

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

**Civil Action No. HBC 83 of 2019**

**BETWEEN:**                    **AIYAZ SAYED-KHAIYUM** of Suvavou House, Victoria Parade, Suva, the Attorney-General, Minister for Economy, Civil Service and Communications of Fiji.

**PLAINTIFF/RESPONDENT**

**AND:**                         **RATU ISOA TIKOCA** c/- SODELPA Office, Denison Road, Suva.

**DEFENDANT/APPLICANT**

**BEFORE:**                    **Hon. Justice Vishwa Datt Sharma**

**COUNSEL:**                    **Mr Valenitabua S. with Mr Tikoca I.** for the Applicant/Defendant  
**Mr Sharma D. with Ms Fatima G.** for the Respondent/Plaintiff

**DATE OF DECISION:**     **Thursday, 04<sup>th</sup> August 2022 @ 9.30am**

**DECISION**

[Setting Aside of Default Judgment entered on 7 November 2019]

## Introduction

- [1] The Defendant/Applicant, Ratu Isoa Tikoca filed a **Summons on 1<sup>st</sup> April 2021** and sought for an Order for the **Interlocutory Judgment** [Judgment by Default] entered against the Defendant/Applicant on **7 November 2019**, be wholly **set aside**.
- [2] This Application was made pursuant to **Order 2 Rule 1(1) and (2), Order 2 Rule 2(1), Order 3 Rule 4, Order 13 Rule 10, and Order 19 Rule 9 of the High Court Rules 1988 and its Inherent Jurisdiction**.
- [3] The Counsel representing the Defendant/Applicant made it very clear to the Court in his submissions that he only had one application which was to seek an Order for **Setting Aside of the Interlocutory Judgment on the grounds of irregularity**.
- [4] The irregularity was two (2) fold:-
- (i) **There was no personal service**
  - (ii) **The pleadings were defective.**
- [5] The Defendant submitted that the High Court had no discretion if there was an irregularity and that the delay was immaterial.
- [6] The Plaintiff submitted that the High Court Rules does allow for the setting aside of any judgment or order on the grounds of irregularity but the party applying must make a proper application under Order 2 Rule 2 [O.2, r2]. If the Application does not satisfy Order 2 Rule 2, then the Application must be dismissed.
- [7] The Defendant submitted that because there was defective service on the basis that there was no personal service. Therefore, the Interlocutory Judgment dated 7<sup>th</sup> November 2019 was entered irregularly and should be set aside.
- [8] The Summons was opposed by the Plaintiff/Respondent stating that this application is misconceived and must fail on all relevant grounds.
- [9] Both parties to the proceedings furnished Court with their respective written submissions and argued the issue of Setting Aside the Interlocutory Judgment entered by Default orally.

## Background Facts

- [10] The Plaintiff initiated a Writ of Summons together with a Statement of Claim on 21<sup>st</sup> March 2019.
- [11] The substantive issue alleged 'libel and slander' on the part of the Defendant. Claims for damages together with punitive, exemplary and aggravated damages together with other relief were sought as set out in the prayer of the Plaintiff's substantive statement of claim.
- [12] The Registered Bailiff, Nilesh Kumar filed an Affidavit in Court on 19<sup>th</sup> June 2019, wherein he stated that he had personally served the Defendant at Lot 3, Oneata Place, Samabula.

