IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 307 of 2006

BETWEEN : **J K BUILDERS LTD** a limited liability company having its registered office at Nadi, Fiji.

RESPONDENT/PLAINTIFF

A N D : **AJAY RANIGA** and **KAVITA RANIGA** both of Main Street, Nadi, Fiji.

APPLICANTS/DEFENDANTS

A N D : **SHARMA ARCHITECTS DESIGN GROUP LIMITED** a limited liability company having its registered office at Suva and carrying business elsewhere in Fiji.

RESPONDENT/THIRD PARTY

Appearances : Mr S. Krishna with Ms S. Sonika for the applicants/defendants
Ms A. B. Swamy for the respondent/plaintiff
Ms S. Lata for the respondent/third party

Date of Hearing : 19 June 2020

Date of Ruling : 27 July 2020

RULING

[on setting aside judgment given in absence of a party]

Introduction

[01] This is an application for setting aside a judgment granted in the absence of a party.

[02] By a summons filed 10 December 2019, which is supported by an affidavit of Ajay Raniga, the first named defendants (*"the application"*), the applicants/ defendants (*"the defendants"*) seek the following orders:

> *i. That there be an extension of time under Order 3 Rule 4 of the High Court Rules to determine an application to set aside Judgment pronounced on 17 May 2017, of His Lordship Justice M H Mohamed Ajmeer and Order sealed on the 30 May 2017, in the within action pursuant to Order 35 Rule 2 of the High Court Rules, 1988.*
>
> *ii. That the Judgment pronounced on 17 May 2017, of his Lordship Justice M H Mohamed Ajmeer be wholly set aside and that there be a new trial of all the issues within the said action upon such terms and conditions as this Honourable Court deems just and expedient.*
>
> *iii. That all monies together with interest paid by the first defendants subject to and under protest pursuant to the Judgment pronounced on 17 May, 2017 and/or order be deposited into Court pending the determination of the application to set aside.*
>
> *iv. Such other orders as this Honourable Court deems just and equitable.*
>
> *v. That the plaintiff does pay costs of this application.*
>
> *vi. That the service of this summons be abridged to one day.*

[03] The application is made under O 3, R 4, O 35, R 2, O 45, R 10 of the High Court Rules 1988, as amended (*"HCR"*) and inherent jurisdiction of the court.

[04] The respondents, the plaintiff and the third party oppose the application.

[05] At the hearing, both the parties made oral submissions and tendered their respective written submissions.

Background

[06] The brief background facts are as follows:

6.1 On 12 October 2006, the plaintiff instituted proceedings by way of a writ of summons endorsed with the statement of claim against the defendants for monies owed under a construction contract which the defendants denied.

6.2 On 16 March 2009, the defendants joined the third party claiming among other things contribution/indemnity for the plaintiff's claim. The defendants alleged that the third party, who had been engaged to prepare house plans and architectural designs, had failed and/or neglected to carry out its responsibilities under the contract with the defendants.

6.3 The third party denied the defendants claim and counterclaimed against the defendants for monies owed for services provided.

6.4 The trial of the action was listed for 22 and 23 March 2017. On the day of trial, there was no appearance by the defendants or their counsel. However, the clerk for the defendants' solicitor was present and remained throughout the proceedings. As the plaintiff and third party were ready to proceed, the trial commenced and was concluded in the absence of the defendants or their counsel.

6.5 Prior to the trial, on 16 March 2017, the defendants had filed an application to vacate the trial dates as they required obtaining an engineer's report. Their assigned engineer had failed to provide a report and they needed to enlist another engineer. The court hearing the application on 20 March 2017 refused the adjournment.

6.6 At the trial, where the defendants and their counsel were absent, the plaintiff and the third party gave brief evidence.

6.7 On 17 May 2017, the court delivered a judgment as follows:

(Of plaintiff's claim)

(i) *There will be judgment in favour of the plaintiff in the sum of $51,568.52;*

(ii) *The plaintiff is entitled to interest in the judgment sum at 8% from 12 October 2006, until the date of the judgment.*

(iii) *The plaintiff is also entitled to costs of $5,000.00, which is summarily assessed.*

(Of third party's counterclaim)

(i) *There will be judgment in favour of the third party in the sum of $21,493.76;*

(ii) *The third party is entitled to interest on the judgment sum at 8% from 22 October 2013, until the date of the Judgment.*

(iii) *The Third Party is also entitled to costs of $2,500.00, which is summarily assessed.*

6.8 On 28 June 2017, the defendants' former solicitors filed a notice and grounds of appeal against the judgment. Notice of appeal was not served on the opposite party until 5 July 2017. This appeal was not properly constituted as the defendants failed to file and serve their notice of appeal within the prescribed time as required by R 16 of the Court of Appeal Rules ("*CAR*").

