NATIVE LAND TRUST BOARD v AHMED KHAN and MOHAMMED YUSUF KHAN (ABU0005 of 2010)

COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, CHANDRA, WATI JJA

4, 28 September 2012

Practice and procedure — service of documents — no acknowledgment of service filed — default judgment — whether default judgment was regular — whether service of summons was proper and effective — whether personal service required — whether appellant had arguable and meritorious defence — Companies Act s 39(1) — Interpretation Act ss 2(6)(a),(b) — Native Land Trust Act ss 22, 24.

The appellant agreed to give the respondents two registered leases on a cane farm. The instrument of tenancy was signed and the respondents paid money to the appellant. Before the appellants issued the formal leases, the landowners evicted the respondents and took possession of the land. The respondents filed a writ and statement of claim, and both were sent by registered post to the appellant. The appellant acknowledged receipt by return of the accompanying pink slip. As no acknowledgement of service was filed by the appellant, the respondents entered default judgment. The appellant sought to set aside the default judgment, however their application was dismissed and the matter was sent before the Master for the assessment of damages. The main submissions of the appellant on appeal were that there was no proper service of the summons on the appellant, and that the appellant had an arguable and meritorious defence.

Held –

(1) If the appellant thought that service was defective, it should have entered a conditional appearance and then taken objections under s 22(1) of the Native Land Trust Act. Having done nothing to protect their interests, it would be unjustified to allow the appellant to benefit from its omission after sleeping on its rights. There has been proper and effective service of the writ of summons and consequently the entering of the default judgment by the High Court was regular.

(2) The High Court carefully considered the documents the appellants relied on as amounting to misrepresentations and arrived at the conclusion that the appellant had no defence at all. The High Court's decision was not wrong or erroneous and did not amount to a wrongful exercise of discretion in dismissing the application of the appellant to set aside the default judgment.

Case referred to

Alpine Bulk Transport Co Inc v The Saudi Eagle [1986] 2 Lloyd's Rep 221; *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Habib Bank Ltd* [1998] 4 All ER 753; *Kenneth Allison Ltd (in liq) v A E Limehouse & Co (a firm)* [1991] 3 WLR 671; *Pravin Gold Industries Ltd v The New India Assurance Co. Ltd* Civil Action No 250 of 2002; *Subramani v NLTB* HBF No 014 of 2004L; *Sydar Ltd & The Corporations Law Sydar Pty Ltd v K. Simmonds Finance Pty Ltd* No 1320 of 1995, cited.

Appeal dismissed.

L. Macedru for the Appellant

A. Sudhakar for the Respondent

[1] Calanchini AP. I have had the opportunity of reading the judgment of Chandra JA and agree with his proposed orders.

[2] Suresh Chandra, JA. This is an appeal by the Defendant – Appellant from a judgment dated 23rd September 2009 of the learned High Court Judge at Suva.

[3] The Plaintiffs Ahmed Khan and his son Mohamed Yusuf Khan filed a Writ of Summons and Statement of Claim against the Defendant, the Native Land Trust Board (hereinafter referred to as NLTB) in respect of 21 acres of sugar cane farm land in Ba leased from the NLTB which they were occupying until evicted by the land owners.

[4] The Plaintiffs claim was based on an agreement by the NLTB to give them two registered leases of the cane farm. Following initial negotiations and agreement, the plaintiffs had moved on to the farm, cultivated and harvested sugar cane. But before the formal lease was issued, the landowners had decided to give the farm to one of its members. The Plaintiffs alleged that they were forced out and that the NLTB had breached their agreement. They sought damages from the NLTB.

[5] The events that had taken place up to action filed by the plaintiffs were as follows:

> On 11th January 2005, NLTB had offered the Plaintiffs two separate leases of the same land subdivided equally in area, being Cibanaoci No 1 to Ahmad Khan and Cibanaoci to Mohammed Khan of 4.0467 hectares each. Both leases were subject to the same conditions: terms of 30 years and $700 annual rent. On acceptance, the Plaintiffs were to pay $3404.80 each which included the first year's rent.
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> On 14th January 2005, the offer was accepted and the parties signed the instrument of tenancy and the Plaintiffs paid $2704.80 each minus the first year's rent. The rent was subsequently paid on 12th August 2005. Formal leases were to be issued by the NLTB in due course.
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> NLTB did not issue formal leases and the landowners evicted the Plaintiffs and took possession of the farms. The Plaintiffs claimed damages which included the value of the house on the property and standing cane crop ($85,000) and loss of future earning ($450,000) as special and general damages. The Writ and Statement of Claim were filed on 12th July 2006.

