

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 118 of 2011

BETWEEN : WAME NIUTAMATA as Administrator of the Estate of the late Salanieta Kotomaimoala Leqa of Nausori, School Teacher.

PLAINTIFF

AND : SHALEN PRAKASH of Vuduna Road, Nausori, Mini Van Driver.

1st DEFENDANT

AND : UMLESH CHAND of Tuirara Subdivision, Makoi, Driver.

2nd DEFENDANT

AND : THE ATTORNEY GENERAL OF FIJI of Level 7, Suvavou House, Victoria Parade, Suva.

3rd DEFENDANT

AND : SURESH CHAND of Naselai Bau Road, Nausori.

4th DEFENDANT

AND : PIONEER CONCRETE a limited liability company having its registered office at Lot 1 Kura Street, Laucala Beach, Industrial.

5th DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Ms. Kunatuba for the Plaintiff.
: **Ms. Ramoce** for 2nd & 3rd Defendants.
: **Mr. A. K. Narayan** for 4th & 5th Defendants.

Date of Hearing: 28th April, 2016

Date of Ruling : 7th June, 2016

DECISION

(Leave to be granted to the Plaintiff to file an Affidavit in Opposition & written submissions on setting aside of Default Judgment application filed by 4th & 5th Defendants)

APPLICATION

1. On the outset I must state that the Plaintiff's application was only filed into Court after conclusion of the hearing on the Summons to set aside default judgment filed by the 4th and 5th Defendants
2. A Notice of Motion together with an affidavit in support was filed by the Plaintiff on 17th March, 2015 seeking the following orders-
 - (i) **That leave be granted to the Plaintiff to file and serve his affidavit in opposition together with a written submissions to the 4th & 5th Defendants application to set aside the Default Judgment that was regularly entered against them.**
3. The Plaintiff's application doesn't show or mention under which particular provisions of the law the application has been filed.
4. The 4th & 5th Defendants chose not to file and serve any affidavit response to the Plaintiff's application.
5. Application proceeded to hearing on the scheduled hearing date of 28th April, 2015.

BACKGROUND

6. The Plaintiff filed the substantive application on 29th April, 2011.
7. No defence was filed by the 4th & 5th Defendants onto the Plaintiff.
8. The Plaintiff obtained a Default Judgment against the 1st, 4th & 5th Defendants accordingly on 11th July, 2014.
9. The 4th & 5th Defendants filed a Summons together with an affidavit in support on 01st October, 2014, seeking an order to Set Aside Judgment entered against

them pursuant to **Order 13 Rules 9, 10** and **Order 19 Rule 9 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.**

9. The Plaintiff appeared in Court on the returnable date of 27th October, 2014 of the 4th & 5th Defendants Summons, and the Court granted 21 days (on or before 17/11/2014) for the Plaintiff to file and serve his affidavit in opposition and 14 days (on or before 1/12/2014) thereafter to the 4th & 5th Defendants for any reply.
10. Application was scheduled for hearing on 28th April, 2015 at 11.30 am.

PLAINTIFF'S CASE

11. Sought leave of this Honourable court to file his affidavit in opposition and written submissions to the 4th & 5th Defendant's setting aside judgment that was regularly entered against them.
12. This matter has been before this court since 2011, and he has faithfully served all documents on all the Defendants in this action.
13. The 4th & 5th Defendants have filed court documents to set aside the judgment entered against them.
14. The reason that he was unaware of this matter as it had been over two (2) years since judgment had been entered against them and verily believes that it is unfair of the 4th & 5th Defendants to come to this Honourable Court claiming that they forgot to instruct a Solicitor to file a Statement of Defence.
15. That the Plaintiff verily believes that the application for setting aside by the 4th & 5th Defendants is an abuse of process and should not be entertained.
16. Court to exercise its discretion.

THE 4th & 5th DEFENDANT'S CASE

17. Chose not to file and serve any affidavit response to the Plaintiff's application of 17th March, 2015.
18. Raised the following issues-
 - (i) Really appears to be a hybrid application;
 - (ii) Under which law the application filed;
 - (iii) Decision date assigned on the setting aside application;
 - (iv) Plaintiff should have filed response to setting aside in terms of masters orders by 18th February, 2015;
 - (v) Application is irregular;
 - (vi) Case is closed, parties have presented their case, submissions filed;
 - (vii) Plaintiff comes up with an application one month later;
 - (viii) Plaintiff maintains there is no prejudice to my clients;
 - (ix) There is prejudice- presented our evidence and submissions;
 - (x) Case already for ruling on 15th May, 2015 at 2.30 pm.

