IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 124 of 2014

BETWEEN: **JONE RAIQEU** Junior of Namara, Nalawa, Rakiraki, Student by his father and next friend **JONE RAIQEU** Senior of Namara, Nalawa, Rakiraki.

Plaintiff

AND: **RAMESH CHAND** of Mid Road, Rewasa, Rakiraki, Farmer.

1st Defendant

AND: **RINAL RITIN CHAND** of Mid Road, Rewasa, Rakiraki, Farmer.

2nd Defendant

Before : Master U.L. Mohamed Azhar

Appearance: Mr. R. Chaudhary for the Plaintiff
Ms. V. Nettles for the Defendants

Date of Ruling: 30.11.2021

RULING

01. The plaintiff – a minor, with some others, was travelling in a tractor-trailer belonged to the first defendant and driven by the second defendant on 22.11.2011, in Rakiraki. The tractor stopped at a particular place and everyone, including the plaintiff got out of the trailer. The second defendant then reversed the tractor and the left big tyre of the tractor went over the left leg of the plaintiff, causing fracture of left distal tibia. The plaintiff being a minor sued, by his father and next friend, the defendants and claimed a special damage, general damages for pain and suffering, loss of amenities and lose of earning capacity together with the interest and cost.

02. The defendants did not file the acknowledgment; nor the defence. The plaintiff then sealed the interlocutory judgement for default against both defendants on 18th of April 2016 and took out the Notice of Assessment of Damages, Interest and Cost, pursuant to

Order 37 rule 1 of the High Court Rules. At the trial for assessing the damages the plaintiff testified and called the Orthopedic Surgeon Dr. Eddie McKay attached to Lautoka Hospital to give evidence on his behalf. This court, by its decision dated 17.07.2020 awarded to the plaintiff a sum of $ 21,500 being damages, interest and costs in this case against the defendants.

03. The defendants then applied by the current summons to set aside the interlocutory judgment sealed on 18th of April 2016 and the decision of this court delivered on 17.07.2020 awarding damages to the plaintiff. The summons also seeks leave of the court to file the statement of defence. The defendants based their summons on two grounds. First is that, the Writ and other documents were not served on them and their signatures were forged by the bailiff who deposed the Affidavit of Service. Second is that, the defendant was charged for negligent driving in respect of this accident and was acquitted after the trial. In fact, the defendants seek to set aside both the judgment and order for damages made for their default on the basis that, firstly, both are irregular and secondly, the defendants have meritorious defence in this matter. These are the general grounds for setting aside the judgment and orders made for default of the parties in civil suits. It is therefore necessary to discuss the law relating setting default judgments and orders to consider the grounds urged by the defendants.

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. The rationale is that, such irregular judgments and orders are considered as 'void orders' resulting from a 'fundamental defect' in proceedings (Upjohn LJ in **Re Pritchard (deceased)** [1963] 1 Ch 502, and Lord Denning in **Firman v Ellis** [1978] 3 WLR 1). Such judgments also considered as resulting from a 'without jurisdiction' or ultra vires act of a judicial office (Lord Denning in **Pearlman v Governors of Harrow School** [1978] 3 WLR 736). A 'fundamental defect' includes a failure to serve process where service of process is required (Lord Greene in **Craig v Kanssen Craig v Kanssen** [1943] 1 KB 256); or where service of proceedings never came to the notice of the defendant at all (e.g. he was abroad and was unaware of the service of proceedings); or where there is a fundamental defect in the issuing of proceedings so that in effect the proceedings have never started; or where proceedings appear to be duly issued but fail to comply with a statutory requirement (Upjohn LJ in **Re Pritchard** [1963] 1 Ch. 502). Failure to comply with a statutory requirement includes failure to comply with rules made pursuant to a statute (**Smurthwaite v Hannay** [1894] A.C. 494).

