IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 253 OF 2012

BETWEEN	:	**MOHAMMED SHAHEEM KHAIRATI** formerly of Yalalevu, Ba, Fiji, but presently residing at 88 Stirling Drive, Morrinsville, Waikato, 3300, New Zealand, Businessman. **Plaintiff**
AND	:	**MOHAMMED FAREED KHAIRATI** of 14582-85A Avenue Surrey B.C. Postal Code: V3F5T6, Canada, Businessman. **First Defendant**
AND	:	**MOHAMMED HASSAN** aka **MAHMUD HASSAN** of 13545-66A Avenue, Surrey B.C. Postal Code: V3W2B6 Canada, Businessman. **Second Defendant**
Counsel	:	Ms. Jyoti o/i of Messrs. Mishra Prakash & Associates for the Plaintiff.
	:	Ms. Arti Bandhana Swamy o/i Patel & Sharma Lawyers for the Defendant.
Date of Hearing	:	24th October, 2017.
Date of Ruling:	:	6th November, 2017.
Date of Pronouncement	:	7th November, 2017
Ruling by	:	Justice Mr. Mohamed Mackie

RULING (1)

(On Setting Aside of the Ex-parte Judgment)

A. INTRODUCTION:

1. This Court has been called upon to pronounce rulings, on two distinct Applications made by the Defendants and the Plaintiff, respectively, as follows;

A. An Application by way of SUMMONS dated and filed on 24th November, 2016, made by the Defendants seeking reliefs, among other things, for the **stay of execution of an Ex-parte Judgment entered on 13th October, 2016, and to have the same judgment set aside,** under Order 19 Rule 9 and Order 14 Rule 11 of the High Court Rules 1988 and inherent Jurisdiction.

B. An Application by way of SUMMONS made by the Plaintiff on 2nd June, 2016, and issued on 21st August, 2016, against the Defendants, who are, admittedly, resident in Canada, seeking Security for Cost under Order 23 Rule 2 of the High Court Rules and the inherent Jurisdiction of the Court.

2. Both Summonses were taken up for hearing before me together on 24th October, 2017. In addition to the oral submission made, both the learned Counsel have tendered written submissions in respect of both Applications.

B. BACKGROUND:

3. The Plaintiff, who is said to be now resident in New Zealand, filed writ of summons dated 5th December, 2012, together with his Statement of Claim dated 4th December, 2012, against the Defendants, who are said to be resident in Canada, alleging that the Defendants have defamed the Plaintiff as averred in paragraphs 8 to 12 of the Statement of claim and sought reliefs, *inter- alia*, damages.

4. The Defendants initially filed their Statement of Defence dated 20th December,2012, in person, and thereafter, having filed their acknowledgement of Summons dated 19th March,2013, through their Solicitors Messrs Patel and Sharma , filed the joint Statement of Defence on 15th of April,2013, and thereafter, the Plaintiff filed his Reply to Statement of Defence on 14th May,2013.

5. Subsequently, pre-trail formalities being fulfilled, when the matter was mentioned on 24th July, 2015 to fix the trial date, since the Plaintiff and/or his Solicitors were absent; my predecessor Judge had made Order taking the matter out of the cause list.

6. However, on an Application being made by the Plaintiff's Solicitors, the matter stood reinstated of consent on 22nd September, 2015, and same was fixed for trial on 8th & 9th June, 2016.

7. Thereafter, the Solicitors & Barristers for the Defendants, Messrs Patel & Sharma, by Summons dated 03rd May, 2016, supported by an Affidavit of Ms. Arthi Bandhana Swamy, the learned Counsel for the Defendants, had moved for leave of the Court to cease acting as Barristers and Solicitors for the 1st and 2nd Defendants and same being supported before my predecessor on 18th May, 2016, the Application had been allowed

in the absence of both the Defendants as per the minutes and the Order of same date filed of record.

8. Thereafter, when the matter being mentioned on 1st June, 2016, before the same Judge to fix for trial, the Defendants being absent and unrepresented; same stood fixed for formal proof on 8th June, 2016. In the meantime the Plaintiff had filed an Affidavit of him and that of his two witnesses, namely, Mohamed Naim Khairathi and Marunnisa in support of final Judgment against the Defendants. According to the record, I find that the copies of these Affidavits have been sent to the Defendants by Post on 3rd of May, 2016, just 5 days prior to the formal proof trial.

