

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

Civil Action No. 35 of 2020

**BETWEEN:** **PHILIP ANDREW JOHN WHITE** of Lot 1320 Pacific Harbor, Retired Computer Consultant

**PLAINTIFF**

**AND:** **JANUSZ KUBS** aka **JANUSZ WOJCIECH KUBS** of Lot 1 DP No 11006, Viti Levu Drive, Pacific Harbor, Retired Businessman.

**DEFENDANT**

**Counsel** : **Plaintiff: Mr O'Driscoll. G**  
: **Defendant: Mr Vasarogo. V**  
**Date of Hearing** : **25.3.2021**  
**Date of Judgment** : **29.3.2021**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff filed this action by way of writ of summons and a statement of claim along with *ex parte* motion seeking extension of caveat for Defendant's three certificates of title. Plaintiff in the statement of claim briefly stated that he had given a sum of \$125,000 to Defendant during a period of three years and had also stated that there was an agreed interest rate of 10% for the said sum. He also stated that sum was borrowed by Defendant to build a villa in Fiji. In this application as well as in previous affidavits filed Plaintiff could only produce some money transferred in overseas in foreign currency, and could not establish sum of \$125,000 paid to Plaintiff. The payments were made in Great Britain Pounds, and had not even indicated an exchange rate for the said calculation of alleged liquidated sum. There is no evidence of any agreed interest rate at all. Default judgment was for \$165,000 including alleged, agreed interest rate of 10% for loaned sum of \$125,000. There was no evidence of such a fixed interest rate and how an interest of around \$40,000 calculate, as money was given on different dates. Hence the claim itself lacked necessary characteristics to be considered as liquidated amount, on the disputed facts contained in the proposed statement of defence. Plaintiff on the evidence before the court had failed to establish a liquidated sum of \$165,000 or any lessor liquidated sum, due from Defendant. Hence lacked basic establishment of liquated sum. The default judgment made on 18.5.2020 is hereby set aside. Accordingly all the proceedings taken

based on default judgment of 18.5.2020 for registration of charge on Defendant's certificates of titles, are deemed set aside and declared null and void.

## FACTS

2. Plaintiff filed this action seeking extension of caveat on Defendant's villa situated in CI 43315.43316 and 43317, "by virtue of not honouring his agreement terms of repayment to moneys handed to Janus Kubs aka.....)(see paragraph 5 of the affidavit in opposition filed by Defendant for extension of caveat).
3. Plaintiff had attached 'some bank transfer records from 2016-2018 hereto showing some of the amounts sent to the Defendant and his suppliers .....)(see paragraph 9 of affidavit in reply of the Plaintiff to the extension of caveat).
4. Defendant had filed acknowledgment of service on 26.2.2020 but failed to file statement of defence.
5. Judgment by default was entered on 18.5.2020 and an affidavit of service of the said judgment was filed on 7.10.2020.
6. There after Plaintiff made an application in terms of Order 50 rule 1 of High Court Rules 1988 seeking an order to show cause, to Defendant to register a charge on three properties belonging to Defendant for execution of default judgment.
7. The Defendant filed summons dated 12.3.2021 to set aside a judgment entered against him on 18.5.2020.
8. In the said affidavit in support Defendant had denied service of default judgment to him personally and stated that alleged liquidate sum contained in default judgment for \$125,000 and \$40,000 was obtained without any evidence
9. The Plaintiff filed his affidavit in opposition to this application, on 19.5.2021.
10. The Defendant filed his reply on 23.5.2021.

## ANALYSIS

11. Counsel of Plaintiff at the outset stated that the judgment was regularly obtained and he is not disputing that.
12. Plaintiff had filed writ of summons and also *ex parte* motion seeking extension of caveat. Defendant through his solicitors had acknowledged service on 25.2.2020. So, there was no need to obtain a court order to serve the writ of summons filed at the time of filing of this action as contended by Defendant in the affidavit in support of setting aside of default

judgment.

13. Plaintiff's application for extension of caveat was not successful but both parties had filed affidavits with some facts, but Defendant had failed to file statement of defence.
14. From the records it is not clear when the writ of summons was served as there was no affidavit of service, but solicitor for Defendant had acknowledged it on 25.2.2020 but failed to file a statement of defence. From affidavit in support of present application, it seemed that Defendant or his solicitor had a mistake of law as to procedure regarding writ of summons.
15. Plaintiff obtained judgment in default in terms of Order 19 rule 2 and Order 13 rule 1(2) of High Court Rules 1988.(HCR)
16. Defendant stated that default judgment was not served to him personally.
17. Irrespective, of above disputed fact of service, any judgment entered in terms of Order 19 HCR for default of pleadings, can be set aside or vary it, in terms of Order 19 rule 10 HCR when it is 'just'. This is a broad discretion granted to court, and can be exercised depending on the facts and circumstances.
18. Court is required to find out whether the default judgment is justified to remain so that it can result in recovery through execution. For this there should be certainty as to the sum ordered or varied sum ordered and Plaintiff's right to obtain such an liquidated amount as judgment.
19. The paramount consideration in setting aside default judgment is merits. In this case Plaintiff had failed to substantiate his claim for \$125,000 and interest for \$40,000. There is no evidence of interest and even if so there was no calculation presented to substantiate any sum as interest.
20. Even alleged principal sum is unsubstantiated and no evidence produced in the affidavit in opposition how such an amount accrued.
21. Plaintiff cannot obtain a judgment for liquidated sum unless he is able to substantiate said sum and or interest claimed and impose that on Defendant through registering a charge on the properties owned by Defendant.
22. Both parties have produced affidavits for the previous application seeking extension of caveat, even considering them found wanting in this important aspect of the liquidated sum or any lesser sum.
23. Defendant in the affidavits filed previously not denied acceptance of certain amount of money from Plaintiff, but denied that such money was not expended on properties or

villas he had constructed.

