

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 433 of 2019

BETWEEN : **JAI PRASAD** of Wainibokasi, Nausori, Businessman.

PLAINTIFF

AND : **VISHAL KUMAR** aka **VISHAL VARUN KUMAR** of Melborne Street, Varetā, Nausori,
c/- M. Y. Khan Transport, Driver.

DEFENDANT

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Kumar S. - of the Plaintiff
Mr. Gosai S. P. - for the Defendant

DATE OF DECISION: 20th January 2021 @ 9.30 am.

DECISION

(Summons by Plaintiff for leave to enter Judgment against the Defendant pursuant to Order 13 rule 6 and Order 19 Rule 7 of the High Court Rules, 1988 and the inherent jurisdiction of the Honorable Court)

INTRODUCTION

1. This is the **Plaintiff's Summons for leave to enter Judgment** against the Defendant and sought for the following orders-
 - (i) **Judgment or an order for such relief as upon paragraphs (a), (b), (c) and (d) of the Plaintiff's Statement of Claim hereto; and;**
 - (ii) **Cost of this application be paid by the Defendant.**
 - (iii) **Any other orders that this court deems just and reasonable.**
2. The application is made pursuant to **Order 13 Rule 6, and Order 19 Rule 7 of the High Court Rules, 1988 and the inherent jurisdiction of the High Court.**
3. The Defendant opposed the Plaintiff's Summons and filed an Affidavit in Opposition coupled with a Draft Statement of Claim on 24th April, 2020.
4. An Affidavit in Reply was thereafter filed by the Plaintiff on 19th May, 2020.
5. The Application was heard on oral submissions and a written submission was furnished to Court by the Defendant. The matter was adjourned for a Decision to be delivered accordingly.

THE LAW

6. **Judgment in default (O.13, r.6) (Other Claims)**

6.-(1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4 then, if any defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time and, if that defendant has not acknowledged service, upon filing an affidavit proving service of the writ on him and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had given notice of intention to defend.

(2) Where a writ issued against a defendant is indorsed as aforesaid, but by reason of the defendant's satisfying the claim or complying with the demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter judgment with the leave of the Court against that defendant for costs. (Underline mine)

(3) An application for leave to enter judgment under paragraph (2) shall be by summons which must, unless the Court otherwise orders, and notwithstanding anything in Order 65, rule 9, be served on the defendant against whom it is sought to enter judgment.

7. **Default of defence: other claims (O.19, r.7)(Other Claims)**

7.-(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail 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, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim. (underline mine)

(2) Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may-

(a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or

(b) set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.

(3) An application under paragraph (1) must be by summons or motion.

PLAINTIFF'S CASE

8. The Plaintiff filed a Writ of Summons together with a Statement of Claim on 31st December, 2019 claiming for the following relief-
 - (i) Specific Performance of a written agreement between the Plaintiff and the Defendant made on 07th July, 2008, for the sale by the Defendant to the Plaintiff of the Defendant's Motor Vehicle Registration No. FC 07001/LM now MB.62 with permit;
 - (ii) An injunction restraining the Defendant whether by himself, his servants, agents or howsoever from dealing with FC 01/LM 62 now MB.62 with permit until further orders of the Court.
 - (iii) Plaintiff claims damages for breach of contract; Alternatively, an immediate refund of the sum of \$25,000 with 15% interest on the principal sum from 07th July, 2008.
 - (iv) Legal Practitioners costs in the sum of \$5,000 for making demand, attending and engrossing writ of Summons with the statement of claim and pursuing the same.
 - (v) Such further relief and Incidental costs.
9. The writ of Summons together with the Statement of Claim was served onto the Defendant 24th January, 2020. An Affidavit of Service to this effect was filed into Court.
10. Neither Acknowledgment of Service nor any Statement of Defence has been filed within time allocated in the High Court Rules. Non Compliance of Rules. Reasonable excuse given. Now the Defendant has filed a sham Draft Defence.
11. Summons for Leave to enter judgment filed on 3rd March 2020 and served on 6th March 2020.

12. No application to cure irregularities filed. No formal application filed to seek extension of time to comply with the High Court Rules. Sought for Default Judgment be entered against the Defendant.

DEFENCE CASE

13. Writ was served in timely manner. Not retained by client but only instructed to respond to the demand notice Later the Defendant engaged our services and Draft Defence filed.
14. Substantive matter needs to be determined on merits. Default Judgment as of yet not entered. Defendant has arguable Defence. Admit that the Defendant did not Acknowledge Writ.
15. Defendant be allowed to file his Defence.

ANALYSIS AND DETERMINATION

16. This court needs to determine the following issues-
- (i) **Whether leave be granted to the Plaintiff to enter Default Judgment against the Defendant; and**
 - (ii) **Costs.**
17. The Plaintiff filed the Writ of Summons together with the Statement of Claim on 31st December, 2019.
18. The same was served onto the Defendant on 24th January, 2020.
19. The Court noted that **neither an Acknowledgment of Service** nor a **Statement of Defence** was filed by the **Defendant** as was required under the **High Court Rules, 1988**.
20. The Plaintiff filed the Current Summons and sought for an order to **enter Default Judgment against the Defendant**. Subsequently the **Defendant** filed an **Affidavit in Opposition** annexing a draft **Statement of Defence**.
21. In its **Draft Statement of Defence**, the **Defendant** states as follows-
- *Admitted paragraph 1 of the Plaintiff's claim;*
 - *Denies the contents of paragraph 2 and further states that the Plaintiff and the Defendant did not enter into a sale and purchase agreement, while the defendant through his Solicitors responded to the Demand Notice which was served to him and requested the Plaintiff to provide particulars.*
 - *Deniers paragraph 3 of the claim and Puts the Plaintiff to strict prove of the claim;*
 - *Denies that the Plaintiff paid the Defendant a sum of \$20,000. There was a mutual agreement that only the vehicle was purchased by the Plaintiff and the Permit belongs to the Defendant.*