- [13] Since the Defendant had failed to acknowledge service of the documents, the Registered Bailiff had left the document on the doorstep of Lot 3 Oneata Place, Samabula in the presence of the Defendant and took a picture of the documents left on the doorsteps annexed to his Affidavit.
- [14] The Defendant failed in its bid to file any Acknowledgement of Service and a Statement of Defence in terms of the High Court Rules 1988 and therefore it subsequently resulted in the Plaintiff successfully obtaining an Interlocutory Judgment on 7<sup>th</sup> November 2019 pursuant to Order 19 Rule 3 of the High Court Rules 1988 against the Defendant.
- [15] The Interlocutory Judgment was filed on 5<sup>th</sup> November 2019 and sealed on 7<sup>th</sup> November 2019 respectively.
- [16] The Plaintiff added that if the Defendant was unhappy with the final judgment of the Court, then he had three options available to him:-
- (i) *He could have filed an appeal within 42 days to the Court of Appeal; OR*
- (ii) *He could have made an application to set aside the Final Judgment pursuant to Order 35 rule 2 of the High Court Rules; OR*
- (iii) *He could have made an application set the Final Judgment pursuant to Order 32 rule 6 of the High Court Rules since the Assessment of Damages was made pursuant to a Summons.*
- [17] The Defendant did not pursue any of the above avenues that was available to him.
- [18] Therefore, the Plaintiff submitted that the Defendant has made a misconceived application to set aside the Interlocutory Judgment instead of filing an Appeal against the final award accordingly.
- [19] The Interlocutory Judgment together with Summons for Assessment of Damages, Affidavit in Support and a letter were served onto the Defendant, by leaving the documents at his residence at Lot 3 Oneata Place, Samabula, Suva, Fiji and a picture taken and annexed with the Affidavit therein.
- [20] At the time of such service, the Defendant's son advised the Bailiff that the Defendant was away in Australia and unable to come to Fiji due to the lockdown in Australia.
- [21] Thus, a Summons was filed by the Defendant on 1<sup>st</sup> April 2021 seeking for Setting Aside of the Interlocutory Judgment entered by Default against the Defendant accordingly.

### **Determination**

- [22] The only issue for this Court to determine is: "**Whether the Order for an Interlocutory Judgment [Judgment by Default] entered against the Defendant/Applicant on 7<sup>th</sup> November 2019 be wholly set aside?**"
- [23] However, the following was raised during the hearing of the summons to set aside the Interlocutory Judgment entered by Default and therefore needs to be determined accordingly as well:-

- (i) *Whether the Summons is defective and contrary to Order 2 Rule 2(2) [O.2, r.2 (2)] of the High Court Rules 1988 since the Summons does not set out the grounds of objection?*
- (ii) *Whether 'Personal Service' of the Writ and the Statement of Claim was effected onto the Defendant and whether the Service was defective?*
- (iii) *Whether the Plaintiff's pleadings in the Statement of Claim is defective?*
- (iv) *The issue of the translation of the Defamatory Statement which was made in iTaukei language. The Defendant queried that the original iTaukei statement was not put before the Court and it was for an expert to have provided a translation instead.*

#### **Whether Defendant's Summons is Defective?**

- [24] The Summons seeking an Order for setting aside of the Interlocutory Judgment (Default Judgment) entered against the Defendant on 7<sup>th</sup> November 2019 was filed together with an Affidavit in Support deposed by Mere Vatulili in her capacity as the office Manager of Law Naivalu.
- [25] Order 41 Rule 9(2) states:-
- "Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing and an affidavit which is not so indorsed may not be filed or used without the Leave of the Court."*
- [26] It is clear that the Defendant has authorized Mere Vatulili to depose the Affidavit on his behalf as is confirmed by Annexure "MV-1" filed on 1<sup>st</sup> April 2021. Subsequently, the Defendant's Affidavit in Support deposed on 30<sup>th</sup> March 2021 was filed into Court.
- [27] Application was made under **Order 2 Rule 1(1) and (2) and Order 2 Rule 2(1)** of the **High Court Rules 1988**.
- [28] The Defendant purported to have filed his Summons also pursuant to **Order 2, Rules 1(1) and (2) and Order 2 Rule 2(1)** of the **High Court Rules 1988 and the Inherent Jurisdiction of this Court**. **Order 2 Rule 1(2)** allows Court to set aside any Judgment on the grounds of irregularity.
- [29] However, in terms of **Order 2 Rule 2(1)**, any person applying to set aside a judgment or order on the grounds of irregularity cannot be allowed to do so unless:-
- (i) *the application is made within a reasonable time; and*
- (ii) *before the party applying has taken any fresh step after becoming aware of the irregularity.*
- [30] The Interlocutory Judgment in default of filing an acknowledgement and a statement of Defence was entered against the Defendant on 7<sup>th</sup> November 2019.

