IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 101 of 2016

BETWEEN	:	**SURUA DASS** of Korovutu, Nadi, in the Republic of Fiji Islands, Cultivator.
		Plaintiff
AND	:	**VENKAT DASS** of Korovutu, Nadi, in the Republic of Fiji Islands, Cultivator
		Defendant
Before	:	Acting Master U.L. Mohamed Azhar
Counsels	:	Mr. V Chandra O/I of *Samusamuvodre Sharma Law* for the Plaintiff Ms. Dunn of Legal Aid Commission for the Defendant
Date of Ruling	:	04th October 2017

RULING
[Setting Aside of Default Judgment]

01. This is the amended summons filed 17.02.2017 by the defendant pursuant to Order 19 rule 9 of the High Court Rule and the inherent jurisdiction of this court to set aside the interlocutory judgment entered against him on 23rd of September 2016. The defendant initially filed a summons on 03.02.2017 for the same purpose, but withdrew the same on 14.02.2017 for the inadvertent errors on the said summons. Thereafter, the second summons was filed 15.02.2017. On the returnable day, the counsel for the defendant again sought the leave of the court to amend it, which was allowed subject to cost and finally the current summons was filed. The summons is supported by the affidavit sworn by the defendant. The plaintiff opposed the summons and filed the affidavit in opposition which was later replied by an affidavit sworn by the plaintiff.

02. The plaintiff, as beneficiary in the Estate of Hari Dass, late of Korovutu, brought this action against the defendant, who is the Executor and Trustee of the said Estate, for the alleged breach of his duties as the Executor and Trustee of the said Estate. The Estate includes the sugarcane farm and the dwelling house in the Crown Lease No 20114 situated at Korovutu, Nadi. According to the statement of claims, the particulars of the breach are failure to provide full and proper accounts; failure and or negligence and or refusal to provide full and proper accounts of the sugarcane proceeds received from the

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Estate farm; failure to distribute the same and delaying the final distribution of the Estate having obtained the Probate in August 1989. The Writ, which was issued on the 1st day of June 2016, was served on the defendant on 09th June 2016. The defendant appearing in person filed the Acknowledgment of Service on the following day i.e. 10th June 2016. However, he failed to file and serve the statement of defence within the prescribed time. The plaintiff, having done his search of defence at the registry, sealed the interlocutory judgment on 23.09.2016 and thereafter filed the summons for assessment of damages on 04.11.2016. Only upon service of the summons for assessment of damages, the defendant turned up and filed the notice of appointment of his solicitors followed by the summons for setting aside the said interlocutory judgment.

03. The law on setting aside a default judgement is well established both in English common law and our local jurisdiction. There are number of authorities which are frequently cited by the courts when exercising the discretion to set aside the judgments entered for the default of either party. *Anlaby v. Praetorius (1888) 20 Q.B.D. 764*; *Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985)*; *O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762*; *Evans v Bartlam [1937] 2 All E.R. 646*; *Burns v. Kondel [1971] 1 Lloyds Rep 554*; *Fiji National Provident Fund v Datt [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988)*; *Eni Khan v. Ameeran Bibi & Ors (HBC 3/98S, 27 March 2003*; *Wearsmart Textiles Limited v General Machinery Hire limited and Shareen Kumar Sharma(1998) FJCA26; Abu 0030u.97s (29 May 1998)*; *Fiji National Provident Fund v Datt [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988)* are the most important foreign and local cases, to name a few, which deal the principle. I had the opportunity to extensively discuss the principles in a recent case of ***Chand v M R Khan Brothers Transport Company [2017] FJHC 679; HBC197.2016*** which was decided on 19th of September 217.

