

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 137 of 2016

BETWEEN : LAVENIA RADITORA of Lot 26 Delainavesi Road, Lami in the Republic of Fiji.

PLAINTIFF

AND : ONISIMO NAIKAVOU of Wainasalato Settlement, Naboro.

1ST DEFENDANT

AND : ESALA JAMES of Wainasalato Settlement, Naboro.

2ND DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Vijay Maharaj for the Plaintiff
Mr. R. Vananalagi for the Defendants

Date of Ruling : 30th April, 2018

RULING

[Summons seeking Setting Aside of Default Judgment by the 1st and 2nd Defendants pursuant to Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court.]

A. INTRODUCTION

1. The 1st and 2nd Defendants filed a Summons on 7th November, 2016 and sought for the following orders-
 - (a) That the Judgment in Default entered herein on 12th July, 2016 and sealed on 09th August, 2016, against the 1st and 2nd Defendants on default of filing the 1st and 2nd Defendant's Defence be set aside on the grounds appearing in the Affidavit of Onesimo Naikavou filed herein.
 - (b) That further proceedings on the Judgment in Default entered on 12th July 2016 be stayed pending the hearing and determination of this application; and
 - (c) That costs of the Application be costs in the cause.
2. This Summons was filed together with an Affidavit in Support deposed by the 1st Defendant, Onesimo Naikavou, and also on behalf of the 2nd Defendant, Esala James in this proceeding.
3. The Application was made pursuant to *Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court.*
4. The application was opposed by the Plaintiff and an affidavit in opposition was filed.
5. Both counsels representing the parties to this proceeding filed their written submissions and accordingly argued their respective cases.

B. BACKGROUND FACTS

6. The Plaintiff filed and commenced a Writ action against the Defendants on 10th June, 2016.
7. Both Defendants were served and filed their respective Acknowledgment of Service on 14th June, 2016 but failed to serve the Plaintiff.
8. The Defendants failed in its bid to file and serve their Defence which subsequently resulted in the Plaintiff successfully obtaining a Default Judgment pursuant to *Order 19 Rule 6 of the High Court Rules, 1988* against both the Defendants.
9. The Default Judgment was sealed and served on the Defendants on 29th July, 2016.
10. On 05th October, 2016, the Plaintiff filed her Notice of Assessment of Damages.
11. On 17th November, 2016, the Defendant's Solicitors filed Notice of Appointment of Solicitors and Summons to set aside the Default Judgment.
12. Hence, the application for setting Aside the Default Judgment for determination.

C. PRINCIPLES ON SETTING ASIDE A DEFAULT JUDGMENT

13. *Order 19 Rule 9 of the High Court Rule, 1988 deals with Setting Aside Judgment and states as follows:-*

9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

14. Under **Or.19 r.9** the Court may set aside or vary 'any judgment' unconditionally or on terms.
15. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles is that:

"Unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473).

16. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in **Halsburys Laws of England Vol 37 4th Ed. para 403**, inter alia, thus:

"In the case of a regular judgment, 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 ... For this purpose it is enough to show that there is an arguable case or a triable issue"

17. It is further stated therein:

"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desirable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed".

18. A useful summary of the factors to be taken into consideration in setting aside is to be found under **Notes to Or.19 r.9 of The Supreme Court Practice 1995 Vol 1** at 142 which inter alia states as follows:

"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."

It goes on to further state as follows:-

"The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., at p. 223, where the earlier cases are summarised. From that case the following propositions may be derived:

- (a) *It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*
- (b) *If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

19. Also on the subject of setting aside default judgment, in *Davies v Pagett (1986) 10 FCR 226* at 232 a Full Court of the Federal Court of Australia said:-

"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways; for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions, hearings or other pre-trial procedures which enable the court to supervise progress - and, more pertinently non-progress - in all actions".

