

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 063 of 2005

BETWEEN : **CHANDRA WATI** daughter of Ajodhiya Prasad of Martintar, Nadi,
Domestic Duties as sole Executrix and Trustee of the Estate of
JAGDISH CHANDRA GOSAI son of Ram Prasad 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

A N D : **REGISTRAR OF TITLES** created and established by statutory
provisions.

2nd DEFENDANT

Appearances : Mr Mishra V for **Plaintiff**
Mr Anish J Singh for **Defendant**
Ms Lee for the **2nd Defendant**

Ruling

Introduction

1. This is an application by the 1st Defendant Nadi Town Council to set aside the Judgement made after trial by Justice Yohan Fernando against the said council. By its Notice of Motion dated 10th June 2013 the 1st Defendant seeks the following Orders:
 - i) That the judgement made against the 1st Defendant on the 11th day of September, 2012 by Justice Yohan Fernando be set aside.
 - ii) That the Judgement made against the 1st Defendant on the 11th Day of September 2012 by Justice Yohan Fernando be stayed pending the hearing of the setting aside application.
 - iii) That the service of this application be abridged.
 - iv) That the costs of this application be costs in the cause.

2. The Notice of Motion of the 1st Defendant is supported by an affidavit sworn on 31st May 2013 by Nemias Taginasedrau, the CEO of Nadi Town Council.
3. The son of the 1st named Plaintiff Atil Chandra Gosai has filed an affidavit sworn on 21st June 2013 opposing the 1st Defendants application to set aside the judgement.
4. The 1st Defendant has filed an affidavit in reply sworn by its acting manager for Buildings and Planning. The 2nd Defendant filed an affidavit sworn by its Senior Legal Officer on 15th August 2013.
5. When this matter was called in the Masters Court Hon Master delivered a ruling on 9th May 2014 on the written submissions filed.
6. In his Ruling, Hon Master held that it is outside his jurisdiction to set aside a judgement entered by a Judge after fully considering the evidence adduced at the trial where the 1st Defendant failed to appear. By his Order he has referred this matter to the Deputy Registrar for allocation to a Judge and the Deputy Registrar has accordingly referred the matter to this court.
7. When the matter was called before me on 11th August 2014 Counsels for the Defendants and the Plaintiff agreed to have a ruling delivered on the written submissions already filed at the Master Court.

Background

8. The Plaintiffs case is based on a charge lodged and registered by the 1st Defendant Council against the Plaintiffs property which the Plaintiffs allege was done without just or reasonable cause.
9. The matter proceeded to trial over 5 days namely 9th to 11th and 16th to 17th of July 2012 on which dates the first Defendant did not appear although it had a solicitor on records. The second Defendant appeared and filled written submissions at the end of the trial.
10. On the evidence adduced at the hearing the trial Judge pronounced the following decision by his Judgement dated 11th September 2012.

"22 In that respect there was no cause for the 1st Defendant to tender a charge to be registered without specifying the extent of the charge and in the absence of any dues from the Plaintiff to the 1st Defendant. The 1st Defendants actions 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 judgement 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”.*

The Law

11. The 1st Defendant filed the current application to have the said Judgement set aside. Though the application does not mention under which rule it is filed I presume that the application is made pursuant to Order 35 rule 1 (2) of the High Court Rules 1988.
12. In the Affidavit filed with the application the 1st Defendants CEO has deposed inter alia the following facts;
 - a) That the matter was listed for hearing before Justice Yohan Fernando on the 11th of September 2012
 - b) That an opinion was being sort from another Solicitor in regard to the matter
 - c) That the Solicitor on record did not appear because of confusion as to instructions.
 - d) That the 1st Defendant was not aware that the matter was for hearing on 9th, 10th, 11th, 16th and 17th of July 2012.
 - e) That the Plaintiff will not be prejudiced if the application is heard.
 - f) That it would be a miscarriage of justice if this application is not granted as the 1st Defendant is a statutory body which operates for Nadi residents.
 - g) That there has not been an inordinate delay in making the application.
13. In the second affidavit filed by the 1st Defendant Acting Manager for Building and Planning it is stated inter alia: that
 - i) That the 1st Defendants Solicitor on record was unaware that he was still acting for the 1st Defendant as the 1st Defendant approached another Solicitors for a second opinion.
 - ii) That the Solicitor for the Plaintiff was discourteous to the 1st Defendants previous Solicitors by not ensuring that the 1st Defendants Solicitors on record were present for the hearing.
14. I will now refer to Order 35 Rule 1 (2) and Rule 2 (1) the relevant provisions to this application.

