

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 87 OF 2013**

**BETWEEN** : **RASUAKI SALABABA and JOKAVETI DOLANAISORO**  
both of Varadoli, Ba, Police Officers.  
**PLAINTIFFS**

**A N D** : **PREM CHAND, SUSHIL CHAND AND VINOD CHAND**  
formerly of Nadari, Ba but now residing in Canada.  
**1<sup>ST</sup> DEFENDANT**

**A N D** : **MOHAMMED HAROON trading as HAROONS**  
**HARDWARE** a hardware and construction business having its  
registered office in Rakiraki, Ra.  
**2<sup>ND</sup> DEFENDANT**

**Appearances** : **(Ms) Jyoti Sangeeta Naidu for the plaintiffs**  
**Mr Nazeem Sahu Khan for the defendants**

**Date of hearing** : **Monday, 20<sup>th</sup> May, 2019**  
**Date of ruling** : **Monday, 03<sup>rd</sup> June, 2019**

**RULING**

- (1) By Notice of Motion filed on 02<sup>nd</sup> April, 2019 the defendants seek the following orders;
1. *That the Judgment by Default entered against the First named Defendants in the matter be set-aside unconditionally.*
  2. *That there be an Order that the Judgment entered into in this action be set-aside unconditionally on the grounds of material non-disclosure by the Plaintiffs.*

3. *That the First Defendant be granted 14 days to file and serve a Statement of Defence and Counter-Claim in the matter.*
4. *That there be a stay of execution of the Default Judgment until the final determination of this application and/or subsequent hearing of the Judgment is set-aside.*
5. *That Mohammed Haroon trading as HAROONS HARDWARE, a hardware and construction business having its registered office in Rakiraki, Ra be reinstated and/or joined as the Second Defendant in this action or joined as a Third party in this action.*
6. *That the Writ of Summons and Amended Statement of Claim in the matter be struck for non-compliance of Order 6 Rule 6 of the High Court Rules 1988 and the Judgment against the First Defendant and all Orders made in the matter be discharged and/or set-aside.*
7. *That there be a Declaration that the whole proceedings in this action was irregular and ought to be set-aside and/or dismissed for not having being properly instituted.*
8. *That there be a Declaration that in view of non-compliance of by the Plaintiffs Order 6 Rule 6 of the High Court Rules 1988 the Writ of Summons and/or the whole proceedings in this action is null and void and of no effect.*
9. *That there be a Caveat placed on the land more fully described as VATUVAKA (part of) containing Thirty Three Perches and one tenth perch be the same a little more or less and being Lot 9 on Deposited Plan No. 4991 and situated in the District of Rakiraki in the Island of Viti Levu on Certificate of Title No. 20298 (our land) until further Order.*
10. *That the Plaintiffs be restrained from interfering, putting on tender and/or selling and/or dealing with the land more fully described as VATUVAKA (part of) containing Thirty Three perches and one tenth perch be the same a little more or less and being Lot 9 on Deposited Plan No. 4991 and situated in the District of Rakiraki in the Island of Viti Levu on Certificate of Title No. 20298 until further Order.*
11. *That leave be granted for the 1<sup>st</sup> Defendant to rely on the Affidavit of Dinesh Prakash Chand in the matter.*
12. *Such further and/or other relief that may seem just and proper to this Honourable Court.*
13. *That costs be costs in cause.*

