. Accordingly, I do not find that the defendant was required to obtain leave of the court to file her acknowledgement of service pursuant to order 12 rule 5 (1).
16. The plaintiff admitted that he received an e-mail from the defendant on 5th of August 2013 which informed him that the statement of defence was filed at the Lautoka high court registry. The said e-mail was received to the e-mail address given by the plaintiff in his writ of summons. A copy of that e-mail dated 5th of August 2013 was tendered as annexure to the affidavit in support for my perusal and consideration. The said *e-mail* has only notified the plaintiff of filing of statement of defence but has not mentioned any acknowledgment of service. In view of these reasons, I am satisfied that the defendant has failed to serve or post the plaintiff a copy of acknowledgment of service pursuant to Order 12 rule 3 (2).
17. I now turn to the issue of the defendant’s failure to provide her address for the service pursuant to Order 12 rule 2 (2) (a). It is evident from the acknowledgment of service filed by the defendant that she has only given her e-mail address and put an address of

another in Lami as her city agent which is undoubtedly contradictory with the requirements stipulated under Order 12 rule 2 (2).

18. Order 12 rule 2 (4) states that ; *“If an acknowledgment of service does not specify the defendant's address for service or the Court is satisfied that any address specified in the acknowledgment of service is not genuine, the Court may on application by the plaintiff set aside the acknowledgment or order the defendant to give an address or, as the case may be, a genuine address for service and may in any case direct that the acknowledgment shall nevertheless have effect for the purposes of Order 10, rule 1(5), and Order 65, rule 9”.*

19. The address for service is that if the defendant acknowledges service in person, the address within the jurisdiction specified under sub – paragraph (a) shall be his address for service. (o 12 r 2 (2).

20. In view of the Order 12 rule 2 (2) and rule 4, I find that the defendant has failed to provide a specific address for service in her acknowledgment of service as mandatorily required by the rules mentioned above.

21. Having found that the defendant has not only failed to serve a copy of her acknowledgment of service but also failed to provide an address for service as required by Order 12 rule 2(2)(a), (4), rule 3 (2) of the High Court rules, I am satisfied that the acknowledgment of service of the fifth defendant is defective and not in conformity with the mandatory requirements stipulated under Order 12 of the High Court rules.

22. I now turn to the next issue. That is, the statement of defence filed by the defendant on 6th of August 2013 was not dully filed upon leave of the court.

23. Order 18 rule 2 states that ; *“Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a*

defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is the later”.

24. In view of the Order 18 rule 2, the defendant is required to qualify to serve a defence by properly giving his notice of intention to defend, otherwise unless the court gives leave to contrary, the defendant could not serve his defence on the plaintiff. Turning on to this instance case, I find that the fifth defendant is not qualified under Order 18 rule 2 to serve her defence on the plaintiff as she failed to give proper notice of intention to defend in conformity with Order 12 of the High Court rules. In view of these reasons, I am satisfied that that the statement of defence of the defendant filed on 6th of August 2013 was not duly filed pursuant to Order 18 rule 2 (1) of the High Court rules.

25. In conclusion, I hold that the acknowledgment of service and the statement of defence of the fifth defendant filed on 6th of August 2013 were not in conformity with the High court rules. I accordingly make the following orders that ;

- i. The acknowledgment of service of the fifth defendant filed on 6th of August 2013 is struck out,
- ii. The statement of defence of the fifth defendant filed on 6th of August 2013 is struck out,
- iii. No order as to cost,

Dated at **Lautoka** this 11th day of October, **2013**.

.....

R.D.R Thushara Rajasinghe
Acting Master
High Court, Suva