6.9 On 17 July 2017, the defendants filed a fresh appeal pursuant to R 17 of the CAR.

6.10 On 25 July 2017, the third party filed an application to strike out the defendants' appeal. This was granted by his Lordship Calanchini, J on 5 February 2019, and the defendants purported appeal was struck out.

6.11 The defendants had complied with the judgment.

6.12 The defendants have filed this current application to set aside the judgment delivered against them in their absence on 17 May 2017.

Legal framework

[07] HCR, O 35, R 2, provides that:

> *"2 (1) Any judgment, order or verdict obtained where one party does not appear at the trial may be 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."*** [Emphasis supplied].

[08] HCR, O 3, R 4, states that:

> **"Extension etc of time**
>
> ***4 (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.*** *[Emphasis provided].*
>
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
>
> *(3) The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the court being made for that purpose..."*

Principles on setting aside judgment given in the absence of a party

[09] In *Shocked and another v Goldschmidt and others* [1998] 1 All ER 372, where judgment was given in favour of the defendants and various orders were made, with which S complied late. S subsequently applied under RSC Ord 35, r 2(1) to set aside the judgment and the application was heard in November 1993. The deputy judge granted the application, holding that the principles relating to

setting aside default judgments were applicable, that S had a reasonable prospect of making some impact by way of defence on the counterclaim and that the inadequacy of S's explanation for her non-attendance did not bar her from the relief she sought. The defendants appealed to the Court of Appeal, the Court of Appeal held:

> *"On an application to set aside a judgment given after a trial, in the absence of the applicant, different considerations applied than on an application to set aside a default judgment. In particular, the predominant consideration for the court was not whether there was a defence on the merits but the reason why the applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside, the conduct of the applicant, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation. It followed, in the instant case, that in approaching the exercise of his discretion as he did, the deputy judge had erred in principle. Having regard to the facts that S's non-attendance had been deliberate, that she had no real prospects of success in a retrial, that she had delayed in applying to set aside, that her conduct before and after judgment had been undeserving, that G would be incommoded by a retrial and that a retrial would require the court to spend a further ten days hearing the proceedings and so was contrary to the public interest, it would not be right to set aside the judgment. Accordingly, the appeal would be allowed (see p 381 e to j and p 382 c to j, post)."*

[10] Leggatt LJ in the above case after considering the authorities then set out at p.381 a series of propositions or *"general indications"* which are: -

> *"(1) where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.*
>
> *(2) where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*

(3) where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.

(4) the court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment or third parties have acquired rights by reference to it.

(6) in considering justice between parties the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(7) a material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) there is a public interest in there being an end to litigation and in not having he time of the court occupied by two trials, particularly if neither is short.

The submissions

[11] Mr Krishna, on behalf of the defendants, submits that: the defendant had on occasions prior to the trial date liaised with their former solicitors regarding the trial, however at the eve of the trial advised that the former solicitor would not be able to appear but had instructed another counsel to appear and make representation on the defendants' behalf; and the defendants were also advised by the former solicitor that they need not be present on the trial date as their trial would not proceed. His submission goes on that the defendants had a meritorious case to be presented and ought to be given the opportunity to do the same, and their entire defence to the plaintiff's claim and claim against the third party remains standing and yet to be properly tried before this court. In explanation of the delay, he submits that the defendants had, until the date of judgment, been under the assumption that the matter was being conducted in a reasonable manner and as such, they were awaiting in anticipation of the matter

to proceed to trial so that they could not just raise and argue their defence but also prove their claim against the third party. He further submits that the defendants had duly paid out what was awarded against them whilst the appeals were still on foot and as such, this reflects on their genuine approach to compliance of court orders. Finally, he submits that the circumstances of the matter in which how the former solicitor handled the matter should also be taken into consideration.

