IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER:	**HBC 113 OF 1992**
BETWEEN:	**BRYAN CHARLES FERRIER - WATSON, DENNIS ALLEN McELRATH AND DAVID WILLIAM ZUNDEL AS EXECUTORS AND TRUSTEES OF THE ESTATE OF NORMA ATHOL FERRIER WATSON.**
	PLAINTIFFS
AND:	**MOHAMMED JANIF, MOHAMMED HANIF AND MOHAMMED HAMID AS EXECUTORS OF THE ESTATE OF JAN MOHAMMED**
	DEFENDANTS
Appearances:	Mr. Hari Ram for the Plaintiffs. Mr. Iqbal Khan for the Defendants.
Date/ Place of Judgment:	Monday 03 March 2014 at Suva.

JUDGMENT

Catchwords:

Practice and Procedure – Setting aside default judgment- delay- explanation for delay- defence on merits.

Legislation:

The High Court Rules 1988 ("HCR"): Order 3 Rule 5.

The High Court (Amendment) Rules 2005.

The Local Government Act: s. 75.

The Cause

[1]. On 3 August 1992 judgment by default was entered against the defendants for the sum of $31,705 with interest at the rate of 11 per centum per annum from 9 April 1992 and costs.

[2]. The defendants seek to set aside the judgment by default and for an unconditional leave to defend the matter.

[3]. Judgment by default was entered for failure to deliver a defence.

[4]. The plaintiffs had claimed that the defendants owed to them land rental from 19 December 1990 in the sum of $4620 and town rates in the sum $23,811.25 with interest at 11% thereon making a total sum of $27,085.00 as at 8 April 1992.

[5]. The plaintiffs averred that they are the executors and trustees of the estate of Norma Athol Ferrier – Watson who was the registered proprietor of the land comprised in Lot 1 on DP No. 1439 on CT No. 10842. The defendants are the executors and trustees of the estate of Jan Mohammed who was the lessee in respect of the said land under a tenancy agreement of 13 April 1946. Jan Mohammed was an annual tenant.

[6]. The defendants were in use of the said land as tenants of the plaintiffs. The property was within the boundary of Nadi Town Council and the annual rent in respect of the said property was $420. The plaintiffs had claimed that the defendants were also liable to pay all town rates in respect of the said land.

The Grounds in Support

[7]. The defendants say that they had specifically instructed their counsel Mr. H. A. Shah to oppose the claim and defend the matter vigorously. After having taken full instructions, their counsel advised them that they had a defence on merit with a good prospect of success.

[8]. At all times they held the view that Mr. Shah had done all that was required to be until 1994 when they were told that there was judgment entered against them as no

defence was filed. They finally instituted a Court action to recover the fees which was already paid to Mr. Shah.

[9]. The defendants explain the reasons for the delay in filing an application for setting aside as follows:

a. *After they were informed that a default judgment was entered against them for failure to file a defence, they instructed Mr. Shah to make all appropriate applications to vacate the judgment so that the matter can be tried on merits. For reasons best known to him no application was made.*

b. *Meanwhile, Kennedy Watson Limited, the purchasers of the subject property instituted an action against them and other tenants of it to vacate the land. Since Mr. Shah was acting for them, they instructed Mr. Shah to handle the matter for vacant possession. In the case for vacant possession they appeared in High Court twice but were not informed of the hearing date, as such they did not appear in Court anymore. Even when judgment for vacant possession was pronounced, they were not informed of the same by their solicitor.*

c. *After enquiries with their solicitor's office they were informed that a judgment was entered and they had to vacate the said land on or before 31 December, 1993.*

d. *They made an appointment to see Mr. Shah. After consultation with him, he advised them to appeal the decision, for which they gave instructions and paid him the fees he demanded.*

e. *Later, they made esquires with Mr. Shah with regard to the appeal and were informed that the appeal was not lodged and it was out of time. Then Mr. Shah returned their files to them.*

f. *They took advice of another counsel, namely Mr. Adish Narayan. It was through him that they came to know that the judgment by default was not set aside.*

