

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 324 of 2023

BETWEEN:

HYBRID AUTO CENTRE PTE LIMITED
PLAINTIFF

AND:

SHANICK BUILDING CONTRACTORS PTE LIMITED
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Jackson Bale Lawyers for the Plaintiff
Crown Law for the Defendant

Date of Hearing:

07th May 2025

Date of Ruling:

27th June 2025

RULING

01. The current application before this Court is the Summons filed by the Defendant on 19/04/2024 for Stay of Execution and Setting Aside of Order Granted on 14th March 2024. This application has been supported with an Affidavit of Pradip Prasad filed on 19/04/2024.

02. This application has been opposed by the Plaintiff and an Affidavit in Opposition as deposed by Abdul Shekeb was filed on behalf of the Plaintiff on 31/07/2024. Upon Court's direction, both parties have filed written submissions (inclusive of further written submissions) in support of their respective positions and the Court has extensively considered the written submissions, the submissions made at the Hearing and the affidavit evidence before it whilst making this ruling.
03. The history of the proceedings reveals that the Plaintiff filed its Writ of Summons and the Statement of Claim on 25/10/2023 and had served the same on the Defendant on 02/11/2023. An Affidavit of Service has been filed of Record on 28/11/2023.
04. The Plaintiff's claim is for loss and damages arising out of a breach of a building contract between the parties. The Defendant runs a construction business, and the Plaintiff has engaged the services of the Defendant to construct a new spare parts shop for its business. Parties had entered into a written contract in this regard on 01/09/2022 for a total value of \$ 110000.00 and the Defendant was to complete all works by 28/11/2022. The Defendant had failed to complete the work of the building as per the agreement and the Plaintiff further alleges that the works done by the Defendant were not carried out with all due care, skill or diligence or in good workmanship.
05. The Plaintiff on 19/01/2023 had issued a Notice of Breach of Building Contract and had offered 14 days from the said Notice to rectify all defects. However, the Defendant having failed to comply with the said Notice had abandoned the construction site by 20/01/2023.
06. Plaintiff submits that the building contract was repudiated accordingly, and the Plaintiff accepted the Defendants repudiation of the contract by way of its solicitors email dated 08/02/2023.
07. On 23 January 2023, the Plaintiff retained an independent contractor to inspect the works executed by the Defendant, which the Plaintiff contends confirmed substandard workmanship on the part of the Defendant. The Plaintiff has duly itemized the loss and special damages incurred as a result of the alleged breach of the building contract and the Defendant's poor workmanship in its claim.
08. The Defendant, although been served with the Writ and the Statement of Claim on 02/11/2023 failed to duly file an Acknowledgment of Service and Notice of Intention to Defend within the prescribed 14 days¹ period as per the High Court Rules 1988.

¹ Order 12 Rule 4 (a) of the High Court Rules 1988.

09. Notwithstanding the provisions set forth in the Rules, the Solicitor representing the Defendant purportedly filed a document entitled, “Notice of Intention to Defend,” on 27 November 2023, which is twenty-five (25) days subsequent to the date of service of the Writ and the Statement of Claim upon the Court Registry.
10. It remains unclear how the said solicitor was able to effect such filing, as no leave of Court has been obtained for the late acknowledgment of service². Furthermore, the said document does not conform to the requisite form and content standards of a proper Acknowledgment of Service, thereby constituting a blatant contravention of the provisions contained in Order 12 Rule 2 of the High Court Rules 1988.
11. Given that this document bears the signature of the Defendant’s solicitor, it appears that the violations and breaches of the applicable rules herein were committed knowingly and intentionally. No explanation has been provided regarding the manner in which the solicitor obtained authority to file the aforementioned document with the Court Registry, despite the clear illegality and irregularity of such filing. Under the circumstances, this act constitutes an abuse of the Court’s process, and the conduct of the Defendant’s solicitor is deemed highly questionable and open to serious scrutiny.
12. Notably, the questionable conduct of the Defendant’s solicitor appears to extend beyond the irregular filing of the “Notice of Intention to Defend” as described above. After a period of two (2) months from the date of that filing, on 26 January 2024, the said solicitor once again engaged in the illegal and irregular filing of a “Statement of Defence,” in direct contravention of Order 12 Rule 5(2) of the High Court Rules 1988. While it appears that the solicitor may have identified alternative channels to effect such filings unlawfully, these acts constitute an abuse of the Court’s process and are thus unlawful and cannot be recognized as valid or regular dealings in the proceedings.
13. In the event of the Defendant’s failure to duly acknowledge the Writ and the Statement of Claim and/or to file a proper Statement of Defence, the Plaintiff, on 18 January 2024, duly filed an Ex-parte Summons seeking leave to enter Judgment by Default. This application was supported by an Affidavit sworn by Siddarth Singh.
14. The said Summons was heard before the Court on 14 March 2024. Upon reviewing the case, the Court identified the illegally filed documents, namely the ‘Notice of Intention to Defend’ and the ‘Statement of Defence’ and held that these documents constituted a blatant abuse of the Court’s process. The Court accordingly struck out both documents. Consequently, the Plaintiff’s application for Default Judgment was granted, and judgment was entered by default against the Defendant.

