IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 359 of 2015

BETWEEN : **THE TRUSTEES FOR ARIYA PRATINIDHI SABHA OF FIJI** a religious body registered under the Religious Bodies Registration Act Cap. 68 having its head office at Suva

PLAINTIFF

AND : **TRUSTEES OF BULA FIJI TOURISM EXCHANGE** an incorporated trust under the Charitable Trust Act and having its registered office at 56 Grantham Road, Suva

DEFENDANT

Counsel : **Mr. V. Maharaj for the Plaintiff**
Ms. M. Chan for the Defendant
Date of Hearing : **16th May, 2018**
Date of Judgment : **18th May, 2018**

JUDGMENT

INTRODUCTION

1. This is the application of the Defendant to set aside the default judgment entered against it. The Defendant did not file a statement of defence or intension to defend. The amended statement of claim contained orders for vacant possession, rental arrears for the said premises, and also for mense profit for a sum of $7,155.55 per month until the vacant possession is given and also for interest. The default judgment was entered on 2nd March, 2016 for the Defendant to pay Plaintiff 'damages and interest to be assessed'. There was no default judgment entered against eviction .There was a summons for summary judgment filed on 3rd December, 2015 and there was no opposition filed for the same. The Master on 4th July, 2016 dismissed the said summons and he had also dismissed the writ of summons and also statement of claim on the basis that there was no consent from the Director of Land to institute proceedings. This decision was appealed and on 15th November, 2017 the Master's decision was set aside by a brother judge and this file was allocated to me on 20.2.2018. On 26th March, 2018 a Notice of Assessment was filed by the counsel for the Plaintiff. I fixed the matter for hearing on 23rd April, 2018. Before, the Notice of

Assessment proceed to hearing the Defendant filed summons on 3rd April, 2018 to set aside the default judgment entered on 2nd March, 2016.

ANALYSIS

2. The default judgment entered on 2nd March, 2015 reads as follow;

> *'No acknowledgment of service and or statement of defence having been filed by the Defendant therein. IT IS THIS DAY JUDGED that the Defendant do pay the plaintiff damages and interest to be assessed.'*

3. So the default judgment does not include vacant possession of the premises, as contended by the Defendant's counsel and the Master Nanayakkara's Ruling(as his lordship then was) in ***Vatukola Gold Mines Limited Vs Kalaveti Tukutukulevu*** (delivered on 30.6.2015)(unreported) cannot be applied. In that case irregularity was entering default judgment for the vacant possession which had not happened in the case before me and more elaborated below.

4. The fact that a vacant possession was contained in the statement of claim does not preclude the Plaintiff from confining the claim only to the assessment where again the Plaintiff is required to prove his damages and the Defendant is also given opportunity to dispute the assessment.

5. The summons filed by the Defendant seeks following orders

> *'The judgment by default sealed on 2nd March, 2016 be set aside.*
> *The Defendant is given 28 days to file a statement of defence*
> *The matter to take its normal cause.*
> .....'

6. The summons was made pursuant to Order 13 rule 10 of the High Court Rules.

7. At the hearing the Defendant only relied on the irregularity of the judgment entered on default. The counsel said since the claim is a mixed one, no default judgment can be entered and referred to the case ***Vatukola Gold Mines Limited Vs Kalaveti Tukutukulevu*** (supra). The default judgment entered in that case was set aside and the

default judgment entered on 2nd March. 2015 are fundamentally different as there was no default judgment for vacant possession. A person who has filed mixed claims can always confine the default judgment in terms of Order 13 rule 5 of the High Court Rules of 1988. It reads as follow,

> *'where a writ issued against any defendant is indorsed with two or more of the claims mentioned in the foregoing rules, and no other claim, then, if that defendant fails to give notice of intension to defend. the plaintiff may, after the prescribed time , 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 indorsed on the wit, and proceed with the action against the other defendants, if any.'*

8. The Plaintiff had not obtained default judgment for vacant possession. What was entered as default judgment is for damages to be assessed by court and interest on that. So there is no irregularity as to the said judgment entered in default of notice of intension to defend.

9. Even if I am wrong on that, there is no specific irregularity stated in the summons to set aside. It is a requirement for setting aside of default judgment to specify the alleged irregularity as required in Order 2 rule 2 of the High Court Rules of 1988. There is no specific irregularity stated in the summons filed by the Defendant on 3rd April. 2018. So the Defendant cannot raise an objection as to irregularity without specifying the exact irregularity. Even at the hearing counsel did not specify which part of the default judgment was irregular and what was the irregularity. One has to look at the default judgment entered and see whether it was entered irregularly. A mixed claim can obtain judgment in terms of Order 13 rule 5 of High Court Rules 1988.

10. Both counsel admitted the receipt of the arrears of rents and also vacant possession of the land after filing of this action.

