IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 14 of 2019

BETWEEN	:	**VEER SINGH VERMA** of Carreras Road, Votualevu, Nadi, Lecturer. **Plaintiff**
AND	:	**ROPATE LEQELEQE** of Lot 44, Westfield, Legalega, Nadi, Lost Prevention Officer. **Defendant**
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. R. Singh for the Plaintiff The Defendant in person
Date of Ruling	:	14th August 2019

RULING

01. This is the summons filed by the defendant seeking to set aside the order made by this court in this case on 07.05.2019 in his absence. Concisely, the plaintiff, being the last registered proprietor of the land comprised in Native Lease No 28223 known as 'Legalega' part of, being Lot 44, on SO 5562, in the Province of Ba, in the Tikina of Nadi and containing an area of 1508 m^2, brought the summons pursuant to section 169 of the Land Transfer Act. The plaintiff could not personally serve the summons as the defendant was evading the service as per the affidavit filed by the plaintiff in this case. Therefore, the court granted leave for substituted service. The defendant, upon substituted service of the summons, appeared in person and sought time to file his affidavit in opposition. The court granted him time and adjourned the matter to 07.05.2019. However, the defendant did not appear in court nor he filed affidavit opposing the summons. The counsel for the plaintiff then sought order in terms of the summons as the defendant failed to show cause.

02. On perusal of the summons and affidavit of the plaintiff, the court was satisfied that, the plaintiff was the last registered proprietor of the Native Lease as mentioned above and the certified true copy of the Native Lease was marked as Exhibit **"A"** and filed for the proof for the same. The court was also satisfied that the summons contained full and proper

description of the disputed property and the defendant was given sufficient time as provided by the relevant section. Therefore, the court immediately made the order on the defendant to deliver the vacant possession of the property together with the summarily assessed cost of $500 to be paid by the defendant within 14 days. The defendant thereafter filed the instant summons to set aside the said order made for his default.

03. The summons is supported by an affidavit sworn by the defendant and the plaintiff too filed his affidavit opposing the summons. At the hearing, the counsel for the plaintiff and the defendant made oral submission. Since the summons seeks to set aside an order made for the default of the defendant, it has become necessary to discuss the law relating to the setting aside default judgment and order.

04. The law of 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. Some of the important foreign and local cases are 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) and Fiji National Provident Fund v Datt [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988).

05. The courts are given discretion to set aside any judgment entered for the default of any party. 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".*

06. 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 entered, 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.

07. 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."*

08. 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".

09. The order made on 07.05.2019 was regularly made for default of the defendant to file the affidavit showing his causes to remain in the disputed property. The primary consideration as per Lord Atkin in **Evans v Bartlam** (supra) or the first test as per Fatiaki J in **Fiji National Provident Fund v Datt** (supra) is the meritorious defence. If the meritorious defence is shown, a court will not allow any such judgment entered without proper hearing. Lord Denning, MR in **Burns v. Kondel** [1971] 1 Lloyds Rep 554, very briefly explained the principle and sated that;

> *'We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He needs only show a defence which discloses an arguable or triable issue'*.

10. Legatt LJ in **Shocked v Goldsmith** (1998) 1 All ER 372held at p.379 ff that;

> *"These cases relating to default judgment are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and any delays, as well as against prejudice to the other party."*

11. The Fiji Court of Appeal in **Fiji Sugar Corporation Limited v Ismail** [1988] FJCA 1 [1988] 34 FLR 75 (8 July 1988) stated that, what is required is the affidavit disclosing of prima facie defence. If there is no such affidavit stating the fact showing a defence, the application ought not to be granted. It is an (almost) inflexible rule that there must be an affidavit of merit 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 (The Supreme Court Practice 1993 Or 13 r.9 p.137).

12. The defendant in his affidavit stated that, he attended a case in Nadi Magistrate's court on 07.05.2019. Therefore, he could not appear on that day in this court and the court made the order in his absence. He attached a letter issued by the Magistrate's court in his affidavit for the proof of his attendance on that day. However, he did not mention any defence as required by the authorities cited above. The only paragraph which states about his defence is the paragraph 12 of his affidavit, where he states that, he has 'substantial interest in defending the summons for ejectment'. There is no other averment on his defence in this case apart from the above assertion. The question is whether this mere and bald assertion could be considered as a defence that can show an arguable case in this matter. It is therefore necessary to examine the decisions that lay down the duty of a defendant in cases filed under section 169 of the Land Transfer Act.

13. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant and held that:

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."* (Emphasis added)

14. The duty on the defendants is, not to produce any final or incontestable proof of their right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the property in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10th Edition, page 678). Thus, duty of the defendant is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.

15. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

> *"..but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide*

words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required". (Emphasis added).

16. According to above decisions, the court is to decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right or even he failed to adduce such evidence, he or she must be able to satisfy the court to form an opinion that, an open court hearing is required, given the circumstances of a case. Generally accepted defences are the proprietary and promissory estoppel, and in case of a lessor against lessee the payment of full rent together with all the incurred cost as per the proviso in section 172 of the Land Transfer Act. Hence, mere assertion of the defendant in this case, that he has substantial interest in defending the summons of the plaintiff, is not sufficient to fulfill the requirement of accepted defences.

17. The defendant does not deny locus standi of the plaintiff to bring this action, nor does he deny other requirements fulfilled by the plaintiff as per section 170 and 170 of the Land Transfer Act. Therefore, having considered the all the averments of the defendant and lack of a defence in his affidavit, the court specifically asked the defendant of his defence at the hearing of his summons. His only answer was that, the plaintiff did not give sufficient time for him to vacate, and he (plaintiff) did the same to other tenants too. This let him to fight this matter. This argument might give a cause of action for the defendant to claim damages only if there was a tenancy agreement providing for specific time given for termination of such tenancy agreement. However, it will not give any defence for the defendant in this case filed pursuant to section 169 of the Land Transfer Act. Under the section 169 of the Land Transfer Act, the last registered proprietor can invoke the jurisdiction of this court, not only against any unlawful occupants, but also against the lessee who failed to pay the rent and who was served with the notice to quit. In this case, the defendant who entered the property as a tenant continues to forcefully occupy it without paying single penny to the plaintiff. This rampant attitude cannot be condoned in a country where the rule of law is upheld. Any difference or dispute should be referred to the forum of competent jurisdiction for adjudication and no one will be allowed to take the law into own hand.

18. Furthermore, the submission of the defendant, in this matter, does not qualify to a defence that can show an arguable issue which is the primary consideration to set aside any judgment or order that was made for the default of any party. As a result, the summons filed by the defendant ought to be dismissed with cost. In addition, the plaintiff having obtained the order for possession moved the court to issue the writ of possession. However it was on hold till determination of this summons filed by the defendant.

Therefore, I further decide that, the writ of possession should immediately be issued in this matter for the plaintiff to enjoy the fruit of the order.

19. Accordingly, the final orders are;

a. The summons filed by the defendant to set aside the order made on 07.05.2019 is dismissed,

b. The defendant is ordered to pay a summarily assessed cost of the $500 to the plaintiff within 14 days, and

c. The writ of possession to be issued with immediate effect.

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
14.08.2019