

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 126 of 2017

BETWEEN: **PUSHPA WATI** of Sydney, Australia.

PLAINTIFF

AND: **GANGA RAM** of Lot 2, Farm Road, 10 Miles, Nasinu, occupation unknown to the Plaintiff and
occupier of the property compromised in Methodist sub-Lease 8222326.

DEFENDANT

BEFORE: Honourable Justice V D Sharma

COUNSEL: Ms. Naidu S - for the Plaintiff
 Mr. Anand Singh - for the Defendant

Date of Ruling: 03rd June, 2020 @ 9.30 am

DECISION

[Defendant's Application seeking Orders for Setting Aside of Default Judgment and Stay]

INTRODUCTION

[1] The Defendant filed the current **Inter-Parte Summons** on 12th November 2019 coupled with an Affidavit in Support deposed by Ganga Ram [Defendant] and sought the following orders:

- (i) That the Interlocutory Judgment dated 23rd September 2019 be set aside;
- (ii) For an order for Stay of the Writ of Possession pending the determination of the application for the Setting aside of the Judgment in default;
- (iii) That the application be considered and granted ex-parte with appropriate orders for inter-parte hearing;
- (iv) Alternatively, there be an abridgement of time for service and hearing of the application for stay;
- (v) The Defendant be permitted to re-enter the premises.

AND for a further order that the costs of this application be costs in the cause.

- [2] The application is made pursuant to Order 19 Rule 5 of the High Court Rules 1988 and inherent jurisdiction of the High Court of Fiji.
- [3] The parties to the proceedings filed simultaneous written submissions and the inter-parte Summons proceeded to a full hearing.

THE LAW

[4] Order 19 Rule 5(1) of the High Court Rules 1988 deals with Default of defence claim for possession of land (O 19, R 5) and provides as follows:-

(1) Where the plaintiff's claim against a defendant is for possession of land 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 service of the defence, and on producing a certificate by his or her barrister and solicitor, or (if he or she sues in person) an affidavit, stating that he or she is not claiming any relief in the action of the nature specified in Order 88 Rule 1, enter judgment for possession of the land as against that defendant and for costs, and proceed with the action against the other defendants, if any. (Underline is mine)

DEFENDANT'S CASE

- [5] That the Defendant's filed a Summons and Affidavit in Support seeking for Enlargement of Time to file the Defence coupled with a Summons seeking for Security for Costs. Both Summons' were assigned returnable date of 22nd August 2019. The Summons' were adjourned by the Master for mention on 17th October 2019.
- [6] Whilst the Master of the High Court was seized of the Two (2) Summons' and adjourned both Summons' to 17th October 2019, the Plaintiff, without any notice to the Master or to his Solicitors proceeded to seal an Interlocutory Judgment on 23rd September 2019.

- [7] The Interlocutory Judgment was sealed in defiance of the dates of appearances as given by the Master.
- [8] On 27th October 2019, an application was made for Leave to Issue a Writ of Possession which was not served on the Defendant notwithstanding the fact that there were pending Summons' for Enlargement of Time and Security for Costs.
- [9] Since the Master was seized of the matter therefore the entry of the Interlocutory Judgment is contrary to the Master's supervision of the file.
- [10] Hence, seeks for the Orders in terms of the Inter-Parte Summons filed on 12th November 2019.

PLAINTIFF'S CASE

- [11] To substantiate the regularity of the Judgment obtained by the Plaintiff on 23rd September 2019, the Plaintiff relied on the documents filed as per the court record and referred to in the Plaintiff's Affidavit in Opposition filed on 29th November 2019.
- [12] The Judgment obtained by the Plaintiff pursuant to Order 19 Rule 5 of the High Court Rules is regularly obtained.
- [13] On 15th August 2019, the Defendant filed an application for the Enlargement of Time to file their Statement of Defence. This application was moot as the Defendant had notice of an Interlocutory Judgment pending issuance from the High Court Civil Registry.
- [14] On 17th October 2019, in Court, the Master of the High Court informed Defence Counsel that no further action was required at this stage since an Interlocutory Judgment was filed by the Plaintiff. The Defendant was to file an application seeking for Setting Aside of the Interlocutory Judgment.
- [15] It was not until 12th November 2019, after the execution of the Writ of Possession that the Defendant filed its application to set aside a Default Judgment. Despite having notice of the Interlocutory Judgment filed since 26th July 2019, the Defendant made no attempt to set aside the Interlocutory Judgment earlier.
- [16] Pursuant to the directions within the Master's Judgment delivered on 29th May 2019, converting the action into a Writ action, the Statement of Defence with a Counterclaim was due around 26th June 2019. The Application for Enlargement of Time to file and serve a Statement of Defence was made too late in the day.
- [17] The Plaintiff's says that the application for Leave to issue a Writ of Possession is ex-parte and there was no requirement of the notice to the Defendant. The High Court Rules were complied with to obtain Leave to issue a Writ of Possession.

