

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 201 of 2019

BETWEEN : **ROSHINI LATA NAND** of 1013, Herman Street, San Bruno CA
94066, United States of America, Nurse

Plaintiff

AND : **JAI PRAKASH** of 161318 – 56 Street, Edmonton, Alberta, Canada
through his lawful attorney SUSHIL KUMAR of Votualevu, Nadi
under Power of Attorney No. 58462.

1st Defendant

AND : **MOHAMMED ZAHID KHAN** of Votualevu, Nadi, occupation
not known to Plaintiff

2nd Defendant

Before : U.L. Mohamed Azhar, Acting Judge.

Counsels : Mr. K. Chand for the Plaintiff
Ms. A. Naidu with Ms. S. Singh for the 1st Defendant

Date of Hearing : 10 May 2024

Date of Ruling : 30 July 2024

RULING

01. The plaintiff and the first defendant are siblings. Their late mother Bhan Mati and the first defendant were the registered lessees of iTaukei Lease No 27653 having an area of 15 acres, 3 roods and 13 perches (the property). The late mother by her will bequeathed her undivided half share of the property to the plaintiff. The plaintiff was registered as proprietor in the property as to one undivided half share on 4 October 2017. The plaintiff requested the first defendant to consent for subdivision of the property in order to have a separate lease. The first defendant did not respond, nor he shown interest in subdividing the property. In addition, the second defendant was allegedly occupying the half share belonged to the plaintiff, with the assistance of the first defendant.

02. The plaintiff then commenced this action against both defendants. The plaintiff sought orders for sub-division of the property; order for vacant possession against the second defendant; and order for damages against both defendants. Both defendants filed Acknowledgment through their solicitors. The second defendant filed the statement of defence. The solicitors for the first defendant withdrew from appearing for the first defendant with the leave of the court. The first defendant neither filed statement of defence, nor did he take any step either personally or through another solicitor.
03. In the meantime, the plaintiff discontinued the action against the second defendant as he vacated the property. The plaintiff then filed the summons pursuant to Order 19 rule 6 of the High Court Rules to obtain judgment against the first defendant for default of pleadings. The plaintiff testified at hearing and the judgment was given to her on 04 December 2020 as prayed for, against the first defendant.
04. The first defendant then filed the current Motion on 20 September 2022 and moved the court to set aside the judgment entered against him on 04 December 2020. The plaintiff opposed the summons and filed the affidavit in opposition.
05. The court has broad discretion under Order 19 rule 9, to set aside or vary any judgment entered in pursuance of Order 19, on such terms as it thinks just. The Writ was duly served and acknowledged by the first defendant. The first defendant defaulted in pleadings. The plaintiff filed the summons and obtained the judgment against the first defendant. This makes the judgment, against the first defendant, regular. When exercising the discretion to set aside a default judgment that was regularly entered, the primary consideration is whether the defendant has merits. If merits are shown, the courts will not, *prima facie*, desire to let a judgment pass on which there has been no proper adjudication. The failure to appear and or take steps could be punished by way of costs (**Evans v Bartlam** [1937] 2 All E.R. 646).
06. Fatiaki J (as he then was) in **Fiji National Provident Fund v Datt** [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988) summarized the judicial tests applicable in setting a default judgment and said 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 be 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”.

07. The defendant, in order to set aside a default judgment, does not need to show a good defence on the merits. He needs only to show a defence which discloses an arguable or triable issue (**Burns v. Kondel** [1971] 1 Lloyds Rep 554).

08. The plaintiff's claim in nutshell is that, she seeks order for sub-division of the property to have separate lease for her share. The plaintiff's right to half share of the property together with the dwelling and the Sugar Cane Contract No. 18575 (Legalega Sector) derives from the Last Will of the mother of both plaintiff and first defendant - the late Bhan Mati. Late Bhan Mati was entitled to the same share and she bequeathed it the plaintiff. The plaintiff claimed in paragraph 3 of her statement of claim that, the dwelling falls under her share of the property. Then she specifically pleaded in paragraph 4 (b) of her statement of claim, the justification for her claim for the dwelling. It reads:

That the said deceased Bhan Mati under her Last Will and Testament dated 7th day of July 2015 bequeathed her half share of which she was in occupation in Native Lease No. 27653 to the plaintiff, her daughter together with concrete tin/timber dwelling house together with 5 bedrooms, sitting room, dining room, 3 kitchens and other amenities absolutely.