04. Basically, the courts are given discretion to set aside any judgment entered for the default of any party (see: Or 13 r 10, Or 14 r 11, Or 16 r 5 (2), Or 19 r 9 and Or 35 r 2). However, when exercising this discretion the courts have adopted two different approaches in dealing with regular and irregular judgments. This distinctive approach is clearly stated by **Fry L. J.** in ***Anlaby v. Praetorius*** *(1888) 20 Q.B.D. 764*. His Lordship held that:

> *"There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief".*

05. In **O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762 Greig J** said at 654: The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled *ex debito justitiae* to a setting aside. Accordingly, if the judgment was obtained irregularly, the applicant is entitled to have it set aside *ex debito justitiae*, but, if regularly, the Court is obliged to act within the framework of the empowering provision **(see:Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985)**. Thus, the defendant against whom an irregular judgment was entered in default has the right to have it set aside and the courts have no discretion to refuse to set aside.

06. Conversely, if the judgment is regular, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits. ***Evans v Bartlam*** *[1937] 2 All E.R. 646* is an important case, among others, which set out the principle of setting aside the default judgement entered regularly. In that case, **Lord Atkin** explained the primary consideration that the court should pay heed. His Lordship held that;

> *"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication..........*
>
> *The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."*

07. There are several local authorities which recognized the tests and which have been cited by court very often. ***Fiji National Provident Fund v Datt*** *[1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988)* is one of those judgments which clearly set out the judicial tests. Fatiaki J held in that case that:

> *"The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can he elevated to the states of a rule of law or condition precedent to the exercise of the courts unfettered discretion.*
>
> *These judicially recognized "tests" may be conveniently listed as follows:*
>
> *(a) whether the defendant has a substantial ground of defence to the action;*
>
> *(b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and*
>
> *(c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.*
>
> *In this latter regard in my view it is proper for the court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed".*

08. The defendant in his affidavits states that, the interlocutory judgment entered against him is an irregular judgment and he is entitled *ex debito justitiae* to have it set aside. It is defendant's argument that, though said interlocutory judgement was entered on 23.09.2016, it was not served on him till January 2017. The failure to serve the judgment

within the prescribed period has rendered the said judgment irregular. The defendant's counsel referred to the Order 42 rule 8 of the High Court Rules and the case of ***Waigele Sawmills Ltd v Begg* [2015] FJHC 171; HBC23.2014 (11 March 2015)** in her argument. Conversely, the plaintiff in his affidavit states that, the defendant failed to disclose any meritorious defence which is the requirement to set aside a regular judgment. It will be prudent to discuss the question of irregularity first in this case.

09. The Order 42 rule 8 which was introduced to the High Court Rules on 13.09.2005 by the Legal Notice 47/15 imposes a duty on the party entering a judgment to serve it on every other party not later than 14 days after entry of the judgment. The said rule reads:

> *A party entering judgement **must serve** a copy of the sealed judgement on every other party not later than 14 days after entry of the judgement.* (Emphasis added)

10. Failure to follow this rule, after entering a judgment, will constitute an irregularity under Order 2 of the High Court Rule as the service is compulsory from the wording of the above rule as emphasized. In the case (***Waigele Sawmills Ltd v Begg***) cited by the counsel for the defendant, the plaintiff failed to serve the default judgement on the defendant, however, when the application for setting aside was filed, the plaintiff submitted that, the defendant application was merely delaying plaintiff from the fruit of the default judgment. The learned Master held in that case that, it was the plaintiff who delayed the matter by serving the default judgment after two months and cannot, now, claim that he is prevented from the fruit of his default judgment as the defendant filed the application to set aside immediately after service of default judgment. The Master further held that, failure to comply with Order 42 rule 8 was an irregularity. It should be noted that, the court in that case never held that, the said default judgment was irregular due to such failure to serve. Thus, the counsel for the defendant cannot rely on that case for her argument that, the failure to serve the default judgement as required by the rules will render it irregular. Therefore the question is whether the irregularity in serving any default judgment will render it as irregular, as the counsel for the defendant argues. It would be noteworthy to consider how the irregularity is attributed to any default judgment.

