IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. 39 of 2012L

BETWEEN : **KRISHNA SAMI NAIDU** (f/n Shiu Sami Naidu) of Malau Road, Labasa, Fiji Islands, Businessman and Managing Director.

Plaintiff

AND : **MOHAMMED ALEEM KHAN** (f/n Mohammed Hakim Khan) of 11, Kennedy Avenue, Nadi, Fiji Islands, Businessman

1st Defendant

: **GULF INVESTMENT (FIJI) LIMITED** a limited liability company having it registered office in Nadi, Fiji Islands

2nd Defendant

: **ALEEM INVESTMENT LIMITED** a limited liability company having it registered office in Nadi, Fiji Islands

3rd Defendant

: **KENNEDY LAUNDRY & DRY CLEANING LIMITED** a limited liability company having it registered office in Nadi, Fiji Islands

4th Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Mr. D. Sharma for the Plaintiff
Mr. R. Singh for the Defendants

Date of Ruling : 15.06.2023

RULING

01. The defendants filed the summons pursuant to Order 13 rule 10, Order 86 rule 4, Order 86 rule 7 (Order 14 rule 11) of the High Court Rules and the inherent jurisdiction of this court. The summons is supported by an affidavit sworn by one Ayesha Khan claiming to be the wife of the first defendant in this matter. The summons seeks the following orders from the court:

a. The order granted by Justice Inoke on 09.03.2012 and interlocutory judgment entered against the first defendant on 31.03.2012 be set aside as they are irregular and null as the relevant pleadings were not served on the defendants,
b. The leave be granted to the defendant to defend the matter by filling the statement of defence,
c. Order to revoke the transfer of shares of first defendant held in second, third and fourth defendant to the plaintiff and to revert back them to the first defendant,
d. Costs on indemnity basis and
e. Other reliefs.

02. Conversely, the plaintiff too, upon receipt of the above summons, filed a summons pursuant to Order 2 rule 2 (i) and Order 7 rule 2 (1) of the High Court Rules and the inherent jurisdiction of this court. The plaintiff's summons is supported by an affidavit sworn by the plaintiff and seeks to strike out the defendants' summons with the indemnity costs and it is founded on the following grounds:

a. No Notice of Intention to Proceed was filed by the defendant,
b. No Defence on merit is disclosed by the defendant,
c. No Notice of Non-Revocation of Power of Attorney has been attached by the Deponent,
d. No explanation is given for the delay in making the Defendant's application as required under Order 2 rule 2(1) of the High Court Rules,
e. The plaintiff has already taken fresh steps after making of orders by the court and
f. The defendant's summons is filed in breach of Order 7 rule 2 of the High Court Rules 1988.

03. The affidavit sworn by the plaintiff in support of his summons also served as the affidavit in opposition for the summons filed by the defendants and therefore, the defendant thereafter filed the affidavit in reply. Precisely, the summons filed by the defendants seeks to set aside orders made on 09.03.2012 by Justice Inoke and the judgment entered against the defendants on 31.03.2012 for default.

04. The sole argument of the counsel for the defendants is that, both order and the interlocutory judgment are null and void as the Writ of Summons and other pleadings were not served on the defendants. The counsel for the plaintiff on the other hand submitted that, the Writ was served on the defendants and orders were made regularly.

05. If a judgment or an order was obtained irregularly, a defendant is entitled to have it set aside *ex debito justitiae*. A 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. The rationale behind this is that, such irregular judgments and orders are considered as "***void* orders**" that resulted 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).**

06. A 'fundamental defect' includes 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 failed to comply with a statutory requirement (**Upjohn LJ in Re Pritchard [1963]**). Failure to comply with a statutory requirement includes rules made pursuant to a statute (**Smurthwaite v Hannay [1894] A.C. 494**).

07. The deponent of the supporting affidavit is not a party to this action. She is the wife of the first defendant. She states in her affidavit that, she was advised by the first defendant in this matter that he had never been served with any documents in relation to this matter on 02.03.2012. The reason for mentioning this specific date (02.03.2012) is that, the affidavit of service sworn by the bailiff Jackson Yavala states that, the first defendant being the Managing Director of the second, third and fourth defendants acknowledge the service on their behalf. The plaintiff, in his affidavit in opposition, annexed a copy of the writ that was served on the defendants. It is marked as **"A"** and annexed with the affidavit in opposition sworn by the plaintiff. It clearly shows that, the first defendant not only acknowledged the service of writ on his behalf and on behalf of the other defendants

on 02.03.2012, but also placed the common seal of the second, third and fourth defendant companies.