- [31] The Application by the Defendant seeking an order to set aside the Interlocutory Judgment was filed on 1<sup>st</sup> April 2021 after a lapse of some 15 months' timeframe.
- [32] In May 2019, Vuataki Law from Lautoka received instructions from the Defendant in the current Civil Action No. HBC 83 of 2019 when the Counsel wrote to the principal of R. Patel Lawyers for '**public retraction and apology to the Defendant**'.
- [33] Even though the Defendant had the legal services of the Instructing Solicitors, Vuataki Law, yet an **inordinate delay of 15 months** in the Defendant making the current application for setting aside of the Interlocutory Judgment cannot be called a **reasonable delay**.
- [34] Hence, the Defendant has failed to satisfy the **first limb of Order 2 Rule 2(1)** in terms of the meaning of within a reasonable time.
- [35] Subsequent to Court granting the Interlocutory Judgment in default of pleadings, the Defence Counsel made the court appearance on behalf of the Defendant in the impending Summons for Assessment of Damages. A Notice of Adjournment of Hearing (NOAH) was also directed by the Court to the Defendant to be served accordingly.
- [36] I find that the Defendant has not satisfied the **second limb** of the criteria in terms of **O.2, r.2 (1) of the High Court Rules 1988-**
- *Since the current setting aside application was not made within a reasonable timeframe;*
  - *Before, the Defendant applied and or filed the 'Setting Aside' Application, the Defendant chose to take other steps such as:-*
    - *Instructing Solicitors [Vuataki Law] on 23<sup>rd</sup> May 2019 to write to R. Patel Lawyers seeking to settle matters when they were clearly aware of the Plaintiff's Writ and the Statement of Claim filed and is impending before this Court; and*
    - *After Interlocutory Judgment in default of Plaintiff, an appearance by a Counsel was made for the Defendant in the impending 'Summons for Assessment of Damages' accordingly.*
- [37] Further, the Defendant's Summons seeking for the Setting Aside of the Interlocutory Judgment entered by default does not reflect and/or set out the grounds of objections.
- [38] For the abovementioned reasons, I find that the *Defendant's Summons is **defective** and the application seeking Setting Aside under Order 2 of the High Court Rules 1988 must **fail**.*

#### **Whether Personal Service is Defective?**

- [39] The Defendant/Applicant's contention is that the finding of the Court that the Defendant was served personally is wholly erroneous. The Defendant submitted that he was never served personally with a Writ of Summons and the Statement of Claim. Nor did he evade service of any documents.

- [40] The Defendant at paragraph 8 of his Affidavit in Support deposed that he departed Nadi for Sydney on 16<sup>th</sup> October 2019 and rightfully was not served with any Writ of Summons. He submitted that personal service is defined in O.65, r.2 of the High Court Rules 1988 as: "Personal service of a document is effected by leaving a copy of the document with the person to be served." Bailiff Nilesh did not comply with the mode of service when he left the documents at the Samabula address.
- [41] Further, he does not know any Ratu Isoa Delana Tikoca residing at Lot 3, Oneata Street, Samabula. This property belongs to his daughter Asenaca Tikoca. He resides at Lot 1 Nayaria Road, Saweni, Lautoka.
- [42] However, the Registered Bailiff, Nilesh Kumar deposed an affidavit of service on 29<sup>th</sup> May 2019, filed into Court on 19<sup>th</sup> June 2019 that:-
- *"On 16<sup>th</sup> May 2019 at 12.45pm personally served the abovenamed Defendant, Ratu Isoa Delana Tikoca by leaving at the doorsteps of his residence at Lot 3 Oneata Place, Samabula, Suva, 'Writ of Summons and Statement of Claim' and an 'Acknowledgement of Service'.*
  - *That at the time of the service, the said Defendant refused to acknowledge the service of the documents."*
- [43] It can be ascertained from the above Affidavit that the Defendant was present at the time the Bailiff went to serve the documents onto him. However, the Defendant refused to acknowledge the service of the documents. The Bailiff had no alternative but to leave the documents on the doorsteps in his presence. That is accordingly a proper service of the documents onto the Defendant in terms of the High Court Rules 1988.
- [44] The Defendant has deposed in his Affidavit in Support at paragraph 8 that he departed Nadi for Sydney on 16<sup>th</sup> October 2019.
- [45] He did not realize the fact that he only left for Sydney on 16<sup>th</sup> October 2019 only 5 months after being personally served with the Court documents on 16<sup>th</sup> May 2019.
- [46] Further, it was only after the Defendant was personally served that the Defendant instructed Vuetaki Law to act for him and write a public retraction and apology to the Plaintiff in a prominent print. This prompted Vuetaki Law to write a letter addressed to R. Patel Lawyers on Thursday 23<sup>rd</sup> May 2019. It will be noted that this letter was written just 7 days after the personal service of the Writ of Summons and the Statement of Claim. [Annexure 'A' within Affidavit of Aiyaz Sayed-Khaiyum refers].
- [47] There is also clear evidence before Court that the Defendant was staying in Suva because his own Solicitors had admitted this fact in an e-mail on 16<sup>th</sup> June 2019 [Annexure B] in the Plaintiff's Affidavit refers.
- [48] It has become obvious and clear that the Defendant was personally served with the Writ of Summons and the Statement of Claim on 16<sup>th</sup> May 2019 by the Registered Bailiff, Nilesh Kumar who has confirmed and has deposed an Affidavit of Service confirming the service on the Defendant of the Court documents filed in Court on 19<sup>th</sup> June 2019 accordingly.

