

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 162 of 2013

BETWEEN : **FRANK THOMPSON** and **IVAMERE MARAMA THOMPSON** both of
Vakabalea Farming Settlement, Navua.

PLAINTIFFS

AND : **TOMASI VALAMALUA**

FIRST DEFENDANT

AND : **JONE SARAUTU**

SECOND DEFENDANT

AND : **REGISTRAR OF TITLES**

THIRD DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : Mr. Rayawa for the Plaintiff
Mr. O'Driscoll for the 1st & 2nd Defendants
Ms Sharma for the 3rd Defendant

Date of Hearing : **20th February, 2014**

Date of Ruling : **11th April, 2014**

RULING

A. INTRODUCTION

1. These two Summons were filed by the Defendants dated 18th of September 2013 and 24th of October 2013 seeking an order that the Default Judgment entered against the three Defendants on 30th of August 2013 be set aside.
2. This Inter- Parte Summons filed by the third Defendant is made pursuant to Order 3 r 4(1) and Order 77 of the High Court rules. Meanwhile the 1st & 2nd Defendants filed their Summons to set aside the default judgment pursuant to Order 19 r 9 and Order 18 r 1 of the High Court Rules.
3. The Third Defendant filed an affidavit of Sangeeta Chand in support of their summons, however, the 1st & 2nd Defendants did not file any affidavit in support. Subsequent to the filing of these two summons, the Plaintiff filed his affidavit in opposition upon being served with the same. These summons were then set down for hearing on the 20th of February 2014. All the parties agreed to conduct the hearing by way of written submissions, wherefore; I invited them to file their respective written submissions. However, only the Defendants filed their respective written submissions and Plaintiff did not. Having considered the respective summons, affidavits and written submissions, I now proceed with my ruling as follows.

Background

4. The Plaintiff instituted this action by way of a writ of summons on the 6th of June 2013 seeking following orders inter alia ;
 - i. *Specific Performance of an agreement for the sale of land described as CT 26111; Name of Land Lot 2, DP 8463, pt. of 26111, province of Serua in Viti Levu, area 8096 m2, prtrial transfer. This agreement has been partially performed by all the Defendants. The Plaintiff seeks orders compelling all the Defendants to complete the performance of the said agreement;*

- ii. *Further or alternatively, damages for breach of contract;*
 - iii. *Such further or other relief as this honorable court seems fair and just;*
 - iv. *Cost of and incidental to this action.*
5. Upon being served with the Writ of Summons, the Defendants served their notice of acknowledgment of service on 11th and 13th of June 2013 respectively. The Plaintiff entered a judgment in default of defence against all three Defendants on the 30th of August 2013.

1st & 2nd Defendant's Case.

6. The learned counsel for the 1st & 2nd Defendants submitted that the Plaintiff filed this writ of summons with indorsement of claim on 6th of June 2013. The Plaintiff then entered a default judgment after the Defendants served their notice of acknowledgment of service instead of serving their statement of claim pursuant to Order 18 r 1, wherefore the default judgment entered on 30th of August 2013 is irregular and should be set aside unconditionally.

3rd Defendant's Case.

7. The learned counsel for the third Defendant submitted that no default judgment could be entered against the State except with the leave of the court pursuant to Order 77 r 6 (1) of the High Court rules. Since the absence of such leave obtained from the court, the default judgment entered against the third Defendant is irregular and should be set aside unconditionally.

Analysis

8. I first turn to the Summons filed by the 1st & 2nd Defendants which is founded on Order 19 r 9 and Order 18 r 1.

9. The main contention of the 1st & 2nd Defendants is that the Plaintiff has entered this default judgment instead of serving his statement of claim pursuant to Order 18 r 1. The Plaintiffs were required to file and serve a statement of claim pursuant to Order 18 r 1 since they have filed this Writ of Summons with the indorsement of claim.
10. Order 6 r 1 states that every writ must be in Form 1 in Appendix. Order 6 rule 2 (1) (a) states that the writ must be indorsed with a statement of claim or if the statement of claim is not indorsed on the writ, with concise statement of the nature of the claim made or the relief or remedy sought in the claim.
11. In this instance case, the Writ is not indorsed with a statement of claim. The writ is only contained with an indorsement of claim. The endorsement of claim only constitutes with orders sought by the Plaintiff. Under such circumstances, the Plaintiff is mandatorily required under Order 18 r 1 to serve a statement of claim on the Defendant before the expiration of 14 days after the Defendant gives notice of intention to defend. Instead of serving his statement of claim, the Plaintiffs have entered this judgment in default of defence.
12. Having perused the default judgment entered on the 30th of August 2013 and the orders sought by the Plaintiff in his indorsement of claim, I now turn to review the procedures stipulated under order 19 of the High Court rules in respect of the default judgment.
13. If the Defendant fails to serve his defence within the prescribed time pursuant to order 18, the Plaintiff should be allowed under order 19 to obtain a default judgment. The procedure of obtaining such judgment in default of defence is depending on the nature of the orders sought in the writ. Order 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.

14. The orders sought in the indorsement of claim are specific performance of an agreement and alternatively damages for breach of contract. In view of the nature of the orders sought, they undoubtedly fall with the meaning of "other claims" defined under Order 19 r 7.

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 by 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. However, in this instance case, there had been no such summons or motion filed by the Plaintiff for a judgment on default of defence. In view of the reasons set out above, I find the default judgment entered on 30th of August 2013 against the 1st and 2nd Defendants is irregular.

17. In respect of the third Defendant's contention, Order 77 r 6 (1) states that: "*Except with the leave of the court, no judgment in default of notice of intention to defend or of pleading shall be entered against the state in civil proceedings against the state or in third party proceedings against the state*".
18. Justice Fatiaki observed in **Litiwai Setevano v The Attorney General (1995) HBC 119 of 1995, (21 June 1995)** that "*I say "purportedly" advisedly because it is clear beyond question that the Plaintiff's claim is a civil proceedings against the crown..... Give the above, the relevant procedural rule is not Order 19 r 7, but Order 77 r 6 which expressly requires the "leave of the court" to any entry of default judgment against the state*".
19. The Plaintiff has not made any application by summons to obtain leave of the court pursuant to Order 77 r 6 (1) and (3). Under such circumstances, the default judgment entered against the third Defendant is irregular.
20. Having satisfied that the Judgment entered on 30 of August 2013 against the three Defendants is irregular, I now turn to the judicial dictum outlined by 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 30th of August 2013 is irregular and should be set aside unconditionally. I accordingly make following orders that;

- i. The Default Judgment entered on 30th of August 2013 against the three Defendants is set aside unconditionally;
- ii. The Three Defendants are granted cost of \$500 each, assessed summarily.

Dated at **Suva** this 11th day of April, 2014.



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