9. Accordingly, the matter being taken up for formal proof hearing on 8th June. 2016, before my predecessor, same has stood concluded by tendering the aforesaid affidavits in evidence. Additionally, the Plaintiff's Counsel has made oral submissions and tendered written submissions too on the same date. Thereafter, the learned predecessor judge, having pronounced the impugned Judgment orally on 6th October, 2016, has delivered the written Judgment on 13th October, 2016, granting the Plaintiff $ 20,000.00 as damages and $ 5,000.00 as costs summarily assessed.

10. It is against this Judgment the Defendants have filed the aforesaid SUMMONS dated 24th November, 2016, **under O-19 R-9 and O14-R11** of the High Court Rules 1988 moving a stay and vacation of the Ex-parte Judgment.

C. ANALYSIS

11. **ORDER 14-SUMMARY JUDGMENT**

Setting aside the Judgment (O.14, r.11) states;

> *Rule-11. Any judgment given against a party who does not appear at the hearing of an application under **rule 1 or rule 5** maybe set aside or varied by the Court on such terms as it thinks just*

12. On careful perusal of the **Order 14 Rule 11**, it appears to me that this Order & Rule do not assist the Defendants to succeed in their Application . The reason is that only the summary judgments entered under O-14, r-1 or r-5 can be set aside under the rule 11, which states as follows.

Application by plaintiff for summary judgment (O.14, r.1)

> **Rule.-1.** Where *in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any*

damages claimed, apply to the Court for judgment against that defendant.

Application for summary judgment on counterclaim (O.14, r.5)

Rule 5.-(1) *Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3), the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.*

(2)....
(3)....

13. The impugned Judgment in this case is not a Judgment entered under the above Order 14 rule 1 or rule 5, for the Defendants to invoke the provisions of the above rules under Order 14.

Setting aside judgment (O.19, r.9)

Rule-9. "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".

14. For the Court to act under this rule (Order 19 -9) the Defendants have to show under which rule of the Order 19 (from -R 1 to -R-8) they fall.

15. On perusal of the Case Record, it is apparent that it is due to Defendants' failure to appear on the trial date the so called formal proof judgment has been entered. The record reveals further that the Defendants had duly filed their Statement of Defence for which the Plaintiff had filed response as well.

16. There was no any default on the part of the Defendants for them to fall under Order 14 rule 11, which covers only the judgments entered under rules 1 and 5 under Order 14.

17. Since the Defendants are also not falling under any of the rules from Rule 1 to Rule 8 of the Order 19, they cannot claim relief under Order 19 Rule 9 of the High Court Act.

18. It is observed that the correct Order and rule that should have been invoked by the Defendants to have the ex-parte Judgment entered against them vacated was the Order 35, Rule (2) which states as follows.

Judgment, etc. given in absence of party may be set aside (O.35, r.2)

"2.-(1) Any judgment, order or verdict obtained where one party does not appear at the trial maybe set aside by the Court, on the

application of that party, on such terms as it thinks just".(Emphasis Mine)

19. The law on setting aside a default judgement is well established both in English common law and our local jurisdiction. There are number of authorities which are frequently cited by the courts when exercising the discretion to set aside the judgments entered for the default of either party. Anlaby v. Praetorius (1888) 20 Q.B.D. 764; Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985); O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762; Evans v Bartlam [1937] 2 All E.R. 646; Burns v. Kondel [1971] 1 Lloyds Rep 554; Fiji National Provident Fund v Datt [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988); Eni Khan v. Ameeran Bibi & Ors (HBC 3/98S, 27 March 2003; Wearsmart Textiles Limited v General Machinery Hire limited and Shareen Kumar Sharma(1998) FJCA26; Abu 0030u.97s (29 May 1998); Fiji National Provident Fund v Datt [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988) are the most important foreign and local cases, to name a few, which deal with the principle.

