

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 201 OF 2013

BETWEEN : **ALENA VODIVODI** of Tavua Primary School Compound,
School Teacher.

1st Plaintiff

: **SAVENACA VODIVODI** of Tavua Primary School
Compound, Police Officer

2nd Plaintiff

AND : **SUSANA VAKALOLOMA** aka **SUSANA SEVUTI**
VAKALOLOMA aka SUSANA BOUBOU VAKALOLOMA of
William Cross Primary School, School Teacher.

Defendant

Counsel:

Mr J Rosa for plaintiff

Mr Vakaloloma for defendant

Date of Hearing : 08 September 2014

Date of Ruling : 18 November 2014

R U L I N G

[On setting aside]

INTRODUCTION

[1] This is a notice of motion to set aside interlocutory judgment entered against the defendant (the application) filed on 24 April 2014.

[2] The application seeks the following orders:

- 1.0 *THAT the Interlocutory Judgment entered herein against the Defendant on Wednesday 3rd January 2014 be wholly and unconditionally set aside.*
- 2.0 *THAT the Summons for Assessment of Damages filed on 12th March 2014 be struck out and dismissed.*
- 3.0 *THAT the Defendants be granted leave to file its Statement of Defence to the Statement of Claim filed on the 5th November 2013.*
- 4.0 *THAT Defendant be granted leave to file Statement of Defence within 21 days.*
- 5.0 *THAT the cost be in the cause of application*

[3] The application is supported by an affidavit of SUSANA VAKALOLOMA, the defendant.

[4] Plaintiff through her solicitor filed affidavit in opposition. The plaintiff did not file her own affidavit. Instead, she has filed an affidavit of William John Rosa, her solicitor and he also appeared for her at the hearing on the application to set aside, sworn and filed on 19 May 2014. The defendant filed reply to affidavit in opposition.

[5] This application is made pursuant to Order 13 Rule 10 and Order 19 Rule 9 of the High Court Rules 1988 (HCR) and pursuant to the inherent jurisdictions of the Court.

[6] At hearing, both parties made oral submissions and they also tendered their respective written submissions.

BACKGROUND

[7] On 5 November 2013 the plaintiff filed writ of summons seeking for damage for defamation. The writ was served on the defendant on 12 November 2013. The defendant filed acknowledgement of writ on 20 November 2013. However, the defendant failed to file and serve her statement of defence within the prescribed time. As a result, on 3 January 2014 the plaintiff entered interlocutory judgment against the defendant with damage to be assessed with costs and interest.

Thereafter, on 24 April 2014 the defendant filed the present application to set aside the interlocutory judgment.

ISSUE FOR DETERMINATION

[8] The issue for determination before the Court is whether or not to set aside the interlocutory judgment entered on 3 January 2014 against the defendant.

THE LAW

[9] O.19 r.9, HCR states that:

“The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order”.

PRINCIPLES ON SETTING ASIDE

[10] In **Suva City Council v MeliTabu** ABU 55 of 2003S, the Court of Appeal, referring to **Pankaj Bamola & Another v Moran Ali** FCA 59/90 stated that:

“However, in order for the court to properly exercise the discretion whether or not to set aside a regularly obtained default judgment, it has been consistently held that certain basic preconditions must be fulfilled by the party making the application.

These are:-

- (i) Reasons why judgment was allowed to be entered by default.*
- (ii) Application must be made promptly and without delay*
- (iii) An affidavit deposing to facts that show that the defendant has a defence on the merits”*
... we subscribe to the White Book’s preferred view that “unless potentially credible affidavit evidence demonstrates a real likelihood

that a defendant will succeed on fact no “real prospect of success” is shown and the relief should be refused”.

DETERMINATION

- [11] The defendant applies to have the default judgment entered against her in default of defence. Though the defendant filed her acknowledgement of service, she failed to file statement of defence within the time permitted for that purpose by the High Court Rules. In fact, she should have filed her statement of defence, since the writ was served within the jurisdiction, within 14 days (including the day of service) after the last day of the time limited for acknowledging service, see O.12, r.4.
- [12] The interlocutory judgment against the defendant was entered on 3 January 2014. The defendant did not serve a defence on the plaintiff until then. Nor did she file application for extension of time. So, the default judgment has been entered regularly.
- [13] However, the defendant has filed the present application to set aside on 24 April 2014. The application to set aside must be made promptly and without delay.
- [14] The application to set aside is made pursuant of O. 19, r.9. That rule empowers the court to set aside any judgment entered on such term as it thinks just. Order 19 deals with default of pleadings. The impugned judgment was entered in default of defence. Therefore O.19, r.9 applies to the defendant’s application to set aside.
- [15] O.19, r. 9 does not prescribe time limit within which an application to set aside should be made. But, nonetheless, an application to set aside under O.19, r. 9 must be made within reasonable time. In **Suva City Council’s case** [supra] the Court of Appeal said the application to set aside must be made promptly and without delay. The defendant has filed the application within reasonable time. Perhaps, she has

filed the application promptly and without delay. The plaintiff does not complain that the defendant's application to set aside was filed belatedly. In the circumstance, I would say the defendant has filed her application promptly and without delay.