08. Furthermore, the order made by Justice Inoke on 09.03.2012 too was served on the defendants and the first defendant had acknowledged it in the similar way by placing the common seal of the second, third and fourth defendant companies. The Exhibit marked as **"B"** and annexed with the affidavit of the plaintiff is evident for the same. Even though the Exhibit **A** and **B** annexed with the affidavit of the plaintiff are important evidence for the proof of acknowledgement of service by the defendants, the deponent of the affidavit in her reply, conveniently avoided to mention anything about these two exhibits and merely responded that, the papers were not served on the defendants.

09. The acknowledgement by the first defendant as exhibited by the above two Exhibits was purely within the knowledge of the first defendant. However, the first defendant authorized the deponent to swear the affidavit otherwise for the reasons best known to him. The court can only assume that, either the first defendant intentionally suppressed acknowledgement to the court or the deponent did not know the first defendant's acknowledgement when she sworn the affidavits. If the first defendant deliberately suppressed the material facts in relation to service of Writ on him and on the other defendants, his intention to mislead the court in order to abuse its process. On the other hand if the deponent did not know the facts, her affidavit should be rejected, because an affidavit may contain only facts the deponent is able of his own knowledge to prove it or may contain a statement of information or belief with the sources and grounds thereof (Order 41 rule 5).

10. The plaintiff in his affidavit filed on 19.11.2020 annexed a copy of Indemnity signed by and between him and the first defendant, marking as **"C"**. The said Indemnity was signed on 22.10.2015. The plaintiff stated in his affidavit that, the first defendant indemnified him against any Share Transfer and any other action and therefore, the said indemnity is to act an absolute bar to any action. The deponent in her affidavit in reply stated that, she has been advised to believe that, the said indemnity does not restrain the application for setting aside the orders granted on 09.03.2012 and 31.05.2012. The deponent again failed to disclose grounds of belief as required by Order 41 rule 5, but simply stated that, she believes on an advice without referring to the person who advised her. In any event, the said Indemnity clearly discredits the averment of the deponent. The following is the material part of the first page of the said indemnity signed by the plaintiff and the first defendant. The emphasis is added by the court.

INDEMNITY

DATED: 22.10.2015

PARTIES

1. **MOHAMMED ALLEM KHAN** of Sydney, Australia, his successors, assigns, representatives ("**Aleem**"); and

2. **KRISHNA SAMI NAIDU** of 29 Belo Street, Suva Fiji, his successors, assigns, representatives **("Krishna")**

BACKGROUND

A. Aleem was a major shareholder in Gulf Investments (Fiji) Limited, a company incorporated in Fiji Having its registered office at 184 Queens Road, Nadi, Fiji **("Gulf").**

B. **Krishna has instituted legal proceedings against Aleem and three other companies owned by Aleem under Civil Action 39 of 2012 in the High Court of Fiji in Lautoka, for monies owed to Krishna ("the Action"). Pursuant to the Action, the court on 31 May, 2012, entered a Default Judgment against Aleem and the other Defendants' to pay Krishna the sum of $2,003,000.00 (Two Million and Three Thousand Dollars) together with damages, costs and interest to be assessed. In lieu of payment of the judgment sum, Aleem transferred his shares in Gulf to Krishna in settlement of Krishna's claim ("Share Transfer").**

C. Aleem, by virtue of this indemnity agreement **("Indemnity")** hereby indemnifies Krishna, his agents, assignees, successors and representatives and any other associated parties against the Share Transfer and the Action and any pending or future claims with respects to the Share Transfer and the Action in accordance to the terms of this Indemnity.

D. The parties agree that in this Indemnity, all references to Aleem's provision of indemnity with respect to the Action includes that Aleem, his agents, successors, assigns, representatives or any party or corporation on his behalf, **shall not file or institute any legal proceedings in relation to the Action including but not limited to filing an appeals,**

application to set aside the default judgment, stay of proceedings of any other application in relation to the Action at any time in whatsoever nature or manner. (Emphasis added).