² Order 12 Rule 5 (1) of the High Court Rules 1988.

15. The Defendant, on 19/04/2024, filed the current application for Setting Aside the orders granted on 14/03/2024. This application is supported with an Affidavit of Pradip Prasad. In the said Affidavit, the Defendant is still attempting to rely on the illegally and irregularly filed documents, namely the ‘Notice of Intention to Defend’ and the ‘Statement of Defence and Counter Claim’.
16. Additionally, it is averred in paragraph 11 of the Affidavit of Pradip Prasad that, *‘if the Court Registry had not accepted the Defendant’s Statement of Defence and Counter Claim on 26th January 2024, then the Defendant would have made an application for extension of time to file its Statement of Claim (SIC) and Counter Claim on the basis of a Supreme Court Judgment’*.
17. This statement clearly constitutes an attempt to distort and justify the illegal conduct of the Defendant and/or its solicitors to legitimize their unlawful actions. It is not necessary to elaborate extensively on the legal implications here; however, it is insofar suffice to state that the Court Registry is not tasked with monitoring or regulating the legality of filings made by parties or their representatives. It is, instead, the duty of the Court to identify and address any irregularity and/or illegality, on its own motion and/or once brought to its attention.
18. Furthermore, the solicitor responsible for filing the documents was well aware that the prescribed time for such filings had expired and that obtaining leave of the Court was a legal requisite for their proper admission. Despite this knowledge, the solicitor cynically engaged in unlawful and irregular conduct, as previously evidenced, and now seeks to shift blame onto the Court Registry—an act that is both unjustified and improper.
19. The Defendant has asserted that its Counterclaim has not been struck out and remains valid. However, it appears that the Defendant either misapprehends or is misled regarding the Court’s findings rendered on 14 March 2024, wherein the Court explicitly held that the documents filed by the Defendant, namely the ‘Notice of Intention to Defend’ and the ‘Statement of Defence,’ were illegitimate and irregular, constituting an abuse of the Court’s process. As a result, the Court struck out and dismissed these documents, and they were expunged from the Court Record. Consequently, there exists no valid Counterclaim or any other pleading filed by the Defendant before this Court.
20. Furthermore, the Defendant contends that the date on which the Affidavit of Siddarth Singh was sworn—17 January 2024—renders the application for Default Judgment ‘invalid,’ as it was sworn a day prior to the date of the Plaintiff’s Summons for Default Judgment. This is a point argued by the solicitor for the Defendant based on the dicta of His Lordship, Justice Gunaratne, P in the case of *Santok Investment v*

21. Prior to progressing with the substantive application for setting aside the Default Judgment, I deem it necessary to address this legal issue at this stage. As stated, the dicta of His Lordship in the aforementioned case declares as follows,

The Summons to Strike Out and the Supporting Affidavit

15. *The summons has been filed (as the seal of the Court Record reveals) on 27th October 2021. The supporting affidavit (as the seal of the Court Record reveals) shows that it has been deposed to on 26th October 2021.*

A supporting affidavit must follow a summons on the same date or on a subsequent date (not on an antecedent date)

16. *This I lay down as a proposition of law.*
22. All procedural requirements concerning the filing of affidavits in civil proceedings before the High Court of Fiji are governed by Order 41 of the High Court Rules 1988. An examination of the provisions of Order 41 reveals that there is no specific rule requiring an affidavit to be deposed on the same day (or on a subsequent day) as against an application such affidavit intended to support.
23. An affidavit constitutes a sworn statement of facts that the deponent attest to from their own knowledge and in interlocutory proceedings; it may also include statements of information or belief, provided the sources and grounds for such statements are disclosed³. Consequently, when it comes to the form, context and the admissibility of an affidavit, the date of an affidavit holds limited significance unless it conflicts with the facts contained therein.
24. In the above context, I shall consider what the dicta stated in the above case means. It is stated that '**a supporting affidavit must follow a summons on the same date or on a subsequent date (not on an antecedent date)**' and that this is laid down as a proposition of law.
25. The term proposition is defined (pursuant to the Concise Oxford English Dictionary) as, '*a statement expressing a judgment or opinion, a statement expressing a concept that can be true or false*⁴'. It is clear that as per the literal meaning of the term, the

³ Order 41 Rule 5 of the High Court Rules 1988.