[49] Since the Defendant was challenging the Personal Service of documents on the Defendant in terms of the Affidavit of Service filed by the Registered Bailiff, Nilesh Kumar, then the Defendant should have immediately filed a Summons and sought for an Order to 'Set Aside the Affidavit of Service'. However, this was not done and the evidence before Court confirms that personal service was effected onto the Defendant on 16<sup>th</sup> May 2019.

### **Defective Pleadings**

[50] The Defendant raised the issue of the pleadings within the Plaintiff's claim to be defective.

[51] However, the Defendant after being personally served with the Plaintiff's Writ of Summons and the Statement of Claim had the opportunity to challenge and counter the alleged defectiveness or the irregularity of the pleadings even though there is no proposed Statement of Defence filed by the Defendant setting out the grounds for irregularities of pleadings. He also failed to file and serve any Statement of Defence to counter the same.

[52] Further, the Defendant should have filed a Summons to strike out the Plaintiff's Writ of Summons and the Statement of Claim showing that there was no proper cause of action in terms of Order 18 Rule 18(1) [O.18, r.18(1)] of the High Court Rules 1988.

[53] Reference is now made to the case of **Chand v. Fiji Times** CBV 005 of 2009. In this case, the Supreme Court laid down the Rule;

*"That the pleadings must set out verbatim the precise words used by the perpetrator and if the words are contained in a lengthy document than the pleadings must identify the parts of part of the document that is alleged to be defamatory."*

[54] I find that the pleadings identifies the cause of action and has been filed as per the requirement of the High Court Rules 1988 accordingly.

### **The Issue of Translation**

[55] The Defendant raised the issue of translation of the defamatory statement made in iTaukei language. He questioned why the iTaukei Statement was not put before the Court and for an expert to provide a translation?

[56] The Defendant also submitted that the translation made by Aklesh Vince Singh could not be accepted by Court as he is an Indo-Fijian.

[57] Above issues raised by the Defendant are triable issues.

[58] The Defendant after service of the Writ of Summons and the Statement of Claim failed in its bid to file and serve his Acknowledgement of Service and any Statement of Claim which subsequently resulted in the Plaintiff succeeding to obtain an Interlocutory Judgment by default of pleadings pursuant to Order 19 Rule 3 of the High Court Rules 1988 against the Defendant.