11. The above extract from the Indemnity clearly shows that, the surrounding circumstances of impugned orders sought to be set aside were not only within the knowledge of the first defendant but also he acted upon the said orders. The first defendant further agreed to indemnify the plaintiff from any issues that may arise from implementing the said orders granted to him by the court in this case as the first defendant specifically mentioned this case (Civil Action 39 of 2012) in the above Indemnity. Despite the clear terms of the above Indemnity, the deponent states in her affidavit that, the indemnity does not restrain the first defendant from applying for setting aside the impugned order and default judgment. The averment of the deponent is contrary to what is in black and white in the said Indemnity. This act by the deponent is totally denounced.

12. It has now become evident from the affidavits filed by the parties in this matter that, firstly, the writ in this matter was duly served on the defendants and the first defendant being director of the other defendant companies acknowledged the same on behalf of himself and the companies. Secondly, the first defendant was well aware of this case and the orders made in his absence. Thirdly, the first defendant acted upon those orders and also went ahead and indemnified the plaintiff from any claim that may arise from implementing the impugned orders granted in this matter. Fourthly the deponent is not even able of her own knowledge to prove the facts she deposed in her affidavits. Neither she provided the source of information or ground of belief, nor is her evidence consistent with the documentary evidence which shows that, the writ was served and the plaintiff was indemnified by the first defendant. For above reasons, I decide that, the first defendant having acknowledged service of Writ and other documents, tried to mislead the court by allowing his wife who is not privy to the transactions at all to swear the affidavit contrary to clear evidence.

13. Accordingly, the default judgment and the impugned order were regularly made in this matter. The contention advanced on behalf of the defendants that they were irregularly made, ought to be rejected. Even if I am wrong in holding that the impugned order and the default judgment are regular, the defendants' application for setting aside them for the alleged irregularity should be dismissed for failing to comply with the Order 2 rule 2 (1) of the High Court. The Order 2 rule 2 (1) provides as follows:

Application to set aside for irregularity *(O.2, r.2)*

2 (1). An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein

> shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

14. According to the above rule an application to set aside any proceedings, any step taken in any proceedings or any documents, judgment or order on the ground of irregularity shall not be allowed unless it is made within reasonable time and before taking any step. The facts in **Shameem v Toyota Isusho (SS) Ltd** [2004] FJCA 44; ABU0042.2003S (16 July 2004) are similar to the case before me. It was alleged in that case that, the writ was not served. However, the application to set aside was made after almost 2 years and 7 months. The Court of Appeal unanimously held that:

> Counsel submitted that the decision as to service was a decision on an irregularity. We agree with the contention of the respondent that in any event the point must fail because of the delay involved. Order 2 rule 2(1) provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. If the application is not made within a reasonable time then the application shall not be allowed. (Underlining is original).

15. In this matter, the impugned order was made on 09.03.2012 and the default judgment was entered on 31.05.2012. However, the defendants filed the current application to set aside the same only on 16.10.2020 almost after 8 years. There is no explanation and or reason whatsoever for such long delay of 8 years. The first defendant filed number of actions and all were withdrawn at hearing of this application. This shows the first defendant was constantly advised by the solicitors on the issues related to this matter. However, failed to bring the application within reasonable time. The current application should be dismissed on this ground alone.

16. The plaintiff in his affidavit in opposition sought the costs on indemnity basis. Some important facts to be noted before deciding the quantum of the costs for this application. Firstly, the above analysis reveals that, the first defendant duly acknowledged the service of Writ in this matter. Secondly, he acted upon the impugned order and the default judgment against him and further went ahead with executing the Indemnity in order to fully indemnity the plaintiff in respect of all matters arising out of the share transfer. He by the said Indemnity bound his agents, successors, assigns, representatives or any party or corporation acting on his behalf not to take any action in relation to the default judgment and matters connected with. Thirdly, in spite of all, he authorized his wife – the deponent to swear the affidavit and to take up completely contrary position. These facts

clearly demonstrate that, the first defendant tried to abuse the process of the court. This conduct is obnoxious and the plaintiff should be entitled for indemnity costs. However, considering the age of this matter and the delay might be caused in dealing with assessment of indemnity costs, I decide that the cost on high scale will do justice in this matter.

17. Accordingly, the final orders are;

a. The Summons filed by the first defendant, to set aside the orders made on 09.03.2012 and the default judgment entered on 31.03. 2012 is dismissed,

b. The first defendant should pay a summarily assessed cost of $ 7500 to the plaintiff within a month from today.

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
15.06.2023