IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 55 OF 2017

BETWEEN: **ROBERT LEONARD KOROI**

Plaintiff

AND: **PERMANENT SECRETARY FOR HEALTH**

First Defendant

AND: **ATTORNEY-GENERAL OF FIJI**

Second Defendant

CORAM: **The Hon. Mr. Justice David Alfred**

COUNSEL: **Mr. A. Maisamoa for the Plaintiff**

Mr. J. Pickering for the First and Second Defendants

Date of Hearing: **7 March, 2018**

Date of Interlocutory Judgment: **8 March, 2018**

INTERLOCUTORY JUDGMENT

1. This is the Plaintiff's Inter-Partes Summons (summons) seeking leave to enter judgment in default of the filing and service of Notice of Intention to Defend and their Defence by both Defendants within the periods specified by the applicable rules of the

High Court Rules 1988 (HCR). All references hereafter to Orders and rules are to those in the HCR.

2. The Summons is supported by the affidavit of Nacanieli Bulisea (NB) of Colavanua Law, Suva, a Barrister and Solicitor. He deposes as follows:

(I) The Writ, Statement of Claim and Acknowledgment of Service were filed on 28 March 2017. They were served on the Defendants on the same day at the Attorney–General's Chambers (AGC), Suva, which acknowledged service.

(2) The Affidavit of Service was filed on 16 May 2017.

(3) The Acknowledgment of Service was filed on 4 April 2017 by the AGC and served within the requirements of O.12 r. 4 (a).

(4). The Defendants failed to file their Notice of Intention to Defend pursuant to O.13 r r 1 and 2 within 14 days after the acknowledgement of service.

(5) The Defendants failed to file their Defence pursuant to O. 19 r r 1 and 2 within 14 days after the service of the Notice of Intention to Defend was filed and served.

(6) To the date of the swearing of that affidavit (4 October 2017) the Defendants have still failed to file and serve their intention to defend and their defence. That was approximately 6 months after the Defendants should have done so.

(7) The Plaintiff therefore sought the leave of the Court to enter judgment against the State pursuant to O. 77 r 6 based on non-compliance of O.13 and O. 19.

3. The Defendants replied to the affidavit of NB by the affidavit sworn on 28 December 2017 by Dr Jaoji Vuibeci, the Medical Superintendent of the Labasa Hospital. Therein he deposes as follows:

(1) The Defendants filed a Summon dated 23 May 2017 pursuant to O 4 r 1 (4) to have the matter transferred to Labasa.

(2) When the matter was transferred to Labasa, the Counsel appearing on the instructions of Counsel for the Defendants sought leave to file their Defence within 21 days but was advised by the learned Madam Master that the Plaintiff file an application to enter a default judgment.

(3) Their Defence could not be filed because the Plaintiff had filed an application to enter a Default Judgment in October 2017 and they were advised to file an affidavit in reply when they sought time to file their Defence.

(4) The Defendants therefore pray that the application be dismissed with costs.

4. The Plaintiff swore an affidavit in reply on 13 February 2018.

5. The hearing commenced with the Counsel for the Plaintiff making an oral submission. He also provided the Court with a written one. He said the writ was served on 28 March 2017 and therefore the acknowledgement of service should have been served by 10 April 2017, but was filed on 22 May 2017 and served on their Suva agent on 30 May 2017. The Defence should have been filed and served by 24 May 2017. However, to date (7 March 2018) the Defence has still not been filed nor served. (This was confirmed by State Counsel). Counsel concluded by saying that the Defendants failed to apply for an extension of time under O. 3 r. 4 and that the authorities relied on by them were all in regard to default judgments obtained without the leave of Court.

