

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

Civil Action No. 16 of 2013

**BETWEEN** : **KWON SOON JAE** of the Embassy of the Republic of Korea  
**PLAINTIFF**

**AND** : **BENJAMIN PADARATH** of Duncan Street, Suva  
**1<sup>ST</sup> DEFENDANT**

**AND** : **THE ESTATE OF ADISHWAR PADARATH**  
**2<sup>ND</sup> DEFENDANT**

**AND** : **LAVINIA PADARATH** of Duncan Street, Suva  
**3<sup>RD</sup> DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**

**COUNSEL** : **Ms. N. Raikaci** for the Plaintiff  
**Mr. F. Vosarogo** for the Defendant

**Date of Hearing** : **20 January 2014**

**Date of Decision** : **12 February 2014**

**DECISION**

**INTRODUCTION**

1. The Plaintiff had obtained default judgment against all the defendants for a sum of FJ\$134,270. The defendants seek to set aside the said default judgment. The 3<sup>rd</sup>

Defendant is the mother of the first Defendant and also the intended executrix of the 2<sup>nd</sup> Defendant estate, the 1<sup>st</sup> Defendant is a beneficiary of the 2<sup>nd</sup> Defendant, and no cause of action against 2<sup>nd</sup> and 3<sup>rd</sup> Defendants revealed in the statement of claim. The claim of the Plaintiff is against the 1<sup>st</sup> Defendant for failure to pay a sum of FJ\$38,110 which he had paid to the 1<sup>st</sup> Defendant in order to secure a lease for accommodation in an apartment. The 1<sup>st</sup> Defendant admits the receipt of the said sum in the proposed statement of claim, no defence as to the liability of that amount. After the hearing of the summons for setting aside of the default judgment, the parties indicated their desire for a settlement and I allowed the parties to settle, but there was no settlement.

## ANALYSIS

2. The default judgment for a sum of FJ\$ 134,270 was entered on the 21<sup>st</sup> May, 2013 since there was no acknowledgment of service or statement of defence on behalf of the Defendants. The said sum comprised of following claims:
  - a. FJ\$38,110 – as sum that was paid by the Plaintiff to the 1<sup>st</sup> Defendant, which is admitted by the 1<sup>st</sup> Defendant in the proposed statement of defence annexed to the affidavit of support of this application.
  - b. FJ\$92,160 – for loss of enjoyment of apartment 3A which the Plaintiff intended to occupy upon the payment of the above sum.
  - c. FJ\$ 2,500 as return air fare- allegedly incurred to the Plaintiff since he had to explain the situation to officials in his country.
  - d. FJ\$1,500 as moving out expense from the apartment he obtained to another place.
3. The default judgment for the total sum of FJ\$134,270 was obtained against all the Defendants. The perusal of the statement of claim would indicate that apart from explaining the status of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants there are no claims against the said Defendants according to the statement of claim. On that basis alone the default judgment entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants needs to be set aside. There is proposed

statement of defence and there they had stated that they had no nexus to the claim. At the hearing the counsel for the Plaintiff stated that the addition of 2<sup>nd</sup> Defendant was based on the basis that 1<sup>st</sup> Defendant was a beneficiary to the 2<sup>nd</sup> Defendant. Hence there is no cause of action against the 2<sup>nd</sup> Defendant in this statement of claim. The same can be applied to the 3<sup>rd</sup> Defendant who was an intended executrix of the 2<sup>nd</sup> Defendant estate and according to the statement of claim that was the basis of joining in this action. Clearly this is a case of misjoinder if those were the sole basis of joining, and in that event the writ and or the statement of claim need to be amended properly.

4. The 1<sup>st</sup> Defendant had also filed a statement of defence where he had admitted the receipt of the money to the sum of FJ\$38,110. There is no defence revealed in the statement of defence for not returning said money to the Plaintiff. There are no merits in the proposed statement of defence and or the affidavit in support of the summons as regards to the said sum. In the circumstances the default judgment entered against the 1<sup>st</sup> Defendant should only confine to this amount.

5. The Order 19 rule 9 of the High Court Rules of 1988 states as follows:

*'Setting aside judgment (O.19.r9)*

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

6. The Supreme Court Rules 1999(White Book) p 368 19/9/1 states as follows:

*'Effect of rule- The wording of this rule is wide enough to authorize the Court, in its discretion, to set aside one part of the default judgment and to grant a general stay of execution on another part (National Westminster Bank plc v Humphrey (1984)128 s.j. 81.CA).'*

7. In the circumstances the default judgment against the 1<sup>st</sup> Defendant should be amended to FJ\$ 38,110 which is also admitted in the statement of defence proposed by him .The rest of the claim though quantified as special damages in the statement of claim needs to be proved by the Plaintiff. The sum of FJ\$ 92,160, which was included in the default

judgment sum, is for non enjoyment of an apartment that the Plaintiff intended to move in upon the payment of the said sum to the 1<sup>st</sup> Defendant. This alleged loss due to non enjoyment is a general damages that need the proof in court. The Plaintiff needs to prove first that he incurred a loss and then the quantum needs to be determined by the court on the evidence presented to the court. The alleged moving expense of \$1,500 and the air fare of \$2,500 can be categorized as special damages but these needs the proof in court, hence cannot be obtained in the default judgment on the basis that they are special damages.

8. ***Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd*** [1998] 4 All ER 753 at 757, Park J held,

*'If, from the affidavits and exhibits, the court concludes that, even though there were irregularities in the writ or the judgment or both, the substantive content of the judgment is right, the court will not set the judgment aside. The only effect if it did would be to put the parties to further expense and delay to reach a regular judgment for the same amount.'*

*Further, it is the same in principle if the court is satisfied from the affidavits and exhibits that, although the amount in the default judgment was wrong, it (the court) knows what the correct amount was. The court will not set the incorrect judgment aside and make the plaintiff start again. It will vary the judgment to the correct amount.'*

9. In the circumstances the default judgment against 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is set aside and the default judgment against the 1<sup>st</sup> Defendant is amended for a sum of FJ\$ 38110 and for the interest of 5% from the date of institution of the action to 21<sup>st</sup> May, 2013.

## **FINAL ORDERS**

- a. Default judgment entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is set aside.
- b. The execution of the default judgment entered on 21st May, 2013 against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, is stayed

- c. The Plaintiff is granted 14 days to consider any amendments to the statement of claim and, or writ of summons.
- d. Default judgment against the 1st Defendant is amended for a sum of FJ\$ 38110 and for the interest of 5% from the date of institution of the action to 21st May, 2013.
- e. No costs.

Dated at **Suva** this 12<sup>th</sup> day of February, **2014**.

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**Justice Deepthi Amaratunga**  
**High Court, Suva**