⁴ Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press.

contention by His Lordship in the above case is an opinion which may be preferable and not a rule of law. Furthermore, in the absence of any provision in the High Court Rules 1988 to the above effect, I do not find that His Lordship has intended this proposition to be construed as a rigid rule of law in every interlocutory application before the Court.

26. The solicitors for the Plaintiff have also submitted to the Court a recent Ruling of the Court of Appeal in the same case, **Santok Investment v Abbco Builders PTE Limited & Another; Civil Appeal No. ABU 0044 of 2021(04 April 2025)**, where His Lordship, Justice Prematilake, RJA, has held as follows,

6. *...Dr. Almeida Gunaratne, P had held in the previous ruling as a proposition of law that a supporting affidavit must follow a summons on the same date or on a subsequent date (not on an antecedent date). Thus, if the view of Dr. Almeida Gunaratne, P is correct on this alone the summons to strike out the appeal cannot succeed. However, I think that the Court of Appeal should look into this proposition of law and deliver a more considered and reasoned pronouncement for the guidance of Courts, practitioners and litigants.*

27. The aforementioned declaration by His Lordship, Justice Prematilake, RJA, reinforces this Court's view that the proposition of law articulated by His Lordship, Justice Gunaratne, P, does not constitute a rigid rule of law that must be strictly adhered to in all interlocutory applications before the Court.

28. Accordingly, I find no merit in the argument advanced by the Defendant's solicitor that the Plaintiff's application for Default Judgment was invalidated due to the Supporting Affidavit being deposed on a date prior to the date of the Summons.

29. Coming back to the substantive application before this Court, the Defendant has submitted at averment number 13⁵, *'that in the interest of justice, it is just in all the circumstances to set aside the Default Judgment and allow the Defendant to present its defence'*.

30. Nevertheless, the said Affidavit contains no factual basis to support the Defendant's contention. There is no draft Statement of Defence attached thereto for the Court's consideration, to determine whether any meritorious defence exists as against the Plaintiff's claim. Such assertion appears to be a vague and general averment lacking any factual substantiation.

⁵ Affidavit of Pradip Prasad filed on 19/04/2024.

31. During the hearing, counsel for the Defendant attempted to contend that there exists a connected case between the parties, specifically a winding-up action initiated by the Defendant against the Plaintiff, and that the Court in that case had determined there were triable issues between the parties. A copy of the Judgment pertaining to that case was subsequently submitted through the Defendant's further written submissions filed on 21 May 2025.
32. However, firstly, no affidavit evidence was provided to substantiate this assertion. This Court therefore has no facts, whatsoever, to consider the scope of the findings in the case referred to by the solicitor for the Defendant. Consequently, this Court lacks the factual basis to consider the scope or implications of the findings in the referenced case, as against the factual context of the matter presently before the Court.
33. Secondly, it is incumbent upon the Defendant to submit relevant facts through affidavit evidence for the Court's proper consideration. The Defendant has failed to provide any such facts and is now attempting to influence the Court's deliberations by submitting a copy of a judgment from a separate proceeding, without any factual basis supporting its relevance or applicability to the present case. Accordingly, the Court is not in a position to consider or give weight to the said judgment in these proceedings, and it is thus rejected.
34. In the Affidavit in Opposition of Abdul Shekeb filed on 31/07/2024, it is averred that the Defendant has been duly served with the Writ and the Statement of Claim and due to failure of the Defendant to file a proper Notice of Intention to Defend and/or a Statement of Defence, the Default Judgment was duly entered.
35. The law on Setting aside a Default Judgement is well established both in English Common Law and in the local jurisdiction. Order 13 Rule 10 and Order 19 Rule 9 of the High Court Rules provides for setting aside or varying any judgment entered in default of Notice of Intention to Defend, and/or in default of pleadings, in such terms the Court thinks just.
36. It is clear that the provision in the Rule provides unconditional discretion to the Court. There are a number of authorities which are frequently cited by the Courts when exercising such discretion to set aside judgments entered in default of a party.
37. 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).

38. 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.”

39. In ***O’Shannessy v Dasun Hair Designers Ltd*** [1980] 2 NZLR 762 **Greig J** said at pg. 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.”*

40. In the present matter, the Defendant contends that the Default Judgment is irregular on the basis that the Plaintiff’s application was invalidated due to the supporting affidavit being deposed on a date prior to the date of the application. This argument is rejected by the Court, as detailed in the preceding paragraphs. Aside from this discredited contention, the Defendant has submitted no other facts to substantiate a claim that the Default Judgment is irregular.