ANALYSIS AND DETERMINATION

- [18] The Plaintiff's commenced proceedings by Originating Summons pursuant to Order 113 of the High Court Rues 1988 on 4th of May 2017 and sought for an Order for the possession of the property comprised under Methodist Church Sub Lease No. 822326 being Lot 2 Farm Road, 10 Miles, Nasinu.
- [19] A Response Affidavit was filed by the Defendant opposing the Plaintiff's application.
- [20] The application was heard by the Master of the High Court and a Ruling was delivered on 29th May 2019 converting the current Originating Summons into a Writ Action and setting out the following directions:
- (a) The Plaintiff to file and serve her Statement of Claim within 14 days.
 - (b) The Defendant to file and serve his Statement of Defence and Counter-claim [if any] in 14 days thereafter.
 - (c) The Plaintiff to file and serve Reply to the Statement of Defence and Defence to Counter-claim [if any] in seven (7) days thereafter.
 - (d) The Plaintiff shall before the next Court date file and serve a Summons for Direction.
 - (e) Matter will now be called for mention on 11 July 2019.
 - (f) Costs to be in cause.
- [21] Notably, no Statement of Defence was filed by the Defendant within the prescribed timetable given by the Master. However, the Defendant filed in a Summons seeking for Enlargement of Time to file and serve his Statement of Defence which was accordingly issued and assigned with a returnable date of 22nd August 2019.
- [22] On the returnable date of the Defendant's Summons, the Summons was not served onto the Plaintiff. Hence, the Summons was directed to be re-dated and served, matter adjourned to 17th October 2019.
- [23] On 01st July 2019, the Plaintiff filed the Interlocutory Judgment seeking an Order for the Defendant to give the Plaintiff vacant possession of the land comprised under Methodist Church Sublease 822326 being Lot 2 Farm Road, 10 Mile, Nasinu and the Defendant to pay the Plaintiff legal costs as sought therein. The Registry realised that the Plaintiff's application for Interlocutory Judgment needed some rectification before the same could be processed any further, the same was refiled on 19th September 2019 and was signed and sealed on 23rd September, 2019.
- [24] Subsequently to the filing, signing and sealing of the Interlocutory Judgment, the matter assigned before the Master was called on 17th October, 2019. Both counsels were present in Court, and the Master noted that the Judgment was entered against the Defendant on 23rd September, 2019 and therefore made a decision that no further action was required at this stage and the file was closed.
- [25] Upon the perusal of the Court records, it can be ascertained that still the Defendant's Summons seeking for Enlargement of Time to file and serve the Statement of Defence was not served since there is no Affidavit of Service in the Court record.
- [26] The Plaintiff proceeded with Writ of Possession and the Master granted Leave to the Plaintiff to issue Writ of Possession against the Defendant on 22nd of October, 2019. Reference is made to

Order 45 Rule 2 (O45, R2) of the High Court Rules 1988 which deals with **Enforcement of judgment for possession of land** and quite categorically provides for the Enforcement Proceedings.