- [59] At this stage of the proceedings, it must be borne in mind by the Defendant that the Interlocutory Judgment entered against him in absence of filing any Acknowledgement of Service and Statement of Defence simply means that the liability has been established against the Defendant.
- [60] Further, if I may say at this stage that the Interlocutory Judgment in default of Acknowledgement and Statement of Defence tantamounts to a regular Judgment entered in terms of Order 13 Rule 10 [O.13, r.10] of the High Court Rules 1988.
- [61] To sum up, the issues raised herein in terms of the 'Translation' remains triable issues and cannot be raised in the Interlocutory application seeking for the setting aside judgment.
- [62] It is the Defendant who failed to file an Acknowledgement of Service and the Statement of Defence if his contention was to contest the Plaintiff's claim therein.
- [63] In absence of any Acknowledgement of Service and the Statement of Defence, the facts therein are deemed to have been established by the Plaintiff.
- [64] Therefore, the issue of Translation of the original defamatory statement in iTaukei language and the tendering into Court of English translation made by Aklesh Singh has become too late in the day [some 17 months after the Entering of Interlocutory Judgment] on 7<sup>th</sup> November 2019. For the Defendant to challenge the issue when he had the opportunity to do so earlier after the personal service of the Plaintiff's Writ of Summons and the Statement of Claim.

### **Interlocutory Judgment**

#### **Whether the Interlocutory Judgment entered by default of pleadings should be set aside?**

- [65] The proceedings with two (2) substantive issues has been fully heard and determined by this Court on 7<sup>th</sup> November 2019 whereby-
- an Interlocutory Judgment was finally entered by default of pleadings; and
  - a final Judgment [on assessment of damages] on 25<sup>th</sup> February 2021 respectively.
- [66] The file has now been closed with all impending substantive matters duly determined.
- [67] The Defendant made it very clear that his contention seeking setting aside of the Interlocutory Judgment was on the grounds of irregularity only.
- [68] The Defendant submitted that the High Court had no discretion, if there was an irregularity and submitted further that delay was immaterial.
- [69] A Defendant against whom judgment in default has been entered may apply for it to be set aside pursuant to Order 13 Rule 10 [O.13, r.10] and/or under Order 19 Rule 9 [O.19, r.9] of the High Court Rules 1988.



- [70] If the Defendant has failed to file into Court in these proceedings his Acknowledgement of Service, then Order 13 of the High Court Rules 1988 procedure is the correct procedure.
- [71] However, Order 19 procedure is only applicable where Acknowledgement of Service is filed but no Statement of Defence has been filed to counter the Plaintiff's claim.
- [72] In the current case, neither an Acknowledgement of Service nor a Statement of Defence was filed.
- [73] Therefore the Defendant's application should have only been made in terms of Order 13 procedure since the Defendant failed to file and serve any Acknowledgement of Service upon service of the Writ and the Statement of Claim.
- [74] A Default Judgment can be obtained regularly or irregularly. Upon application, both can be set aside in law.
- [75] The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles is that:-

*"Unless and until the court has pronounced 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 only been obtained by a failure to follow any of the rules of procedure" (per Lord Atkin in Evans v. Bartlam [1937] A.C. 473).*

- [76] The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in Halsburys Laws of England Vol 37 4<sup>th</sup> Ed. para 403, inter alia thus:-

*"In the case of a regular judgment it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits. For this purpose it is enough to show that there is an arguable case or a triable issue."*

- [77] Lord Atkins in **Evans v. Bartlam** [1937] 2 All E.R. 646 at 650 which is apt:-

*"It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of the efficacy. The principle obviously is that, unless and until the court has pronounced 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."*

- [78] The leading authority for an application seeking an order for setting aside the default judgment is the old English decision **Evans v. Bartlam** [1937] A.C. 473. The primary and secondary consideration described in that decision have been approved and adopted in Fiji by the Court of Appeal in several decisions including the **Fiji Sugar Corporation Limited v Mohammed Ismail** [1988] 34 Fiji LR 75;

**Wearsmart Textiles Limited v General Machinery Hire Limited and Shareen Kumar Sharma** (unreported) Fiji Court of Appeal, Civil Appeal No. ABU0030 of 197, a decision dated the 29<sup>th</sup> of May 1998 (their honours Sir Moti Tikaram, President, the right Honourable Sir Maurice Casey, and the Honourable Justice J. D. Dillon presiding) and more recently **Suva City Council v. Meli Tabu** (unreported), Fiji Court of Appeal, Civil Appeal No. ABU0055 of 2003 delivered on the 16<sup>th</sup> of July, 2004 (their honours Eichelbaum, Penlington and Scott).