Order 35 Rule 1 (2) is as follows

“If when the trial of an action is called on, one party does not

appear, the Judge may proceed with the trial of the action or any counter claim in the absence of that party."

15. The Judgement pronounced in this matter falls under the above mentioned Order 35 Rule 1 (2) as it is delivered after a trial and it is not a default judgement entered by the Deputy Registrar in default of appearances or pleadings.

16. The provision to set aside such a judgement entered after trial is provided by Order 35 Rule 2 (1) and (2).
Rule 2 (1) (2) states as follows:

"(1) Any judgements, 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"

17. The Principles which apply for setting aside a judgement after trial are discussed in **Shocked and Another-V-Goldschmidt and Others [1998] 1 All ER 372**

18. *In Shocked case Leggatt LJ stated at page 377:-*

"The case about setting aside judgements fall into two main categories.

(a) Those in which judgement is given in default of appearance or pleadings or discovery and

(b) Those in which judgement is given after a trial, albeit in the absence of the party who later applies to set aside. Different considerations apply to these two categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed."

19. After considering authorities Leggatt LJ at page 381 sets out a series of propositions or general indication applicable in setting aside a judgement entered after trial and states that setting aside such a judgement depends on the facts of each case.

20. The propositions set out by Leggatt LJ in shocked case are:

"1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

- 2) *Where judgement has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*
 - 3) *Where the setting aside of judgement would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.*
 - 4) *The court will not consider setting aside judgement regularly obtained unless the party applying enjoys real prospects of success.*
 - 5) *Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgement, or third parties have acquired rights by reference to it.*
 - 6) *In considering justice between parties, the conduct of the person applying to set aside the judgement has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.*
 - 7) *A material consideration is whether the successful party would be prejudiced by the judgement being set aside, especially if he cannot be protected against the financial consequences.*
 - 8) *There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."*
21. The Lord Justice then stated that in setting aside a judgement given in default of appearance or pleadings or discovery the court is primarily concerned to see whether there is a defence on the merits and in setting aside a judgement given after trial the predominant consideration is the reason why the party against whom judgement was given absented himself.
22. The Principal laid down in Shockeds case in setting aside a judgement given after trial was followed in Fiji in the following cases:
- (i) **Southern Transport Limited V Tebara Transport Limited, HBC 229 of 1998,**
 - (ii) **Vidya Wati V Western Division Drainage Board and Attorney General [2009] HBC 332/01L and Mukesh Chandra V Sunil Chand [2009] HBC 50/07L.**

Application of the law to Facts.

23. I will now consider whether the 1st Defendant has satisfied why it absented itself on the hearing dates which are the dominant or the main consideration in an application of this nature according to the propositions set out in Shocked case.
24. Nemia Taginasedrau the CEO of the 1st defendant in paragraph 3 of the affidavit sworn on 31st May 2013 states that the matter was listed for hearing on the 11th September 2012 before Justice Yohan Fernando. It states further that an opinion was being sort from another Solicitor regarding the matter and also that the Solicitors on records did not attend because of confusion on to instructions. It is also stated by him in the affidavit that the 1st Defendant was not aware that the matter was for hearing on the 9th, 10th, 11th, 16th and 17th days of July 2012.
25. While stating that the matter was listed for hearing on 11th September 2012 in paragraph 3 of the affidavit in paragraph 6 he states that the 1st defendant was not aware of the hearing dates in July. 11th September 2012 stated as the hearing date is the date on which the Judgement was pronounced after the hearing was concluded in July 2012.
26. The deponent also states that the 1st Defendant sort an opinion from another Solicitor in regard to this matter and the Solicitor on record did not attend because of confusion as to instructions.