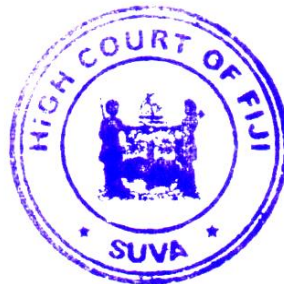
- *The Plaintiff transferred the vehicle to the defendant and for his security executed a Bill of Sale of \$5,000.*
 - *There was no agreement to transfer the Permit LM 62 to the Plaintiff's name. The Permit is registered under the Defendant's name due to a mutual understanding and the Permit cannot be transferred to the Plaintiff's name.*
 - *No binding contract was entered into.*
 - *Seeks an order for striking out of the Plaintiff's claim.*
22. It cannot be denied by the Defendant that the service of the Writ and the Statement of Claim was effected onto the Defendant on 24th January, 2020.
23. Even the Counsel representing the Defendant in the proceedings in the current application by the Plaintiff for Leave to Enter Default Judgment has admitted in his oral submissions to the Court that the Defendant was served in a timely manner.
24. It can also not be denied that an Acknowledgment of Service and the Statement of Defence was not filed as was required by the High Court Rules..
25. Further, this court notes from the court records that the **Defendant** after realising that they have failed to file and serve any Acknowledgment and/or the **Statement of Defence**, that he was subsequently prompted to defend the **Plaintiff's Summons** seeking an **order for leave to enter Default Judgment against the Defendant** for the claims made within the **Statement of Claim**.
26. Thereafter, the **Defendant** thought fit and proper to file and serve an **Affidavit in Opposition** to the Plaintiff's **Summons for leave to enter Default Judgment against the Defendant**.
27. However, the Defendant did not think appropriate in the circumstances to file and serve an application seeking for Leave for extension of time to file the Statement of Defence out of time.
28. Upon the perusal of the Defendant's 'Draft Statement of Defence" annexed to his Affidavit in Opposition, prima facie it is evident that there existed some mutual understanding between the parties as to the purchase of the Vehicle LM 62 and may be the transfer of the Permit to the Plaintiff together with a payment whether it was \$5,000 and or \$20,000and/or \$25,000. Further the Defence talks about the Bill and Sale And an Agreement? There are no documentary evidence of any of the Agreements, Bill of Sale, Sale and Purchase Agreement and payment of any receipt? All these poses many Questions to this Court which remains unanswered. Further, these Questions leave this Court in a Dilemna and in uncertainty, nothing concrete. The Court needs to find an answer to all these Questions before arriving at a just and fair Judgment.
29. Accordingly, for the aforesaid Rational, I **find** that there are **triable issues** which need to be fully deliberated upon and accordingly determined at a full trial.
30. Plaintiff's Summons seeking for Leave to enter Default Judgment against the Defendant is not the answer to this proceeding and should not be dealt with summarily taking into consideration the prima facie merits within the 'Draft Statement of Defence herein.

31. Therefore, having perused and taking into consideration the **affidavit evidence, draft Statement of Defence, and oral and written submissions** of both parties to this proceedings, and no doubt there being **triable issues** raised and the court being appraised of the same, that I am **inclined** to exercise my **discretion** and accordingly **decline** the **Plaintiff's leave to enter Default Judgment** against the **Defendant** at this stage of the proceedings.
32. Since, the **leave to enter Default Judgment** against the **Defendant** has been **declined**, in the circumstances it is only appropriate and I will allow and grant time frame of **14 days' time** to the **Defendant** to file and serve their **Statement of Defence** on the **Plaintiff from the delivery date of this Decision on 20th January, 2021**. The Plaintiff is at liberty to file and serve any Reply within 14 days thereafter.
33. Since the Plaintiff's Summons proceed to a hearing, it is only appropriate that the Plaintiff is entitled to **costs summarily assessed @ \$650** against the Defendant to be paid before the filing of the Defendant's Statement of Defence.
34. In **Conclusion**, I now proceed to make the following final orders:

FINAL ORDERS

- a) **Plaintiff's Summons for leave to enter Default Judgment against the Defendant fails and is accordingly declined.**
- b) **The Defendant is hereby granted an extension of 14 days' time to file and serve their Statement of Defence onto the Plaintiff.**
- c) **The Plaintiff is at liberty to file and serve any reply within 14 days thereafter.**
- d) **The Defendant to pay the Plaintiff Costs summarily assessed @ \$650 to be paid before the filing of the Statement of Defence.**
- e) **Substantive Matter is adjourned for mention on 25th February, 2021 @ 9.30 am accordingly.**

Dated at Suva this 20th Day of January, 2021



VISHWA DATT SHARMA
JUDGE

cc: Sunil Kumar Esq, Nausori
Jiten Reddy Lawyers, Nakasi.