[6] The Writ and Statement of Claim were sent by registered post to NLTB on 18th July 2006 and NLTB had acknowledged receipt in Suva by return of the accompanying pink slip. A copy had also been served at the Lautoka Office of the NLTB on 14th July 2006.

[7] As no Acknowledgement of Service was filed by the NLTB, the Plaintiffs' Solicitors entered Default Judgment on 21st September 2006.

[8] NLTB's Solicitors filed a Summons to set aside the Default Judgment and for leave to file its Defence, and the application was supported by an affidavit sworn by the litigation clerk and a second affidavit by the NLTB Field Officer in Lautoka. Mohammed Khan filed two affidavits in reply on 24th November 2006. Counsel for both parties had filed written submissions and judgment was to be delivered on notice by the Judge then seized of the matter. It remained outstanding till 11th September 2009 when both Counsel agreed that the judgment could be delivered by Judge Inoke.

[9] Judge Inoke by Judgment dated 23rd September 2009 ordered that the Appellant's application to set aside the Default Judgment entered for the Plaintiffs on 21st September 2006 be dismissed, and that the matter be sent before the Master for assessment of damages and costs in a sum of $800.

[10] The Appellant was granted leave to appeal on 1st December 2009 by Justice Inoke, and the order was sealed by the Master of the High Court on 12th January 2010 accordingly.

[11] The grounds of appeal relied on by the Appellant are as follows:

> (i) That the learned Judge erred and/or misdirected himself in law in his interpretation of s 22(1) of the Native Land Trust Act (Cap 134) when he states that the Writ could be served by registered post instead of personally on the Secretary of the TLTB;
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> (ii) That the learned Judge erred and/or misdirected himself in law and in fact when he compared the service of a Writ on a company under s 391(1) of the Companies Act Cap 247 as to how service should be effected upon the Appellant;
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> (iii) That the learned Judge erred and/or misdirected himself in law and in fact when he fails to consider the Appellant's defence of the Respondent's misrepresentation that the landowning unit had consented to the giving of separate leases to them;
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> (iv) That the learned Judge erred and/or misdirected himself in law and fact when he states that the Appellant had breached its obligations against the Respondents when the Appellants referred the Respondents to the Police when they were threatened by the landowners;
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> (v) That the learned Judge erred and/or misdirected himself in law and in fact in failing to consider the overall justice of the matter when dismissing the Appellant's setting aside of Default Judgment application.
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> (vi) That the learned Judge's decision is wrong and erroneous and as such tantamounts to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.

[12] The main submission of Counsel for the Appellant was on the basis (1) that there was no proper service of summons on the Appellant and (2) that the NLTB had an arguable and meritorious defence.

[13] It would be necessary to consider whether the default judgment entered in this case was regular in the first instance, which would in effect bring in the question of whether service of the summons was proper and effective.

[14] The relevant provisions in the Native Land Trust Act (Cap 134) are Sections 22(1) and 24. S 22(1) provides that service on the Board 'of all legal processes and notices shall be effected by service on the Secretary'.

> S 24 (1) Any application, statement, demand, instrument, notice or other document authorised or required by this Act, or any regulation made thereunder, may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode or by sending it through the post in a registered letter addressed to him there.
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> (2) Where any such document is to be served on a person by being sent through the registered post it shall be deemed to have been served not later than the fourteenth day succeeding the day on which it was posted, and for proof of such service it shall be sufficient to prove that the letter containing the notice was properly addressed, registered and posted.

[15] It was the submission of Counsel for the Appellant that it was the current practice of the Board Secretary to receive all documents served upon the Board and he then summons the Regional Office where the case befalls to provide the necessary files, briefs and documents pertaining to the allegations and claims against the Board before they are referred to the Board's Solicitors. It was on this basis that it was argued that service on the Secretary should have been effected personally and that the service by registered post on the Board was irregular and contrary to s 22(1) of the Native Land Trust Act.

[16] To further strengthen their position as to improper service of summons, Counsel for the Appellant relied on s 2(6)(a) of the Interpretation Act (Cap 7) which section provides as follows:

> 'Where any written law authorizes or requires any notice or document to be served, then unless the contrary intention appears, such notice of document must be served either –
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> (a) By delivering it to the person on whom it is to be served; or (b) In the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at their registered or principal office or sending it in a prepaid envelope addressed to the secretary or clerk of the company or body at that office;'

[17] The Appellant submitted that NLTB is not an incorporated company but a creature of a Statute, and cited the case of *Subramani v NLTB* HBF No 014 of 2004L in support of that proposition.

