



IN THE SUPREME COURT OF NAURU
YAREN DISTRICT
CIVIL JURISDICTION

Civil Case No 1 of 2017

BETWEEN

Sprent Dabwido of Menang District (Landlord)

PLAINTIFF

AND

Nita Dabwido (nee Seymour) of Yaren District (Lessor)

FIRST DEFENDANT

AND

Craig Construction CCL (NZ) Ltd (Lessee)

SECOND DEFENDANT

Before: Khan J

Date of Hearing: 22 September 2017

Date of Ruling: 29 September 2017

Case may be cited as *Dabwido v Nita Dabwido and others*

CATCHWORDS:

Application to set aside default judgment- whether the default was irregular and if so defendant is entitled to *ex debito justitiae* to have it set aside- if the default was regular then court has discretion to set it aside if there is a triable issue.

Held: There is a triable and default judgment set aside.

APPEARANCES:

Counsel for the Plaintiff:

Mr V Clodumar

Counsel for the First and Second Defendants:

Miss A Lekenaua

RULING

INTRODUCTION

1. This is an application by the first defendant to set aside the default judgment entered against her on 18 May 2017 by the Registrar, Mr F Jitoko (Registrar).

CHRONOLOGY OF EVENTS

2. The plaintiff filed a writ of summons on 1 March 2017. In the statement of claim the plaintiff claimed that he was the estranged husband of the first defendant; that he had leased the property situated at Portion 262 in Buda District (Portion 262) to first defendant; who had in turn leased it to the second defendant for a term of 12 months at the rental of \$6000.00 per month; the plaintiff had agreed to the continuation of the said lease agreement on the condition that the rent of \$6,000 was to be shared equally between the first defendant and their daughter (Eimona Dabwido) in the sum of \$3,000 each. Amongst other orders the plaintiff sought a declaration that he was the sole owner of the house on Portion 262 and an order for the cancellation of the lease entered into between the first and second defendants.
3. On 2 March 2017, the plaintiff obtained an ex parte interim injunction in the following terms:
 - 1) That Craig Construction CCL (NZ) Ltd the second respondent be and hereby restrained forthwith from paying the monthly \$6,000 rental for the use of the house on Portion 262 Buda District to Nita Dabwido, the first respondent;
 - 2) That all the monthly rentals due, with respect from March 2017, are to be paid to the Registrar of the Supreme Court until further orders of the Court;
 - 3) That the applicant serve all the documents including this order on the respondent.
4. On 19 April 2017, the plaintiff filed a Notice of Motion seeking the default judgment against the first defendant for failure to file an appearance and defence. In the Notice of Motion, the plaintiff sought the following reliefs:
 - a) Declaration that the applicant is the sole legal owner of the house on Portion 262 in Buada District;
 - b) Declaration that the lease signed by the respondent with the second respondent is null and void;
 - c) Declaration that the first respondent had breached the verbal agreement with the applicant whereby the first respondent was to open a bank account for their daughter Eimoma Dabwido in which 50% of the rental income is to be deposited;
 - d) An order that the second respondent pays the rental money from the month of March 2017 onwards to the applicant forthwith;

- e) Costs to be summarily assessed at \$1,500 against the first respondent.
5. On 28 April 2017, the Registrar made orders for the service on the first defendant of the Notice of Motion to enter default judgment which had a returnable date of 28 April 2017.
6. On 2 May 2017, the Notice of Motion to enter Default Judgment was served on the first defendant by Lawanda Clodumar.
7. On 18 May 2017, the Registrar entered Default Judgment in favour of the plaintiff and made the following orders:
- a) Declaration that the applicant/plaintiff is the sole owner of the house on Portion 262 in Bauda District;
 - b) Declaration that the first respondent/first defendant is in breach of the verbal agreement with the plaintiff for the apportionment of monthly rental by depositing 50% of it in their daughter's, Eimoma Dabwido, name;
 - c) Declaration that the plaintiff as the sole owner of Portion 262 in Buda District and the house built on it is the only legal authority to enter into leasing agreement of both the land and the house built on it.
8. On 26 May 2017, the first defendant was served with a copy of the judgment of the Registrar dated 18 May 2017 and orders in respect of payment of the rental into the Trust Account.