20. *Eni Khan v. Ameeran Bibi & Ors* (HBC 3/98S, 27 March 2003), His Lordship Justice Gates set out the principles applicable to setting aside default judgment, referring to *Burns v. Kondel* [1971] 1 Lloyd's Rep 554; *Evans v. Bartlam* [1937] AC 473; *Vann v. Awford* (1986) LS Gaz 1725; The Times LR (23 April 1986); and *Fiji National Provident Fund v Datt* [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988). So, too, His Lordship Justice Pathik in *South Pacific Recordings Ltd v. Ismail* [1994] FJHC 134; Hbc0597j.93s (30 September 1994) and also in *Pravin Gold Industries Ltd v. The New India Assurance Company Ltd* [2003] FJHC 298; HBC0250d.2002s (4 February 2003), referring to *Pankaj Bamola & Anor v. Moran Ali* (FCA 59/90), amongst others. In *Kaur v. Singh* [2008] FJHC 158; Appeal Case 61 of 2008 (5 August 2008) the authorities were also explored.

21. *Wearsmart Textiles Ltd v. General Machinery Hire Ltd* [1998] FJHC 26; Abu0030u.97s (29 May 1998) the Court of Appeal similarly addressed the question of setting aside judgment, by reference to the authorities including *Farden v. Richter* (1889) 23 QBD 124; *Hopton v. Robertson* [1884] WN 77, reprinted 23 QBD 126n; *Richardson v. Howell* (1883) 8 TLR 445; *Watt v. Barnett* (1878) 3 QBD 183; *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1886] 2 Lloyd's Rep 331 (CA); and *Vann v. Awford* (1986) 83 LS Gaz 1725; The Times LR (23 April 1986).

CONSIDERATION OF THE APPLICATION

22. The Plaintiffs substantive claim was seeking damages against the Defendants both jointly and severally, an account for the value of the pigs sold from 01st January, 2007 to date, special damages in the sum of \$312,000 and \$2500 respectively and interest with costs.
23. On 12th July, 2016 the Defendants failed to file and serve their respective Defences as was required of them in terms of *Order 18 Rule 18(2) of the High Court Rules, 1988*. As a result, Default Judgment was entered against both Defendants on 29th July, 2016.
24. Currently before this court is the Summons filed and served by the 1st and 2nd Defendants seeking orders to set aside the Default Judgment entered on 12th July, 2016 AND That further proceedings on the Judgment in Default entered on 12th July, 2016 be stayed pending the hearing and determination of this application.
25. At this stage of the proceedings, it must be borne in mind and the Defendants should have been aware that the entry of Judgment by Default in absence of Defences simply means that the liability has been established by the Plaintiff. The onus of proving the Damages as sought for in the substantive claim remains with the Plaintiff at the hearing of the Assessment of Damages, which is yet to be assigned any hearing date by the court.
25. It cannot be denied by both parties to this proceeding and it is my view that the Judgment in Default of Defence entered against the Defendants on 12th July, 2016 is a regular judgment.
26. The leading authority on an application setting aside the default judgments is the old English decision *Evans v Bartlam* [1937] AC 473. The primary and secondary considerations described in that decision have been approved and adopted in Fiji by the Court of Appeal in several decisions including *The Fiji Sugar Corporation Limited v Mohammed Ismail* [1988] 34 Fiji LR 75; *Wearsmart Textiles Limited v General Machinery Hire Limited* and *Shareen Kumar Sharma* (unreported), Fiji Court of Appeal, Civil Appeal No. ABU0030 of 1997, a decision dated the 29th of May, 1998 (their honours Sir Moti Tikaram, President; the right Honourable Sir Maurice Casey, and the Honourable Justice J.D. Dillon presiding) and more recently *Suva City Council v Meli Tabu* (unreported), Fiji Court of Appeal, Civil Appeal No. ABU0055 of 2003 delivered on the 16th of July, 2004. (Their honours Eichelbaum, Penlington and Scott).

The principles are:

- (a) As a primary consideration there must be before the court an affidavit from the defendant or associated person properly deposing and demonstrating a meritorious defence.
- (b) As secondary consideration the affidavits and submissions must advance adequate reasons as to why the judgment was allowed to be entered by default.
- (c) The affidavit and submissions must confirm that a substantive application was made promptly or explain with adequate reasons why there was a delay in making the application.
- (d) The plaintiff should depose and submit in reply as to any prejudice or irreparable harm that will be suffered if judgment is set aside.

27. The exercise of the discretion is wide and unfettered as until the Court has pronounced judgment upon the merits or by consent it must have the power to revoke a default judgment obtained by a failure to follow any of the rules of procedure (*Evans supra*). Any defence described in the affidavits supported by the submissions must have a real prospect of success and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action.