20. Basically, the Courts are given discretion to set aside any judgment entered for the default of any party (see: Or 13 r 10, Or 14 r 11, Or 16 r 5 (2), Or 19 r 9 and Or 35 r 2). However, when exercising this discretion the courts have adopted two different approaches in dealing with regular and irregular judgments. This distinctive approach is clearly stated by Fry L. J. in ***Anlaby v. Praetorius (1888) 20 Q.B.D. 764.*** His Lordship 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, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief".*

21. In ***O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762*** *Greig J said at 654: "The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled ex debito justitiae to a setting aside. Accordingly, if the judgment was obtained irregularly, the applicant is entitled to have it set aside ex debito justitiae, but, if regularly, the Court is obliged to act within the framework of the empowering provision" (see:Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985). Thus, the defendant against whom an irregular judgment was entered in default has the right to have it set aside and the courts have no discretion to refuse to set aside.*

How the impugned Judgment in this Action becomes irregular?

22. At the hearing before me, it was observed that both the Counsel had come to Court to argue the matter on the basis that the impugned Judgment is a regularly obtained

Judgment, which in that case it calls up on the Court to consider various factors such as;

(a) Whether the defendant has a substantial ground of defence to the action (merits);

(b) Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ;

(c) Whether the plaintiff will suffer irreparable harm if the judgment is set aside; and

(d) The delay & the reason for the delay.

23. It is my view that the above factors need not be subjected to consideration in the matter in hand as the impugned judgment can be clearly termed as an irregularly obtained judgment for the following reasons.

24. At the hearing, I drew the attention of both the Counsel to the Summons filed by the Defendants' Solicitors on 3rd May, 2016, seeking permission of the Court to cease from acting as the Barristers & Solicitors for the Defendants, which is governed by Order 67 Rule 6 (1) of the High court Rules.

When an application is made the Rule 6 (2) says

> *"(2) An application for an order under this rule must be made by summons and the summons must, unless the Court otherwise directs, be served on the party for whom the barrister and solicitor acted".*

25. It is obvious that, unfortunately, the Solicitors for the Defendants had not served or attempted to serve the notice of this Summons for withdrawal, on the Defendants. This Summons was filed on 2nd May, 2016, when the matter stood fixed for trial on 8th & 9th June, 2016.

26. This Summons was supported in the open Court on 18th May, 2016, in the absence of the Defendants / newly appointed Solicitors for them and the Court has allowed the Application on the same day without issuing required notice on the Defendants.

27. What the Court has directed, after making the above Order, is to issue NOAH to the Defendants returnable on 1st June 2016. Learned Counsel for the Plaintiff in his written submissions is maintaining a position that the Defendants were present in Court on 18th May, 2016. The Journal entry sheet or the Order made on 18th May 2016, do not state that the Defendants were present in Court. It is to be noted that, if the Defendants were present in Court, the Court need not have issued NOAH on 18th May, 2016, returnable for 1st June, 2016.

28. Further, it was also a duty on the Solicitors for the Defendant to have a copy of the Order so obtained, granting permission to cease to act as Solicitors for the Defendants, served on the Defendants and to file a certificate at the Registry to the effect that that the Order has been duly served on the Defendants as, respectively, required by sub

rule 1(a) and 1(c) of Rule 6 under Order 67 of the High Court Rules 1988. The learned Judge also could not have turned a blind eye on this requirement.

29. When the Defendants' former Solicitors had failed to serve the above Notice and the Order granted, the Court and/ or Plaintiff's Solicitors could not have proceeded to fix the matter for trial or gone through the trial to have the above Judgment delivered against the Defendants while they were, obviously, in the dark as to what had transpired in Court with regard to their legal representation.

30. According to the records, the only service attempted by the solicitors for the Plaintiff on the Defendants prior to the trial was the posting the Affidavits of the Plaintiff and that of his two witnesses filed to obtain final Judgment. This has been done on 3rd June, 2016, just 4 days prior to the purported trial on 8th June, 2016. Apart from the above, a copy of the purported Judgment also claimed to have been sent to the Defendants, by post on 09th November, 2016. However this has not served the required purpose.

31. In the light of the above, it is clear that the impugned Judgment has been obtained in clear violation of the provisions of relevant rules under Order 67 of the High Court Rules of 1988, by keeping the Defendants away from Court wittingly or unwittingly.