09. The proposed Statement of Defence is annexed with the affidavit that supports the motion to set aside the default judgment. Examination of defence reveals that, the first defendant took up two self-contradictory positions in his statement of defence. On one hand, the defendant in paragraph 3 of his statement of defence denied the plaintiff's claim for the area that covers the dwelling. On the other hand, in paragraph 4, the first defendant admits the paragraph 4 (b) of the plaintiff's statement of claim which is mentioned above, i.e. the first defendant admitted that, their late mother Bhan Mati bequeathed her half share in the property which she occupied together with the dwelling therein to the plaintiff.

10. In fact, the plaintiff sought an order to sub-divide the property in such a way that, the dwelling goes to her according to the will of the late mother Bhan Mati. Accordingly, the first defendant has not adduced, in his proposed statement of defence, an arguable or triable issue, since he admitted that, the plaintiff is entitled to half share that includes the dwelling in the property.
11. The first defendant filed the Acknowledgment of Service of Writ of Summons through his solicitors on 15 August 2019 within 14 days from the date of filling the Writ in this matter. The statement of defence of the first defendant was due from 29 August 2019 – 14 days from filling of Acknowledgement. The plaintiff filed the Motion pursuant to Order 19 and obtained the judgment against the first defendant on 04 December 2020. The first defendant retained another solicitor and filed current Motion to set aside the judgment only on 20 September 2022. It was after one year and nine months from the date of judgment.
12. In explaining the reasons for not taking steps on time, the first defendant provided two contradictory reasons. Firstly, it is stated in paragraph 6 of the affidavit filed in support of the Motion to set aside the judgment that, the first defendant was told that, the plaintiff's claim would not concern him as long as his name is in the Lease. It means, his failure to take steps was intentional based on what he was told about. Secondly, it is stated in paragraph 8 of the same affidavit that, the first defendant is a lay person who does not know the strict procedural deadlines. This cannot be accepted, because the first defendant retained a solicitor immediately after the Writ was served and filed the acknowledgement through his solicitors. The solicitor withdrew due to lack of instruction. If he was not aware of the requirements of the rules, he should have continued to engage the solicitors. However, he withdrew his instructions to his solicitors. He did not retain another solicitor, nor did he act personally. It is evident that, the first defendant was aware of this matter; however he intentionally failed to appear and take appropriate steps in this matter either personally or through the solicitors.
13. Conversely, the plaintiff in compliance with the judgment, started the sub-division works. The plaintiff engaged the service of a surveyor and paid a substantial amount of money in two stages. A quotation given by the surveyors and the receipts for payment of fees to them are marked as Exhibits and annexed with the supplementary affidavit filed on behalf of the plaintiff. These Exhibits are evident that, a total sum of \$ 6,075.00 had already been paid and the 90% of the sub-division works had already been completed.
14. The plaintiff objected to the supplementary affidavit on basis it was deposed by the law clerk who did not have knowledge. This objection is frivolous, because the supplementary affidavit does adduce the documentary evidence (Quotation of the surveyors and their receipt for the amount paid to them) to substantiate the averments in the original affidavit

deposed by the plaintiff. The court can accept this documentary evidence for the proof of payment and extent of the sub-division works carried out by the plaintiff after obtaining the judgment in this case.

15. In fact, the plaintiff was even amendable, as it was informed by her counsel at hearing, to set aside the judgment if the total cost incurred by the plaintiff is paid. However, the first defendant was not willing. Therefore, if the judgment is set aside, the plaintiff will suffer irreparable harm as she has taken more steps to enforce the judgment spending a substantial amount of money for sub-division and other related activities.
16. The above discussion reveals that, the first defendant has not adduced any arguable issue in his affidavit. He in fact admitted the claim of the plaintiff. He deliberately let the judgment go in this matter. There is no satisfactory explanation for his failure to come to court to set aside the judgment for one year and nine months. In addition, setting aside would prejudice the plaintiff. As a result, the summons filed by the first defendant ought to be dismissed. The plaintiff has incurred costs in defending this unjustified and belated application of the first defendant to set aside the judgment. The plaintiff sought the cost on indemnity basis. However, I decide that a summarily assessed costs will do justice.
17. Accordingly, the final orders are;
 - a. The summons filed by the first defendant, to set aside the judgment dated 04 December 2020, is dismissed, and
 - b. The first defendant is ordered to pay a summarily assessed cost in sum of \$2,500 to the plaintiff within a month from today.



At Lautoka
30.07.2024


U.L. Mohamed Azhar
Acting Judge