11. The authorities suggest that, a judgment or an order becomes irregular when there is a fundamental defect in the proceedings and such irregular judgments are considered as '***void* orders**' resulting from a 'fundamental defect' in proceedings ***(Upjohn LJ in Re Pritchard (deceased)* [1963] 1 Ch 502 and Lord Denning in *Firman v Ellis* [1978] 3 WLR 1).** Such judgments also considered as resulting from a 'without jurisdiction' or ultra vires act of a judicial office (***Lord Denning in Pearlman v Governors of Harrow School* [1978] 3 WLR 736).** A 'fundamental defect' includes a failure to serve process where service of process is required (**Lord Greene in Craig v Kanssen Craig v Kanssen [1943] 1 KB 256**); or where service of proceedings never came to the notice of the defendant at all (e.g. he was abroad and was unaware of the service of proceedings); or where there is a fundamental defect in the issuing of proceedings so that in effect the proceedings have never started; or where proceedings appear to be duly issued but failed to comply with a statutory requirement: **Upjohn LJ in Re Pritchard [1963]**. Failure to comply with a statutory requirement includes rules made pursuant to a statute: **Smurthwaite v Hannay [1894] A.C. 494.** In ***Craig v Kanssen* [1943] 1 KB 256,**

[1943] 1 All ER 108, there had been a failure to serve process where service of process was required. The result was that the order made based upon that process was irregular.

12. It is evident from the above authorities that any irregularity, which precedes entering a judgment or an order, is the deciding factor of irregularity in that judgment or an order which follows such irregularity and the irregularity after entering any judgment or an order will not render it irregular. The difference should be made between the pre-judgment irregularity, which makes the judgment irregular and post-judgment irregularity which makes the proceeding aftermath of judgment, irregular. In this case, the failure to serve the default judgment in compliance with the Order 42 rule 8 is an irregularity which occurred after the default judgment had been entered and does not, in my view, render the said default judgment irregular. Thus the argument of the counsel for the defendant fails to differentiate the pre-judgment irregularity and post – judgment irregularity and therefore it is misconceived and must fail as the default judgment in this case cannot be considered as irregular judgment on the ground of failure of the plaintiff to serve it on the defendant. However, the fact that it had not been served could play an active role in deciding the prejudice that may be caused to the plaintiff and the delay on part of the defendant in filling the application for setting aside the said default judgment.

13. Now I turn to consider whether the said default judgment was entered in accordance with the rules or can it be considered as an irregular judgment on any other ground. For this purpose it would be necessary to discuss the modes of entering default judgment in civil suits in the High Courts. The term 'default judgment' may be defined as *"a judgment entered in favour of either party after hearing or without hearing, based on some failure to take action by other party"*. Accordingly, a default judgment not necessarily is entered against the defendant only, in any civil suit. It can also be entered against the plaintiff and a third party as well. In addition, the court may enter the default judgment in favour of either party after hearing the claim or the defence or may be entered without hearing.

14. The High Court Rules provide for entering default judgment whether it is final or interlocutory, mainly in four instances. First instance is under Order 13. Under this Order the default judgment may be entered against the defendant, without hearing, for default of notice of intention to defend except under rule 6 where the plaintiff to enter the judgment against the defendant with the leave which should be sought by a summons to be served on the defendant, unless the court otherwise orders. This Order will apply only in a situation where the defendant fails to give Notice of Intention to Defend within the prescribed period after acknowledgement of service of Writ. Under this Order there are several rules which provide for the entering default judgments depending on the nature of the claim filed by the plaintiff. The classifications are; the claim for liquidated demand (O.13, r.1); the claim for unliquidated damages (O.13, r.2); the claim for detention of goods (O.13, r.3); the claim for possession of land (O.13, r.4); the mixed claims (O.13, r.5) and the other claims (O.13, r.6). However, the judgment shall not be entered against a defendant under this Order unless *(a)* the defendant has acknowledged service on him of the writ; or *(b)* an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant; or *(c)* the plaintiff produces the writ indorsed by the defendant's solicitor with a statement that he accepted service of the writ on the defendant's behalf. The rule 10 provides that, without prejudice to rule 8(3) and (4), the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order. The rule 8 (3) and (4) provide for an application by the

plaintiff himself to set aside the judgment so entered or to seek direction from the court when the post is undelivered for the addressee if the Writ has been served by post under Order 10, rule 1(2) (a).

