

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 120 of 2018

BETWEEN: SAVERIO BALEIKANACEA of 3 Baka Drive, Delainavesi, Lami, Retiree.

PLAINTIFF

AND: TOKATOKA BETOBALAVU TRUST established under the trust deed dated 18th November, 2016, whose principal address is Korobebe Village, Voturu, Ba.

1ST DEFENDANT

AND: ERONI NARUA of Korobebe Village, Baturu Ba, Trustee.

2ND DEFENDANT

AND: JOPE NUKUQAMU of Korobebe Village, Baturu Ba, Trustee.

3RD DEFENDANT

AND: AISAKE NAVURA of Korobebe Village, Baturu Ba, Trustee.

4TH DEFENDANT

BEFORE: Hon. Justice V D Sharma

COUNSEL: Mr. Maisamoa - for the Plaintiff
No-appearance - of the all the Defendants

Date of Ruling: 18th October, 2018 @ 9.30 am

JUDGMENT

[Originating Summons on Breach of Contract and Specific Performance together with an Ex-Parte Summons seeking an order for Judgment in Default against the Defendants]

INTRODUCTION

1. The **Plaintiff** commenced the **substantive proceedings** against the **Defendants** alleging **Breach of Agreement** and claimed for the following relief from the **Defendants** **jointly and severally**:
 - (a) *Specific performance*
 - (b) *Special damages in the sum of \$82,500.00*
 - (c) *General damages*
 - (d) *Punitive damages*
 - (e) *Exemplary damages*
 - (f) *Interest on the award of damages*
 - (g) *Interest on the award of costs*
 - (h) *Costs of indemnity basis*
 - (i) *Such other relief as the court deems just and equitable in the circumstances.*
2. The **Defendants** were served with the writ of **Summons** and the **Statement of Claim** together with the **Acknowledgment of service** by the **Plaintiff's Lawyer**.
3. The **1st, 3rd and 4th Defendants** failed to file and serve their respective **Acknowledgment of Service** and the **Statement of Defence** as was required in terms of the *High Court Rules, 1988*. However, the **2nd Defendant** filed his **Acknowledgment of Service** only.
4. Subsequently, the **Defendants failure** to file and serve any **pleadings** prompted the **Plaintiff** to file and proceed with the current **Ex-Parte Summons seeking an order for Judgment in Default to be entered against the Defendants and Damages to be assessed with Interest and Costs accordingly**.

BACKGROUND

5. The **1st Defendant, Tokatoka Betobalavu Trust (Trust)** was awarded a **Contract** by **Basic Industries Limited Fiji** to **load and cart blasted quarry stones**. A mandatory deposit was required by **Financial Institution** for the **Funding**.
6. The **Trust** through their adviser **Kinijoji Sokosoko** and the **2nd Defendant** on behalf of the **Trust** including the **3rd and 4th Defendants** approached the **Plaintiff** and discussed the possibility of funding the **Tokatoka Betobalavu Trust** in order for the **Trust** to implement its **contract** with the **Basic Industries Limited Fiji**.
7. After a successful discussion between **Kinijoji Sokosoko** and the **2nd Defendant** on behalf of the **Trust** with the **Plaintiff**, the **Plaintiff** offered to provide financial deposit required by the **Defendants**.
8. A **Memorandum of Agreement (MOA)** was drawn and entered into between the **2nd Defendant** on behalf of the **Defendants** and the **Plaintiff** on **10th November, 2016**. The **MOA** with all the

particulars and conditions as enumerated at paragraph 9 of the **Statement of Claim** was witnessed by the **Trust Advisor Kinijoji Sokosoko**.

9. On or about the 11th November, 2016, the Plaintiff transferred a sum of \$100,000 from his HFC Bank account to the Defendant's account Tokatoka Betobalavu Trust at BSP.
10. According to the Plaintiff's Counsel-
 - The Defendants paid a total sum of \$27,500 only to the Plaintiff and failed to continue with the monthly payments of \$5,000 to clear the balance of \$82,500 despite several reminders made:
 - That the Defendants failure to make the payments in terms of the Memorandum of Agreement makes the Defendants liable for the Breach of Agreement dated 10th November, 2016.
 - That the Plaintiff on the Basis of the Breach of Agreement by the Defendants is claiming against the Defendants jointly and severally for Specific Performance, Damages under various heads, interest and costs accordingly.
11. The Defendants failed to file and serve any pleadings to counter the Substantive claim and therefore the Defendants failure prompted the Plaintiff to seek an order for Judgment in Default for the balance sum of \$82,500 against the Defendants.