32. Under these circumstances, the Court could not have proceeded for the trial and delivered any Judgment against the Defendants and any such Judgment delivered has to be treated as a judgment made without jurisdiction. Thus the impugned Judgment entered on 6th / 13th of October, 2016, in this case has to be, necessarily, treated as an irregular Judgment for the purpose of the Application in hand.

33. Accordingly, as per the authorities cited above, the Defendants can, as of a right, have this Judgment vacated without being subjected to any conditions.

R U L I N G (2)

(On Security for Cost)

BACKGROUND

1. The Plaintiff by Summons dated 21st August ,2017, supported by his Affidavit, moved for an Order directing the Defendants to deposit $35,000,00 or any such sum the Court may think just, within 14 days from the date of the Order and in default of giving such Security, the 1st and 2nd Defendant's Summons filed on 24th November,2016, for Stay and to Set aside the Judgment be dismissed.

2. This Summons has been filed on the basis the Defendants are ordinarily resident out of jurisdiction and thus the 1st and 2nd Defendants should deposit $ 35,000.00, being the

Security for costs of this Application and for other purposes as averred in the said Affidavit.

RELEVANT LAW:

ORDER 23- SECURITY FOR COSTS
Security for costs of action, etc. (O.23, r.1)

> *1.-(1) where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*
> *(a) That the plaintiff is ordinarily resident out of the jurisdiction, or*
> *(b) ……,*
> *(c)……,*
> *(d) ……..,*
>
> *then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.*
> *(2) ………..,*
> *(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*

3. The Plaintiff has made the instant Application under the sub rule 1 (3) above, after the Summons was filed on behalf of the Defendants to Stay of execution and Set aside the Judgment entered in favour of the Plaintiff against the Defendants in their absence, **which the Court has now found as an irregularly obtained Judgment.**

4. When the impugned Judgment is found to be an irregularly obtained Judgment, the Defendant/s can, as or a right, have it vacated as observed above.

5. It is interesting to note that the total sum of the alleged costs $ 35,000.00, according to the averments in the Plaintiff's supporting Affidavit, has been made of as follows.

A. Amount awarded by Judgment (Ex-parte)	$ 20,000.00
B. Costs awarded in the said Judgment	$ 5,000.00
C. For the execution of the said Judgment and- expenses for hearing of Defendant's Summons	$ 10,000.00
Total-	**$ 35,000.00**

6. It is to be noted that under the relevant Order 23 and Rules thereunder for Security for costs, there is no provision for providing security for the amounts awarded as judgment and/ or Costs. However, the purported Judgment now stands set aside and vacated by the ruling above. Therefore, no question of liability arises for the Defendants on account of the said ill-fated Judgment.

7. Further, portion of the purported Security for Costs, according to averments in Plaintiff's Affidavit, is said to be for the Plaintiff's expected expenses for the execution of the said judgment. Since same now stands set aside no question of execution will arise.

8. The balance amount claimed by the Plaintiff is said to be for the expenses to be incurred on account of the hearing of the Defendants' Summons for Stay and Setting aside the Judgment. As the Defendants are entitled, as of a right, to, have the above Judgment set aside, the Defendant need not be required pay any costs.

9. Even if the Plaintiff is entitled for Security for Cost on any other ground/s, still the Court can turn down the Application, in view of his own admission that the Defendants have certain assets in this Jurisdiction, which is said to be their undivided share in the Estate.

FINAL ORDERS IN BOTH THE APPLICATIONS:-

1. The Summons of the Defendants for the Setting aside the default Judgement is allowed;

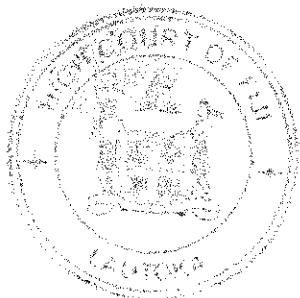
2. Accordingly, the impugned judgment dated 13th October, 2016 , stands set aside;

3. Action will proceed for inter-parte trial ;

4. The Summons of the Plaintiff seeking Security for costs is hereby dismissed.

5. Considering the circumstances no cost is ordered on both the Summons.

6. The main action will proceed on its normal course.



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A.M.Mohammed Mackie

Judge

At Lautoka
6th November, 2017