15. The second instance is under Order 16 rule 5 (1) (b) and rule 5 (2). The Order 16 provides for the Third Party and Similar Proceedings and rule 5 deals with the default of a third party. If a third party does not give notice of intention to defend or, having been ordered to serve a defence, fails to do so, the defendant by whom the third party notice was issued may, if judgment in default is given against him in the action, at any time after satisfaction of that judgment and, with the leave of the Court, before satisfaction thereof, enter judgment against the third party in respect of any contribution or indemnity claimed in the notice, and, with the leave of the Court, in respect of any other relief or remedy claimed therein. Under this rule, failure of a third party to give notice of intention to defend will not automatically allow the defendant who issued third party notice to enter the default judgment. The condition precedent is that the defendant should have satisfied the judgment against him and if not satisfied so, he should have obtained the leave of the court. In any event this is an indemnity process and he is entitled for the contribution he made towards satisfying the judgment against him or the indemnity claimed by him. If he wants to enter judgment for any other remedy or claim, then the leave of the court must be obtained. The rule 5 (2) provides for the entering judgment against the third party or against the defendant by whom a third party notice was issued, for default of serving of any pleading. The difference between rules 5 (1) (b) and 5 (2) is that under the former the judgment is entered against the third party for default of notice of intention to defend and whereas under the later, the judgment is entered against the third party or the defendant by whom a third party notice was issued and the reason is default of pleadings.

16. The third instance is under Order 19. Like Order 13, this Order too classifies (rules 2 to 7) the claims depending on their nature and allows the plaintiff to enter the judgment against the defendant for default of pleading. However under rule 7 like under Order 13 rule 6, the plaintiff cannot automatically enter the default judgement, but has to apply to the court, by summons or motion for judgment and the court, after hearing such application, shall give judgment as the plaintiff appears entitled to on his statement of claim. A notable rule under this Order is the rule 8 which treats the defendant who has counterclaims against a plaintiff as the plaintiff for the purpose of rule 7. The fourth instance is under Order 35 rule 1 (2) 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 counterclaim in the absence of that party. This rule however, does not directly provide for entering judgment in default. However, it is implied from the rule 2 which provides that, any judgment, 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. The situation is same under Order 14 rule 11 as well.

17. The comparison among those instances reveals that, the difference between the Orders 13 and 19 are that, under the former, the judgment is entered for the default of notice of intention to defend and whereas under later, the judgment is entered for default of pleadings. In the meantime, the Order 16 rule 5 provides for both default of notice of intention to defend and default of pleadings as well. The very important similarity between the Order 13 and the Order 19 is that, under both Orders, the plaintiff has the discretion to enter the default judgment for liquidated demand, the claim for unliquidated

damages, the claim for detention of goods, the claim for possession of land and for the mixed claims. However, for the other claim under Order 13 rule 6 and Order 19 rule 7, the discretion does not vest in the plaintiff. The plaintiff cannot routinely enter the default judgment as he or she can do so under other rules. Under Order 13 rule 6 the leave of the court should be obtained by a summons which needs to be served on the other party unless the court otherwise directs. Likewise, under Order 19 rule 7 the plaintiff should apply to the court by summons or motion and the court shall, on hearing such application, give such judgment as the plaintiff appears to be entitled to on his statement of claim. If the plaintiff fails to follow this procedure under both rules, the judgment entered would be an irregular judgment.