[16] The defendant in her supporting affidavit explains why the statement of defence was not filed in time. In her affidavit she states that, *'after I made instruction to my Solicitor Vakaloloma & Associates I left for holiday to New Zealand and did not return until the first week of January 2014. not until the 13th January 2014, when my solicitor was able to contact me and told me that no statement of defence has been filed in my case because of solicitor could not get in touch with me to be better instructed on the facts of my case because I was away in New Zealand. I wish to apologise to this court for causing of delay when I left to New Zealand without providing better information in regards to the making of my Statement of Defence. I make this Affidavit in support of our motion seeking extension of time to file my Statement of Defence.'*

[17] The plaintiff filed an affidavit in opposition to the application to set aside. That affidavit was not sworn by the plaintiff. Her solicitor has signed and filed the affidavit on behalf of the plaintiff. Affidavits must be sworn by the parties themselves. Solicitor has no authority to swear an affidavit on behalf of his or her client because affidavit requires discretion and personal knowledge.

[18] About the affidavit filed by the plaintiff opposing the application to set aside, the defendant in her affidavit in reply states that, the affidavit is sworn on behalf of the plaintiff by the plaintiff's solicitor and the whole contents of the said affidavit are all hearsay evidence and as such the same cannot be admitted in evidence, see paras 3 & 4 of the plaintiff's affidavit in reply.

[19] For my part, I have carefully perused the affidavit in opposition filed on behalf of the plaintiff. I find that that affidavit was not sworn and does not express in the first person and that also does not state the place of residence of the deponent and his occupation. The affidavit

filed by the plaintiff offends O.41, r. 1 (4), which, so far as relevant, provides:

'(4) Every affidavit must be expressed in first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.'

[20] The plaintiff's affidavit expresses that 'the plaintiffs state or say' and does not express in first person. Moreover, it does not state the place of residence and the occupation of the deponent. It does not also carry indorsement note required by O.41, r. 9 (2). Every affidavit must be indorsed with a note showing on whose behalf it is filed and the date of swearing and filing, and an affidavit which is not so indorsed may not be filed or without leave of the Court, see O.41, r.9 (2) of HCR. The affidavit filed by the plaintiff has been filed against O. 41, r.9 (2). The plaintiff did not seek leave of the court to file or use that affidavit.

[21] In **Kim Industries, in re** (No. 1) [2000] 1 FLR 141, Hon. Justice Gates (as he was then) thought:

'Normally leave must be obtained for affidavit to be filed or used if affidavit does not carry indorsement note. Failure of counsel will not always result in a court allowing indulgence.'

[22] O.41, r. 8 of HCR expressly prohibits affidavit to be sworn before barrister and solicitor of the party. Rule 8 states that, no affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.

[23] In this instance, the plaintiff solicitor himself has filed an unsworn affidavit on behalf of the plaintiff. This is clearly against O.41, r.8.

[24] The plaintiff's affidavit in opposition does not comply with O.41, rr. 1 (4), 8 and 9 (2) of HCR. In my judgment, the affidavit filed by the

plaintiff cannot be considered a proper affidavit. I therefore disregard that affidavit.

[25] The defendant could not file her statement of defence due to lack of communication with her solicitor. She left for New Zealand on holidays honestly believing that her solicitor will take necessary steps in the cause. Unfortunately, her solicitor could not file the statement of defence without proper and better instructions which the defendant was unable to give as she was away overseas. The explanation given by the defendant in her supporting affidavit, since I have disregarded the opposing affidavit filed by the plaintiff, remains undisputed. I therefore accept that explanation.

[26] Furthermore, the defendant has attached her proposed statement of defence to her affidavit in support wherein she states that the mode of communication was purely a manner of reporting meant as complaint for the purpose of police investigation. It is not clear whether or not investigations were launched or not on the complaints made by the defendant about the plaintiff. The defence that the complaints made by the defendant are still under investigations would be a good defence to a claim that stems from the allegation of defamation.

[27] The defendant has filed the application to set aside promptly and without delay, has given a satisfactory explanation for not filing the statement of defence in time and has also shown that she has a good defence to the claim. In the circumstances, I think it appropriate to exercise my discretion in favour of the defendant.

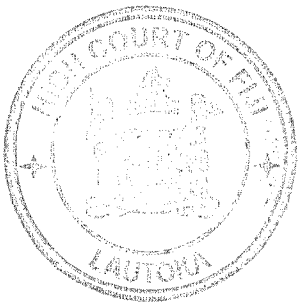
CONCLUSION

[28] Having considered the application to set aside and the supporting affidavit, the proposed defence and the submissions advanced in court, I proceed to wholly and unconditionally set aside the interlocutory judgment entered on 3 January 2014 against the defendant and grant leave to the defendant to file and serve statement

of defence within 14 days. The plaintiff will file and serve reply to the statement of defence within 14 days thereafter, if need be. I would order costs of this proceeding shall be costs in the cause. I would strike out and dismiss the summons for assessment of damage filed on 12 March 2014 as I have set aside the interlocutory judgment entered against the defendant. I will now adjourn the matter to 22 January 2015 for mention only.

FINAL OUTCOME

- 1) The interlocutory judgment entered on 3 January 2014 against the defendant is wholly and unconditionally set aside.
- 2) The summons for assessment of damage filed on 12 March 2014 is struck out and dismissed.
- 3) The defendant is granted leave to file and serve statement of defence within 14 days.
- 4) The plaintiff is to file and serve reply to statement of defence within 14 days thereafter, if need be.
- 5) The costs of this proceeding shall be costs in the cause.
- 6) The matter is now adjourned to 22 January 2015 for mention only
- 7) Orders accordingly.



M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
PUISNE JUDGE

At Lautoka
18/11/14

For plaintiff : Messrs Zodiac Laws, Barrister & Solicitor
For defendant : Messrs Vakaloloma & Associates, Barrister & Solicitor