[12] On the other hand, Mr Singh counsel for the plaintiff submits that:

12.1 The defendants were aware of the trial date themselves however failed to appear in person on the day of trial.

12.2 There was no defence or defence on merits established by the defendants as well.

12.3 The conduct of the defendants is to be taken into consideration, in that:

a) Non-appearance at the trial date despite being aware of the date on which the trial was to be conducted.

b) Being made aware of the judgment and thereafter choosing to file appeal. They filed second appeal as the first one was deemed abandoned.

c) The appeal was struck out on 5 January 2019. In the appeal ruling the Fiji Court of Appeal indicated that the defendants under the circumstances the judgment was obtained to apply for a setting aside under O 35, R 2 of the High Court Rules. Despite the indication from the Fiji Court of Appeal the defendants filed an appeal in December 2019.

d) The delay is now 2 years and 9 months from the date of judgment and this delay is substantial.

[13] On behalf of the third party, Ms Lata submits that: the reasons advanced for justifying the delay of 935 days are unmeritorious. The defendants cannot entirely blame their former solicitors as they did not withdraw their instructions or take any action against them (former solicitors). The current application was

made more than 10 months after the ruling of the Fiji Court of Appeal on 5 February 2019. The court had, having satisfied on both the plaintiff's and the third party's evidence as being clear and straightforward, already decided the defendants had no reasonable defence to the claims made by the plaintiff and the third party. There is no doubt that the defendants' defence/counterclaim against the plaintiff and the third party do not have any merit and is likely to fail even if there is a retrial. There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short. The money paid under the judgment has now been rightfully utilized by the third party.

Discussion

[14] The defendants make application to set aside the judgment delivered against them in their absence on 17 May 2017. In October 2006, the plaintiff issued a writ of summons endorsed with the statement of claim against the defendants on a cause of action which arose out of a building contract entered in November 2003. The defendants issued the third-party proceedings against the third party and the third party counterclaimed against the defendants.

[15] The trial of the action was listed on 22 and 23 March 2017. On the trial day, there was no appearance by the defendants or their counsel. The plaintiff and the third party gave brief evidence in the absence of the defendants and reserved its judgment. On 17 May 2017, the court delivered the judgment against the defendants in favour of the plaintiff and the third party in the sum $51,568.52 and $21,493.76 with costs. The defendants had complied with the judgment.

[16] If, when the trial of an action is called on, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party (see *HCR, O 35, R 1 (2)*).

[17] Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just (see *HCR, O 35, R 2 (1)*).

[18] An application to set aside a judgment obtained where one party does not appear at the trial must be made within 7 days after the trial (see *HCR, O 35, R 2 (2)*).

[19] Instead of making an application to set aside the judgment obtained in their absence at the trial within 7 days after trial as required by O 35, R 2 (2), the defendants appealed the judgment to the Court of Appeal on two occasions. First appeal, which was filed on 28 June 2017, was not properly constituted as they failed to serve the appeal on the respondents within the prescribed time. Then, on 17 July 2017, they filed their second appeal which was struck out on 5 February 2019.

[20] In *Shocked*, above the Court of Appeal said that on an application to set aside a judgment given after a trial, in the absence of the applicant, different considerations applied than on an application to set aside a default judgment. In that case the court set out eight propositions or general indications applicable to such an application (see para 10 of this judgment).

[21] I intend to apply, so far as relevant, the propositions set out in *Shocked* by the Court of Appeal to the application at hand as it is one to set aside a judgment given after a trial in the absence of the applicants.

[22] As was said in *Shocked* the predominant consideration for the court was not whether there was a defence on the merits but the reason why the applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing

Reasons for default in appearance

[23] The reasons given by the defendants for their absence at the trial were that they were under the assumption that their former solicitor had proper carriage of the file and relied on the legal advice provided, and that they had on occasions prior to the hearing date liaised with their former solicitor regarding the trial however at the eve of the trial were advised that their former solicitor would not be able to appear but had instructed another counsel to appear and represent them.

[24] It is noteworthy that the defendants blame their former solicitor for not being present at the trial.

[25] The former solicitor had acted on the instructions of the defendants. Therefore, the defendants must bear responsibility for whatever their former solicitor did.

[26] In *Bank of Scotland v Pereira & Others* [2011] 3 All ER 392, Lord Neuberger MR had this to say:

> *"I reject the contention that former solicitors were to blame to delay the matter rather than saying that this is a case where the normal rule shall apply that a party has to bear responsibility for delay whether it be caused by him or his solicitors."*

[27] The defendants' non-appearance at the trial, in my opinion, was not due to accident or mistake. It was deliberate because they had absented at the trial knowing very well of the trial date. The defendants must bear responsibility for default at the trial whether it be caused by them or their solicitors.