28. This requires the court to scrutinize the defendant's affidavit to see whether it contains deposed facts which will support a meritorious defence that is one with a reasonable chance of success (*Wearsmart Textiles (supra)*, *Suva City Council (supra)* and *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's Reports 221).

Why was Default Judgment allowed to be entered?

29. The Writ was issued by the Plaintiff on 10th June, 2016 and both Defendants were served on 13th June, 2016.

30. In terms of Order 18 Rule 18(2), the Defendants should have filed their Statement of Defence no later than 11th July, 2016, and failed to do so rather only filed the acknowledgment of service showing intention to contest the proceedings.

31. On 29th July, 2016, the Plaintiff filed the Judgment by Default pursuant to **Order 19 Rule 9** and succeeded in obtaining the Default Judgment signed and sealed by the Chief Registrar on 09th August, 2016.

32. The Defendants explanation is as follows-

- That assistance of Ms. Rhonda May of Public Trustee's office was sought, who advised the Defendants to file an acknowledgment of service and the Statement of Defence.
- That upon receipt of the Default Judgment, Defendants sought assistance from the High Court Civil Registry and were advised to look for a lawyer and later Ms Rhonda advised them to contact Mr. Vananalagi.

33. Both Defendants ought to have known better herein that the front page of the Writ of Summons they were served with clearly stated what the Defendants were required to do and on their

failure to act accordingly would result in the Plaintiff proceeding with the action and obtain Judgment against the Defendants without any further notice.

34. **Alternatively**, the Defendants could have sought the assistance of the High Court Civil Registry and enquired what was required to be done and/or when are they supposed to appear before the Court or should they seek the legal representation in the matter. Instead they thought fit and proper to seek assistance of Ms Rhonda, file an acknowledgment of service and stay away from the court proceedings. The Defendants should have followed the proceedings and filed their Defence and kept a tab on proceedings until its final disposition only if they were interested in defending this action to the extreme. Both Defendants failed in their bid to carry out the necessities and only woke up when the Plaintiff issued and served the **Notice of Assessment of Damages** returnable on 08th November, 2016 that then prompted the Defendants to engage the legal representation and counter the same by filing a Summons seeking to set aside the Default Judgment entered against them respectively.
35. I do not find both Defendants explanation **satisfactory** and therefore is **unacceptable** as to what led to the entering of the Default Judgment against them by the Plaintiff.

Meritorious Defence?

36. The proposed Defence of both Defendants have been marked and annexed as "ON-2" to the Affidavit in Support deposited by the 1st Defendant, Onisimo Naikavou.

At paragraph 12- the Deponent alleges that the "**WILL**" of his late father was obtained by fraud by the Plaintiff. No particulars of the alleged fraud are given rather than bare allegations made therein.

At paragraph 13- He deposes that the "**WILL**" was challenged but was struck out.

At paragraph- He stated that they were now in the process of filing fresh proceedings to challenge the "**WILL**". He added at paragraph 15 that the claim for particulars of loss and damages in the Substantive Claim is misleading, but in any event the damages are unliquidated and require proof in a trial.

37. I had the opportunity to peruse the *High Court Civil Action HBC No. 30 of 2009* wherein both Defendants had challenged the "**WILL**" of the late Esala Nawaiqaliva. The Action was **struck out** with no order as to costs pursuant to **Order 25 of the High Court Rules, 1988** by Kumar J on 21st February, 2014. I further note that the Plaintiffs (Onisimo and Esala) neither appealed the decision nor took any alternative steps to have the case reinstated accordingly.
38. I reiterate that the Judgment by Default entered in absence of Defendants Defences simply means that the **liability** has been **established** by the Plaintiff. The onus of proving the **Damages** as sought for in the substantive claim remains with the Plaintiff to formally prove at the hearing of the **Assessment of Damages, which is yet to be assigned any hearing date by the court.**
39. I find that the practice of attaching and annexing a "**draft Defence**" to the Affidavit in support and pointing to its contents containing sufficient prima facie material on which this court rely for

this setting aside application is principally wrong. A proposed Statement of Defence is a "pleadings" and pleadings are not "*evidence*" per se.

