

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 241 of 2004

BETWEEN: **UDAY CHAND**

APPLICANT/PLAINTIFF

AND: **MAHENDRA PRASAD**

RESPONDENT/DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

COUNSEL: **Ms M. Rakai for the Applicant/Plaintiff**
No Appearance for the Respondent/Defendant

DATE OF RULING: **31 August 2018**

RULING

(Application set aside Orders of 2 November 2016)

1.0 Introduction

1.1 On 25 January 2017, Applicant (Plaintiff) filed Application by way of Summons seeking Orders made on 2 November 2016, be set aside pursuant to Order 13 Rule 10 and Order 19 Rule 9 of the High Court Rules.

1.2 On 16 February 2017, parties were directed to file Affidavits and Submissions and Application was adjourned to 2 May 2017, for hearing.

1.3 Parties filed Affidavits as directed with only Applicant/Plaintiff filing Submissions.

2.0 Order 13 Rule 10 and Order 19 Rule 9 of High Court Rules (HCR)

2.1 Applicant intends to set aside Order of the Court made on 2 November 2016, whereby Court struck out Applicants' claim and heard Respondents Counterclaim.

2.2 Order 13 Rule 10 of HCR deals with setting aside or varying Judgment obtained in default of Notice of Intention to Defend.

2.3 Order 19 Rule 9 of HCR deals with setting aside or varying any Judgment obtained in default of pleadings which is defence to the claim or defence to counterclaim.

2.4 Applicant's application is therefore defective as in this instance Claim was struck out for failure to Plaintiff to attend to trial and proceed to claim.

2.5 For completeness the applicable Order and rule is Order 35 Rule 2 which provides as follows:-

“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.

(2) An application under this rule must be made within 7 days after the trial.”

2.6 The Order striking out Applicant's (Plaintiff's) claim was made on 2 November 2016, which was the date of trial and Application is filed on 25 July 2017, which is more than two (2) months from trial date.

2.7 It is undisputed fact and accepted by Applicants Counsel that Applicant has failed to make the Application within the time prescribed in Order 35 Rule 2(2) of HCR.

2.8 Order 35 Rule 2(2) of HCR is a mandatory provision and failure to comply with it is fatal and will result in Application being dismissed.

3.0 Costs


3.1 This Court takes into consideration that Applicant filed defective Summons, failed to comply with Order 35 Rule 2(2) of HCR and Respondent only filed Affidavit in Response on 21 February 2017, and did not appear at the hearing of the Application.

4.0 Orders

4.1 This Court makes following Order:-

- (i) Applicant's (Plaintiff's) Application to set aside Order made on 7 November 2017, is dismissed and struck out;
- (ii) Applicant (Plaintiff) do pay Respondent's cost of the Application assessed in the sum of \$250.00 within twenty-one (21) days from date of this Ruling.




K. Kumar
JUDGE

At Suva

31 August 2018

SHERANI & CO. FOR PLAINTIFF

PACIFICA CHAMBERS FOR DEFENDANT