

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 171 of 2018

**BETWEEN : SAREN PATEL**  
**PLAINTIFF**

**AND : FIJI DEVELOPMENT BANK**  
**DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF :** Mr A Singh [Singh & Singh Lawyers]

**DEFENDANT :** Ms N Choo [R Patel Lawyers]

**RULING OF :** Acting Master Ms Vandhana Lal

**DELIVERED ON :** 08 November 2019

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**INTERLOCUTORY RULING**

[Setting Aside Judgment By Default]

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**Application**

1. This is the Defendant's application, a summon dated 26 July 2018 to set aside a default judgment entered on 04 July 2018.

An Affidavit of one Usenia Losalini sworn on 25 July 2018 was filed in support of the application. The Defendant's application is made pursuant to Order 2 rule 1, Order 3 rule 4, Order 12 rule 5(2), Order 13 rules 9 and 10 and Order 19 rule 9 of the High Court Rules and upon following grounds:

- a) *The Default Judgment is irregular;*
- b) *Default Judgment was obtained contrary to Order 19 rule 3 of the High Court Rules 1988 (as amended);*

- c) Default Judgment was premature and contrary to Order 12 Rule 5(2) of the High Court Rules 1988 (as amended);*
  - d) That the Default Judgment was filed contrary to the fact that an Acknowledgment of Service had been filed and served on the Plaintiff;*
  - e) The Defendant was well within time limits prescribed under the High Court Rules to file its Statement of Defence;*
  - f) The Default Judgment contains misrepresentations of fact and errors;*
  - g) That the Defendant has a valid and meritorious Defence to the Plaintiff's claim;*
  - h) That the Defendant has a valid and reasonable explanation why a Defence was not filed at the time Default Judgment was entered.*
2. Said application is opposed and the Defendant filed its affidavit in opposition on 10 August 2018.

A reply to the said affidavit in opposition was filed by the Defendant on 27 August 2018.

### **History of the Proceeding**

3. On 11 June 2018 the Plaintiff had initiated the proceedings against the Defendant when she filed a writ of summon dated 11 June 2018.

Her claim is for unlawful detention and conversion of certain properties which she had stored in four (4) containers belonging to the Plaintiff. The said containers were placed on the property belonging to Toa Fiji Limited.

It is alleged Fiji Development Bank took possession of the assets of Toa Fiji Limited and hence had taken possession of the Plaintiff's containers. Despite request the Defendant has refused to release the containers.

4. An affidavit of service was filed on 27 June 2018 and according to the affidavit of service the writ of summon and acknowledgment of service was served on Fiji Development Bank on 11 June 2018.
5. The Plaintiff on 4 July 2018 filed a praecipe and search along with a judgment by default.

A judgment by default was sealed on 4 July 2018 for a sum of \$129,030.00 with interest and cost to be assessed by the Court. Said judgment by default was served on Fiji Development Bank on 9 July 2018.

**Acknowledgment of service filed on 26 June 2018.**

6. The Defendant informs that an acknowledgment of service was filed by them. Upon perusal of the Court file, I make note of the following:
  - i. An acknowledgment of service was accepted and processed for filing by the High Court Civil Registry on 26 June 2018. A filing fee was paid by the Defendant.
  - ii. However via a letter dated 3 July 2018, the registry informed the Defendant the same was accepted by the Revenue Collector in error. Since the default judgment was already on foot by the Plaintiff the acknowledgment of service was not entertained and returned.
7. Though accepted and filed in error, I do not think the Registry has authority to return the documents once filed unless there is a court order to remove a document from the records.
8. With no application by the parties to remove the acknowledgement of service or the court hearing the parties on its own motion and making orders for the same to be removed, the decision of the Registry to return the acknowledgment of service is irregular.

The registry is to recall the document so returned and place the same in the file as part of the court records.

**Was the Acknowledgment of Service filed within the Requisite time frame?**

9. The time limited for acknowledging service is 14 days. [Order 12 rule 4(a) of the High Court Rules].
10. Pursuant to sub-rule 5(a) if a judgment has been obtained court's leave is required by the Defendant to give notice of intention to defend.

Subject to the above provision the Defendant is not precluded from acknowledging service of the writ after the time limited to do so. However the Defendant cannot serve a defence without a court's order [Order 12 rule 5(b)].

11. As per the affidavit of service the writ was served on the Defendant on 11 June 2018.

The 14 days requirement commenced from 12 June 2018 and expired on 25 June 2018.

The acknowledgment of service was filed by the Defendant on 26 June 2018 at 3:40pm, a day after the time limited for acknowledging service of the writ.

**Determination on the Application**

12. Since the service was acknowledged after the 14 day time frame, the Defendant was required to apply for the court for leave to file its statement of defence [Order 12 rule 5 (2)].
13. The notation on the judgment by default is that the Defendant failed to file an acknowledgment of service to the writ of summon and statement of claim.
14. After the filing of the acknowledgment of service, the Defendant had 14 days [by 9 August 2018] within which they should have sought leave under Order 12 rule 5 (2) to file their statement of defence.

15. A search, praecipe and default judgment was initially filed with the registry on 26 June 2018 but could not be sealed due to errors.

Another set of documents were filed on 4 July 2018 and sealed on said date.

16. I do agree with the Defendant that rightfully the Plaintiff should have had the acknowledgment of service set aside and obtained the judgment by default in the form it has been sealed. Or alternatively enter a judgment in default of service of a statement of defence after 09 July 2018.
17. For afore reason I find the Judgment sealed on 4 July 2018 to be irregular and ought to be set aside for this reason.
18. Furthermore it is apparently clear from that the claim by the Plaintiff is for detention of goods.
19. Order 19 rule 4 of the High Court Rules outlines how judgment should be obtained in default of defence and it reads:

*4-(1) Where the plaintiff's claim against a defendant relates to the detention of goods only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for the service of the defence-*

- (a) at his option enter either-*
- (i) interlocutory judgment against that defendant for delivery of the goods or their value to be assessed and costs, or*
  - (ii) interlocutory judgment for the value of the goods to be assessed and costs, or*
- (b) apply by summons for judgment against that defendant for delivery of the goods without giving him the alternative of paying their assessed value,*

*and in any case proceed with the action against the other defendants, if any.*

20. Again I find the judgment by default entered on 4 July 2018 to be irregular and ought to be set aside.

**Final Orders**

21. For reasons afore mentioned I make following orders:

- i. The judgment by default sealed on 4 July 2018 is hereby wholly set aside;
- ii. All execution proceedings to be stayed permanently;
- iii. The Defendant to file and serve its statement of defence on or before 4pm 22 November 2019;
- iv. The Plaintiff to pay cost of this application summarily assessed at \$1,000. Said cost to be paid in 14 days.

22. The Senior Court Officer, High Court Civil Registry is directed to recall the acknowledgment of service filed by the Defendant on 26 June 2018.



  
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Vandhana Lal [Ms]  
Acting Master  
At Suva.