g. *At that point in time the plaintiff was taking all necessary action to evict them. After that period, the plaintiff really took no active action to evict them. In fact, they were negotiating with them to reach some form of settlement, but on the 8 April 1999 they were evicted by the plaintiff.*

h. *They did not take any steps to vacate the said default judgment after the files were released to them by Mr. Shah because they were dealing with the eviction action which could have resolved all the pending matters between the plaintiffs and them.*

i. *To further exacerbate the problem, one of the co-defendants namely Mohammed Hamid died on 1 November 1995.*

j. *They are virtually illiterate and relied upon their lawyers for advice. They are not familiar with the rules of the court. At all time they had taken a stand to defend this action vigorously. Contributing to the problem was their illiteracy and old age.*

[10]. The defendants say that they have a proposed defence on merits. A copy of the defence was attached to the affidavit in support.

[11]. The defendants say that the judgment entered against them is irregular. They say that there is no evidence at all which depicts that there was any liability to pay the rate. Further all rentals were paid by them into the trust account of their lawyer.

[12]. Their only means of income was from the sugarcane farm from which they have been evicted. As a result of the eviction they are left with no source of income for their survival. In total, 15 of them used to basically live on the said land and rely upon the farm income.

Grounds in Opposition

[13]. The Plaintiff says that the proposed defence of the defendants does not have any merits. The plaintiffs claim was for land rentals, Nadi Town rates and interest owed by the defendants.

[14]. There is inordinate delay on the part of the defendants in making the present application to set aside the default judgement. The eviction action in the High Court took longer than expected because of the application made in the action after the order for vacant possession was granted.

[15]. The default judgment was not irregular. The sum claimed was for a liquidated amount for which a default judgement can be entered in default of defence.

[16]. The defendants remained in occupation and possession of the land unlawfully. They continued to use and enjoy the land unlawfully, while, at the same time, failing to pay rent, rates and interest. The rates and interest were payable to Nadi Town Council and because of the defendants' failure to pay the same, the plaintiffs and their successors became liable for their payment.

[17]. The defendants claim that they received advice from other solicitors. In that case they had an opportunity to make the present application within a reasonable time but failed to do so.

The Submissions

[18]. The defendants were given 14 days to file written submissions. They failed to do so. The plaintiffs did file their written submissions as ordered.

[19]. By the written submissions, the plaintiffs initially raised a preliminary issue pursuant to Order 3 Rule 5 of the HCR. The plaintiff states that the defendants' application for setting aside default judgement was filed in 1999. The default judgment was entered against the defendants in 1992. The defendants have filed the application for setting aside without filing a notice of intention to proceed as required under Order 3 Rule 5. It was submitted that the word *"must"* in Order 3 Rule 5 makes it a mandatory requirement to file the notice of intention to proceed. The present application for setting aside ought to be dismissed for failure to file notice of intention to proceed.

[20]. The plaintiffs' submitted that there is inordinate delay on the part of the defendants' in bringing the application for setting aside. The application is made after 7 years. Whilst it is accepted that the fundamental duty of the Court is to do justice between the parties and this would mean allowing the parties a proper opportunity to put their case upon its merits, to avoid prejudice to the other party limits must be imposed on that opportunity. After a lapse of seven years the plaintiff has substantially changed its position in the matter. The plaintiffs say that they have sold the land in question to Kennedy Watson Limited. Since such a long period of time has lapsed, the plaintiffs would have a real difficulty in proving their case now as it would be very difficult to produce evidence as generally records are only

retained for six years. Since the plaintiffs had obtained the judgment by default there was no need to retain any records of documentary evidence beyond six years. The plaintiffs would be unfairly prejudiced if the defendants are allowed an opportunity to "re-open" the case.

[21]. The explanation for the delay, contended the plaintiffs, is unreasonable and incredible. The defendants say that they instituted an action against Mr. Shah to recover for the fees that they paid to Mr. Shah. The news paper publication itself states that the matter in which the defendants took legal action against Mr. Shah was in respect of a matter at the Agricultural Tribunal and not the present action.