40. Reference is now made to the Case of *Fiji Sugar Corporation Limited (supra), Dhan Kaur v Karam Singh & Others*, Lautoka High Court Civil Action No. 223 of 1993 an unreported decision of his Honour Justice Lyons wherein he said- "*When a Defendant makes an application to set aside judgment, the onus is on him to put before the court evidence in proper form by way of an affidavit as to the factual elements of a meritorious Defence*".
41. Upon a careful perusal of the **Draft Defence, Affidavit in Support, written and oral arguments together** with the above rational, I find that the **Defendants** have failed to **satisfy** this court with **credible evidence** that they have a **good and meritorious Defence** that is likely to **succeed** if the matter proceeded to **trial**.
42. I further find that both **Defendants** have also failed to **establish** any **triable issues** and/or **arguable Defence** that would have some **prospect of success** at trial with a **degree of conviction**.

Delay in filing Setting Aside Default Judgment?

43. Default Judgment was entered on **29th July, 2016** and sealed on **09th August, 2016**. The Defendants filed their Summons seeking the setting Aside of Default Judgment on **07th November, 2016**, almost **4 months later**.
44. If the **Defendants** has kept a tab on the proceedings and liaised with the High Court Civil Registry, they would not have faced this uphill battle of Setting Aside the Default Judgment.
45. If it had not been for the service of the **Plaintiff's Notice of Assessment for Damages** on the **Defendants** on **15th October, 2016** that the Defendants would not have come to know that Default Judgment had already been entered against them.
46. The reasons enumerated and advanced at paragraph 7 of the Defendant's written submissions as to **delay** is far from satisfactory for they ought to have known better to move on with the Rules and carry out the necessities accordingly.
47. For above rational, I further find that both Defendants have **inexcusably delayed** their application for Setting Aside this default judgment entered against them on **29th July, 2016**.

Will the Plaintiff suffer any Prejudice or irreparable harm on setting Aside Order?

48. The Substantive action was commenced on **10th June, 2016**.
Service of the Writ was effected on the Defendants on **17th June, 2016**.
On **29th July, 2016**, search for the Statement of Defence of the Defendants was made.
Accordingly, on **29th July, 2016**, Judgment by Default was entered against both Defendants.
49. To date, the Plaintiff's Notice of Assessment remains pending determination and is further delayed since the current Summons seeking an order for setting Aside of Default Judgment was filed and proceeded with by the Defendants. This application was heard by this court on **20th April, 2017** and the Ruling was pending delivery on **15th June, 2016**.

50. According to the Plaintiff she will be Prejudiced if the setting aside of Default Judgment is allowed since the Default Judgment was entered regularly and that she will suffer more financial loss.
51. In any event, I notice from the Plaintiff's Affidavit at paragraph 3(d) that after HBC 30 of 2009 was struck out by the court that she was able to transfer the 3 Taxi permits under her name and commence operation of her Taxi Business. She added that if the Assessment of Damages is prolonged any further, the Defendants will not be in a position to compensate the Plaintiff in terms of Damages.

In conclusion:

52. For the aforesaid Rational, I dismiss the Defendant's Summons seeking an order to set Aside the Default Judgment regularly entered against them on 29th July, 2016.
53. The Plaintiff was unable to proceed further and conclude its substantive claim in terms of Damages when the Notice of Assessment was served on the Defendants. The reason being that the Defendants opted to file a Summons seeking for the setting aside of the Default Judgment and the Plaintiff's Assessment was left at an abeyance until the disposition of the setting aside application.
54. Accordingly, the Plaintiff is entitled to costs summarily assessed at \$1,000 to be paid within 14 days.

FINAL ORDERS

- (i) The Defendants Summons seeking the setting aside of the Default Judgment entered against both Defendants is hereby Dismissed.
- (ii) Both Defendants are ordered to pay costs summarily assessed at \$1000 to the Plaintiff within the next 14 days.
- (iii) The Plaintiff's Notice of Assessment of Damages to take its cause a date to be fixed expeditiously upon application by the Plaintiff.
- (iv) Orders accordingly.

Dated at Suva this 30th April, 2018



cc: *M.C. Lawyers, Suva.*
R. Vananalagi & Associates, Nabua, Suva.

A handwritten signature in black ink, appearing to be "VISHWA DATT SHARMA", written over a horizontal dotted line.

Master
VISHWA DATT SHARMA