

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 255 of 2021

BETWEEN: **SUSEN SHARMA** of 9 Clopcott Street, Yalalevu, Ba, Businessman,
currently residing in Australian.

PLAINTIFF

A N D: **I-TAUKEI LAND TRUST BOARD** a corporate body duly constituted
under the Native Land Trust Board Act, Cap. 134, having its registered
office at 431 Victoria Parade, Suva.

DEFENDANT

Appearances: Mr. R. Singh for the Plaintiff
 Ms. Raitamata for the Defendant
Date of Hearing: 20 April 2022
Date of Ruling: 15 July 2022

R U L I N G

INTRODUCTION

1. I am here dealing with an application by the plaintiff by which he seeks *inter alia* to have judgment entered against the defendant, *i*-TLTB on account of the latter's failure to file Acknowledgement of Service and Statement of Defence within the time stipulated under the High Court Rules 1988.
2. The application in question was filed on 28 January 2022 pursuant to Order 19 Rule 6 of the High Court Rules.
3. In particular, the plaintiff seeks the following Orders:

- (i) that there be judgment against the Defendant and that the Defendant be bound by any Judgment or decision given in the action and the judgment be enforced against the Defendant.
 - (ii) that judgment be entered in favor of the Plaintiff as per prayers (i), (ii), (iii), (iv), (v) and (vi).
 - (iii) that damages be assessed
 - (iv) costs of this action on a solicitor/client indemnity basis
 - (v) any other relief this Court deems just
4. The application is supported by an affidavit of Sailendra Sharma sworn on 28 January 2022.
5. The defendant has filed an affidavit of Anand Badlu sworn on 5 March 2022 in opposition to the application.

PLAINTIFF'S AFFIDAVIT

6. Sharma deposes the following key facts in paragraphs five (5) to ten (10) of his affidavit:
- (a) he is the lawful attorney (Power of Attorney No. 59978) of the plaintiff, Susen Sharma.
 - (b) the plaintiff applied to i-TLTB for various leases.
 - (c) the *i*-TLTB offered the plaintiff the following leases separately:
 - (i) 6/10/42703
 - (ii) 6/10/41700
 - (iii) 6/10/42316 (Plaintiff still waiting for this lease document to be issued by *i*-TLTB)
 - (iv) 6/10/42492
 - (v) 6/11/40974
 - (vi) 6/10/42481
 - (vii) 6/10/42571
 - (d) *i*-TLTB did grant offer letters in respect of the above applications on 08 November 2018; 10 December 2018; 14 December 2018; 16 April 2019; 18 April 2019; 16 July 2019; 24 December 2019.
 - (e) the plaintiff made payments as required by *i*-TLTB for the issuance of the leases. He also paid Stamp Duty.

- (f) *i*-TLTB then issued leases to the plaintiff
 - (g) on 28 October 2018, *i*-TLTB issued termination notices for the said leases. *i*-TLTB also advised the plaintiff that the Board's policies and procedures were not complied with at the time of the issuance of the said leases.
 - (h) aggrieved by the said termination notices, the plaintiff then filed the current writ of summons and statement of claim
7. At paragraphs eleven (11) to fourteen (14), Sharma deposes that the Writ of Summons and Statement of Claim were served on *i*-TLTB on 30 November 2021. However, *i*-TLTB has not filed an Acknowledgement of Service or Statement of Defence as at 28 January 2022. Sharma also deposes that the plaintiff's cause of action against the *i*-TLTB is for breach of statutory duty and breach of Agreement for Lease and that the plaintiff has suffered loss as a result.
8. Sharma pleads at paragraph fifteen (15) of his affidavit as follows:

..due to the failure of the Defendant to file an Acknowledgement of Service of the Writ of Summons and Statement of Claim and also failing to file any defence to the claim ..the Plaintiff humbly seeks leave of this Honorable Court to enter default judgment against the Defendant on the grounds that;

That the Defendant has deemed to admit the claim stated in the Plaintiff's Statement of Claim