[22]. The defendants have alleged that they are illiterate and relied on the advice of Mr. Shah but since the defendants came to know of the default judgment in 1994 they have consulted another counsel namely Mr. Adish Narayan. They should have thus made an application immediately through another counsel but they chose to wait until 1999. The explanation is highly unacceptable.

[23]. The plaintiffs argued that the defendants have alleged that the judgement is irregular but they have failed to state how the judgment is irregular. The plaintiff says that there is nothing irregular about the judgement. The sum claimed was a liquidated amount for which a default judgment can be entered. Since the judgment was regular, there has to be defence on merits by the defendants. In paragraph 3 of the proposed statement of defence the defendants have denied that the tenancy had expired. The defendants have alleged that the plaintiffs represented and encouraged the defendants to continue with the occupation of the land and that the plaintiffs advised the defendants that their lease documents were being prepared. The defendants also say in their defence that they paid rental to their solicitors with the knowledge of the plaintiffs.

[24]. The Agricultural Tribunal in Agricultural Tribunal Reference No. WD 22/91 between the defendants and the plaintiffs' successor and the Lautoka High Court in Civil Action No. 125 of 1991 between the defendants and the plaintiffs' successor conclusively determined the issue of whether the defendants were tenants of the plaintiff. The defendant must be debarred from re-litigating the same issue.

[25]. The plaintiffs argued that the defendants have alleged the plaintiffs for making representations and encouraging them to stay on the land but have failed to state whether the same was made verbally or in writing. Section 59 (d) of the Indemnity, Bailment and Guarantee Act disallows an action to be brought upon any contract for any sale of land unless the agreement is in writing and signed by the parties charged therewith.

[26]. The plaintiffs contended that the defendants have no real prospect of success and the defence lacks credibility.

The Law and Analysis

[27]. I will first deal with the preliminary issue. The judgement by default was entered in 1992. The application for setting aside was made in 1999. In that case does Order 3 Rule 5 apply? Order 3 Rule 5 reads:

"Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed."

[28]. The rule has since been amended to substitute *"one year"* with *"6 months"*. The amendment was by High Court (Amendment) Rules 2005. The amendment does not apply to this case as the application for setting aside was made well before the amendment.

[29]. In my view Order 3 Rule 5 does not apply to this case. In my analysis, I find that the order applies when the proceedings have not been finalised. By a default judgment, the matter was finalised. The application by the defendant is in itself seeking permission to continue with the proceedings. The order applies to parties who could as of right continue with the proceedings without any leave to proceed. In this case, Courts leave is needed to defend the action.

[30]. The defendants' first contention is that the judgment is irregular however they do not say how the judgment is irregular. A party who alleges that a judgment is irregular must show to the Court how it is irregular. By raising a bare ground

without supporting the same is unhelpful to their case. I thus do not make a finding that the judgment that was obtained was irregular.

[31]. The next is the delay period. The judgment was entered in 1992 and the application for setting aside was made in 1999 after a period of 7 years. The defendants say that they learnt of the default judgment in 1994. After their knowledge of the default judgment, they waited for a period of 5 years. Even if I were to work from 1994, I find that taking 5 years to apply for a setting aside is inordinate delay.

[32]. I will examine the reasons put forward by the defendants for the delay. The defendants are blaming their solicitor Mr. H. A Shah for not protecting their interest. Mr. Shah allegedly failed to file a defence, failed to make an application for setting aside, failed to properly defend the action for vacant possession and failed to file an appeal. The judgment by default was entered in 1992 and the order for vacant possession was made in 1993. If the defendants realised that their solicitor was not protecting their interest they should have immediately either changed the solicitors or insisted that an application for setting aside be made. They failed to press for their rights. It was their duty to monitor the progress of the case given the history of their solicitor's inaction.