- (2) The Notice of Motion was returnable on 05<sup>th</sup> April, 2019. On the returnable date, the Court clearly informed counsel for the defendants that there exists no judgment by default to be set-aside or stayed. But counsel for the defendants paid no heed. Counsel chose not to withdraw the application. Counsel informed that he will be proceeding with his applications to (1) set-aside the default judgment (2) stay of execution of the default judgment.
- (3) The plaintiffs opposed the Notice of Motion. The court granted leave for the plaintiffs to file Affidavit in Opposition. Affidavits in Opposition and in Reply were filed. The court set down for argument on 20<sup>th</sup> May, 2019.
- (4) At the hearing, counsel for the plaintiffs submitted that there exists no default judgment to be stayed or set-aside and as such counsel moved court to strike out the application by the defendants.
- (5) I agree with counsel for the plaintiffs on her submissions.
- (6) The defendants application for setting-aside and stay is concerned with the judgment written and delivered by Hon. Mohammed Mackie J dated 13/11/2018. It is written by the judge on the basis of evidence and submissions emanating from the plaintiffs' side only there being no appearance by the defendants. **It is an ex-parte judgment after the formal proof hearing held before the court on 18/09/2018.**
- (7) On behalf of the defendants, Mr.Khan, now says from the bar table;

**Court:** *So, you saying it's a Default Judgment?*

Counsel: Default in the appearance of the parties, yes.

**Court:** *You say it's a Default Judgment?*

Counsel: Yes.

**Court:** *No an Ex-Parte Judgment?*

Counsel: It's in Default of the appearance of the parties. So, that's the issue that I was going to raise now, my Lord. If you hear both

*Court: Now, what are you now saying, you went on saying it's not an Ex-Parte Judgment, it's a Default Judgment? So, on that basis, I said; okay I will hear your application. And you said*

Counsel: It's a Default Judgment in the Default of appearance of the Defendants, my Lord.

*Court: Okay. So, in short what you are trying to say, you are maintaining your stand? What you are trying to say is;*

Counsel: In default of the appearance of the Defendants.

- (8) I regard this submission of counsel for the defendants from the bar table, as wholly absurd. There is a world of difference between a default judgment and an ex-parte judgment. His submission from the bar table would make a mockery of having separate rules in relation to default judgments and ex-parte judgments and undermines the principal behind them. A default judgment can be obtained as a matter of course following the defendant's failure to give notice of intention to defend or default of defence. As I have said, ex parte judgments are essentially provisional in nature and they are made by the judge on the basis of evidence and submissions emanating from one side. The defendants' application for setting aside and stay is concerned with the judgment written and delivered by Hon. Justice Mohammed Mackie dated 13.11.2018. It is written by the judge on the basis of evidence and submissions emanating from the plaintiffs' side only there being no appearance by the defendants. **It is an ex-parte judgment after the formal proof hearing held before the court on 18/09/2018. The defendants should have come under Order 35, rule 2 of the High Court Rules to rescind the ex parte judgment. The current application is made pursuant to Order 19, rule 9 of the High Court Rules, dealing with setting aside judgments entered in default of defence to counter claim. Such an error is fundamental which the court cannot, in its discretion rectify as mere non-compliance under Order 2, rule 1 of the High court Rules.**

I would dismiss his application on the ground that it is being an abuse of process of the Court.

- (9) Counsel for the Plaintiffs submits that the Court awards costs on an indemnity basis. In support she argues that the application is misconceived and amounts to no more than gross abuse of the Court's process. Counsel is correct; it is the worst case of abuse of process of the court. While the court generally is reluctant, except in exceptional cases, to award costs on an indemnity basis, in this instance, indemnity is more than justified.

- (10) There does not seem to be any doubt that the defendants application amount to what appears to be a deliberate attempt to deprive the plaintiffs' entitlement to enjoy the fruits of its judgment. The plaintiffs must enjoy the fruits of its judgment.
- (11) **The application to stay execution of the default judgment and set-aside the default judgment is dismissed. The plaintiffs are at liberty to proceed with execution or enforcement of the Ex-parte judgment delivered on 13/11/2018.**
- (12) **There will be costs of \$1,000.00 on an indemnity basis. The costs to be paid within 14 days.**
- (13) Orders accordingly.



  
03/06/2019  
**Jude Nanayakkara**  
[Judge]

**At Lautoka**  
**Monday, 03<sup>rd</sup> June, 2019**