

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 224 OF 2013L

BETWEEN : **RUKMANI PATORNO** the sole Executrix and Trustee in
the Estate of Dor Swamy of Western Preston, Victoria
3072, Australia.

PLAINTIFF

AND : **JAI RAM** aka Manoj of Malolo, Nadi

DEFENDANT

Before: Master M H Mohamed Ajmeer

Counsel:

Mr J Sharma for the plaintiff

Ms L Tabuakuro for the defendant

Date of Hearing : 9 May 2014

Date of Judgment : 25 June 2014

J U D G M E N T

Introduction

[1] This is a summons (“application”) filed 6 March 2014 by defendant to set aside the default judgment entered against him. The application seeks the following orders:

(a) An Oder that the execution of the said Order made by the Honourable Court on the 26th day of February 2014 be stayed until the determination of the setting aside application.

(b) An Order that the Order made by the Court against the defendant on the 26th day of February 2014 be set aside and/or dissolved.

(c) An Order that the Plaintiff pay for the cost of this application.

(d) The service of this application be abridged to 2 days.

[2] The application is supported by affidavit of Jai Ram, the defendant. The supporting affidavit annexes no documents. In his affidavit the defendant states:

1. that the Order was made in default of me not filing defence in the action as the Plaintiff sought judgment pursuant to order 19 Rules 5 and 7 which can be set aside under Order 19 Rule 9 of the High Court Rules.

2. that the Plaintiff failed to disclose as to whether they have obtained the consent of the Director of Lands as required under Section 13 of the Crown Lads Act before obtaining the Order against me.

[3] This application is made pursuant Order 19 Rule 9 and Order 32 and Order 35 Rule 2 of the High Court Rules, 1988.

[4] The defendant opposes the application and filed affidavit of Rukmani Patorno, the plaintiff (“the affidavit in opposition”). In the affidavit in opposition the plaintiff states:

1. that the Public Trustee’s Office is not empowered to and neither is it authorised to defend nor provide legal advice in matters such as this.

2. that the defendant is no longer residing on the subject land. Upon his refusal to abide by the Orders of this Honourable Court, he was removed from the subject land on or about the 7th March, 2014. The defendant is now residing elsewhere.

[5] Only plaintiff filed written submissions. The defendant did not file any written submission.

Background

[6] Rukmani Patorno, the plaintiff is the sole Executrix and Trustee in the Estate of Dor Swamy by virtue of probate granted in April 2005. Estate of Dor Swamy is the registered proprietor of all that property

contained in Crown Lease number 6862, being Lot 8 on Plan No. ND5133 and Lot 34 on Plan 5184 and known as part of Nacaqara and Navo (Formerly part of CT 11913) in the Island of Viti Levu, District or Town of Nadi (“the property”). The property has a 5 bedroom dwelling house on it. Jai Ram, the defendant occupied, according to plaintiff, part of the house since 2011. His occupation was without the consent of the Director of Lands. By a written notice dated 12 October 2012 the plaintiff cancelled any license that may have given to the defendant and his family to occupy the property. She also notified the defendant of her intention to proceed with the distribution of the Estate. However, the defendant has refused to give vacant possession of the property to the plaintiff.

- [7] The plaintiff issued these proceedings against the defendant. Summons was duly served on him. The defendant neither filed acknowledgement of service nor affidavit in response. The plaintiff then filed on 11 February 2014 a notice of motion to enter judgment under Ord. 19 Rules 5 & 7 of the High Court Rules to enter judgment against the defendant. That motion was heard on 26 February 2014. The defendant appeared with another person. He did not even file a response to this motion as well. Upon hearing the plaintiff’s counsel and the defendant in person, the court made order that the plaintiff was entitled to immediate possession of the property. As a result of this order the defendant was ejected from the property on 7 March 2014.

The Law

- [8] I now venture to briefly summarise the law involved in this case. The defendant seeks to set aside the judgment entered against him in default of defence. The defendant relies on Ord. 19, r.9, Ord. 32 and Ord. 35, r.2 of the High Court Rules.

- [9] The defendant’s application to set aside is made pursuant to Ord. 19, r. 9, which provides:

“9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order”.

- [10] Ord. 32 deals with application and proceedings in chambers. Ord.32, r.5, in so far as material provides:

“5.-(1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.

(2) Before proceeding in the absence of any party the Court may require to be satisfied that the summons or, as the case may be, notice of the time appointed for the resumed hearing was duly served on that party.

(3) Where the Court hearing a summons proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may re-hear the summons”.

- [11] Then Ord. 35, which deals with proceedings at trial. Rule 2 of that Order provides:

“2.-(1) Any judgment, order or verdict obtained where one party does not appear at the trial maybe 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”.

- [12] The plaintiff obtained judgment under Ord. 19, r. 5, which deals with default of defence-claim for possession of land. That rule provides:

*“5.-(1) Where the plaintiff’s **claim against a defendant is for possession of land only, then, if that defendant fails to serve a defence on the plaintiff**, the plaintiff may after the expiration of the period fixed by or under these Rules for service of the defence, and on producing a certificate by his barrister and solicitor, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in order 88 rule 1, **enter judgment for possession of the land as against that defendant** and for costs, and proceed with the action against the other defendants, if any.*

(2) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until

judgment for possession of the land has been entered against all the defendants” (Emphasis provided).