Reasons for the delay in making the application to set aside

[28] The matter was called on for trial on 22 March 2017, where the defendant had absented. The court heard evidence of the plaintiff and the third party in the absence of the defendants and delivered the judgment against the defendants on 17 May 2017. The defendants have made this application more than 2 ½ years after the judgment was pronounced. The delay is too long.

[29] The reasons for the delay are that:

(i) Negligence and conduct of their former solicitors in filing the appeal and handling their case which was beyond their control.
(ii) The defendants' present solicitors could not withdraw the appeal as the third party had filed a summons to strike out at the Court of Appeal which needed determination.

[30] The HCR, O 35, R (1) and (2), is clear that a judgment obtained where one party does not appear at the trial may be set aside by the court on application which must be made within 7 days after trial.

[31] There has been non-compliance of the HCR by the defendants. It is no excuse that they did not know of such rule.

[32] Again, the defendants blame on their former solicitor for the delay. I repeat that the defendants must bear responsibility for the delay in applying to set aside whether it be caused by them or their solicitor.

The prospects of success of the applicants in a retrial

[33] The defendants in their statement of defence had pleaded that full particulars of the rectification works would be provided at the trial. They had now produced a list of rectification costs for their remedial works done on the property which ranges from 2006 to 2017. These particulars such as receipts, cheques and invoices for costs of rectifications were not provided by the defendants before the trial.

[34] The defendants made application before the trial date for adjournment of the trial of 22 and 23 March 2017 on the basis that they did not had their engineer's certificate. This clearly demonstrates that, even in 2017, the defendants were not ready to proceed with the trial of the action which was instituted in 2006.

[35] Having heard the evidence of the plaintiff and the third party in the absence of the defendants, the court had decided that their evidence was clear and straightforward and that the defendants have no reasonable defence to the claim and to the third party's counterclaim.

[36] In my judgement, the defendants have no real prospects of success in a retrial.

Whether the successful party would be prejudiced by the judgment being set aside

[37] The cause of action arose out of a construction contract entered in 2003. The action was instituted in 2006. Some 14 years had lapsed since the institution of the action.

[38] It is true the memories of the witnesses would have faded and employees of the plaintiff would have moved on. It would be hard for the plaintiff and the third party to locate their witnesses after 17 years of the construction agreement. Further, the successful parties had acted upon the judgment.

[39] In the circumstances, I am of the opinion that the successful party (the plaintiff and the third party) would be prejudiced by the judgment being set aside.

Defendants' conduct before and after judgment

[40] The conduct of the defendants before and after the judgment had been undeserving. They absented at the trial despite being aware of the trial day. After the judgment they chose to file appeal contrary to O 35, R 2. They had delayed in applying to set aside- two and half year delay. They unsuccessfully appealed the judgment twice. Their first appeal was properly prosecuted in that they failed to serve the appeal on the respondents within the prescribed time. As a result, they had to file their second appeal which was later struck out on the application of the third party.

[41] The appeal was their mistaken choice when the HCR, O35, R 2, allowed them to apply for setting aside the judgment obtained in their absence.

[42] When striking out their appeal on 5 February 2017, the Fiji Court of Appeal indicated that they had to make application for setting aside. Even then, they had delayed more than 10 months after the Court of Appeal ruling.

[43] All these clearly demonstrate the defendants' lackadaisical conduct before and after the judgment.

The public interest in there being an end to litigation

[44] The plaintiff and the third party would be inconvenienced by a retrial and that a retrial would require the court to spend a further 3 to 5 days hearing the claims. It would not be right to set aside the judgment after two and half years, particularly where the judgment had been acted upon, it would be contrary to public interest in that there being an end to litigation.

Conclusion

[45] For the reasons given above, I proceed to dismiss the defendants' application to set aside with costs to the plaintiff and third party, which I summarily assess at $850.00 each (totalling $1,700.00).

Result

1. Defendants' application to set aside judgment obtained in their absence is dismissed.

2. The defendants shall pay summarily assessed costs of $850.00 to the plaintiff and the third party each, totalling $1,700.00.

Hajmeer

.....27/7/20

M.H. Mohamed Ajmeer
JUDGE

At Lautoka
27 July 2020

Solicitors:
Krishna & Co, Barristers & Solicitors for the applicants/defendants
Patel & Sharma, Barristers & Solicitors for the respondent/plaintiff
AK Lawyers, Barristers & Solicitors for the respondent/third party