[33]. The defendants say that there were negotiations going on regarding them occupying the land which could have resolved the entire issue between the parties. The order for vacant possession was obtained by the new purchasers of the property. Any negotiation on the eviction proceeding could not affect the judgment obtained by the plaintiffs. The defendants had only been wasting their time with the hope of settling the case. Even if there were negotiations of any form, the application for setting aside should have been made to vindicate their rights as there was no certainty that the negotiations would turn out in favour of the defendants. Any prudent person would have filed the application for setting aside. That would not have stopped them from making any form of negotiation.

[34]. The defendants also assert that one of the defendants died in 1995. They were also not aware of the rules as they are old and illiterate. I do not see how the death of one of the defendants, their illiteracy and the old age handicapped the defendants. The least they knew was that there was judgment against them and that they have to set

it aside otherwise they have to pay monies to the plaintiff which by their standard was substantial. In fact that problem of old age and illiteracy does not solve by waiting and allowing the time to go by. In my finding 5 years is too long a time to wait to solve a problem and the reasons advanced by the defendants are unreasonable and unacceptable.

[35]. In their defence, the defendants say that:

a. *The plaintiffs represented and encouraged the defendants to continue with the occupation of the said land after the demise of their father.*

Even if this were so, that defence does not exonerate the defendants from liability to pay rent and rates.

b. *That the late Jan Mohammed had no knowledge or any constructive knowledge of and/or was impliedly or expressly informed by the landlord of the fact that the said land was within the Nadi Town Council boundary or that there was any agreement to pay the rates.*

The defendants should have at least annexed a copy of the tenancy agreement dated 13 April 1946. The agreement would have indicated the terms of the tenancy agreement, whether there was any agreement to pay the town rates or not. The plaintiffs say that they do not have any more documents left as the application for setting aside was made after 7 years and they do not keep records after 6 years. The defendants knew that they had to make an application for setting aside and according to their evidence they learnt of this in 1994. They therefore would not have destroyed any document pertaining to the land.

c. *That rent was paid to their solicitors trust account as land rental was unilaterally increased by the landlord. Their solicitors advised them to pay the land rental in the trust account. The landlord was fully aware that the monies were paid in the trust account but they refused to accept the same.*

There is admission that the defendants did not pay the rent to the plaintiffs but in their solicitors' trust account. The defendants say that the plaintiffs refused to accept the rental. There is no reason why the plaintiffs would do so

when they had increased the rent and wanted the money. What remains is that the plaintiffs were not paid the rental. It is not denied that rents are not owing.

d. *That the defendants had promised the defendants a proper registerable lease if they were to pay increased rent. The defendants say that they were told that their lease was in process.*

I cannot fathom why the defendants are raising this as the defence. The Agricultural Tribunal had already made a finding in the case of WD 22/91 that the defendants were annual tenants on the property. Upon expiry of the annual tenancy, the defendants asked for a renewal and the plaintiffs had refused. If the plaintiffs had refused the renewal of annual tenancy, there is no question of promising a registerable lease. Even if there was any promise, that does not abdicate the defendants from paying for the property, the rental and other dues as agreed. It is difficult for me to appreciate that for an increase of $80.00 rental per year, the defendants expect a lease of the property. A registerable lease could be expected on the purchase of a property and not when there is tenancy agreement and a mere increase in the rent.

e. *That the defendants have a defence of s. 75 of the Local Government Act.*

The defendants have not argued what in s. 75 speaks in their favour. As such I cannot make any determination on this proposed defence.

[36]. In the final analysis I find that the delay in bringing the application for setting aside the judgment by default is inordinate and the defendants have failed to satisfy me that there is a reasonable explanation for the delay. I also do not find that the defences raised are meritorious. As such I do not find any basis to disturb the default judgment.

Final Orders

[37]. The application for setting aside is refused and dismissed.

[38]. I order costs to the plaintiffs in the sum of $1000.00 which sum is summarily assessed.

<u>Anjala Wati</u>

Judge

03.03.2014

<u>To:</u>

1. *Mr. Hari Ram for the plaintiffs.*
2. *Mr. Iqbal Khan for the defendants.*
3. *File: HBC 113 of 1992.*