Discussion

- [13] By an originating summons supported by affidavit the plaintiff sought an order that the defendant give vacant possession to the plaintiff of the property in question. The defendant failed to file his acknowledgement of service and/or affidavit in defence. The plaintiff then filed a notice of motion to enter judgment against the defendant pursuant to Ord. 19, r. 5. Under that rule the plaintiff was entitled to enter judgment against the defendant as the plaintiff claimed only possession of the land. On 26 February 2014 the court after being satisfied with the requirements of Ord. 19, r.5 entered judgment against the defendant in that the court ordered the defendant to deliver up possession of the property to the plaintiff. The defendant in these proceedings seeks to set aside that judgment.
- [14] It is to be noted that on 7 March 2014 the defendant has been ejected from the property on the strength of the judgment delivered on 26 February 2014 with the enlistment of bailiff.
- [15] I will consider the application to set aside on the basis that the impugned judgment was a regularly entered judgment. Because there was no argument advanced before me that that judgment was entered irregularly.
- [16] Where the default judgment had been entered regularly, the defendant must show an affidavit of merits in order to succeed in setting aside the default judgment. It was so held in **Fiji Sugar Corporation Limited v Ismail** [1988] FJCA; [1988] 34 FLR 75 (8 July 1988).
- [17] Let me now embark on the issue whether the defendant in this case has shown an affidavit of merits in order to succeed in his application to set aside. The plaintiff sought vacant possession of the property in

question. The defendant must therefore show that he has a right to possession of the property.

- [18] This is what the defendant says in his affidavit in support, his brother had been advised by the Public Trustee that the plaintiff is an improper person to look after the affairs of the Estate of Dor Swamy as she resides in Australia. The defendant also says that his brother advised him that his late father failed to make reasonable provision in the defendant's favour as required under law.
- [19] Admittedly, The plaintiff is the sole Executrix and Trustee in the Estate of Dor Swamy who was the registered proprietor of the property. The plaintiff has been granted probate by the High Court of Fiji on 28 April 2005 after the will of the late Dor Swamy was duly proved.
- [20] The defendant, if he is one of beneficiaries under the will, might have brought an action to remove the plaintiff as Executrix and Trustee in the Estate of Dor Swamy if she is not a proper person to be so. Now the defendant cannot complain that his father had failed to make reasonable provision in his favour when making the will as the will had been already proved.
- [21] I am unable to understand how the Public Trustee which is a statutory body can represent private individual's matters. The defence that the defendant's brother was advised by the Public Trustee that the plaintiff is an improper person to look after the affairs of the Estate of Dor Swamy has no merit for the purpose of setting aside application. That defence fails to establish that the defendant has a right to possession of the property in dispute.
- [22] Returning to the issue of consent. Ms Tabuakuro counsel for the defendant advanced a contention the plaintiff could not have initiated these proceedings without the consent of the Director of Lands as the property is a protected lease.

[23] Mr J Sharma, on the other hand, argued that the plaintiff does not need the consent of the Director of Lands to bring proceedings to eject a mere occupier. He also said that the defendant was in occupation without the consent of the Director of Lands or license of the plaintiff.

[24] The defendant has not shown that he has a right to possession of the property. He had no authority or license of the owner of the property to occupy hence he was a mere occupier.

[25] Justice Gates (as he then was) in **Prasad v Chand** [2001] FJHC 289; [2001] 1 FLR 164 (30 April 2001) held:

“I find it is not necessary to prove the Director of Lands has given his consent to the institution of proceedings for ejectment of a mere occupier without lease”

[26] In the matter at hand as well the defendant was occupying without lease or consent or license. He was then a mere occupier. Therefore the consent of the Director of Lands was not necessary for the plaintiff to bring these proceedings. So, the contention that the plaintiff could not have initiated these proceedings without the consent of the Director of Lands is doomed to fail.

[27] The judgment entered against the defendant has been enforced. The defendant no longer resides on the property. In the circumstance the judgment entered in default of defence should not be disturbed. Ord. 32, r. 3 has no application in this case. Because the judgment/order made by the court has been perfected. In this situation the question of re-hearing the summons will not arise.

Conclusion

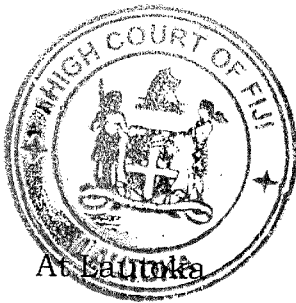
[28] For all these reasons, I would conclude that the defendant has failed to show an affidavit of merits to succeed in his application to set aside the default judgment entered on 26 February 2014. In that he has not shown a right to possession of the property. I would therefore dismiss

and strike out the application filed 6 March 2014 by the defendant with summarily assessed cost of \$300.00.

Final Orders

- a) The setting aside application filed by the defendant on 6 March 2014 is dismissed and struck out with summarily assessed costs of \$300.00 payable by the defendant to the plaintiff in 21 days;
- b) Order accordingly.

M H Mohamed Ajmeer



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M H Mohamed Ajmeer
Master of the High Court

For the plaintiff: Janend Sharma Lawyers, Barristers & Solicitors

For the defendant: Koyas, Barristers & Solicitors