41. The solicitors for the Defendant further contend that, given the Court’s observation that there was no appearance on behalf of the Defendant at the time the Default Judgment was entered, the Court ought to have issued a notice for the Defendant’s appearance and proceeded to hear the Plaintiff’s application for Default Judgment *inter-partes*, thereby preventing any prejudice to the Defendant.

42. Such an argument is perplexing and without merit. The Plaintiff's application for Default Judgment was made *ex parte*, in accordance with Order 19 Rule 6 and Order 65 Rule 9 of the High Court Rules. The Defendant's failure to duly acknowledge the Writ and Statement of Claim, coupled with its unscrupulous filing of a document titled 'Notice of Intention to Defend' and a 'Statement of Defence and Counter Claim' which were subsequently found to be illegitimate and irregular, resulted in the Court striking out and expunging these documents from the Court Record.
43. Under these circumstances, it is unreasonable and unfounded to assert that there was any obligation on the Court to notify the Defendant or to consider the application for Default Judgment *inter-partes*. The procedural conduct and the Court's rulings accordingly dispel such claims as baseless.
44. Furthermore, having thoroughly considered all material facts and evidence before it, the Court finds no basis to conclude that the Default Judgment was entered irregularly. The Court's assessment is grounded in the principles of law and procedure governing the validity of judgments, and it affirms that the judgment in question was duly and properly entered in accordance with the applicable legal standards. Accordingly, the law applicable to the current application before the Court shall be the law pertaining to a regular, valid Judgment, and the Court proceeds on the basis that such judgment is regular and lawful.
45. 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 sets out the principle of setting aside a Default Judgement entered regularly. In this 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,

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.

46. There are several local authorities which recognized the above 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 sets out the judicial tests. **Fatiaki J** in this case held,

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.

47. If a defence on merits 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 stated,

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 (to) show a defence which discloses an arguable or triable issue.

48. **Legatt LJ** in *Shocked v Goldsmith* (1998) 1 All ER 372 held at p.379 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.

49. In relation to the current application before this Court, the Defendant has provided no explanation for permitting the entry of Default Judgment against him. The Defendant's reliance solely on the so-called 'Statement of Defence and Counter Claim' which has been previously deemed an abuse of process and accordingly struck out, is misplaced.

50. Furthermore, the Defendant failed to acknowledge the Writ and Statement of Claim as required by law. The face of the Writ clearly indicates that an Acknowledgment of Service, together with a Notice of Intention to Defend, must be filed with the Court Registry within fourteen (14) days of service of the Writ. It also explicitly states the consequences of failing to comply with this deadline.

51. The Acknowledgment of Service was duly served on the Defendant with the Writ, and the Defendant was thereby informed of the requirement to complete and file the same within the specified period. Despite this clear notice on the face of the Writ, the Defendant neglected to acknowledge the service and subsequently unscrupulously filed an irregular 'Notice of Intention to Defend' and a 'Statement of Defence and Counter Claim' both of which are illegitimate and irregular. Such conduct is inconsistent with the requirements of the law and undermines any claim that the Defendant was not aware of the proceedings or the implications of non-compliance.

52. In assessing whether the Defendant possesses a meritorious defence to the Plaintiff's claim, this Court observes, as previously outlined in the preceding paragraphs of this ruling, that the Defendant has failed to submit any factual basis to substantiate a valid defence within its supporting affidavit filed on 19 April 2024. Consequently, the Court has no alternative but to determine that the Defendant lacks a valid or genuine defence to the Plaintiff's claim.

53. Lastly, it is noteworthy that this matter was instituted in 2023, and the conduct of the Defendant has contributed to an unacceptable delay in the progression of these proceedings. The Plaintiff has already sustained damages and losses in business income arising from the alleged breach of the building contract by the Defendant.

Having considered all the material before the Court, I find that setting aside the default judgment would result in irreparable harm to the Plaintiff, particularly given the circumstances and the importance of timely resolution in this matter.

54. Based on the foregoing discussions and findings, the Court concludes that the Defendant has failed to demonstrate any sufficient justification for setting aside the Default Judgment entered against him on 14 March 2024. Accordingly, the application to set aside the judgment is hereby refused and dismissed.
55. Consequently, the Court makes the following orders,
- 1) The Summons filed on 19/04/2024 for Stay of Execution and Setting Aside of Orders Granted on 14th March 2024 is hereby refused,
 - 2) The Summons dated 19/04/2024 is accordingly struck out and dismissed.
 - 3) The Defendant shall pay a cost of \$ 2000.00 to the Plaintiff, as summarily assessed by the Court, as costs of this application.
 - 4) Proceedings in this matter is accordingly concluded, and the file is closed.



At Suva
27/06/2025.

L. K. Wickramasekara
Acting Master of the High Court