ANALYSIS and DETERMINATION

12. The Plaintiff's current application for *Judgment by Default* against the Defendants is made pursuant to *Order 13 Rules 1 and 2, Order 19 Rules 2, 3, and 7 and Order 37 of the High Court Rules, 1988 respectively.*
13. The issue to determine is "*Whether the Plaintiff is entitled to Judgment by Default on their substantive Claim against the Defendants as sought for herein.*"
14. *Order 19 Rule 7 provides as follows-*

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. (underline mine for deliberation)
15. *Order 19 Rule 2* deals with Default of defence for a claim for liquidated demand and *Order 19 Rule 3* deals with Default of defence for a claim for unliquidated damages.
16. Therefore, *Order 19 Rule 7* does not apply in this case where the Plaintiff is seeking for **Judgment by Default** for a liquidated claim of \$82,500 (O.19 r.2) and **Damages to be assessed** which obviously falls in the category of **unliquidated Damages** (O.19 r3).

17. The Counsel representing the Plaintiff did admit in his submissions that the "claim made by the Plaintiff is a combination of a liquidated demand and unliquidated damages.
18. Therefore, the current application should have been made in terms of "*Mixed Claims*" pursuant to *Order 19 Rule 6* which provides as follows-

Default of defence: mixed claims (O.19, r.6)

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in *rules 2 to 5*, and no other claim, then, if that defendant fails 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, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those rules if that were the only claim made, and proceed with the action against the other defendants, if any.

Order 19 Rule 6 would have taken care of both the liquidated claim and unliquidated damages that was sought for in terms of *rules 2 and 3* respectively.


19. This court also notes that the Counsel representing the Plaintiff personally served the Defendants with the Writ of Summons and filed an Affidavit of Service to prove that service has been effected on all the Defendants. Procedurally, service by the Counsel representing the party and subsequently having the conduct of the case at the current hearing would be unfair and therefore unacceptable to this court.
20. The 1st, 3rd and 4th Defendants failed to file and serve their respective **Acknowledgment of Service** and the **Statement of Defence** as was required in terms of the *High Court Rules, 1988*. The court notes that the 2nd Defendant had only filed his Acknowledgment of Service.
21. At the hearing, the Plaintiff's Counsel did not call the Plaintiff nor any witnesses to give evidence and or tender any documentary evidence to substantiate the Plaintiff's claim as per the Statement of Claim filed herein.
22. The Plaintiff informed this court that he will rely on his Affidavit evidence coupled with the oral and written submissions. He also furnished court with a case authority *Civil Action No. HBC 162 of 2013- Frank Thompson and Tomasi Valamalua and 2 others* which I find deals with the **setting aside of Default Judgment** and therefore has no relevance to the present application.
23. The Plaintiff's Substantive claim was founded on the **Breach of Agreement** by the Defendants which was executed and witnessed by the **Trust Advisor Kinijoji Sokosoko** on the 10th November, 2016.
24. The Plaintiff further submitted that as per the **Memorandum of Agreement (MOA)**, the Plaintiff provided a sum of **\$10,000 cash** to the Defendants as a pre-operation expenses and thereafter on or about 11th November, 2016; the Plaintiff transferred a sum of **\$100,000** from his **HFC Bank Account** to the **Defendant's Bank Account style as Tokatoka Betobalavu Trust at BSP**. That the Defendants only paid a sum of **\$27,500** and failed to pay the balance of **\$82,500**. Hence, the Plaintiff now seeks for an order for **Default Judgment** to be entered against the Defendants for the balance sum of **\$82,500 and Damages to be assessed with costs to the Plaintiff**.

25. There is no evidence tendered before this court to substantiate the transaction of money as submitted herein.
26. It can be clearly ascertained from the Plaintiff's submissions and the Affidavit in support deposed by the Plaintiff, Saverio Baleikanacea that the **Memorandum of Agreement (MOA)** entered into between the **2nd Defendant** on behalf of the **Defendants** and the **Plaintiff** and **witnessed** by the **Trust Advisor Kinijoji Sokosoko** on **10th November, 2016** was an important piece of documentary evidence that the Plaintiff's case hinged on and therefore should have relied on and tendered into evidence in court in order to substantiate his claim and seek for Default Judgment against the Defendants.
27. Further, upon the perusal of the Plaintiff's Affidavit in Support, I still do not find the **Memorandum of Agreement (MOA)** annexed to this Affidavit. I reiterate that this was an important piece of evidence that needed to be tendered into evidence for court's examination in order for the Plaintiff to succeed in obtaining the order for the Default Judgment on his current application before this court.
28. The Plaintiff Counsel's failure to call the **Plaintiff** to testify in court and tender into evidence the **Memorandum of Agreement (MOA)**, and therefore in absence of any evidence of the **Memorandum of Agreement** before court leaves me with no alternative but to **dismiss** the Plaintiff's current Summons seeking an order for **Judgment in Default** and the **Damages to be assessed** with costs against the Defendants herein.
29. There will be no order for any costs made against the Plaintiff at the discretion of this court.
30. **In conclusion**, for the aforesaid rational, I now proceed to make the following Final Orders-

FINAL ORDERS

- (a) The Plaintiff's Summons seeking an order for Judgment in Default and Damages to be assessed with costs fails and is hereby dismissed.
- (b) There will be no order for costs at the discretion of this court.
- (c) Orders accordingly.




VISHWA DATT SHARMA
JUDGE
SUVA
18th Day of October, 2018