

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 60 of 2009

BETWEEN : **PETER IAN KNIGHT and ROSALIA LUSIANA CHUTE** as
executors and trustees of the Estate of Adi Vulase Susi
Tarte aka Susie Vulase aka Susie Leonard

PLAINTIFFS / RESPONDENTS

AND : **NASIR KHAN**

DEFENDANT / APPLICANT

Before : Justice K. Kumar

Mr A Ram : For Plaintiff/ Respondent

Mr A Sen : For Defendant/ Applicant

Date of Hearing: 14th June, 2013.

RULING

(Application to set aside Judgement by Default)

1.0 Introduction

1.1 On 5th March, 2013, the Defendant filed Summons for an Order that Judgement by Default entered on 1st of March, 2012 against the Defendant be set aside on the grounds stated in the supporting Affidavit of Nasir Khan the Defendant, sworn on 1st of March, 2013.

1.2 Parties filed the following Affidavits in respect to the setting aside Application:-

Defendant / Applicant

Affidavit of Nasir Khan sworn on 1st March, 2013 and filed on 5th March,2013

Plaintiffs/ Respondents

Affidavit of Peter Ian Knight sworn on 18th March, 2013 and filed on 21st March, 2013.

2.0 Chronology of Events

- (i) On 16th November, 2009 Original Plaintiff filed Writ of Summons with Statement of Claim.
- (ii) On 1st March, 2012 Plaintiff entered Judgement in Default of Notice of Intention to Defence against the Defendants in following terms:

“1. do give Plaintiff possession of the land described in the Statement of Claim being Lot 4 on DP 8841 as comprised in Certificate of Title 35459 and pay the Plaintiff cost to fixed by the Court or to be taxed, and

2. do pay the Plaintiff damages/ mesne profits to be assessed”

- (iii) On 1st March, 2012 Plaintiff filed Affidavit of Archie Tikotikoca, sworn on 15th February, 2012 stating that the Writ of Summons was served on the Defendant on 4th March, 2010.
- (iv) Since then matter has been adjourned on several occasions to fix date for assessment of damages, even

though no Summons for Assessment of Damages was filed and served on the Defendant.

- (v) On 16th August, 2012 the Defendant appeared for the first time on which date defendant was given time to seek legal representation. Plaintiff's Counsel who is also one of the trustees of the Original Plaintiff's Estate then informed the Court that the Original Plaintiff had died. The Court directed the Counsel to regularise the Pleadings by substituting the Trustees.
- (vi) On 12th November, 2012, Ms Maqbool and Co. filed Notice of Appointment of Solicitors on behalf of Defendant .
- (vii) On 28th November, 2012 the Executors and Trustees filed an application to substitute themselves as Plaintiffs and Order to that effect was made on 29th November, 2012.
- (viii) On 5th March, 2013 the Defendant filed Summons to set aside Judgement by Default entered on 1st March, 2012.
- (ix) Parties filed written submissions and on even date they informed the Court that they rely on Written Submissions and Affidavits filed in respect to the application and do not wish to present any oral argument.

3.0 Application to Set – Aside Judgement in Default Notice of Intention to Defend.

- 3.1 Writ of Summons and Statement of Claim was allegedly served on the Defendant on 10th of March, 2010. As such the time of filing of Acknowledgement of Service expired on 25th April, 2010.
(Order 12, Rule 4(a))

Defendant entered Judgement in Default in Default of Notice of Intention to Defend pursuant to Order 13, Rules 2, 4 and 5 of High Court Rules.

3.2 Order 13 Rules 10 of the High Court Rules provides:-

“Without prejudice to Rule 8(3) and(4), the Court may, on such terms as it thinks just, set aside or vary any judgement in pursuance of this Order”.

3.3 It is not disputed by the Plaintiff in its submission that this Court has an unfettered discretion to set aside the Default Judgement.

3.4 Even though Defendant alleges Judgement by Default is irregular and raises it in his submissions and Affidavit, he has not stated the grounds for irregularities in the Summons.**(Order 2 Rule 2(2) of High Court Rules)**

3.5 **Order 2 Rule 1(1) of High Court Rules:**

“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgement or order therein.”

Pursuant to this rule Summons to set aside Judgement by Default is not a Nullity for failure to comply with Order 2 Rule 2(2)

3.6 At paragraph 403 of Halsbury’s Law of England Vol 37 4thedn it is stated as follows:

“In the case of an irregular judgement, the defendant is entitled to have it set aside ex debito justitiae, and the

court should not impose any terms whatever upon the defendant.”

3.7 Also at paragraph 13/9/8 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated as follows:

“Where a judgement had been obtained irregularly, the defendant was entitled ex debito justitiae to have it set aside (Anlaby v. Praetorius (1888) 20 Q.B.D. 764”.