08. The defendants' first ground is that, both the interlocutory judgment and the decision on quantum of damages are irregular, as the writ and the other documents in this matter were not served; they did not have knowledge of this matter; and therefore they did not appear to defend it. If there was no service of process at all, as claimed by the defendants, both the interlocutory judgment and the decision on quantum should be set aside and this court has no discretion to refuse, as per the authorities mentioned in preceding paragraphs. However, the plaintiff disputes this allegation and annexed the copies of four affidavits for the proof of service of writ, interlocutory judgment and the notice of assessment of damages. Two bailiffs hired by the plaintiff had served all the processes in this matter. The plaintiff further stated in his affidavit that, the bailiff who served both the

interlocutory judgment and notice of assessment damages on the defendants is not here to confirm the service, as he passed away.

09. In fact, all these affidavits of service had already been filed of record. It is evident from them that the writ, interlocutory judgment and the notice of assessment of damages were served on the defendants, and they acknowledged them by placing their signatures on the reverse side of respective documents annexed with the affidavits of service. Those signatures are the proof for service. The signature of second defendant, which appears on two documents annexed with two affidavits of service, resembles his signature in his affidavit filed in support of current summons before me. Both affidavits of service are sworn by the bailiff Kamnieli Qausila. There is nothing in the affidavit of the defendants to suggest that, the said bailiff Kamnieli Qausila was familiar with the signature of the second defendant. Thus, it cannot be said that the bailiff, who did not know the signature of the second defendant, would have forged his (second defendant's) signature on those acknowledgment part without actually serving the process on him. Accordingly, I am unable to accept the contention of the defendants that, the writ and other related documents were not served on them. As per the documents filed in court, the writ was duly served on the defendants and therefore, I hold that, the interlocutory judgment was regularly entered by the plaintiff. Further, both the interlocutory judgment and the notice of assessment of damages were duly served and the decision on quantum of damages is regular. This shows that, the defendants failed to substantiate their contention that, the interlocutory judgment and decision on quantum of damages are irregular. Accordingly, the first ground that supports the current summons fails.

10. The second ground on which the defendants rely to set aside the interlocutory judgment and the decision on quantum of damages is that, they have meritorious defence in this matter. It is settled law that, the applicant must show a defence on merit if the judgment was regularly entered. **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.

11. 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:
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> (a) whether the defendant has a substantial ground of defence to the action;
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> (b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
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> (c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.
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> 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".

12. 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'.

13. 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."

14. The second defendant deposed in paragraphs 12 and 13 of his supporting affidavit that, he was charged for negligent driving and was acquitted by the trial magistrate. He annexed a copy of the judgment handed down by the respective magistrate, marking as **"RRC4"**. As correctly pointed out by the plaintiff in paragraph 9 of his affidavit, the learned magistrate having analyzed the evidence before him concluded that, the second defendant was driving in rash and negligent manner at the time of accident. The learned magistrate stated in paragraph 16 of the judgment as follows:

> 16. When considering all these evidence together I find proved beyond reasonable doubt that accused manner of driving was rash and negligent.

15. Further perusal of that judgment **"RRC4"** reveals that, even though the learned magistrate found the second defendant negligent in his driving at the time of the accident, he acquitted him on the basis that, the place of accident – a private farm - is not within meaning of "public way" as defined in Crimes Act 2009, and the last element of the offence was not proved. Accordingly, the judgment **"RRC4"**, on which the defendants rely for their meritorious defence, is self-evident that, the second defendant was negligent in his driving on that particular day and it was proved beyond reasonable doubt as per the judgment of learned magistrate. Hence there is no merit on the defence taken up by the defendants to support their summons to set aside the judgment and the decision made for their default. The defendants failed to fulfill the mandatory requirement of showing meritorious defence as required by the decisions cited above. As the result, the summons filed by the defendants should be dismissed and the plaintiff must be compensated with

reasonable costs to defend this meritless application even after obtaining judgment and orders in his favour.

16. Accordingly, the final orders are;

a. The Summons filed by the defendants on 31.08.2020, is dismissed,

b. The defendants should jointly pay a summarily assessed cost of $ 2000 to the plaintiff within a month from today.

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
30.11.2021