APPLICATION FOR SETTING ASIDE DEFAULT JUDGMENT

9. On 7 July 2017, the first defendant filed a summons pursuant to Order 16 Rule 9 of the Civil Procedure Rules 1972 (CPR) to set aside the default judgment. She also filed an affidavit in support of the application to set aside the default judgment. In her affidavit, she deposed that the house built on Portion 262 was a matrimonial home; that both she and the plaintiff were co-owners; that she made financial contributions towards the construction of the house; that she and the second defendant sought and obtained consent of the land owners to build the house. In her affidavit, she also alleged that she was not served with any documents in this matter.
10. On 12 July 2017, an affidavit in response was filed by Richene Kam in which she stated that the first defendant was served by her on 1 March 2016 (I believe it should read 1 March 2017). (I would just like to add that parties including their lawyer should be careful in drafting affidavits so that it reflects the correct dates.)
11. On 22 September 2017 the plaintiff filed an affidavit in response in which he stated that he and the first defendant separated in January 2015; that after their separation the house was rented in the sum of \$5,000 per month which was divided equally between the plaintiff and the first defendant; that when the property was rented by the first defendant to the second defendant, the rent of \$6,000 per month was equally divided between the first defendant and their daughter (and this was at the plaintiff's instigation and with his consent). The plaintiff further stated that since their separation the first

defendant took cash in the sum of \$104,000; which according to him is more than the value of the house which is worth only \$90,000.

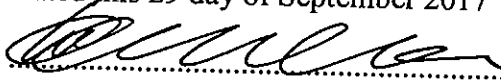
CONSIDERATION

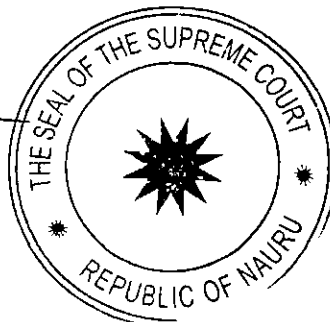
12. Miss Lekenaua did not explain as to why the first defendant did not attend court after being served. There was clearly an onus on the first defendant to explain her failure to attend court as that is one of the factors that the court takes into consideration in setting aside default judgment.

What was the defendant served with?

13. Was she served on 2 May 2017 with the Notice of Motion to enter default judgment with the returnable date of 28 April 2017? If that was the case, then the service on the first defendant would be defective and therefore this judgment against her would be irregular and she would be entitled to *ex debito justitiae* to have it set aside¹.
14. It is unfortunate that the affidavit of Lawanda Clodumar does not assist the court as the documents which were served on the first defendant were not annexed to her affidavit. If the documents were annexed, that would itself have shown as to what documents were served on her and whether she was served with the Notice of motion to enter default judgment with the returnable date of 28 April 2017 or 18 May 2017.
15. Ms Lekenaua has not addressed me on why the first defendant did not attend court and as to whether the Notice of Motion required to attend court on 18 May 2017. In the absence of any explanations by Ms Lekenaua or the first defendant I presume that it is an admission that she was properly served and if that is the case then the default judgment granted by the Registrar was regular.
16. If the judgment was regular, then I am required to consider whether I should exercise my discretion to set it aside. Having considered the material filed by the parties it is apparent that the house situated on Portion 262 was the matrimonial property owned by both the parties. That being so, there is a triable issue and the first defendant should be allowed defend this action. In the circumstances, the default judgment is set aside.
17. I order that the defendants shall file their statement of defence and counter-claim, if any, within 21 days and the plaintiff to file reply to defence and defence to counter-claim within 21 days thereof.

Dated this 29 day of September 2017


Mohammed Shafiullah Khan
Judge



¹ Anlaby v Praetorius (1888) 20 Q.B.D. 764 and the Supreme Court Practice 1988.