3.8 The above principal has been adopted and applied by Courts in Fiji.

3.9 Order 3 Rule 5 of the High Court Rules provides as follows:

“Where six months or more has elapsed since the last proceedings in a cause or matter, a party intending to proceed must give not less than one months’ notice of that intention to every other party”.

3.10 Judgement by default has been held to be a proceeding in the action for the purposes of this rule. **Paviter’s Departmental Store v Lodhias Limited (1978) 24 FLR 70.**

3.11 It is undisputed that from the Court record that the Judgement by Default was entered more than two years after the Writ of Summons was filed. This is in itself an irregularity.

3.12 Even though the action does not abate on death of a party the personal representative of that party should have himself or herself substituted as a party in place of the deceased party to continue the proceedings.

3.13 If the Defendant’s assertion is correct that he was not served with the Writ of Summons in April 2010 and was only served in 2012 then the Writ of Summons was not valid as it had expired at the time of service.

3.14 **On the face of irregularities mentioned above and exercise of discretion under Order 13 Rule 10 and inherent Jurisdiction of this Court I set aside the Judgement by Default on the grounds of irregularities.**

3.15 To avoid any doubt I will also set aside the Judgement by Default even if it was regular on the grounds/ principles stated hereinafter.

3.16 At paragraph 403 of Halsbury's Law of England Volume 37, 4th Edition, it is stated as follows:

"In the case of a regular Judgement, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits ... For this purpose it is enough to show that there is an arguable case of a triable issue."

3.17 Also at paragraph 13/9/7 of the Supreme Court Practice 1999 Volume 1 page 157 it is stated as follows:

"Regular Judgment- If the judgement is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating the facts showing a defence on the merits (Farden v. Ritcher (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason", per Huddleston, B., ibid. P.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. 126 n.;and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183 at 363).

For the purpose of setting aside a default judgement, the defendant must show that he has a meritorious defence.

For the meaning of this expression see Alpine Bulk Transport Co. Inc. V. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, CA, and note 13/9/18, "Discretionary powers of the Court", below. On the application to set aside a default judgement the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reason given by him for the delay in making the application even if the explanation given by him is false (Vann v. Awford (1986) 83 L.S.Gaz. 1725; (1986) The Times, April 23, CA). The facts that he has told lie in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para. 13/9/18, below).

- 3.18 In **Ratinam v Cumaraswamy & Anor** [1964] 3 ALL ER 933 in dealing with an Application for extension of time to file record of appeal out of the prescribed time, Lord Guest at page 935 paragraph A stated as follows:

"The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, the party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

- 3.19 The principles stated in Halsbury's Law of England, 4th Edition paragraph 403, Supreme Court Practice 1999 Volume 1(paragraph 13/9/7) have been adopted and applied by Courts

in Fiji in many cases dealing with setting of Judgement by Default of default and exercise of Courts discretion pursuant to Order 13 Rule 10 and Order 19 Rule 9.

See: WearsmartTexitiles Ltd v General Machinery Hire Ltd [1998] ABU 003u. 975 (29 May 1998), Pravin Gold Industries Ltd v.The New India Assuarncce [2003] FJHC 298; HBC 250d. 2002s (4 February 2003); Eni Khan v. Ameeran Bibi and Ors (HBC 3/98s) 27 March 2003); and Nand v. Chand [2008] FJHC 310; HBC 222.2007 L (7 November 2008).

3.20 From the above it can be said the factors to be taken into account in dealing with the application are:-

- (i) Whether the Applicant has reasonably explained the delay; and
- (ii) Whether Applicant has shown by way of Affidavit evidence that he has defence on merit which has some prospect of success **(major consideration)**; and
- (iii) Whether Plaintiff will be prejudiced and suffer any irreparable harm.

4.0 Whether the Defendant has reasonably explained the delay in filing Acknowledgement of Service .

4.1 At paragraphs 4 to 8 of the Defendant's Affidavit he states as follows:

“4. I first became aware of this proceedings in June, 2012, when one person by the name of Tevita Ligaini who is the caretaker at Susie's plantation in Waimaqera, Taveuni served me some Court documents.

5. THE documents he has served me related to High Court Writ in Action No. 60 of 2009.

6. UPON service of the documents I made necessary enquiries and was advised that the action against me has expired and the Plaintiff was deceased.

7. On the second occasion on which I was made aware was when a Court Clerk from Taveuni Court House and Police Officer Farmaan visited me in Waimaqera, Taveuni and advised me that I was required to appear in High Court, Labasa.

