

DEVELOPMENT BANK OF SOLOMON ISLANDS-V-FRANK HENRY DAOGA

HIGH COURT OF SOLOMON ISLANDS
[Mwanosalua, J]

Civil Case No. 106 of 2003

Hearing: 24th February 2005

Ruling: 8th March 2005

D. Nimepo for the Plaintiff

P. Watts for the Defendant

RULING

Mwanosalua, J: By a specially Indorsed Writ of Summons filed on 14th May, 2003, the Plaintiff claimed the sums of \$672,619.19 with interest of 14.35% per annum commencing from 28th February 2003 until payment and \$685,839.30 with interest of 18% per annum commencing from 28th February 2003 until payment. The Plaintiff also claimed the Fixed Term Estates in Parcel Nos: 191-001-164 and 191-004-12 for sale in satisfaction of the loan amounts specified in the Plaintiff's statement of claim. The Defendant was personally served with the true copies of the writ of summons and statement of claim on 15th May, 2003 by Mr. Tahy. On 13th August, 2004, the Plaintiff gave notice to the Defendant of its intention to proceed. It also gave notice to the Defendant that in the next proceeding it would apply for summary judgment in default of appearance. The Defendant failed to enter appearance within 14 days. A default judgment was therefore entered against the Defendant on 26th January, 2005 for the sums with interest, the Fixed Term Estates and costs claimed by the Plaintiff in its writ of summons.

On 4th February, 2005, the Solicitor for the Defendant Mr. watts, filed a Notice of Motion to set aside the default judgment entered against the Defendant on 26th January, 2005.

The Defendant's Notice of Motion.

The Defendant's Notice of Motion filed on 4th February, 2005 sought the following orders –

1. For a declaration that the service of the Notice of Motion which was taken out by the Plaintiff on the Defendant on Tuesday 25th January 2005, one day before the hearing of the same on Wednesday 26th January 2005, is inconsistent with the provision for "two clear days" pursuant to order 55 Rule 5 of the High Court (Civil Procedure) Rules 1964.

2. If the declaration sought in (1) above is granted, for consequential orders that the order entered for the Plaintiff on the 26th January 2005 be set aside.
3. That the parties herein enter into consent orders for the judgment debt to be reschedule on the basis of such consent orders.
4. Such orders as the court may deem fit to impose.

The Defendant's case

Counsel for the Defendant argued that the service of the Plaintiff's Notice of Motion on the Defendant on 25th January 2005, one day before it was heard on 26th January 2005, violated order 55 Rule 5 of the High Court (Civil Procedure) Rules 1964 (the High Court Rules). He therefore submitted that the default judgment entered against the Defendant on 26th January, 2005, be set aside. Also, counsel argued that the judgment could still be set aside even though the Defendant may not have a defence to the action.

The Plaintiff's case

Counsel for the Plaintiff advanced three arguments against the Defendant's motion. First, that the Defendant has been evading and refusing service on a number of occasions. Second, that the Defendant has no defence to the action. And third, that the court has no duty to compel the parties in this case to enter into consent orders on the manner which the Defendant should repay his loan to the Plaintiff.

The Decision

The Plaintiff acted under Order 13, rule 3 of the High Court Rules and obtained judgment in default of appearance against the Defendant on 26th January, 2005. A judgment entered in default of appearance may be set aside under rule 8 of Order 13 above.

The Defendant sought to set aside the default judgment on the ground that the Motion upon which the court had acted on to enter the judgment against the Defendant was heard by the court only one day after it was served on the Defendant. Mr. Watts argued that it is a requirement under order 55, rule 5 that there must be at least two clear days between the service of Notice of Motion and the day when the Motion is heard by the court to obtain a valid judgment in default of appearance.

Order 55, rule 5 of the High Court Rules is in these terms –

"Unless the court give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion."

Kabui, J. considered the requirement of order 55, rule 5 in *John Uluhoru, Elsie Koitoke, Eileen Sipunaru, Annette Ilu and Casper Bana v. Isabel Timber Company Limited (Civil Case No. 197/99)*. At page 3 of his ruling His Lordship said -

"The requirement in this rule is simple. A motion must be served upon the other party two clear days in the minimum before the motion can be heard by the court. If the motion is to be served immediately upon the other party and heard, the party filing the motion must first of all apply for special leave from the court to do so. The way to do this is to apply by summons for abridgment of time under order 64 rule 5 of the High Court Rules. It could be obtained ex parte. In this case, such application for abridgment of time could have been conveniently included in the Amended Notice of Motion as one of the orders sought in order to save time. But that was not done in this Case."

In that case, the hearing date for the motion was fixed for 26th January, 2001. On that date, the Plaintiff filed an Amended Notice of Motion to the Motion in open Court. The Plaintiff forgot to obtain special leave under order 55, rule 5 of the High Court Rules. The court set aside the Amendment Notice of Motion on this ground. The court also ordered the Amended Notice of Motion to be struck out for abuse of the court process.

In this case, the Plaintiff served the Notice of Motion on the Defendant on 25th January, 2005. The Plaintiff then moved the Motion in court on 26th January 2005 and obtained default judgment against the Defendant. The court heard the Motion less than two clear days from the day when the Notice of Motion was served on the Defendant. A motion must be served on the other party two clear days in the minimum before the Motion can be heard by the court.

The Plaintiff did not obtain special leave from the court under order 55, rule 5 for abridgment of time for the court to hear the Motion in less than two clear days from the day when the Notice of Motion was served on the Defendant. The result is that the Notice of Motion was defective and the Plaintiff cannot proceed upon it to obtain default judgment against the Defendant. The default judgment was not obtained regularly and should therefore be set aside.

The Defendant sought an order to have the parties to this action enter into consent orders for the judgment debt to be rescheduled for payment by the Defendant. I do not think it would be proper for the court to compel the parties to enter into

consent orders to reschedule the debt for payment. The entry into consent orders and the rescheduling of the debt for payment by the Defendant are best left to the parties to consider and agree on as they see fit. Also, the judgment debt has been set aside in this ruling.

The principal argument advanced by the Plaintiff in opposition to the Motion by the Defendant to set aside the default judgment is that the Defendant has no defence to the Plaintiff's claim. I appreciate the basis of that argument, but it can be considered in due course if the Plaintiff should seek leave to enter judgment under order 14, rule 1 of the High Court Rules at the proper stage of the pleadings.

ORDERS OF THE COURT:

1. Set aside the default Judgment obtained on 26th January 2005.
2. Order sought in paragraph 3 of the Defendant's motion refused.
3. Defendant to file a defence within 14 days.
4. Defendant to pay Plaintiff's costs in this application.

F. Mwanosalua
Puisne Judge