The principles are:

- (a) *As a primary consideration there must be before the court an affidavit from the defendant or associated person properly deposing and demonstrating a meritorious defence.*
- (b) *As secondary consideration the affidavits and submissions must advance adequate reasons as to why the judgment was allowed to be entered by default.*
- (c) *The affidavit and submissions must confirm that a substantive application was made promptly or explain with adequate reasons why there was a delay in making the application.*
- (d) *The plaintiff should depose and submit in reply as to any prejudice or irreparable harm that will be suffered if judgment is set aside.*
- (e) *A useful summary of the factors to be taken into consideration is to be found under notes of Or. 13 r9/14 of The Supreme Court Practice 1995 Vol. I at p.142 and which is, inter alia, as follows:-*

*"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."*

#### **Why Interlocutory Judgment was allowed to be entered by default in the first place**

- [79] The Defendant/Applicant admits that he did not file an Acknowledgement of Service and Default Judgment could be entered under O.13, r.2 of the High Court Rules 1988. He explains the failure to file an Acknowledgement of Service or a Statement of Defence was primarily due to the want of service of the Writ of Summons, the Statement of Claim and other documents to the Defendant/Applicant. The Default Judgment entered against the Defendant on 7<sup>th</sup> November 2019 was therefore entered irregularly on the grounds of want of service.
- [80] The Defendant further submitted that on the basis of the fact that the judgment in default against the Defendant/Applicant was irregular, the Court does not need to exercise its discretion and the Defendant/Applicant does not need to argue and satisfy the abovementioned four (4) tests in '**Evans v. Bartlam**'.

- [81] According to the Plaintiff/Respondent, personal service was effected onto the Defendant/Applicant by Registered Bailiff Nilesh Kumar and he had filed an Affidavit of Service on 19<sup>th</sup> June 2019 confirming service of documents on Defendant on 16<sup>th</sup> May 2019.
- [82] The Bailiff in his Affidavit stated that he had previously served the Defendant at Lot 3 Oneata Place, Samabula on 16<sup>th</sup> May 2019. Since, the Defendant had failed to acknowledge service of the documents, the Bailiff had left the documents on the doorsteps of Lot 3 Oneata Place, Samabula in the presence of the Defendant.
- [83] The Defendant knew very well that he was challenging the service of documents onto him by the Bailiff, yet he failed to file into Court any Summons seeking an order to set aside the Affidavit of Service filed by Bailiff Nilesh Kumar.
- [84] Annexure 'A' within the Affidavit of Plaintiff in Response to the Affidavit of Defendant deposed on 30<sup>th</sup> March 2021, refers. The Defendant instructed Vuataki Law to write a public retraction and apology to the Plaintiff in a prominent print of the Plaintiff's choice to be circulated in Fiji on 23<sup>rd</sup> May 2019.
- [85] The correspondence written was addressed to the Principal, R. Patel Lawyers at 77 Cakobau Road, Domain, Suva.
- [86] It will be noted that only 7 days after the Defendant was served with the Writ of Summons, Statement of Claim and Acknowledgement of Service that the Defendant instructed Vuataki Lawyers to act for the Defendant.
- [87] The evidence before the Court establishes that the Defendant was personally served with the Writ of Summons together with the Statement of Claim and the Acknowledgement of Service on 16<sup>th</sup> May 2019 as has been supported by the Affidavit of Service filed in Court by the Registered Bailiff, Nilesh Kumar.
- [88] Further, because the service was personally effected onto the Defendant, the Defendant chose not to contest the proceedings.
- [89] However, after receipt of the service of documents, the Defendant chose to instruct Vuataki Lawyers, write a Letter of Retraction and apology and evidence also reveals that the Defendant proposed a terms of settlement to the Plaintiff.
- [90] The Defendant has failed to advance adequate reasons as to why the Judgment was allowed to be entered by default.
- [91] Therefore, Interlocutory Judgment by default of pleadings was entered against the Defendant rightfully in accordance with the set down Law and Rules without any doubt whatsoever and I reiterate that the Interlocutory Judgment entered was regular in law.

