

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 20 of 2012

BETWEEN : **TRUSTEES OF NABUA MATUA TAXIS** a duly constituted body incorporated with the registration of Companies on 31st March 2004 and issued with a Certificate of Registration pursuant to Section 12 of the Registration of Business Act.

PLAINTIFF

AND : **LOMACA BALEILEVUKA** of Ucunivanua, Verata, Tailevu, Taxi Operator.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Niubalavu P.** for the Plaintiff
Mr. Valenitabua S. for the Defendant

Date of Hearing : **26th November, 2013**

Date of Ruling : **20th March, 2014**

RULING

A. INTRODUCTION

1. This Summons was filed by the Defendant pursuant to Order 2 rule 2 and Order 13 rule 10 of the High Court Rules (H.C.R.) seeking following orders inter alia, that

- i. The Judgment entered in default of defence dated 12th of November 2013 be set aside for ;
 - a. Irregularity,
 - b. Or alternatively, at the discretion of the court if the judgment is ruled to be irregular,

- ii. There be a stay of execution of judgment until determination of this application or further order of this court,
 - iii. The cost of and occasioned by this application to be assessed summarily,
2. Directions were given to the parties upon their appearance before the court to file affidavit in opposition and affidavit in reply to the affidavit in opposition respectively, which they filed accordingly. The Learned counsel for the Plaintiff undertook not to execute the Default Judgment until the determination of this Summons. Subsequently this Summons were set down for hearing on the 26th of November 2013 where the counsel for the both parties made their oral arguments and submissions respectively. At the conclusion of the hearing, both counsel were given time to file their respective written submissions however, only the Plaintiff filed accordingly. Having considered Justice Balapatabendi's interlocutory Judgment dated 23rd of September 2013, both parties agreed to hold the pronouncement of this ruling until they conclude the Special General Meeting on or before 23rd of December 2013 as per the orders given in said Interlocutory Judgment.
3. Having considered the Summons, respective affidavits and oral and written submissions, I now proceed to pronounce my ruling as follows.

B. BACKGROUND.

4. The Plaintiff instituted this action by filing a writ of summons together with an ex – parte notice of motion seeking following Orders inter alia that;
 - i. *Declaration that the Defendant has acted outside the scope of its powers as a trustee and his action to forcefully enter the taxi base with the assistance of his crew is unlawful and illegal,*
 - ii. *An order for the immediate release of the following items inclusive of Company Computers, tax invoices, receipts, credit legers and journals, company cheques,*

radio telephone, motherboard from the defendant to the Plaintiff company forthwith,

- iii. An order for the immediate removal of the Defendant from administrating of the company and from within the Company premises,*
 - iv. An order restraining the Defendant from interfering with the Plaintiff company and its quite enjoyment,*
 - v. An order against the Fiji Police Force to assist in the due execution of the order and for the maintenance of peace and order,*
 - vi. Cost on a full scale indemnity basis,*
 - vii. Any further orders that this Honourable Court deem just and expedient in the circumstances,*
5. The Interim reliefs sought in the Ex parte Notice of Motions dated 24th of January 2013 and 14th of February 2013 by the Plaintiff were dealt by Justice Balapatabendi and his lordship delivered his interlocutory Judgment on the 23rd of September 2013. Justice Balapatabendi extended the tenure of the current trustees whose terms had been expired at the time of the institution of this action, until the election of new trustees. Furthermore, his lordship ordered a special general meeting to be conducted and completed within three months from 23rd of September 2013.
6. The Defendant did not file any notice of acknowledgement of service; neither did a statement of defence. However, he filed his objection to the two ex-parte notice of motions filed by the Plaintiff. The Plaintiff upon being confirmed after a search with the Registry entered a default judgment against the Defendant on the 12th of November 2013. This Summons was filed to set aside the said default judgment.

Defendant's Case,

7. The Defendant deposed in his affidavit that the default judgment entered against him on 12th of November 2013 is irregular since all Matua members and the Defendant were trying to seek clarification from court on the conflicting interlocutory judgment granted by Justice Balapatabendi. He further deposed that this dispute involves serious triable

issues between the Plaintiff as the purported trustees and the Defendant as the sole managing partner to the firm and in particular, whether the Plaintiff has the *locus standi* to commence this proceedings. The Defendant mainly tried to challenge the interlocutory judgment of Justice Balapatabendi which I do not wish to consider as this court has no jurisdiction to consider such.

Plaintiff's Case,

8. The Plaintiff in his affidavit in opposition urged that the facts deposed in the Defendant's affidavit in support have already considered and determined by Justice Balapatabedi during the hearing of the ex parte summons and could not be considered again before this court. The Plaintiff further contended that the default judgment was entered against the Defendant in accordance with the rules of the High Court hence it's a regular judgment.