8. That on the 19th of October, 2012 I made my first appearance before the Master of the High Court in Labasa.”

4.2 Even though the Defendant appeared on 19th August, 2012 and not 19th October, 2012 I am inclined to accept the rest of the evidence of Defendant as stated above on the grounds that:-

(i) Defendant says that he was served with Writ of Summons on 12th June, 2012 and upon enquiry he was advised that the Writ of Summons has expired and if he indeed was served on 12th June, 2012, Writ of Summons was expired having issued on 25th November, 2009.

(ii) Defendant has been coming to Court after his first appearance on 19th August, 2012 and he instructed his current Solicitor to represent him.

(iii) Original Plaintiff had in fact died on 8th June, 2010.

4.3 I am satisfied that the Defendant has reasonably explained the delay in filing the Acknowledgement of Service and Notice of Intention to Defend.

5.0 Whether Defendant has defence on merits which has some prospects of success.

5.1 It is undisputed that:-

(i) The deceased Adi Susie Vulase was at the time of her death and now her Estate is the Registered property all that land situated

at Vura Taveuni Bay Lot 4 on DP 8441 as comprised in Certificate of Title no. 35459 containing an area of 2.0048 hectares.

- (ii) By an agreement dated 17th July 2001 and signed by the Original Plaintiff and the Defendant, the Original Plaintiff agreed to sell and the Defendant agreed to purchase five acres of the above property (**“the subject land”**) for \$27,500.00 of which \$4,000.00 was paid and settlement was to take effect once title over the subject land was available.
- (iii) The Defendant took possession of the subject land in 2002 and has been cultivating the same since then. Defendant also constructed a dwelling on the subject land.

5.2 Plaintiff in the Statement of Claim alleges that:

- (i) the agreement in 5.1(ii) was cancelled in or about June 2003 at Defendant’s request and also at his request Original Plaintiff agreed to sell the subject land to Defendant’s wife but no formal agreement was signed by the said Farida Bi.
- (ii) Subsequently Defendant advised the Original Plaintiff that he was no longer interested in buying the subject land as he was going to Labasa.
- (iii) Pursuant to a verbal agreement in or about 2006 the Defendant agreed to buy the subject land for \$50,000.00.

5.3 Defendant in his Affidavit in Support denied that he was aware of the agreement between Farida Bi and the Original Plaintiff. I do not believe the Defendant that he was not aware about this alleged agreement as his then Solicitor Mr. Sheik Shah in response to the Plaintiff’s then Solicitors’ letter states as follows:-

“However we are instructed by our client that your client agreed to sell Lot 4 CT 35459 to Farida Bi for the sum of \$32,695.00.....”

5.4 Defendant also states that he only became aware of the Plaintiffs intention to sell the subject land for \$50,000 in 2008. This is incorrect as in the aforesaid letter it is clearly stated as follows:

“However, our client instructs us that why your client is trying to increase the price to \$50,000.00”

(Annexure” PIK 4” of Peter Knight’s Affidavit in Reply refers.)

5.5 Be that as it may, from the Statement of Claim the Affidavits filed and the proposed Statement of Defence and Counterclaim it is apparent that there are various issues that needs to be tried in particular:

(i) whether the agreement dated 17th July 2001 is still binding of the parties and the Defendant is entitled to an Order for specific performance:

(ii) whether the said agreement was cancelled by the subsequent agreement, or by either parties:

(iii) whether any parties are in breach of any agreement (if any).

5.6 Obviously the issues of law and fact to be tried needs to be determined at the trial of this action.

5.7 I find that Defendant has established that he has defence on merits which has some prospect of success and there are triable issues which need to be determined by oral evidence.

6.0 **Whether Plaintiff will suffer irreparable harm if Judgement by Default is set- aside.**

There is nothing in the Affidavit in Reply of Peter Ian Knight that Plaintiff will suffer an irreparable damage if Judgement by Default is set aside. In fact in Plaintiffs submissions, Plaintiff states that the Plaintiffs are still willing to sell the land to the Defendants for \$50,000.00 (paragraph 6.7 of Plaintiffs submissions).

7.0 Conclusion

I make the following Orders:-

- (i) Judgement in Default of Notice of intention to Defend entered on 1st March, 2012 against the Defendant be set aside.
- (ii) No Order as to costs of the Application to set aside Judgement by Default
- (iii) The Defendant file and serve his Statement of Defence and Counterclaim within 14 days from the date of this Ruling.

Delivered at Labasa this 14th day of June, 2013

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Justice K. Kumar

JUDGE

Solicitors

Solicitors for the Plaintiffs - M/S Cromptons T/A M/S Gibson & Co.

Solicitors for the Defendant – M/S Maqbool & Co.