[18] The Appellant also submitted that the use of the term 'shall' in Section 22(1) of the Native Land Trust Act shows that the procedure spelt out therein is mandatory and hence a positive obligation and cited the decision of *Sydar Ltd & The Corporations Law Sydar Pty Ltd v K Simmonds Finance Pty Ltd* No 1320 of 1995 and the House of Lords decision in *Kenneth Allison Ltd (in liq) v AE Limehouse & Co (a firm)* [1991] 3 WLR 671 in support.

[19] These submissions have to be considered in the light of the actual factual situation in the present case. There is no denial of the fact that the writ was received by NLTB and this was fortified by the fact that there was a receipt acknowledged by the NLTB in Suva by return of the accompanying pink slip, which is in the High Court Record at page 28 and shows that the summons had been accepted on 21st July 2006. The Affidavit filed on behalf of the NLTB by the Litigating Clerk also has confirmed this fact where she has said that she became aware of the writ of summons on the 11th of September 2006 when she cleaned up a tray used by the former Senior Legal Officer who had resigned and that her subsequent inquiries revealed that a service by registered mail had been effected on the General Manager on 21st July 2006. In the same affidavit there is also a statement to the effect that 'after the Secretary is served with a writ, it is handed to the Manager Legal Services, a lawyer in the same building'. Further the affidavit was filed only on the 5th of October 2006 after NLTB was served with the default judgment in the case on the 21st of September 2006. The Appellant has not given a genuine reason as to why they neglected to act on the writ of summons served on them. A further fact of note is that in the letterhead of the NLTB it is stated thus: 'Please address all correspondence to the General Manager'.

[20] In this background factual situation it is necessary to consider whether as submitted by Counsel for NLTB whether service that was required was personal service on the Secretary and whether it was a mandatory requirement. S 22(1) of the NLT Act states that it should be served on the Secretary. What is stated in s 22(1) is 'service on the Board' and shall be affected by service on the Secretary. Service by post would therefore be sufficient within the requirements of s 22(1). But a perusal of s 24 of the Act would show that the provisions therein relate to the issue of processes by the NLTB on persons or entities. The provisions in s 24 are very wide in that it refers to service personally, or leaving at his last known address, or by sending it through registered post. Order 10 of the High Court Rules 1988, specifically r 1(2)(1) provides that a writ may be served on a defendant within the jurisdiction by ordinary post at his usual or last known address. Although it may be said that the Rules of the High Court where specific provision is made for in a Statute, as it is the case here, it shows the general intent in relation to serving of processes. While processes served by the NLTB seems

to have a wider coverage as in s 24, it would appear on the face of it much narrower if a literal interpretation is given to s 22(1).

[21] S 22(1) is capable of a wider interpretation when considered with s 2(6)(b) of the Interpretation Act (Cap 7), where in the case of an incorporated company or body, by delivering it to the Secretary or clerk of the company or body at their registered or principal office there would be sufficient service. Although it was argued by Counsel that NLTB is not a 'corporate body', it was conceded that it is a 'creature of a statute' and such a body too could have a principal office and a responsible officer to accept processes, which in the case of NLTB was the 'General Manager' (as named in their letter head).

[22] If personal service was in fact the requirement as argued on behalf of NLTB, what would be the situation when process has to be served, the Secretary is out of office, or on leave or unable to be located or contacted? It certainly would not be the case that it can be served on the Board of which the Secretary is an Officer, it could certainly be possible to have such process received and accepted by someone on behalf of the secretary. This appears to be what has occurred in the present case, where it has been acknowledged by no less than a person as the 'General Manager' as stated in the Affidavit of the Litigating Clerk. Further the letterhead of NLTB requires all correspondence to be addressed to The General Manager. The General Manager who was one of the Principal Officers and certainly a person in authority of the NLTB could well have refused to accept the writ of summons stating that it had not been properly addressed, but no such action had been taken and having accepted same it was his duty to pass it on to the Secretary to take necessary action. No explanation has been offered by the NLTB regarding such inaction and necessarily NLTB has to face the consequences resulting from such failure. The appellant should have entered a conditional appearance if it thought that service was defective and then taken objections under s 22(1). Having done nothing to protect their interest, it would be unjustified to allow them to benefit from its omission and after 'sleeping on its rights'.

