

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 255 OF 2016

BETWEEN : **SIRTAJ ALI** aka **SIREAJ ALI** of Nabuta, Tavua, Fiji.
PLAINTIFF/RESPONDENT

AND : **SULESH CHAND** of Valelevu, Nasinu, Fiji.
DEFENDANT/APPLICANT

Appearances : Ms J. Singh for the plaintiff
Mr W. Rosa for the first defendant
Matter discontinued as against the second defendant

Date of Hearing: 4 May 2018

Date of Ruling : 4 May 2018

R U L I N G

[on setting aside]

Introduction

[01] This is an application for setting aside a default judgment of 29 May 2017, delivered by me after a formal proof hearing, where the plaintiff, Sirtaj Ali gave evidence and marked and produced a document ('PE-1'). The judgment states that the plaintiff is entitled to claim from the defendant, Sulesh Chand the sum of \$25,000.00 with no order as to costs.

[02] By an inter partes notice on motion supported by an affidavit of Sulesh Chand, the defendant ('*the application*'), the defendant/applicant ('*the defendant*') seeks the following orders:

[a] *that the judgment entered on the 30th day of May 2017 be set aside.*

[b] *that all execution arising out of the said judgment be stayed.*

[c] *that the defendant be given unconditional leave to defend the within action.*

[03] The application does not state which provision of the law it is made under.

[04] The plaintiff/respondent (*'the plaintiff'*) has filed an affidavit in opposition to the application.

[05] At the hearing, both the parties orally argued the matter. In addition, only the defendant filed written submissions.

The Background

[06] Precisely, the background facts are as follows.

[07] The defendant was the registered proprietor of the land on Certificate of Title 17325 (*"the land"*). In January 2010, the defendant entered into a Deed with the plaintiff. By that Deed, the defendant donated a piece of land to the plaintiff. According to the Deed, the plaintiff was entitled to build a house and he built a house on the donated land and was occupying the same with his family.

[08] Despite the Deed of Gift, the defendant sold and transferred the land to a Bhupesh Prasad (who was the second defendant in this action and the claim against him was subsequently discontinued) without subdividing the share of the plaintiff as stipulated in the Deed and obtaining a separate title for the plaintiff.

[09] Bhupesh, upon becoming the registered proprietor of the property, brought eviction proceedings to eject the plaintiff from the property and obtained eviction order against him. Subsequently, the plaintiff was removed from the property and his dwelling was demolished. The plaintiff claims damages against the defendant. The writ of summons was duly served on the defendant. He failed to serve a defence on the plaintiff. The plaintiff obtained a judgment after a formal proof hearing. On 29 May 2017, the court entered judgment against the defendant in the sum of \$25,000.00 without costs. The defendant applies to set aside that judgment.

The Law

[10] The judgment has been entered against the defendant in default of pleading. He failed to serve a defence on the plaintiff. The relevant law here is Order 19, Rule 9 of the High Court Rules 1988 (*'HCR'*). Rule 9 states:

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

The Principle on Setting Aside

- [11] In *Wearsmart Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26; Abu0030u.97s (29 May 1998), the Fiji Court of Appeal set down the governing principle to an application to set aside a judgment that has been regularly entered:

"The general principles upon which a Court should act on an application to set aside a judgment that has been regularly entered, are set out in the White Book, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143. They are as follows:-

"Regular judgment -If the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).

For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression see Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., and note 13/9/14, "Discretionary powers of the court," below.

On the application to set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; The Times, April 23, 1986, C.A.) The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/14, below)."

Discussion

- [12] The defendant applies to set aside the judgment entered against him. The impugned judgment was delivered on 29 May 2017 (not on 30 May 2017

as the defendant states in his application), following a formal proof hearing.

- [13] Pursuant to Order 19, R. 6 & 7 of the High Court Rules 1988 ('HCR'), the plaintiff filed a summons to enter judgment against the defendant in respect of the claim on the ground that the defendant had failed to serve a defence on the plaintiff within the prescribed time fixed by or under the HCR. The defendant ought to have filed a defence within 14 days after the service of the writ on him. The writ was served upon him on 8 February 2017. The 14-day period expired on 22 February 2017. The defendant had to serve a defence on the plaintiff by 22 February but he failed. As a result, the plaintiff filed his application to enter judgment in default of defence on 4 May 2017, which was heard on 29 May and judgment against the defendant entered on the same day. A copy of the order was served to the defendant on 31 May 2017. The service was never put in dispute.

The Delay

- [14] The delay between the date of service of the order (31 May 2017) and the application to set aside (24 October 2017) is 4 months and 23 days.

The Reason for the Delay

- [15] As to the reason for the delay, the defendant in his supporting affidavit deposed that: 'My application for legal aid representation from Nasinu Legal Aid Office was refused. I was unable to afford the services of the private counsel.
- [16] The Legal Aid Commission had conveyed its decision refusing the defendant's application for legal aid on 25 May 2017. He had known every well that there was a claim against him and that a judgment would be made against him, for he did not file a defence. He did not even mind filing of an acknowledgement of service. The defendant had a right to apply for legal aid. His application for legal aid was refused after a careful consideration of his application by the Legal Aid Commission.
- [17] The question of whether legal aid is necessary to guarantee a fair hearing must be determined on the particular facts of each case and will depend on the importance of what is at stake for the defendant in the

proceedings. In this case, the defendant was the proprietor of a property and he sold that property including the portion he had donated to the plaintiff. The facts that he sold his property for valuable consideration and that the refusal of his application for legal aid indicate he is capable of engaging a private lawyer. Otherwise, he could have easily exercised his right to be represented in person. The defendant never appeared in court. I find his absence in court was deliberate and calculated. The delay of 4 months and 23 days in making a setting aside application is too long, and the reason given for the delay is unsatisfactory.

Defence on the Merits

- [18] The major consideration in a setting aside application of a default judgment is whether the defendant has disclosed a defence on the merits.
- [19] The default judgment against the defendant has been entered regularly. It was not challenged by the defendant. If the judgment is regular then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (see *Wearsmart's* case above)
- [20] I have carefully considered the affidavit in support filed by the defendant. I am unable to find facts showing a defence on the merits except for the judgment granted is grossly prejudicial against him as he had no legal representation and he has a valid very arguable defence and a valid counterclaim. It is worth noting that the defendant's affidavit fails to state facts showing a defence on the merits.

Conclusion

- [21] It is for these reasons, I conclude: the long delay of 4 months and 23 days has not been sufficiently explained and the reason given for the delay is unsatisfactory. The defendant has not deposed facts showing a defence on the merits in his affidavit. In a setting aside application to set aside a regularly entered judgment, the defendant must show a good defence based on facts and show, at least, a triable issue at the trial. The defendant has failed to disclose facts show defence on the merits or a triable issue in his affidavit. I find that the application has no

merits. I also find this is not an appropriate case to exercise the discretion given to me under O.19, R.9 of the HCR. I would, therefore, dismiss the application with costs of \$500.00 payable to the plaintiff by the defendant.

The Result

1. Application to set aside dismissed.
2. The defendant will pay summarily assessed costs of \$500.00 to the plaintiff.

M.H. Mohamed Ajmeer
4/5/18

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M.H. Mohamed Ajmeer
JUDGE



At Lautoka
4 May 2018

Solicitors:

For the plaintiff: Legal Aid Commission

For the defendant: Messrs Zodiac Law, Barristers & Solicitors