**Meritorious Defence****Whether the Defendant has demonstrated to Court that he has a meritorious defence?**

[92] The exercise of the discretion is wide and unfettered as until the Court has pronounced judgment upon the merits or by consent it must have the power to revoke a default judgment obtained by a failure to follow any of the rules of procedure (*Evans supra*). Any defence described in the affidavits supported by the submissions must have a real prospect of success and carry a degree of conviction allowing the court to form a provisional view of the probable outcome of the action.

[93] This requires the court to scrutinize the Defendant's affidavit to see whether it contains deposed facts which will support a meritorious defence that is one with a reasonable chance of success (*Wearsmart Textiles (supra)*, *Suva City Council (supra)* and *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's Reports 221).

[94] On facts showing a defence the following statement of Lord Denning M.R. in *Burns v Kondel* (1971) 1 Lloyd's Rep. 554 at 555 is apt:

*"We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue."*

[95] However, in the current case, the Defendant has neither filed an affidavit showing a defence on merits nor did he file and serve any Statement of Defence disclosing an arguable and/or a triable case.

**Delay?**

[96] The Interlocutory Judgment by default of pleadings was filed on 5<sup>th</sup> November 2019, and sealed by this Court on 7<sup>th</sup> November 2019.

[97] On 1<sup>st</sup> April 2021, the Defendant filed his Summons seeking for the setting aside of the Interlocutory Judgment. This filing of Summons was done some 17 months later.

[98] A period of 17 months delay cannot be classed as a reasonable delay.

[99] The Defendant has not proffered any proper reasons and I do not find any proper evidence before this Court and/or any explanation for the Defendant's inordinate delay.

**Prejudice or Irreparable Harm**

[100] There is clear evidence before Court that the Defendant was personally served with the Writ of Summons, Statement of Claim together with an Acknowledgement of Service on 16<sup>th</sup> May 2019.

- [101] Interlocutory Judgment was entered against the Defendant for failing to file an Acknowledgement of Service and a Statement of Defence.
- [102] Subsequently, on Summons for Assessment of Damages, the Plaintiff obtained a formal judgment against the Defendant.
- [103] I find that there is no prejudice or irreparable harm caused to the Defendant.
- [104] However, the Plaintiff was severely prejudiced by this application since the Plaintiff went at a great expense to himself in order to successfully obtain a final Judgment in the proceedings.

### **Conclusion**

- [105] The Defendant's Summons seeking setting aside of the Interlocutory Judgment entered on 7<sup>th</sup> November 2019 is defective under Order 2 [O.2] of the High Court Rules 1988 and is accordingly dismissed.
- [106] Personal Service of the Writ of Summons together with the Statement of Claim was effected onto the Defendant on 16<sup>th</sup> May 2019 as deposed in the Affidavit of Service of the Registered Bailiff, Nilesh Kumar.
- [107] The pleadings within the Statement of Claim of the Plaintiff identifies a Cause of Action and is set out as per the requirements of the High Court Rules 1988.
- [108] The issue of translation and why the iTaukei statement was not put before the Court was a trial issue and cannot be raised within the current Interlocutory Summons seeking for setting aside of the Interlocutory Judgment.
- [109] The Defendant has not remotely satisfied the test to set aside the Interlocutory Judgment under Order 13 rule 10 of the High Court Rules 1988.
- [110] The Defendant's Summons seeking Setting Aside of the Interlocutory Judgment by default of pleadings is accordingly dismissed.

### **Costs**

- [111] The Defendant's Summons proceeded to full Hearing with filing of Affidavits and written Submissions.
- [112] It is only fair that the Defendant pay to the Plaintiff a summarily assessed cost of \$1,500 within 14 days timeframe.

**Orders**

- (i) The Defendant's Summons seeking the Setting Aside of the Interlocutory Judgment entered against him on 7<sup>th</sup> November 2019 is hereby dismissed.
  
- (ii) The Defendant to pay the Plaintiff a sum of \$1,500 as summarily assessed costs to be paid within 14 days hereof.

Dated at Suva this 04<sup>th</sup> day of August 2022.



.....  
Vishwa Datt Sharma  
JUDGE

**Solicitors:**

*Messrs R. PATEL Lawyers, Suva  
Valenitabua & Associates, Suva.*