C. ANALYSIS

9. The Defendant's main contention is founded on the argument that the Plaintiff had no *locus standi* to institute this action as the term of the trustees had expired in 2006, wherefore, this default judgment is irregular and need to be set aside pursuant to Order 2 rule 2. I do not wish to consider the issue of *locus standi* of the Plaintiff as Justice Balapatabendi has already dealt with that issue in his judgment and this court has no jurisdiction to discuss or review the said judgment. Apart from the issue of *locus standi*, the Defendant has not raised any other issue to substantiate his contention that this default judgment was entered irregularly.
10. However, having perused the default judgment entered on the 12th of November 2013 and the orders sought by the Plaintiff in his statement of claim, I find it is prudent for the interest of justice to venture beyond from the issues contended by the parties during the hearing of this Summons and review the procedures stipulated under order 13 and 19 of the High Court rules in respect of the default judgment. I am of the opinion that I am not straying out of my jurisdiction by venturing out from the issues contended by the parties

and review the procedure and consider that whether the default judgment dated 12th of November 2013 was entered in accordance with the relevant applicable rules.

11. If the Defendant fails to give his notice of intention to defend in pursuant of order 12, or fails to serve his defence within the prescribed time in pursuant of order 18, the Plaintiff should be allowed under orders 13 and 19 to obtain a default judgment depending on the nature of the orders sought in the writ. A party, who is seeking to obtain a default judgment pursuant to orders 13 or 19, is required to adopt different procedures depending on the nature of the orders sought in writ. Orders 13 and 19 have laid down different procedures to be adopted in respect of claim for liquidated demand, claim for unliquidated damages, claim for detention of goods, claim for possession of land, mixed claims and other claims.
12. Turning to this instance case before me, the writ was filed without an endorsed claim. A separate statement of claim was filed together with the writ, wherefore, in my opinion the Plaintiff is not entitled to employ order 13 as it's only allowed to do such in the instances where the writ is endorsed with a claim against the Defendant. Under these circumstances the Plaintiff should only be permitted to obtain a default judgment if the Defendant fails to serve his defence within the prescribed time upon the serviced of the statement of claim.
13. Having considered the applicable procedure to enter a default judgment, I now turn to consider the nature of the orders sought in the writ.
14. Despite the second order sought in the writ, which is an order to immediate release of some items mentioned therein, all other orders sought by the Plaintiff in his writ of summons undoubtedly fall within the scope of the "other claims" defined under Order 19 r 7. In view of the nature of the second order sought in the writ, I find it should fall within the meaning of Order 19 r 4. None of the orders sought in the writ comes within the meaning of liquidated demand, unliquidated damages or possession of land.

15. Order 19 rules 7 has stipulated the procedure to be adopted when the defendant failed to serve his defence within the prescribed time in respect of the other claims defined under the rule. Oder 19 r 17 states that;

“(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

(2) Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may-

(a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or

(b) set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.

(3) An application under paragraph (1) must be by summons or motion”.

16. In view of the Oder 19 r 7, the Plaintiff should apply to the court by summons or motion for a judgment on default of defence and on the hearing of the application the court shall give such judgment if the Plaintiff is entitled to such on his statement of claim. The procedure which has stipulated under rule 7 is required the Plaintiff to apply to the court by summons or motion unlike in other instances stipulated under order 19.

17. Order 19 rule 4 deals with the claim for detention of good, where it states that;

“Where the plaintiff’s claim against a defendant relates to the, detention of goods only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for the service of the defence-

(a) at his option enter either-

(i) interlocutory judgment against that defendant for delivery of the goods or their value to be assessed and costs, or

(ii) interlocutory judgment for the value of the goods to be assessed and costs, or

(b) apply by summons for judgment against that defendant for delivery of the goods without giving him the alternative of paying their assessed value, and in any case proceed with the action against the other defendants, if any.

A summons under paragraph (1)(b) must be supported by affidavit and, notwithstanding Order 65, rule 9, the summons and a copy of the affidavit must be served on the defendant against whom judgment is sought”.

18. According to Order 19 r 4, the Plaintiff has been given an option either to enter an interlocutory judgment or to apply to the court by summons for judgment against the defendant.

19. The default judgment entered on 12th of November 2013 is only covered the 2nd to 6th orders sought in the writ. As I mentioned above, these orders sought in the writ fall within the meaning of Order 19 r 4 and 7 respectively, wherefore, the Plaintiff is required to follow the procedure stipulated under those relevant rules, if not the judgment entered against the Defendant on default of defence is undoubtedly an irregular judgment. In this instance case, the Plaintiff has not applied to the court by a summons or a motion for a judgment against the Defendant and no hearing was conducted upon such application pursuant to Order 19 r 7. In view of the reasons setout above, I find that this default judgment has entered without adopting the correct procedure stipulated under Order 19 r7, hence this default judgment entered against the Defendant is irregular.

20. Having satisfied that the Judgment entered on 12th of November 2013 is irregular, I now turn to the judicial dictum outlined of Fry L.J in **Anlaby and others v Peatorius** (1888) Q.B.D. 765, where he held that “*there is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside*”.
21. In view of my conclusion that the default judgment is irregular and the observation of Fry L.J in **Anlaby and others v Peatorius** (supra), I hold that the default judgment entered on 12th of November 2013 is irregular and should be set aside unconditionally. I accordingly make following orders that;
- i. The Default Judgment entered on 12th of November 2013 is set aside unconditionally,
 - ii. The Defendant is granted a cost of \$1000 assessed summarily,

Dated at Suva this 20th day of March, 2014.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva