

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 3 of 2012

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate duly having its head office at 360 Victoria Parade, Suva, Fiji.

PLAINTIFF

AND : **DAVID MILLER** and **SERA MILLER** both of Yasiyasi Road, Valelevu, Nasinu, Captain and Bank Officer respectively.

1ST & 2ND DEFENDANTS

BEFORE : Master Vishwa Datt Sharma
COUNSEL : Mr. Pranesh Kumar for the Plaintiff
Mr. Willy Hiuare for the Defendant
Date of Hearing: 18th April, 2016
Date of Ruling : 16th June, 2016

RULING

[Summons seeking Stay of Execution & Setting Aside of the Default Judgment against the 2nd Defendant pursuant to Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court.]

A. INTRODUCTION

1. The 2nd Defendant, Sera Miller filed a Summons on 13th October, 2014 and sought for the following orders-
 - (i) That there be a Stay of Execution of the Default Judgment entered against the 2nd Defendant on the 09th August, 2012.
 - (ii) That the Default Judgment so entered in this matter be set aside and the 2nd Defendant be given unconditional leave to defend the within action.

- (iii) That costs of the Application be costs in the cause.
2. This **Summons** was filed together with an **Affidavit in Support of Serah Chung**.
 3. The Application was made pursuant to *Order 19 Rule 9 of the High Court Rules, 1988 and the inherent jurisdiction of the Honourable Court*.
 4. Both counsels representing the parties to this proceeding filed their written submissions and accordingly argued their respective cases.

B. BACKGROUND FACTS

The Defendant's case

5. The 2nd Defendant's contention are as follows-
 - (i) That the Default Judgment was entered against her and the former partner and her former partner agreed to pay half of the debt.
 - (ii) That there were substantial payments made by the 2nd Defendant which warranted a comprehensive discussion with the Plaintiff in order to set aside this default judgment. This issue was expressly deposed in the Affidavit of Serah Chung dated 13.10.2014 at paragraphs 7-11 inclusive. Also Affidavit of Serah Chung dated 20.02.2015 at paragraphs 8, 9, 10, 12 and 13.
 - (iii) The 2nd Defendant states that its reply is not basically a denial, but that there are issues and replies that have merits which ought to be brought to trial. This is evident through the 2nd Defendant's statement of Defence and Counter Claim annexed in its motion and affidavit.
 - (iv) By merely entering judgment by default, would bring injustice to the 2nd Defendant, as law and common sense should allow the matter to be heard and not allowed procedural standards to override a meritorious trial.
 - (v) More importantly, the Plaintiff will not suffer any harm or prejudice if the judgment is stayed or set as it had already sold the property on mortgage sale at their own volition and benefitted from its proceeds.

The Plaintiffs' Case

6. The Plaintiff raised a **Preliminary Objection** as follows-
- (i) The application filed by the 2nd Defendant has been made pursuant to *Order 19 Rule 9 of the High Court Rules, 1988* which provides as follows-

"The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of the order."
 - (ii) The 2nd Defendant has made this application under an incorrect provision of the High Court Rules. That is this particular provision (O.19 r.9) allows for a setting aside of default judgment on **Default of Pleadings** by the Defendants.
 - (iii) The default judgment obtained against the 2nd Defendant on 09th August, 2012 was on her **failure to file and serve any acknowledgment of service.**
 - (iv) The Plaintiff submitted that the 2nd Defendant should have made this application pursuant to the provisions of *Order 13 Rule 10 of the High Court Rules, 1988* instead.

C. PRINCIPLES ON SETTING ASIDE A DEFAULT JUDGMENT

7. *Order 13 Rule 10 of the High Court Rule, 1988* states as follows:-

'Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.'
8. Under **Or.13 r.10** the Court may set aside or vary 'any judgment' unconditionally or on terms.
9. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles is that:

"Unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive

power where that has only been obtained by a failure to follow any of the rules of procedure". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473)

10. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in Halsburys Laws of England Vol 37 4th Ed. para 403, inter alia, thus:

"In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits ... For this purpose it is enough to show that there is an arguable case or a triable issue"

13. It is further stated therein:

"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desirable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed".

14. A useful summary of the factors to be taken into consideration in setting aside is to be found under Notes to Or.13 r.9 of The Supreme Court Practice 1995 Vol 1 at 142 which inter alia states as follows:

"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."

It goes on to further state as follows:-

"The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co.

Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., at p. 223, where the earlier cases are summarised. From that case the following propositions may be derived:

(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14: it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."

15. Also on the subject of setting aside default judgment, in *Davies v Pagett (1986) 10 FCR 226* at 232 a Full Court of the Federal Court of Australia said:-

"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways; for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions, hearings or other pre-trial procedures which enable the court to supervise progress - and, more pertinently non-progress - in all actions".

- 16 In *Eni Khan v. Ameeran Bibi & Ors* (HBC 3/98S, 27 March 2003), His Lordship Justice Gates set out the principles applicable to setting aside default judgment, referring to *Burns v. Kondel* [1971] 1 Lloyd's Rep 554; *Evans v. Bartlam* [1937] AC 473; *Vann v. Awford* (1986) LS Gaz 1725; *The Times LR* (23 April 1986); and *Fiji National Provident Fund v Datt* [1988] FJHC 4;

(1988) 34 FLR 67 (22 July 1988). So, too, His Lordship Justice Pathik in *South Pacific Recordings Ltd v. Ismail* [1994] FJHC 134; Hbc0597j.93s (30 September 1994) and also in *Pravin Gold Industries Ltd v. The New India Assurance Company Ltd* [2003] FJHC 298; HBC0250d.2002s (4 February 2003), referring to *Pankaj Bamola & Anor v. Moran Ali* (FCA 59/90), amongst others. In *Kaur v. Singh* [2008] FJHC 158; Appeal Case 61 of 2008 (5 August 2008) the authorities were also explored.