[23] The cases cited by Counsel for the NLTB are authorities for the propositions which envisage situations where personal service is required and where it is mandatory and the term shall has to have a strict interpretation having a mandatory effect. The citations in relation to the Companies Act and the authorities thereunder in relation to service of process too have no relevance to the present case except for comparative purposes. The citations in the written submissions of the Appellant do not apply to the situation in the present case where it is quite clear that the NLTB has been found wanting in dealing with the writ of summons that was received by them in their Office and which was not dealt with diligently due to a Legal Officer of the Board failing to follow up with the further steps.

[24] Therefore the first basic argument that the judgment of the High Court can be faulted on the basis that there has been no proper service of the writ of summons fails, and it is my view that there has been a proper and effective serving of the writ of summons, and in fact NLTB had acquiesced in the receipt of same, and consequently the entering of the default judgment by the High Court was regular.

[25] The other basic argument prefaced by Counsel for the Appellant was that a Default Judgment can be set aside if the Appellant had an arguable and meritorious defence. The Court has a very wide discretion in an application of

this nature but it is also guided by certain well known principles as seen from judgments which have dealt with similar situations.

[26] In *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Habib Bank Ltd* [1998] 4 All ER 753 it was held that the court would not set aside a default judgment which suffered from irregularities if there was sufficient evidence before the court from which it was able to conclude that the substantive content of the judgment was right.

[27] In *Alpine Bulk Transport Co Inc v The Saudi Eagle* (1986) 2 Lloyd's Rep 221 it was held that the Court will want to be satisfied that there are sufficient merits in the defence which the defendant wishes to present before it will set the judgment aside. There is no point in setting it aside if the defendant is almost certainly going to lose anyway.

[28] In *Pravin Gold Industries Ltd v The New India Assurance Co. Ltd* – Civil Action No 250 of 2002 it was stated that it is not sufficient to show a merely 'arguable' defence that would justify leave to defend under O 14; it must both have 'a real prospect of success' and 'carry some degree of conviction'. Thus the Court must form a provisional view of the probable outcome of the action.

[29] The facts relating to the breach of the agreement to lease the lands to the Respondents were before Court in the form of documents and affidavits. The learned High Court Judge has considered the said documents in arriving at the conclusion that there had been a breach by the NLTB in relation to their agreement with the Respondents.

[30] Counsel for the Appellant submitted that there had been misrepresentations made by the Respondents regarding the proposed leases and the question of misrepresentation could be tried only on evidence at a proper trial and therefore that the learned High Court Judge erred in failing to consider that NLTB had an arguable case.

[31] The documents that the Appellant relied on as amounting to misrepresentations were the documents regarding the giving of the consent by the landowners to lease the land. A perusal of the documents that were referred to by the Appellant, specially the translation of the documents dated 11th January 2005 written to the Manager of the NLTB on behalf of the members of the Mataqali Namacuku of Nasolo and other documents show that the Landowners have given their consent regarding the grant of the lease to the Respondents. It is these documents that the Appellant relies on to show that the Respondents have misrepresented facts to the NLTB. These documents had been sent by the landowners to NLTB and it is for them to have looked into the authenticity of the same and not to state subsequently that these letters did not truly represent the correct situation, especially in view of the subsequent conduct of the NLTB where it took the further step of virtually finalising the leases, by getting the Respondents to sign the instruments of Tenancy. The learned High Court Judge had carefully considered these documents and the affidavits filed by the Appellant setting out its defence and arrived at the conclusion that the NLTB had no defence at all and refused to set aside the default judgment. On a perusal of the documents and material in the case, the conclusion of the learned High Court Judge cannot be faulted.

[32] In the above circumstances it is my view that the learned High Court Judge's decision was not wrong or erroneous and did not amount to a wrongful exercise of discretion in dismissing the application of the Appellant to set aside

the default judgment entered for the Respondents on 21st September 2006. The judgment of the High Court should be affirmed and the case sent to the Master for assessment of damages.

[33] The Appellant should pay costs of $2000 to the Respondents.

[34] **Wati JA.** 34. I also agree with the proposed orders of Suresh Chandra JA.

Chandra JA.

ORDERS OF THE COURT

[35] The Orders of the Court are:

1 Appeal dismissed.
2 Judgment dated 23rd September 2009 is affirmed.
3 Case to be called before the Master for assessment of damages.
4 Costs in the sum of $2000.

Appeal dismissed.