

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 063 of 2005

BETWEEN : **CHANDRA WATI** of Martintar, Nadi, Domestic Duties as sole Executrix and Trustee of the Estate of **JAGDISH CHANDRA GOSAI** of Northern Press Road, Nadi.

Plaintiff

A N D : **NADI TOWN COUNCIL** a body corporate established and created by Local Government Act.

1st Defendant

AND : **REGISTRAR OF TITLES** created and established by statutory Provisions.

2nd Defendant

Appearances

Mr Mishra Prakash for the plaintiff

Mr Anil J Singh for the first defendant

Mrs. M Lee for the second defendant

Date of Hearing : 05/05/14

Date of Ruling : 9 May 2014

R U L I N G

[On setting aside jurisdiction]

Introduction

[1] This is an application supported by affidavit sworn by Nemia Taginasedrau filed on 31 May 2013 by the first defendant, Nadi Town

Council to set aside the final judgment entered and delivered after trial Judge Y. Fernando. The application seeks the following orders:

- 1) The judgment made against the first defendant on 11 September 2012 by Justice Yohan Fernando be set aside.
 - 2) The [execution of] judgment made against the first defendant on 11 September 2012 by Justice Yohan Fernando be stayed pending the hearing of the setting aside application.
 - 3) That service of this application be abridged.
 - 4) That the cost of this application be cost in the cause.
- [2] It will be noted that the application does not indicate under which rule of the High Court Rules it is filed. Presumably, it seems the application is made pursuant to Ord. 35, r. 1 of the High Court Rules 1988.
- [3] Plaintiff filed affidavit in opposition and the first defendant filed affidavit in reply.

Background

- [4] The plaintiff's case against the first defendant was that the first defendant registered a charge over the whole of the plaintiff's property. The plaintiff had a buyer and wanted it removed so she could wind up the administration of the Estate of Jagadish Chandra Gosai. He claimed that the defendants have unlawfully and without just or reasonable cause lodged and registered charge against the plaintiff's property. Eventually, the matter proceeded to trial. The trial dates were set down with the agreement of all the counsel.
- [5] The trial took place over 5 days namely 9 to 11 and 16 and 17 of July 2012. The first defendant did not appear although it had solicitor on record. The second defendant did appear and file written submissions.

[6] After hearing the evidence adduced [after recording evidence of three witnesses] the trial judge made the following decision:

“22) In that respect there was no cause for the 1st Defendant to tender a charge to be registered without specifying the extend of the charge and in the absence of any dues from the Plaintiff to the 1st Defendant. The 1st Defendants action seeking to compulsorily acquire the Plaintiff's land too now stands dismissed [P2]. As such the charge on the Certificate of Title No. 18653 of the Plaintiff land ought to be forthwith removed.

23) As such judgment for the Plaintiff against the 1st Defendant in a sum of \$3500/=.

24) The Charge registered in Certificate of Title no. 18653 to be forthwith cancelled and removed by the 2nd Defendant.

25) Indemnity costs awarded against the 1st Defendant in favour of the plaintiff to be taxed by the Master”.

[7] The first defendant did not appeal against the judgment. Instead, it filed the current application to have that judgment set aside.

Issue to be determined

[8] The issue that has arisen before me is that whether Master of the High Court could set aside a judgment by default of appearance entered by a judge after considering evidence adduced by one party at the trial.

Law and Analysis

[9] It is that preliminary issue which comes before me. This raises an interesting question with regard to the Master's jurisdiction to set aside a judgment entered by a judge after due consideration of the evidence in the absence of other party.

[10] Importantly, the impugned judgment entered against the first defendant is not the one that was entered by the Deputy Registrar or the Master in default of failure to acknowledge the writ of summons or in default of pleadings. In that case, the Master may have jurisdiction to set aside the

default judgment against a party pursuant to Order 19, r. 9 of the High Court Rules.

[11] In this application filed by first defendant, it is sought to set aside the default judgment entered by a judge after considering evidence adduced at the trial. Here different rule applies, i.e. Ord. 35, r.2 of the High Court Rules. That rule provides that:

*“(1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside **by the Court**, on the application of that party, on such terms as it thinks just.*

(2) An application under this rule must be made within 7 days after the trial (My emphasis).”

[12] The impugned judgment has been made by the judge after due consideration of the evidence adduced at the trial where one party does not appear (in this instant the first defendant), in my view, must be set aside the judge.

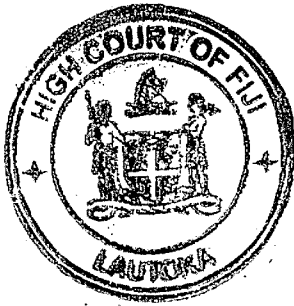
[13] I am fortified by the case authority of **Richmond and another v Burch and others** [2007] 1 All ER 658. In that case a similar situation arose where the Master set aside a default judgment entered by the judge. The court held that:

*“[21] Where the jurisdiction point does matter is in relation to the approach which I should take towards this appeal. Considering, as I do, that **as a matter of jurisdiction the master was wrong to have made the order which he did, the right course is to proceed as if this were a rehearing of the set-aside application.** With this I turn to the second ground of appeal and to the substance of the application” (My emphasis).*

[14] For all these reasons, I conclude that it is outside of my jurisdiction to set aside a judgment entered by a judge after fully considering the evidence adduced at the trial where first defendant failed to appear.

Final Orders:

- 1) I refer the first defendants application dated and filed on 31 May 2013 purportedly filed pursuant to Ord. 35, r.2 of the High Court Rules to have the judgment made against the first defendant on 11 September 2012 set aside before the Deputy Registrar for allocation to a judge.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

Master of the High Court

At Lautoka

09/05/14