

IN THE HIGH COURT OF THE REPUBLIC OF FIJI

WESTERN DIVISION

AT LAUTOKA

Civil Action No. 168 of 2013

BETWEEN : **SEMI NALAU LAU (MINOR) by VIASI WADROI HIS GUARDIAN**
AND NEXT FRIEND of Kerebula Settlement, Nadi Back Road,
Nadi

PLAINTIFF

AND : **NAZEEM ALI** of Nadi, Driver.

1ST DEFENDANT

AND : **ZARINA KHATUN** of Kerebula, Nadi (Occupation not known to the Plaintiff)

2ND DEFENDANT

Before: Acting Master M H Mohamed Ajmeer

Mr Maopa E for the Plaintiff

Mr Pillai for the Defendant

Date of Hearing: 24th March 2014

Date of Ruling: 24th March 2014

R U L I N G
[on setting aside]

[1] Before me is an application filed by the plaintiff on 14 November 2013 seeking to set aside the interlocutory judgment entered by the defendants in default of defence to counterclaim. This application is supported by an affidavit of Viasi Wadroi (guardian and next friend of the first named plaintiff who is a minor). The application is filed pursuant to **O. 19, r.9 of the High Court Rules of Fiji, 1988** (HCR).

[2] On 12 September 2013 the plaintiff issued writ of summons against the defendants praying, inter alia, for special damages and general damage. The claim of the plaintiff arising from an accident allegedly caused by the first defendant wherein the plaintiff (minor) sustained injury.

[3] The defendants filed acknowledgement of service on 25 September 2013 and statement of defence and counterclaim on 9 October 2013. The plaintiff did not file a reply to defence and defence to counterclaim within the prescribed time permitted for that purpose by the HCR. As a result, the defendants entered interlocutory judgment against the plaintiff on 30 October 2013, which was sealed on 1 November 2013.

[4] On 27 January 2014 the matter was set down for hearing on 24 March 2014. When the matter was set down for hearing the defendants sought 21 days to file their affidavit in response, if need be. However, the defendants did not file any affidavit in response until to date. At hearing, counsel for the defendants indicated that the defendants are not filing any affidavit in response, but they would seek cost in the event the Court set aside the interlocutory judgment entered against the plaintiff in default of defence to counterclaim.

[5] The Plaintiff has filed this application to set aside pursuant to **O.19, r. 9** of the HCR. According to the rule, the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order (O.19 deals with default of pleadings). In pursuance of **O.19, r. 8** of the HCR, a defendant who counterclaims against a plaintiff is entitled to enter interlocutory judgment in default of defence to counterclaim against the plaintiff.

[8] When considering an application to set aside a default judgment, the Court must pay attention to the three issues namely, i. Whether there was delay in making the application. ii. Whether prejudice will be caused to any party if the default judgment is set aside. iii. Whether the defendant (in this case the plaintiff) has a good defence which would have real prospect of success.

[9] Issues i and ii above were not raised before me at the hearing. The interlocutory judgment against the plaintiff on counterclaim in default defence to counterclaim was entered on 30 October 2013 and sealed on 1 November 2013. It is not clear when the interlocutory judgment was served on the plaintiff. Nonetheless, the plaintiff filed the application to set aside on 14 November 2013, i.e. within two weeks of entering the interlocutory judgment. I can say the plaintiff has filed the application to set aside promptly. The defendants did not complain any specific prejudice that would be caused to them if the default judgment is set aside. In the absence of complaint of any specific prejudice, I can hold that the defendants will not be prejudiced if the interlocutory judgment is set aside by the Court.

[10] The only issue that I must address is whether the plaintiff has meritorious defence to counterclaim framed by the defendants, which has real prospect of success. The plaintiff annexed a draft reply to defence and defence to counterclaim. The plaintiff's defence to counterclaim is that as a consequence of the accident and injury caused by the first defendant's manner of driving, bystanders demanded the first defendant to drive the minor (plaintiff) to the hospital as matter of emergency. This defence raised by the plaintiff was not disputed in these proceedings. No affidavit in response was filed by the defendants to challenge the defence to counterclaim. I therefore find that the proposed defence to counterclaim as in the draft reply to defence and defence to counterclaim as a good defence to counterclaim which has real prospect of success.

[11] For all these reasons, I proceed to set aside the interlocutory judgment entered on 30 October 2013. The plaintiff is now unconditionally allowed to file and serve a reply to defence and defence to counterclaim within 14 days from today. The plaintiff agreed to pay costs of \$350.00 to the defendants for their appearance in these proceedings. I therefore order the plaintiff to pay the costs of \$350.00 to the defendants within 14 days from today.

Final Orders

- i) The interlocutory judgment entered against the Plaintiff on 30 October 2013 and sealed on 1 November is set aside;**

- ii) **The plaintiff is now unconditionally allowed to file and serve a reply to defence and defence to counterclaim within 14 days from today;**
- iii) **The plaintiff shall pay costs of \$350.00 to the defendants within 14 days from today;**
- iv) **Orders accordingly.**

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M H Mohamed Ajmeer
Acting Master of the High Court

At Lautoka