15. In *Wearsmart Textiles Ltd v. General Machinery Hire Ltd* [1998] FJHC 26; Abu0030u.97s (29 May 1998) the Court of Appeal similarly addressed the question of setting aside judgment, by reference to the authorities including *Farden v. Richter* (1889) 23 QBD 124; *Hopton v. Robertson* [1884] WN 77, reprinted 23 QBD 126n; *Richardson v. Howell* (1883) 8 TLR 445; *Watt v. Barnett* (1878) 3 QBD 183; *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1886] 2 Lloyd's Rep 331 (CA); and *Vann v. Awford* (1986) 83 LS Gaz 1725; *The Times LR* (23 April 1986).

16. The principles therein distilled and a number of other authorities provide:

- *Defendant does not need to show a good defence on the merits - '... need only show a defence which discloses an arguable or triable issue':* *Burns v. Kondel* [1971] 1 Lloyds Rep 554.
- *Applicant must produce to the court 'evidence that he has a prima facie case':* *Evans v. Bartlam* [1937] AC 473, at 651:-

'The defendant's application is brought pursuant to Order 13 Rule 10 which confers on the court a discretion to set aside or vary any default judgment on such terms as it thinks just. The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none [has] been or can be elevated to the status of a rule of law or condition precedent to the exercise of the court's unfettered discretion. These judicially recognised "tests" may be conveniently listed as follows:

- (a) **Whether the defendant has a substantial ground of defence to the action;**
- (b) **Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and**

- (c) Whether the plaintiff will suffer irreparable harm if the judgment is set aside.

CONSIDERATION OF THE APPLICATION

17. The Plaintiff raised a Preliminary objection that the 2nd Defendant has incorrectly filed and served a **Summons** seeking an order for **setting aside of Default Judgment** in terms of **Order 19 Rule 9** instead of **Order 13 Rule 10** of the *High Court Rules, 1988*.
18. Let me deliberate on the Preliminary objection first and determine if the 2nd Defendant had in fact **incorrectly** filed and served her setting aside default judgment application.
19. The difference between the two provisions of the law **Order 13 Rule 10** and **Order 19 Rule 9** dealing with the **setting aside of Default Judgment**, are that-
- The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this **Order 13 R.10** upon the failure of the defendant to give notice of intention to defend; and
 - *The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of the order 19 Rule 9 upon the Default of pleading.*
20. I have carefully perused the court record in my possession to find out the cause of action taken by the 2nd Defendant upon the service of the Writ of Summons by the Plaintiff.
21. The **Writ of Summons** was served onto the 2nd Defendant on 11th January, 2012.
22. As per the requirements of **Order 12, Rule 4 (a) of the High Court Rules, 1988**, that deals with '**Time limited for acknowledging of service**', it states as follows-

'in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has

been extended by or by virtue of these Rules, to that time as so extended;
(underline is mine for deliberation)

23. Whereas, **Order 18 Rule 2 (1)** dealing with the '**Service of Defence**' states as follows:-
- 'Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is the later.*
24. The question that is now paused is whether after service of the **Writ of Summons**, any **acknowledgment of service** and or **Defence** was filed by the **2nd Defendant** in this case or not?
25. I find that the **2nd Defendant** neither filed nor served any **Acknowledgment of Service** or any **Defence** to the Plaintiff's Writ of Summons.
26. The Plaintiff subsequently on 07th August, 2012, filed a **Praecipe** together with a **Search for Acknowledgment of Service** and sealed a **Judgment in Default of Acknowledgment of Service** against the **2nd Defendant** accordingly.
27. On 13th October, 2014, the **2nd Defendant** filed a **Summons** and sought for **setting aside of Default Judgment** together with a stay of execution pursuant to **Order 19 Rule 9 of the High Court Rules, 1988**.
28. I reiterate that the Plaintiff succeeded in obtaining a **Default Judgment in Default of Acknowledgment of Service** when the **2nd Defendant** failed to file and serve any **Acknowledgment of Service** and not in failing to file and serve any Defence.
29. Therefore, in order to make any application and seek an order for **Setting Aside of this Default Judgment in Default of Acknowledgment of Service** against the **2nd Defendant**, the **2nd Defendant** should have made the application pursuant to **Order 13 Rule 10** of the High Court Rules, 1988 instead.
30. This being the case, I hold the Plaintiff's submissions raised in support of the Preliminary objections herein.

31. The 2nd Defendant's application is fatal in the circumstances and is accordingly dismissed.

IN CONCLUSION

- (i) The 2nd Defendants Summons filed on 13th October, 2014 seeking an order for the Setting Aside of Default Judgment is hereby Dismissed.
- (ii) The 2nd Defendant is ordered to pay costs of \$500 to the Plaintiff within the next 14 days.

Dated at Suva This 16th June, 2016



Distribution

1. Nand's Law, Suva.
2. HM Lawyers, Suva.


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MR VISHWA DATT SHARMA
Master of High Court, Suva