IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 94 of 2019

BETWEEN	:	**AJAY RAJ** of Naboutini, Sabeto, Businessman.
		Plaintiff
AND	:	**WAKUILA TUINASAU** of Naqeleusa, Sabeto, Nadi, Farmer.
		Defendant
Before	:	Master U.L. Mohamed Azhar
Appearance	:	The Plaintiff in person The Defendant in person
Date of Ruling	:	24.02.2021

RULING

01. This ruling refers to the Notice of Motion filed by the defendant seeking to set aside the order made by this court in this case on 27.05.2019 in his absence and leave to allow him to file the affidavit in opposition to the Originating Summons of the plaintiff. The Motion is supported by his affidavit which has one annexure marked as **"WT 1"**. Briefly, the plaintiff, being the last registered proprietor of the land comprised in Agricultural Lease No. 26276 over iTLTB Ref No. 4/10/322 known as Naqeleusa, Tikina of Sabeto, Province of Ba comprising an area of 3 acres and 9 perches (**the subject property**), summoned the defendant pursuant to section 169 of the Land Transfer Act.

02. The summons was served on the defendant and the Affidavit of Service was filed for the proof of service. It is evident from the Affidavit of Service that, the defendant was given more time than what is required by the section 170 of the Land Transfer Act. However, the defendant was absent and unrepresented on the summons returnable date, i.e. 27.05.2019. On perusal of the affidavit of the plaintiff, the court was satisfied that, the plaintiff was the last registered proprietor of the subject property and he followed all procedural requirements under section 170 of the Land Transfer Act. Therefore, the court

granted orders as prayed for, by the plaintiff in his originating summons and ordered the defendant to immediately deliver the vacant possession of the subject property to the plaintiff.

03. The defendant thereafter appeared through his solicitor and filed the instant Motion. The plaintiff filed his affidavit and opposed the Motion. The defendant thereafter filed his affidavit in reply. At the hearing, both the plaintiff and the defendant appeared in person and made oral submission based on their affidavits. Since the Motion 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 a judgment or an order entered for the default of a party.

04. The law of setting aside a default judgement is well established both in English common law and our local jurisdiction. It is an unconditional discretion. There is number of authorities which are frequently cited by the courts when exercising such 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. If the judgment was regularly entered, 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 nature of the discretion of the courts and the rule that guides them in exercising such discretion. His Lordship held at page 659 that;

> The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously 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 been obtained only by a failure to follow any of the rules of procedure.

08. There are several local authorities which recognized the tests and which have been often cited by court. **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 27.05.2019 for the default of the defendant was regular. He failed to appear and show cause to remain in possession of the subject property despite of service of summons on him. 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, to stand. 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 372 held 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 defendant explained the reason for not attending the court on 27.05.2019 in paragraphs 31 to 36 of his affidavit filed in support of his Motion. He stated that, a bailiff

served some documents on him and asked if he (defendant) had a solicitor. The defendant further stated that, he thought the bailiff would serve some documents on his lawyer too and the lawyer would take necessary steps in this matter. Therefore, he did not attend the court on that summons returnable date. This is not a justifiable reason for the default of the defendant. It seems that, the defendant blames his lawyer. However, it is not clear whether the defendant had actually instructed his lawyer or not, and who was his lawyer. Even he had instructed his lawyer and the lawyer failed to take required steps, he (the defendant) is responsible and bound by conduct of his lawyer (see: **Lownes v Babcock Power Ltd** [1998] EWCA Civ 211). In addition the incompetence or negligence of legal advisers is not a sufficient excuse (see: **R v. Birks** [1990] 2 NSWLR 677). Accordingly, the reason adduced by the defendant for not attending the court is not justifiable.

12. The defendant neither disputed the proprietorship of the plaintiff under section 169, nor did he challenge the procedural requirement that the plaintiff should fulfill under section 170. Thus, the plaintiff's locus to summon the defendant and the description of the subject property are undisputed. Further the affidavit of service filed by the plaintiff is evident that, the defendant was given more than 16 days to appear in court on the summons returnable date on 27.05.2019. As a result, the impugned orders made by this court on 27.05.2019 in the absence of the defendant can be set aside only if the defendant is able to show some meritorious defence in his affidavit. Such meritorious defence should either be some tangible evidence establishing a right or supporting an arguable case for such a right as expounded by **Morris Hedstrom Limited –v- Liaquat Ali** (CA No: 153/87), or should be able to convince this court to come to a conclusion that an open court hearing is necessary as spelt out in **Ali v Jalil** [1982] 28 FLR 31 (2 April 1982).

13. The defendant narrated the history of the title of the subject property and claimed that, the Lease that was originally issued to one Asela Wati in 2012 should have been cancelled. The defendant claimed that, the Tokatoka did not consent for the lease originally issued to the said Asela Wati. It is evident from the instrument of title annexed by the plaintiff that the subject property was originally leased to the said Asela Wati and then finally to the plaintiff. There were some transactions between both of them as it is evident from the endorsements in memorial of the Instrument of Lease. However, the question is whether the court should look into the history of the transaction. It has now become necessary to examine the nature and effect of well-known Torrens System of Registration on which the Land Transfer Act is founded.