18. The plaintiff, in this case, had entered the default judgment against the defendant for failing to file and serve the defence within the time prescribed by the rules. The claim of the plaintiff as briefly mentioned above is based on the alleged breach of duty by the defendant as the Executor of the Estate of Hari Dass, late of Korovutu, Nadi. The plaintiff therefore prayed for the following reliefs from the court;

a. *An order for the removal of the Defendant as the trustee of the Estate of the Deceased;*

b. *An order for the final distribution of the Estate of the Deceased;*

c. *An order that the Defendant do provide full and proper accounts of the Estate inclusive of the account of all monies received on the Estate Farm Registration No. 2711 since been as the executor and Trustee of the estate of Hari Dass;*

d. *An order that the Defendant do pay the Plaintiff her share of all sugarcane proceeds received on Farm Registration No: 2711 since the Defendant took over the Administration of the Estate;*

e. *Damages for breach of fiduciary duty and/or breach of trust;*

f. *General damages;*

g. *An order restraining the defendant from uplifting sugarcane proceeds from the Fiji Sugarcane Corporation on the Estate Farm Registration No. 2711 and/or causing any interference with the Plaintiffs peaceful occupation and quiet enjoyment of her residential premises situated on Crown lease No. 20114;*

h. *Such other order or relief as the Court may deem just;*

i. *An order that the Defendant do pay costs to the Plaintiff on an indemnity basis.*

19. The plaintiff's claim and the reliefs he sought in his statement of claim are obviously coming under Order 19 rule 7 of the High Court Rules 1988, which requires the plaintiff

to apply to the court by way of summons or motion and seek a judgment in his favour since the defendant failed to file and serve the defence within the prescribed time. The court, too, is under duty to hear such application and to give judgment as the plaintiff appears entitled to, on his statement of claim as required by said rule 7. The said rule reads;

***Default of defence: other claims** (O.19, r.7)*

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. (emphasis added)

20. The Supreme Court Practice 1997 (The White Book) in commentary to this rule states:

"This rule applies only, where the defendant or plaintiff being required to serve a defence either to a statement of claim or to a counter claim makes default, and consequently this rule applies only where a statement of claim or counterclaim has been served: see Wilmot v Young 918810 44L.T. 331.

This rule applies only as between plaintiff and defendant and not to third party proceedings, see O. 16, r.5.

In cases in which this rule applies, the default in serving a defence cannot be followed by judgment without an order, for which the plaintiff must apply by summons or motion.

The plaintiff is, however, entitled without notice to abandon every relief or remedy sought which falls outside the description of claims under

rr.2-6 and enter a default judgment for his claims within those rules (Morley London Developments Ltd v Rightside Properties Ltd (1973) 117 S.J. 876, C.A)".(emphasis added)

21. The above mentioned commentary makes the application of this rule very clear. Accordingly, mere failure to serve the defence within the prescribed time will not be followed by a dufault judgment without an order of the court. However, the plaintiff can abandon his claim under this rule and enter the judgment for other claims under rules 2 to 7.

22. The record shows nothing about any such application. In fact, the plaintiff without applying to the court has routinely entered the default judgment after the search, done at the registry for the defence. This is an obvious non-compliance of Order 19 rule 7 which rendered the said judgment as irregular. For these reasons I decide that judgment entered on the 23.09.2016 against the defendant is an irregular judgment and void resulting from a fundamental defect in proceedings and this court has no discretion to refuse to set aside the same. The defendant is entitled to set aside the same *ex debito justitiae* and therefore, I am unable to impose any cost on him.

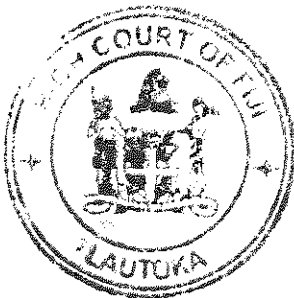
23. As stated above, the plaintiff stated in his affidavit that, the defendant failed to raise any meritorious defence in his affidavit in opposition. Since the said interlocutory judgment is irregular, the question of meritorious defence does not arise. Accordingly, the final orders are;

a. The interlocutory judgment entered on 23.09.2016 is set aside,

b. There is no order for cost,

c. The defendant to file the Statement of Defence within 14 days from today and

d. The pleadings will now take their normal course.



U.L.Mohamed Azhar
Acting Master

At Lautoka
04/10/17