11. The Defendant needs to raise any irregularity of judgment without delay, in terms of Order 2 rule 2(1) of the High Court Rules read with order 13 rule 10. This was not done. The application for set aside was made to the court almost 2½ years after the Defendant was served with the amended statement of claim. An objection based on irregularity should be taken at the earliest opportunity before taking any action. This had not

happened. In the affidavit in support of the setting aside indicate that the Defendant was aware of the proceedings even as far as 2016. The said affidavit had also produced evidence of giving vacant possession to the Plaintiff and also correspondence between the solicitors. (See paragraph 5 of the affidavit in support of the summons filed on 3.4.2018. These emails are annexed to the affidavit in opposition of the Plaintiff annexed as 'C' where the solicitors for the Defendant had stated that hand over of the property was 13.2.2018).

Irregular Judgment

12. Even if I am wrong on that, any irregularity should not *ipso facto* set aside default judgment. It is trite law that if the irregularities are clerical errors or *de minimis* it can be corrected by the court. The reason being if there are no merits there should not be further delay in the action, by allowing a party that had defaulted. Due process should not be allowed to delay and be abused.

13. The merits of the defence is the paramount consideration even in a technically irregular judgment, where the court can correct it without setting it a side.

14. Even if the errors are more than clerical errors the court can correct it and allow the default judgment to stand. If not the outcome would be setting aside of judgment for technical irregularity, when the Defendant does not have a proper defence on merits. If the inevitable consequence is dismissal of the defence does the court need to wait such an application for strike out or summary judgment is made? I do not think so. It would be a waste of time and resources for all parties.

Delay

15. ***Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd*** [1998] 4 All ER 753 at 756, Park J held

> *'..... . I would agree that the irregularities which he says existed here were more than de minimis and were not clerical errors.*

If there was nothing irregular about the writ or the judgment, but the defendant wants to have the judgment set aside in order to defend the action, the court has a discretion which it will exercise on principles laid down by various cases, specially ***Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc****, the* ***Saudi Eagle*** *[1986] 2 Lloyd's Rep 221. The court will want to be satisfied that there are sufficient merits in the defence which the defendant wishes to present before it will set the judgment aside. There is no point in setting it aside it the defendant is almost certainly going to lose anyway. The Saudi Eagle and other cases give guidance about what level of merits the defendant needs to show.'*

16. So the Defendant had handed over the property in issue and solicitor for the Defendant had indicated that the hand over was on completed on 13th February, 2018. (See paragraph of the affidavit in support of the summons for setting aside and annexed 'c' to the affidavit in opposition) The handover of the premises was admitted by Plaintiff.

17. Apart from that both parties admitted that arrears of rent were also paid.

18. So there cannot be any order of the court for vacant possession or for arrears or rent and the claim that is remaining for determination is only the damages (menes profit) and also interest for that, to be determined by the court. This was the default judgment that was entered on 2nd March, 2015. So will it serve any purpose if the default judgment is set aside for alleged illegality? The answer is no.

19. ***Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd*** [1998] 4 All ER 753 at 757, Park J held.

'If, from the affidavits and exhibits, the court concludes that, even though there were irregularities in the writ or the judgment or both, the substantive content of the judgment is right, the court will not set the judgment aside. ***The only effect if it did would be to put the parties to further expense and delay to reach a regular judgment for the same amount.***

Further, it is the same in principle if the court is satisfied from the affidavits and exhibits that, although the amount in the default judgment was wrong, it (the court) knows what the correct amount was. The court will not set the incorrect judgment aside and make the plaintiff start again. It will vary the judgment to the correct amount.' (Emphasis added)

20. The Defendant in this action had not come to court even to set aside the default judgment in timely manner. The delay is excessive and reasons given are a situation after Master struck off the entire action on his own, but there was sufficient time to make an application for setting aside of the default judgment. Even the said Master's decision was set aide, on 17th November, 2017 the Defendant had taken more than 4 months to file the summons to set aside the default judgment. This delay is also inordinate, considering the facts stated in the affidavit in support.

21. The proposed statement of defence does not show merits and indicate even contradictory statements to the affidavit in support of the summons. This show the bona fide of the Defendant. The inordinate delay is another factor that show that Defendant is not keen to defend this action.

CONCLUSION

22. The default judgment is nor irregular. Even if that is irregular it can be corrected and, what is left in this action is to assess the damages and the Plaintiff needs to prove it and Defendant is not precluded from participating in the assessment. So, the default judgment need not be set aside on irregularity. The summons to set aside default judgment does not indicate the any irregularity which they are relying and this was not raised at the earliest opportunity. The Defendant had not shown merits in the proposed statement of defence and also in the affidavit in support of the summons. So the summons for setting aside of the default judgment is struck off. The cost of this application is summarily assessed at $1,500 to be paid within 21 days.

FINAL ORDERS

a. The summons filed on 3rd April, 2018 is struck off.
b. The cost of this action is summarily assessed at $1,500 to be paid within 21 days.

Dated at Suva this 18th day of May, 2018

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Justice Deepthi Amaratunga
High Court, Suva