14. The effect and application of the said system of registration, that was generally applied in certain countries in Pacific, was explained in **Breskvar v. Wall** (1971-72) 126 CLR 376 and Barwick C.J stated at page 385 that:

The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. (Emphasis added).

15. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

> *I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of title but a system of title by registration, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, A Handy book on the real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:*
>
> *".....any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations.*
>
> *This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed'..."*
>
> *Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right.* (Emphasis added).

16. It was equally held in **Fels and another v Knowles and another** (1907) 26 NZLR 604 by Stout C.J at page 620 as follows:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'

17. Accordingly, the registration is everything and it is the registration that confers the title to a person so registered. It is the title by registration and not registration of title. This system of registration cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown/state. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. Therefore, it is not necessary to look into the history of title as the plaintiff is undisputedly the last registered proprietor of the subject property.

18. The defendant further stated in paragraph 28 of his affidavit that, he was advised that the plaintiff's lease can be impeached if he was fraudulent in obtaining the same. The defendant did not particularize his allegation of fraud, but merely mentioned the opinion of his solicitor and his belief based on that opinion. The paragraph 28 of defendant's affidavit reads:

> 28. I was also advised and believe that the lease now in name of plaintiff can be impeached **if he was fraudulent** in obtaining the lease of the land. (Emphasis is added).

19. Mere assertion or belief or opinion of fraud is neither sufficient to defeat the title of a registered proprietor, nor can raise a valid defence to remain in the property. Actual fraud or moral turpitude must be shown on the part of the plaintiff as registered proprietor or of his agents. In **Prasad v Mohammed** [2005] FJHC 124; HBC0272J.1999L (3 June 2005), His Lordship former Chief Justice Gates (as His Lordship then was) succinctly explained the exception of fraud and the sufficiency of evidence for fraud. His Lordship held in paragraphs 13 to 16 that:

> [13] In Fiji under the Torrens system of land registration, the register is everything: *Subaramani & Ano v Dharam Sheela & 3 Others* [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the *Land Transfer Act* [see sections 39, 40, 41, and 42]: *Fels v Knowles* (1906) 26 NZLR 604; *Assets Co Ltd v Mere Roihi* [1905] AC 176, PC. *In Frazer v Walker* [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

"It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent: *Assets Co Ltd v Mere Roihi.*

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."

[14] Actual fraud or moral turpitude must therefore be shown on the part of the plaintiff as registered proprietor or of his agents *Wicks v. Bennett* [1921]30 CLR 80; *Butler v Fairclough* [1917] HCA 9; [1917] 23 CLR 78 at p.97.

[15] Fraud for the purposes of the Transfer Act has been defined by the Privy Council in *Assets Company Ltd v Mere Roihi* [1905] AC 176 at p.210 where it was said:

"...by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he

honestly believes it to be a genuine document which can be properly acted upon."

[16] In *Sigatoka Builders Ltd v Pushpa Ram & Ano.* (unreported) Lautoka High Court Civil Action No. HBC182.01L, 22 April 2002 I had occasion to say:

"Though evidence of fraud and collusion is often difficult to obtain, the evidence here falls a good way short of a standard requiring the court's further investigation. In *Darshan Singh v Puran Singh* [1987] 33 Fiji LR 63 at p.67 it was said:

"There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make section 169 procedure unsatisfactory. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent. There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."

In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of section 169 inappropriate see too *Ram Devi v Satya Nand Sharma & Anor.* [1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In *Wallingford v Mutual Society* [1880]5 AC 685 at p.697 Lord Selbourne LC said:

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."

20. The above discussion reveals that, affidavit filed by the defendant in this matter, does not show a meritorious defence which can either show tangible evidence establishing a right to remain in the possession of the subject property, or require a full trail of the matter.

There must be an affidavit of merits, which means that, the applicant must produce to the court evidence that he has a prima facie defence in order to set aside a judgment obtained regularly: [**Evans v Bartlam** (supra)]. 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).

21. I do not see any other sufficient reason to set aside the order made in the absence of the defendant. As a result, the Motion filed by the defendant ought to be dismissed. In addition, the plaintiff could not enforce the order for possession due to this application for setting aside the order made in the absence of the defendant. The plaintiff should take steps to get the writ of possession issued in order to enjoy the fruit of the order he obtained.

22. Accordingly, the final orders are;

a. The Motion filed by the defendant, to set aside the order made on 27.05.2019, is dismissed,

b. The defendant should pay a summarily assessed cost of $ 200 to the plaintiff within 14 days from today, and

c. The plaintiff to take steps for the writ of possession to be issued.

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
24.02.2020