DEFENDANT'S AFFIDAVIT

9. In the affidavit of Anand Badlu in opposition sworn on 15 March 2022, Badlu highlights the following:
- (a) on 18 November 2021, the plaintiff filed the Writ of Summons and Statement of Claim in question in this case as well as an ex-parte Notice of Motion seeking Orders to injunct the *i*-TLTB from re-issuing and or dealing with the above leases.
 - (b) Orders were granted on 18 November on the ex-parte Notice of Motion. The plaintiff was also granted time to file a supplementary affidavit as to its undertaking as to damages.
 - (c) the plaintiff's Writ of Summons and Statement of Claim were served on the Board on 30 November 2021.
 - (d) on 12 January 2022, the matter was called in Court to review the injunctive Orders. The court dissolved the injunctive Orders and granted *i*-TLTB 14 days to file and serve its Statement of Defence. The matter was then adjourned to 09 February 2022.
 - (e) on 09 February 2022, Messrs. Patel & Sharma filed the Interlocutory Summons which is currently before this Court – seeking Judgment.
 - (f) at the time of the filing of the above Summons, the *i*-TLTB has neither filed an Acknowledgement of Service or a Statement of Defence. As such, the application

for entry of judgment should therefore have been made under Order 13 of the High Court Rules.

- (g) a copy of the Board's defence is annexed.
- (h) the Board was unable to finalize its statement of defence within the fourteen days ordered by the Court on 12 January 2022 because there was some on-going investigation on how the leases in question were issued to the plaintiff in complete disregard of the Board's standard procedures.
- (i) investigations have revealed that a former Senior Estates Officer of the Board, namely Joseva Muana, had fraudulently orchestrated the issuance of the leases in question to the plaintiff in complete disregard of the Board's procedures and the interests of the landowning unit.
- (j) in particular, the rent and premium issued under the offer letters for the leases in question were well below their current market value given the nature of the leases and the fact that the land was situated in prime locations.
- (k) these investigations have led to the filing of a formal complaint to the Fiji Independent Commission Against Corruption and also to the Fiji Police Force. While investigations are ongoing, the Board has since July 2020, terminated Muana's employment.
- (l) Muana was "not acting in the course of employment but rather he was on a frolic of his own when he dealt with the application for the said leases and their issuance to the plaintiff.
- (m) because of the fraudulent nature in which the leases were issued – the leases are unlawful and cannot confer lawful title.
- (n) in obtaining the said leases, the plaintiff unlawfully enriched himself in fraud of the rights of the Board and of the landowners.

THE PROPOSED STATEMENT OF DEFENCE

10. In the proposed Statement of Defence attached to the affidavit of Anand Badlu, all the above are pleaded. The following pleading which appears in paragraph 5(d) is particularly noteworthy:

One of the leases was issued partly over land which was still under reserve (agreement for Lease 4/10/42571) and another over land which is arbor reserve (Agreement for Lease 6/10/42703) and yet another lease over land which is "reserve open space" (Agreement for Lease 4/10/42492)

11. In paragraphs 11 (b), (c), (d) and (e) of the proposed statement of defence, the defendant pleads:

- (b) the conditions of approval for SO 5216 included a condition that Lot 8 (over which a lease was issued unlawfully) be an arbor reserve to be transferred to the State
- (c) no lease could therefore be lawfully issued over the said Lot 8, including the purported lease TLTB Ref. No. 4/7/42703

- (d) no application for consent to assign was lodged nor any consent fees lodged with the Board
- (e) in any event, even if there was any such consent application, it would not have been approved given that the land was an arbor reserve and granting of consent or survey instructions would be unlawful.

COMMENTS

12. Order 19 Rule 6 provides as follows:

Default of defence: mixed claims (O.19, r.6)

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in rules 2 to 5, and no other claim, 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, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those rules if that were the only claim made, and proceed with the action against the other defendants, if any.

13. Order 19 sub rules 2 to 5 provide as follows:

Default of defence: claim for liquidated demand (O.19, r.2)

- 2.-(1) Where the plaintiff's claim against a defendant is for a liquidated demand 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, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.
- (2) Order 13, rule 1(2), shall apply for the purposes of this rule as it applies for the purposes of that rule.

