

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 32 OF 2011

BETWEEN : THE TRUSTEES OF VANUALEVU MUSLIM LEAGUE
1ST PLAINTIFF

AND : BASHIR KHAN
2ND PLAINTIFF

AND : VCORP LIMITED formerly called CENTREPOINT
HOTEL MANAGEMENT LIMITED
1ST DEFENDANT

AND : LABASA TOWN COUNCIL
2ND DEFENDANT

AND : THE ITAUKEI LAND TRUST BOARD
3RD DEFENDANT

AND : MINISTRY OF LANDS
4TH DEFENDANT

AND : MINISTRY OF LOCAL GOVERNMENT
5TH DEFENDANT

AND : ATTORNEY-GENERAL OF FIJI
6TH DEFENDANT

COUNSEL : Mr. Valenitabua for the Plaintiffs
Mr. Sen for the Defendants

Date of the Hearing : 28th July 2014

Date of Judgment : 8th October, 2014

JUDGMENT

[1]. There are two applications filed on 30.6.14. The first one is to set aside a default judgment. The said summons seeks following orders:

- a) *The judgment entered in default of defence to counterclaim in this matter be set aside for:*
- i) *irregularity*
 - ii) *or alternatively, at the discretion of the court if the judgment is ruled to be regular.*
- b) *there be a stay of execution of judgment until determination of this application and HBJ 6 of 2012 or until further order of this court.*
- c) *the costs of and occasioned by this application to be assessed summarily against the 1st Defendant.*

[2]. The second summons filed on the same date is for striking out the plaintiffs claim. Both applications are between the plaintiff and 1st defendant.

[3]. When the matter was taken up before me both Counsel agreed that:

- i) *The Court should first hear and determine the plaintiff's summons to get the default judgment granted pertaining to the defendants counter claim vacated. Accordingly court proceeded to hear the summons for vacating the default judgment.*
- ii) *At the outset the plaintiff's counsel informed Court that he will be limiting his submissions only pertaining to orders sought under order (a) (i) of the said summons which is for vacating the default judgment on the basis of irregularity. Accordingly the 1st defendant too narrowed his submissions only for this ground.*

Background

[4]. Even though this action has been filed in 2011, the parties have filed numerous numbers of interlocutory applications' which has made the substantial matter still pending. Keeping this in mind it would suffice to see the background to the present application. On 13.3.14 the plaintiff's application to file an amended statement of

claim had been allowed and the Defendant's application to file an amended statement of defence too had been allowed.

- [5]. The Plaintiff had filed the amended Statement of Claim dated 19.3.14. The 1st defendant has filed his statement of defence with the counter claim on 8.4.14. On 16.4.14 the matter had been adjourned for 24.4.14 and thereafter to 23.5.14. On this day the court had given time to the plaintiff to file a reply to the counter claim and thereafter on 26.6.14 after the time period granted to the plaintiff to file a reply had lapsed, the defendant has filed a default judgment. I find that there is a sealed default judgment date 26.6.14. Subsequent to that the plaintiff has filed the summons on 30.6.14 to set aside the default judgment and as per his submission on the basis of irregularity. The plaintiff also conceded that they had failed to file the defence to the counter claim within the granted time.
- [6]. At the hearing it was not disputed that as per the counter claim and the default judgment, the defendant's counter claim consisted of liquidated damages, unliquidated damages, exemplary, punitive and aggravated damages and injunction reliefs.
- [7]. At the commencement of the hearing the plaintiff with consent of the 1st defendant's counsel amended the summons to read as in pursuant to O2 R2, O13 R10 and O19 R7 of the High Court Rules. Counsel did not dispute the fact that Order "C" in the amended statement of defence and counter claim of the 1st defendant is for liquidated damages and order F and G are unliquidated damages. Also order b to d are of injunctive nature and by order G the plaintiff has claimed for dismissal of the amended statement of claims.
- [8]. It was also not disputed that as per the composition the 1st defendant's counter claim falls under O19 R7 in the category of other claims.