- [27] Both counsels in their submissions upon inquiry by the court confirmed that the Defendant has vacated the premises pursuant to the sealed Interlocutory Judgment and the Writ of Possession accordingly.
- [28] It was not until 12th November 2019 after the execution of the Writ of Possession that the Defendant filed its application to set aside the Default Judgment entered against him.
- [29] I make reference to **Order 19 Rule 5(1)** of the High Court Rules 1988 which deals with **Default of defence: claim for possession of land (O 19, R 5)** is already reflected at paragraph 4 hereinabove.
- [30] Bearing in mind the orders sought by the Defendant in his Inter-Parte Summons, in particular, setting aside of Default Judgment and stay of Execution of the Writ of Possession, the application should have been made in terms of Order 13 Rule 9, Order 13 Rule 10 and/or Order 19 Rule 9 whichever provision of the law was applicable in the circumstances. Further, the Plaintiff should have been aware that an Interlocutory Judgment has been entered against the Defendant and not the Default Judgment as he seeks to set aside.
- [31] The principles for setting aside judgments are set out in **Evans v Bartlam [1937] AC 437**. These are:-
- i. *Unless and until the Court pronounces a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure;*
 - ii. *The Rules of Court give to the Judge a discretionary power to set aside the default Judgment which is in terms "unconditional" and the Court should not lay down rigid rules which deprive it of jurisdiction;*
 - iii. *The primary consideration is whether the Defendant has a defence to which the Court should pay heed and;*
 - iv. *There is no rigid rule that the Defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the Court will have regard in exercising its discretion to set aside a default Judgment.*

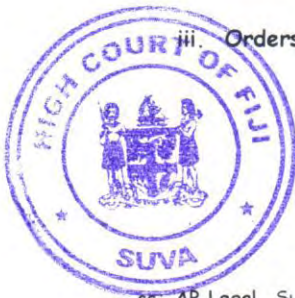
In **Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's rep 221**, the Court concluded that to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the Judgment were to be set aside.

- [32] I have perused the draft Defence and the Counterclaim filed within the Defendant's Inter-Parte Summons and the Affidavit application dated 12th November 2019. However, the Defendant miserably failed in his bid to file and serve his Statement of Defence together with the Counterclaim when he was initially ordered to do so by the Master of the High Court on 29th May 2019. Even upon further grant of adjournments, the Defendant still continuously failed to file and serve his Statement of Defence and the Counterclaim as earlier Ordered. If I may add that rules are made to be followed and adhered to accordingly.

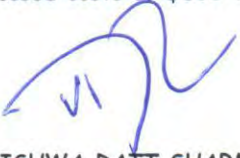
- [33] Prima facie, the application is fatal in the circumstances since the application seeking the nature of the Orders has not been filed in conformity of the abovementioned High Court Rules 1988.
- [34] In fact, the Defendant failed to file and serve his Statement of Defence within the prescribed timeframe as was ordered by the Master of the High Court on 29th of May 2019. The matter was then adjourned to 11th of July and subsequent to 26th of July 2019. Still the Defendant failed in his bid to file and serve his Statement of Defence after the grant of adjournments. Instead the Defendant filed a Summons seeking for Enlargement of Time to file and serve his Statement of Defence and Counterclaim on 15th August 2019.
- [35] The law in terms of Order 19 Rule 5 as hereinabove is very clear and it can be ascertained from the Court records that the Defendant failed to file and serve his Statement of Defence during the prescribed timeframe of the Master's directions. Further, after filing the Summons Seeking Enlargement of Time to file and serve his Statement of Defence, it is noted that even upon grant of three (3) adjournments on 22nd August 2019, 13th September 2019 and 17th October 2019, the Defendant failed to serve the Summons Seeking for Enlargement of Time to file and serve its Statement of Defence onto the Plaintiff as was required by him to do so in terms of the High Court Rules 1988.
- [36] Hence, the Defendant is only to blame himself for the non-compliance of the Rules and effecting service of Summons Seeking for Enlargement of Time to file and serve his Statement of Defence. If the directions of the Court were adhered to and complied with, then the Defendant would not have found himself in the current status.
- [37] The matter proceeded to Hearing and the Defendant is accordingly entitled to costs which I summarily assess at \$800 to be paid by the Defendant.
- [38] In the result, the Defendant's Summons Seeking Setting Aside of the Interlocutory Judgment entered against him herein and for Stay of the Writ of Possession and that the Defendant be permitted to re-enter the premises with costs is accordingly declined.

ORDERS

- i. The Defendants Inter-Parte Summons filed on 12th November 2019 seeking various Orders therein is hereby declined.
- ii. The Defendant is Ordered to pay a summarily assessed costs of \$800 to the Plaintiff.
- iii. Orders as hereinabove accordingly.



cc. AP Legal, Suva
Singh and Singh Lawyers, Suva


VISHWA DATT SHARMA
JUDGE
SUVA
03rd Day of June, 2020