ANALYSIS and DETERMINATION

19. The Plaintiff appeared on the returnable date of the 4th & 5th Defendant's application on 27th October, 2014.
20. In terms of the set down procedure and the Law, this Court granted the Plaintiff 21 days to file his affidavit/response on or before 17th November, 2014 and also granted 4th & 5th Defendants 14 days time thereafter on or before 1st December, 2014 to file their reply.
21. The application was scheduled for hearing and determination on 18th February, 2015 at 11.30 am.
22. The Plaintiff did not appear in court on the date of the hearing and failed to file and serve his affidavit in opposition as per the court directions of 27th October, 2014. Court notes that some 4 months had lapsed since the court made the directions and still the affidavit was not filed for reasons best known to the Plaintiff.

23. The 4th & 5th Defendants application proceed on for hearing on the 18th February, 2015 in the absence of the Plaintiff/Counsel and concluded with a comprehensive oral submissions and arguments. Matter adjourned to 6th March for written submissions and the same was furnished to court on 25th February, 2015.
24. On 6th March, 2015, Plaintiff's Counsel was present when this matter was called to assign a ruling date on the application of the 4th & 5th Defendants. She made an oral application for leave to file the Plaintiff's affidavit with written submissions. The Counsel on the other side objected to her application stating that the hearing was already concluded and it was just for mention to check on the Defendant's written submissions filed and to assign a ruling date.
25. This court delivered a short ruling stating as follows-

“In all fairness, the hearing in terms of the 4th & 5th Defendant's application was already concluded on 18th February, 2015, and today was only to check on the written submissions of the Defendants which had already been orally submitted to court on the 18th February, 2015. I will not allow the Plaintiff to file any written submissions since the hearing has already been concluded. Ms. Kunatuba is at liberty to make a formal application if so desires to do so. Question of costs reserved. Matter adjourned for Ruling on 15th May, 2015 at 2.30 pm.”

26. The Plaintiff subsequently filed a formal application in terms of a Motion and an affidavit in support on 17th March, 2015 and sought for an order to file an affidavit in opposition with written submissions.
27. The question that I paused to myself was whether this court can re-open the case in terms of the 4th & 5th Defendants application which had been concluded sometime ago on 18th February, 2015?

The Plaintiff failed to file and serve his Affidavit/Response as per the court directions of 27th October, 2014. Thereafter he failed to attend court and/or seek any further time to file and serve his affidavit/response until some 3 weeks time lapsed and only after the 4th & 5th Defendants application was heard and concluded to assign a date for ruling.

28. This application was strongly opposed by the 4th & 5th Defendants for the very reasons as it appears hereinabove at paragraph 18 (i)- (x) inclusive. In particular, that the hearing of the 4th & 5th Defendants have been concluded and this court cannot re-open the case and hear it again and secondly, the Plaintiff's application does not reflect the provisions of the law under which he has been able to file this application into court.
29. After a careful consideration of the Plaintiff's application coupled with the Counsel's arguments raised and bearing in mind the oral arguments raised by the 4th & 5th Defendants Counsel, the Plaintiff's application should fail in the given circumstances for the aforesaid rational and should be dismissed accordingly.
30. Further, this court is now at liberty to deliver the impending 4th & 5th Defendant's application on a date yet to be assigned.
31. In conclusion, these are my orders.

ORDERS

- a. **The Plaintiff's application filed on 17th March, 2015 is dismissed.**
- b. **Leave to file his affidavit and the written submissions is therefore refused.**
- c. **The Plaintiff is ordered to pay assessed costs to the 4th & 5th Defendants at \$1,000.**
- d. **The ordered costs to be paid within the next 14 days.**

Dated at Suva this 7th Day of June, 2016



.....
MR VISHWA DATT SHARMA
Master of High Court, Suva

CC: *Ms. Kunatuba* of Law Solutions, Suva.
Ms. Ramoce of AG's Office, Suva.
Mr. A. K. Narayan of A K Lawyers, Ba.
City Agents: **O'Driscoll & Co. Solicitors, Suva.**