

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 37 OF 2018

BETWEEN : MOHAMMED SHAFIK
PLAINTIFF

**AND : ANTHONY MARK VALENTINE and ZAREENA
BIBI**
DEFENDANTS

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr S Raikanikoda [Raikanikoda & Associates]

DEFENDANTS : Mr S Singh [Shelvin Singh Lawyers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 27 February 2020

INTERLOCUTORY RULING

Setting Aside Judgment By default – Order 13 Rule 10
Striking Out – Order 18 Rule 18 (1)(a)

Application

1. On 08th March 2018, a Judgment by Default was sealed and signed against the Defendants in default of filing an acknowledgement of service.
2. The Defendants now wish to have the Judgment so entered against them set aside and the proceeding against them to be dismissed on the grounds that it discloses no cause of action.

Said application is made pursuant to Order 13 rule 10 and Order 18 rule 18 (1) (a) of the High Court Rules.

In so far as the application for Setting Aside is concerned, the Defendants have filed an Affidavit in Support sworn by the First named Defendant.

Defendants Contention

3. According to the Defendants, they have not been served with a Writ of Summon and Statement of Claim. Sometimes at the end of February 2018 an unknown person approached the First named Defendant and told him there was a paper for him. The First Defendant told this person to serve the paper on his lawyers Shelvin Singh Lawyers. According the 1st Defendant, no copy of the Writ of Summon and Statement of Claim was left with him nor was he explained what the paper was about. Neither was the Second named Defendant personally served with the Writ of Summon and Statement of Claim.

He only came to know about the matter when a Judgment by Default was served on him.

The Defendants had in 2014 filed a Civil Action namely No. 196 of 2014 in which action they claim to hold a Judgment in their favour for the Plaintiff to transfer the property the subject of that action to them and the Plaintiff has failed to do so. Contempt proceeding against the Plaintiff is pending before the High Court.

The Defendants claim to have a meritorious defence and have annexed a proposed defence to the Affidavit in Support.

As per ruling of 28th May 2015, the Court has held that the Plaintiff breached the Sale Agreement and he should transfer the property to the Defendants. Hence the Plaintiff cannot seek courts determination twice on the enforceability of the same Judgment and his claim is bad in law.

How Judgment by Default was allowed to be entered?

4. A Writ of Summon was filed on 15th February 2018.
5. I note from the Writ of Summons that there is an indorsement of claim as follows:

The Plaintiff is the legal wife, of the late Rakesh Kumar, Lot 21, Newton, Nasinu, Fiji, Taxi Proprietor. That the deceased, Rakesh Kumar died testate, leaving a Will dated 9th day of April 2014. The deceased Will was prepared by the Reddy Nandan Lawyers and was witnessed by the legal executive of Reddy Nandan Lawyers. The Plaintiff is the legal wife and is entitled to the shares of the said estate.

Statement of the nature of Interest of the Defendant

The Defendant is appointed sole executrix and Trustee pursuant to last will and testament dated 9th day of April, 2014.

6. There is also a Statement of Claim filed where the Plaintiff relying on a written agreement of 17th March 2014 between the parties claims judgment of \$200,000 made up as follows;
 - (i) \$170,000 being the difference in current market value.
 - (ii) \$30,000 cost of renovation.

The Plaintiff alleges the Defendant failed to complete the sale within the 90 days period as per the agreement.

7. The Writ of Summon and Statement of Claim was served on the Defendants on 15th February 2018. There is an Affidavit of one Imtiaz Khan filed on 19th February 2018.

As per the Affidavit of Service, the Defendants are said to have refused to acknowledge service.

8. On 18th March 2018 a Judgment by Default was sealed.

Law on Setting Aside Judgment

9. Since the Defendants have failed to give a notice of intention to defend, appropriate rule applicable is Order 13 rule 10 of the High Court rules which provides:

“Without prejudice to Rule 8 (3) and (4), the Court may, on terms as it thinks just, set aside or vary any judgments entered in pursuance of this order”.

Determination on application for setting aside Judgment by Default.

10. The Defendants argue that they were not served with the Writ of Summon and explained what transpired on the day a person came informing the Second Defendant he had a document.
11. Though there is an Affidavit of Service file, the Plaintiff has not filed any Affidavit in Opposition challenging the evidence of the Defendants concerning what transpired in February 2018 when the server went to serve the documents.
12. As stated earlier apart from annexing a Statement of Claim to the Writ of Summon. The Plaintiff has also endorsed claim on the Writ of Summon which two claims are contradicting.
13. As such on the Judgment by Default the Registry should have clarified this issue with the Plaintiff’s Counsel prior to having the judgment sealed and signed.
14. The Defendants have submitted a proposed defence claiming the claim to be bad in law and the Plaintiff asking to re-litigate matters already decided in Suva High Court Civil Action No 196 of 2014 where the Defendants have obtained orders against the Plaintiff to complete the sale.
15. Considering the above I find the Defendants have successfully argued why the Judgment by Default ought to be set aside.

16. Accordingly I set aside the Judgment by Default so dated 8th March 2018.

Determination on application for dismissal of the action.

17. The Defendants' claim in Suva High Court Civil Action HBC 196 of 2014 was in relation to the Sales and Purchase agreement of 17th March 2014 for Sale and transferring the property comprised in the Methodist Church lease No. 398918 for sum of \$180,000.

18. My Predecessor in his ruling [paragraph 23] made a finding that the parties did not dispute executing a Sale and Purchase Agreement.

He also took note of the Defendant's [the Plaintiff in this action] allegation that the Plaintiffs [the Defendants in this action] caused delay in settlement as per the Sale and Purchase Agreement and asked for engineer's certificate.

My Predecessor found there was no evidence of the fact that either party had sought for an extension of time to complete the settlement and made a finding that both parties waived the condition to complete settlement within 90 days' time period.

My Predecessor also found [on paragraph 31] that the Defendant [the Plaintiff in this case] *"failed to adhere to and complete the obligation in terms of the Sale and Purchase Agreement"*.

Finally on paragraph 43 of his ruling, my Predecessor found the Defendant [the Plaintiff in this action] *"did not have any defence to the Plaintiff's action and that there is an issue or question in dispute which ought to be tried by the court"*.

19. Case laws have held that it is an abuse of process to raise in a second claim an issue which should have been raised against someone who was party to an earlier proceedings.

20. The House of Lords in **Johnson v Gore Wood & Co [2002] 2 ACI** held:

“When considering whether a second claim is an abuse of process a broad, merits-based judgment has to be made, taking into account all the public and private interests involved, and all the facts. A second claim should be struck out only if, in all circumstances. It should rather than merely could have been brought in the first claim”.

21. Accordingly, I find that doctrine of res judicata applies to this case and the Plaintiff is estopped from bringing, this action seeking Court to decide on the Sale and Purchase agreement that has already been adjudged by my Predecessor. The Plaintiff is trying to re-litigate the issues. He failed to mention the case taken up the Defendants in Civil Action HBC 196 of 2014.

Final Orders

22. Final orders made are as follows:

- (i) The Judgment by default dated 8th March 2018 is set aside unconditionally;
- (ii) The Plaintiff's claim is dismissed on its entirety; and
- (iii) The Plaintiff is ordered to pay the Defendants cost summarily assessed at \$1,000. Said cost is to be paid in 14 days.




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Vandhana Lal [Ms]
Acting Master
At Suva.