24. How much was given and what were the terms and conditions of such money and repayment needs to be established for a liquidated sum. A claim that Defendant owed Plaintiff \$125,000 and interest of \$40,000 cannot stand as liquidated sum for default judgment, without further substantiation, on the evidence produced by Plaintiff, when it is denied and challenged.
25. This is a sum that he needs to establish through evidence. The bank transfers that he had so far submitted indicated some transfers in Great Britain Pounds and they were for amounts of 4 812.03 , 4 625.46, 2 040.62 , 1 210.80 , 2,101.46 , 6082.75 and 3 995.21 and a separate transfer of 750.77 paid to Hunan Shinion Energy Saving Scien.
26. Even for said amounts, Plaintiff's reference in bank statement indicated Defendant's first name 'janus', and this is not sufficient to obtain default judgment without further proof such as exchange rate at that time. In such an instance I could even adjust judgment for liquidated sum.
27. *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd* [1998] 4 All ER 753 at p 756

“If there was nothing irregular about the writ or the judgment, but the defendant wants to have the judgment set aside in order to defend the action, **the court has a discretion which it will exercise on principles laid down by various cases**, especially *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1986] 2 Lloyd's Rep 221. The court will want to be satisfied that there are sufficient merits in the defence which the defendant wishes to present before it will set the judgment aside. **There is no point in setting it aside if the defendant is almost certainly going to lose anyway.** *The Saudi Eagle* and other cases give guidance about what level of merits the defendant needs to show.” (emphasis added)

28. By the same token there is no point in allowing a claim to remain as default judgment without sufficient evidence to substantiate such a claim, on mere statement such sum is owed by Defendant. It is unjust to allow such an unliquidated sum being considered as liquidated, only on the basis that Defendant had failed to file a statement of defence.
29. It is not just for Plaintiff to register a charge obtained in default on the properties of the Defendant without prima facie evidence of such a debt, only because Defendant failed to file statement of defence.
30. In *Bank of Credit and Commerce International (Overseas) Ltd (in Liquidation) v*

Habib Bank Ltd [1998] 4 All ER 753, where Park J held on Page 757 as follows:

"Assume a case where the Writ and the Judgment did suffer from some irregularities. **Nevertheless assume also that, by the time that the application to set the Judgment aside comes to be heard, time has passed and almost certainly a great deal of information about the case,** verified by affidavits, will be before the Court. If, from the affidavits and exhibits, the Court concludes that, **even though there were irregularities in the Writ or the Judgment or both, the substantive content of the Judgment is right, the Court will not set the Judgment aside.**" (emphasis is mine)

31. In this case there is some evidence produced through affidavits by both parties regarding application for extension of caveat.
32. It is an unfettered discretion given to court to set aside default judgment if such it is 'just' to do so. In this exercise, Plaintiff's claim needs further examination by court for the first time, as default judgment was entered, on default without examination in detail of the alleged liquidated sum. Ratio of *Bank of Credit and Commerce International (Overseas) Ltd (in Liquidation) v Habib Bank Ltd* [1998] 4 All ER 753 is that court can examine the default judgment more closely with available evidence and can either vary or set aside.
33. Hence, Plaintiff first justify his claim for the default judgment, and in the absence of such evidence it cannot stand and should not be impose on Defendant through registration of charge on his property. It would be unjust to do so and that was what Plaintiff was about to do when this application was filed.
34. Defendant had delayed this application, after filing an acknowledgment over a year ago, for this reason alone this action got delayed, but that cannot be a reason to allow Plaintiff to execute a judgment for \$165,000, which cannot substantiate and not a liquidated sum on evidence before me.
35. Plaintiff had not only taken default judgment on a specific sum, but also taken steps in terms of Order 50 of HCR to register a charge on the properties. Without establishment of sum owed no execution or registration of charges on properties cannot be obtained.
36. Plaintiff had filed this action without substantiating facts for liquidated sum and this sum consisted of several payments, made at different times for a period from 2016 to 2019 and the payments that submitted to court were done in foreign currencies. Without an exchange rate debt of \$125,000 cannot be substantiated.
37. In the affidavit in opposition Plaintiff had not substantiated his claim for default judgment, but considering previous affidavits filed Plaintiff could only show

some money transfers overseas and amounts in the said transfers did not prove payments to Defendant though his name was mentioned as reference, which fell short of establishing a loan.

## CONCLUSION


38. Default judgment entered on 18.5.2020 is set aside and subsequent proceeding instituted in terms of Order 50 of HCR is deemed set aside. Defendant is granted seven days to file and serve stamen of defiance. Matter is referred to Master for directions. Considering the circumstances of this case no cost is awarded.

## FINAL ORDERS

- a. Default judgment entered on 18.5.2020 is set aside.
- b. Accordingly proceedings taken in terms of Order 50 of High Court Rules 1988 is hereby is set aside and declared void.
- c. Each party to bear own costs.
- d. Matter is referred to Master for directions.

Dated at Suva this 29<sup>th</sup> day of March, 2021.



  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**