The said O19 R 7 states:

7.-(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant

or all the defendants (where there is more than one) fails or fail 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, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

(2) *Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may-*

(a) *if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or*

(b) *Set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.*

(3) *An application under paragraph (1) must be by summons or motion.*

Determination

[9]. Both counsel have filed their respective affidavit evidence and preferred to make oral submissions.

[10]. This is an instance where the defendant has sought default judgment against the plaintiff for not filing a defence to the counter claim in the amended statement of defence. The Court observes that the plaintiff had on two occasions sought time to file a reply to the amended statement of defence. However the plaintiff has failed to file a defence and the plaintiff's counsel conceded on this in the submissions. Such a situation is contemplated in O19 R8. It is observed that under the circumstances the

defendant has a right to seek a default judgment, the court now has to examine whether the defendant complied with the rules in seeking such default judgment.

- [11]. As I had stated earlier parties were not at dispute that the counter claim of the defendant comes under the category of “other claims” contemplated under O19 R7. Under the said order for the defendant to obtain a default judgment he should have made an application under O19 R7 (3). Such application should have been made by summons or motion. The Court record does not bear such a summons’s nor a motion. When the Court questioned the 1st defendant’s counsel he conceded that such a summons or motion was not filed. Thus a judgment obtained in non-compliance with O19 R7 (3) in these circumstances becomes a judgment obtained irregularly and the default judgment becomes an irregular judgment.
- [12]. The learned counsel for the defendant submitted that the plaintiff had been given ample time to file a defence and also considering the time period the plaintiff had taken to prosecute this case up to now, the order should not be upset. The Defendant also submitted that even if the order is obtained irregularly that court should act under Order 2 R 2 and not upset it. The defendant also submitted that the plaintiff should have come under O19 R9 to set aside a judgment and not under R7. The court has considered these facts. The court observes that the plaintiff has to bear the responsibility for delayed prosecution of his action. The plaintiff in reply submitted and invited the court to act under order O2 R2 if this application is based on a wrong rule. The court has considered the defendant’s objection and the plaintiff’s reply too.
- [13]. The Court observes that the power to set aside a default judgment is given to Court under O19 R 9. However under O2 R2 the Court has the power to set aside a judgment on irregularity. The plaintiff has filed this application on 30.6.14. The impugned default judgment has been entered on 26.6.14. The plaintiff has filed the summons and a supporting affidavit laying the grounds of objection for the default judgment to stand, within 4 days of the said judgment being sealed.
- [14]. As there is a vital non-compliance by the defendant in obtaining the default judgment, I determine that non-compliance of O19 R7 (3) in this instance is fatal to the defendant to maintain the default judgment. Thus, the non-compliance makes it an irregular judgment. An irregular judgment has to be set aside. This has been decided

in the *Public Trustees [as the executor and trustees of the estate of Jone Kamoe Navui deceased] v Attorney General and the Commander, Republic of Fiji; Military Forces* HBC 536/2002(S). Where the court quoted *Analaby v Precetorious* (1888) 20 ABD 764 and held ... "the judgment having been entered irregularly the defendants are entitled as of a right to have it set aside".

[15]. This is also supported in the following judgment *White vs Western* 2 Q B 647.

"... where there is an irregularity in the entry of default judgment the party against whom judgment is obtained is entitled to have the judgment set aside and the Court should impose no terms whatsoever on him, not even contingent term such as that the costs should be costs in the course."

[16]. This judgment has been applied with approval in *Tirwal Naidu v NLTB and Ors* HBC 374 of 2002(L). Where the court held that when a judgment is irregular the Court has no discretion, it has to be set aside.

Conclusion

[17]. For the reasons I have set out:-

The plaintiff is entitled to have the default judgment on 26.6.14 to be set aside. Accordingly I make the following orders:

- a) *The default judgment of 26.6.14 is set aside.*
- b) *Cost of this application to be cost in the cause.*



Mayadunne Corea

Mayadunne Corea

JUDGE

08.10.2014