I do not see any reasons why the Solicitor should be confused about the hearing date as he was the Solicitor on record and there was no application by him to withdraw from appearing prior to the hearing date. Furthermore, no affidavit by the Solicitor on record has been filed to prove that the Solicitor was confused about the hearing dates.

27. It appears from the affidavit evidence before me that the 1st Defendant did not properly instruct Solicitors despite the matter being set down for a five day trial. Onus of proof is on the 1st Defendant to prove that its absence was not due to any fault on its part. Mere allegations contributing the fault of its absence on its solicitor cannot be accepted as proof that its absence was not due to any fault on its part. Therefore, on the evidence before me I find that the 1st Defendant has not satisfied the dominant consideration in setting aside the judgement.
28. The next proposition to be considered is whether the 1st Defendant enjoys a real prospect of success in this matter. In the affidavits filed in support of this application the deponent does not depose of a real prospect of success in this matter. Furthermore, in the submission filed by the 1st Defendant only states that the 1st Defendant has a prima facie defence against the plaintiff and does not dwell on the merits and to show a real prospect of success.

29. The other factor to be considered in regard to this application is whether there is a delay in applying to set aside the Judgement. As mentioned in the above paragraphs an application under Order 35 rule (8) must be made within seven days after Trial. The trial of this matter was concluded on 9th July 2012. This application is made on 31st May 2013 more than 10 months after the trial. Defendant does not give any explanation for the delay, the Affidavits merely states that there has not been an inordinate delay. Therefore, there is no evidence before me to explain the reasons for the 1st Defendants delay in making this application. In the submission of the 1st Defendant it is stated that the Defendant was not aware of the judgment until they were served with the Order. That submission itself prove that 1st Defendant has not even taken the trouble to inquire from its Solicitor about this matter for a long period of time. Therefore, I am of the view that the 1st defendants previous conduct proves that it had not acted diligently in following the proceedings of this matter. I find that no special reasons are given for the delay of the 1st Defendant in making this application.
30. Seventh relevant factor in Shockeds case in setting aside application is:
".....whether the successful party would be prejudiced by the judgement being set aside especially if he cannot be protected against the financial consequences"
31. In the affidavit filed by the Plaintiff it is stated that this matter has gone for a long time and there were considerable attendances. It is also stated that an appeal was also lodged and the bills amount to \$34,168.91.
32. The deponent of the affidavit a son of the Plaintiff states further that his mother is very ill and she wants this matter to be over. He states that they have made arrangements to sell the land so that their mother can have certain medical treatment and enjoyment of some proceeds of the land during her life time.
33. It is evident from the affidavit evidence of the Plaintiffs son that the Plaintiff has expended a lot of legal costs and devoted many years into this matter. It is also evident that the Plaintiff being a sick lady is deprived of getting any money for her medical needs by selling the property due to the charge being registered by the 1st Defendant. She would not be protected against the financial hardships endured over a period of several years if she is asked to go through the case again. Therefore, I find that it is prejudicial to the Plaintiff if the judgement enforced is set aside in this matter.
34. The public interest to ensure there is an end to litigation is another factor to be considered by court in setting aside applications. In this matter the court has utilised valuable time up to the date of pronouncing the Judgement. The 1st Defendant does not adduce affidavit evidence to prove that it was a mistake or accident. It only sates that the Solicitor was confused with the hearing date. No affidavit is filed by the 1st Defendants Solicitor who was on record. To add to this 1st Defendant files this application several months after

the trial date and fails to adduce any evidence for the delay.

35. Considering the above circumstances it is my view that the court devoting time again to proceeding in which it had already made adjudication is contrary to the public interest ensuring end to litigation.

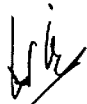
Conclusion

36. Due to the reasons set out as above, I find that I should not exercise my discretion under Order 35 (2) (1) of the High Court Rules to set-aside the Judgement given in this matter.

37. Due to my determination to dismiss the application to set aside the Judgement I will not consider merits of the application to stay made by the 1st Defendant.

38. **Final Orders**

- i) The application to set aside the judgement of Justice Yohan Fernando made on 11th September 2012 and the application for costs be dismissed.
- ii) The 1st Defendant to pay \$1,000 costs to the Plaintiff within 21 days of this order.



Lal S. Abeygunaratne

Judge

09/09/2014