Default of defence: claim for unliquidated damages (O.19, r.3)

3. Where the plaintiff's claim against a defendant is for unliquidated damages 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, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

Default of defence: claim for detention of goods (O.19, r.4)

- 4.-(1) Where the plaintiff's claim against a defendant relates to the, detention of goods 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 the service of the defence-

- (a) at his option enter either-
 - (i) interlocutory judgment against that defendant for delivery of the goods or their value to be assessed and costs, or
 - (ii) interlocutory judgment for the value of the goods to be assessed and costs, or
 - (b) apply by summons for judgment against that defendant for delivery of the goods without giving him the alternative of paying their assessed value, and in any case proceed with the action against the other defendants, if any.
- (2) A summons under paragraph (1)(b) must be supported by affidavit and, notwithstanding Order 65, rule 9, the summons and a copy of the affidavit must be served on the defendant against whom judgment is sought.

Default of defence: Claim for possession of land (O.19, r.5)

- 5.-(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 barrister and solicitor, or (if he sues in person) an affidavit, stating that he 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.
- (2) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until judgment for possession of the land has been entered against all the defendants.

14. The defendant argues that the application should have been filed pursuant to Order 13 Rule 5 of the High Court Rules 1988. They rely on **i-Taukei Land Trust Board v Fiji Wai Limited Ruling** [2015] FJHC 630 whether Acting Master Nanayakkara (as he then was) said as follows:

An application to set aside a default judgment is not the invocation of an appellate jurisdiction but of a specific rule enabling the court to set aside its own orders in certain circumstances where the action has never been heard on the merits.

A Defendant against whom judgment in default has been entered may apply for it to be set aside under Order 13, rule 10 or under Order 19, rule 9 of the High Court Rules.

In situations where the Defendant has failed to file in the first instance, notice of intention to defend, then order 13 procedure is the correct process.

Order 19 is applicable only where, after notice of intention to defend is filed, no statement of defence had followed.

(see also Subamma v Ark Company Ltd [2017] FJHC 5; Fiji Development Bank v Miller [2016] FJHC 542; Macuata Tikina Holdings Ltd v Katonivere [2017] FJHC 650)

15. The plaintiff's counsel appears to concede that the application should have been brought under Order 13 Rule 5 of the High court Rules 1988. However, he argues that the defect is remediable under Order 2 Rules 1 and 2 of the High Court Rules. He relies on the following authorities:

Joeli Tawatatau v AG [2019] FJHC 845; HBJ 2018 (30 August 2019)
Balveer Singh & Jagindra Singh aka Jagindar Singh v Radhabai aka Radha Bai Fiji Court of Appeal Civil Appeal Number ABU 115 of 2018
Bank of Baroda v Ratneel Vishal Naidu & Ors [2018] FJHC 397; HBC 170.2015 (15 May 2018)
Abhindra Singh v Water Authority of Fiji [2017] FJHC 682; HBC 219.2016 (@1 September 2017).

16. The plaintiff's counsel concedes that the power under Order 2 which he relies on is a discretionary power.
17. In my view, even if I were to exercise the discretionary power under Order 2 in favour of the plaintiff in this application, and deem the application as if it was made pursuant to Order 13 Rule 5, I would still be confronted in the end with the question whether or not to grant default judgment which is being sought.
18. In deliberating on that, I would then be confronted with the question as to whether or not the defendant has a defence on the merits.
19. The plaintiff's application for default judgment is based ultimately on his statement of claim which is based on the theory that what the plaintiff and the defendant had was a valid agreement in respect of each of the leases in question.
20. The defendant's proposed defence is based on the theory that all the lease agreements in question were vitiated by the alleged fraud in question. While, notably, there is no direct allegation of fraud against the plaintiff, the defendant's theory appears to be that a former employee of the defendant had acted fraudulently in issuing the leases in favor of the defendant in total defiance and disregard of the defendant's standard procedures and duty under the i-Taukei Lands Trust Act – which resulted in the illegal issuance of the leases in question.

21. I am of the view that the affidavits filed by the defendant and the proposed statement of defence do raise a defence on the merits. Accordingly, I am not inclined to grant the Orders sought by the plaintiff.
22. Parties to bear their own costs. The defendant is directed to file and serve its Acknowledgement of Service in seven days and its Statement of Defence seven days thereafter and the Plaintiff is to file its reply 14 days after service of the Statement of Defence.
23. This case is adjourned to the Master to take its normal course.



Anare Tuilevuka
JUDGE
Lautoka

15 July 2022