6. State Counsel now submitted. He said the only issue is regarding the failure to acknowledge and to file their Defence within time. He produced a copy of the acknowledgement filed in the High Court, Suva on 4 April 2017 and on the office of the Plaintiff's then solicitors, Colavanua Law, Suva on 7 April 2017 with a signed acknowledgment but with no legal firm's rubber stamp affixed to it. Thus he said the acknowledgment was filed and served in time before 10 April 2017. Their main contention was they wanted the matter transferred to Labasa and then they would apply for an extension of time to file their defence.

7. The Plaintiff's Counsel replied that the HCR do not say they should wait for the transfer and then file the defence. The AGC has still not filed an application for an extension of time.

8. At the conclusion of the arguments I informed I would take time for consideration and then deliver my decision. Having done so I shall now deliver my judgment.

9. I shall state at the outset that I find based on the evidence before this Court and I shall so hold that indeed the Defendants had filed in the Suva High Court and served on the office of the Plaintiff's then solicitors in Suva their acknowledgement of service on 4 April 2017 and 7 April 2017 respectively. These dates are there to be seen on the reverse of the document in the court file. The Court has also noted from the affidavit of service of the writ of summons and acknowledgment of service sworn by NB that the same were served on the office of the First Defendant in Suva and at the office of the AGC also in Suva on 28 March 2017. Thus it is crystal clear that the Acknowledgment of Service should have been filed by 10 April 2017. But this had been done on 4 April and 7 April 2017 respectively which dates were both before 10 April 2017.

10. In my view there is one pivotal issue here and it is this. Is the Plaintiff entitled to enter judgment against the Defendants because of their failure to file their defence within the specified time or at all?

11. In the light of the decision I am arriving at, it is inexpedient to refer to the cases cited by Counsel and to the red herrings drawn across the path of this Court. Suffice it to say the excuse – I cannot consider it as an explanation- advanced by State Counsel from the Bar table that they were waiting for the transfer before applying for an extension of time is to say the least implausible. However, this does not bring the matter to an end here and I shall explain why.

12. The matter before me is not as simple and as straight forward as it may seem at first blush. Here because the State are the Defendants, a two stage process is involved. The first stage is under rule 3 of Order 19 as the Plaintiff is claiming special damages which may be specified and general damages which being at large are unliquidated. I may stress that although special damages are specified they still have to be proved and the Court does not necessarily automatically award the exact sums asked for. They have to be specifically proved. Thus only an interlocutory judgment may be entered. The second stage now come into operation under O. 77 r. 6 (1). Putting the two together I envisage the process flow is this. The Plaintiff is able to ask the Court (may) to be permitted to enter judgment against the State. It is the Court which then decides whether permission (leave) is to be given to the Plaintiff to do so.

13. As always Justice must not only be done but must be seen to be done. That will certainly not be the case, if a defendant is deprived of having his day in court to resist a claim against him just because of an omission on the part of his solicitors.

14. The Plaintiff's claim is based on the tort of negligence. The negligence of the First Defendant's staff has to be proved. Then the general and special damages have to be proved. All these require a full trial where all issues will be canvassed and all witnesses heard. Thus these matters which call for proof cannot be brushed aside by an interlocutory judgment.

15. In the result I shall decline to grant the Plaintiff leave to enter interlocutory judgment against the Permanent Secretary for Health and the Attorney General of Fiji under Order 13 rules 1 and 2 of the High Court Rules and shall therefore dismiss the Inter-

Partes Summons. However, in the light of what has transpired and in the exercise of the Court's discretion I shall order both Defendants to pay the Plaintiff costs of this summons summarily assessed at $250.

16. Before I leave this judgment I think it is pertinent for me to state the following matters:

(1) The Defendants should immediately file an application for extension of time to file their defence.

(2) Counsel for both sides should then expeditiously hold their pre-trial conference where the agreed facts and the disputed items would be decided.

(3) Counsel for the Plaintiff should then set the action down for trial expeditiously.

Delivered at Labasa, this 08th day of March, 2018.

HIGH COURT OF FIJI LABASA

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DAVID ALFRED
JUDGE
HIGH COURT OF FIJI