

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. 123 of 2012L

BETWEEN : **KRISHNA SAMI NAIDU** of Vulovi, Labasa, Fiji Islands,
Businessman.

Plaintiff

AND : **MOHAMMED ALEEM KHAN** of 11, Kennedy Avenue, Nadi,
Fiji Islands, Businessman

Defendant

Before : Master U.L. Mohamed Azhar
Appearance : Mr. D. Sharma for the Plaintiff
Mr. R. Singh for the Defendants
Date of Ruling : 15.06.2023

RULING

01. The defendant filed the summons and motion pursuant to Order 6 rule 6, Order 11 rule 1(1) (d) (i), Order 59 rule 16, Order 13 rule 9, Order 86 rule 4, Order 86 rule 7 (Order 14 rule 11), Order 29 rule 1(2) Order 32 of the High Court Rules and the inherent jurisdiction of this court. The summons and the motion is supported by an affidavit sworn by one Ayesha Khan claiming to be the wife of the defendant in this matter. The summons seeks orders to set aside the order made on 19.11.2012 and the interlocutory judgment sealed on 09.07.2015; leave to defend the matter and revoke the transfer of the property involved in this matter to the plaintiff. The motion seeks to stay the execution of those impugned order and interlocutory judgment and the proceeding in Civil Action No. 184 of 2019 until determination of the substantive matter in the current action.
02. The plaintiff sued the defendant by way of Writ of Summons and alleged that, they had a Sale and Purchase Agreement whereby the defendant agreed to sell his property comprised in Certificate of Title No 12555 Lot 32 on DP No. 2631, Land known as

“Waqadra” (portion of) situated in the Island of Viti Levu in the District of Nadi (**the subject property**). The plaintiff also pleaded that, the total price was agreed at \$ 115,000.00 which was fully paid by him. The defendant allegedly refused to transfer the subject property even after full payment and the plaintiff sued him seeking for an order for transfer of the subject property together with the damages, general and exemplary, interest and cost on indemnity basis.

03. The plaintiff also filed a Notice of Motion on the same day the Writ was filed and sought for an order that, the subject property be transferred to the plaintiff on the ground that, he paid the full purchase price. The Motion was supported by an affidavit sworn by the plaintiff. The Motion was thereafter amended and served. The service of Motion was acknowledged by one Anil Kumar who claimed to be the Financial Controller of Kennedy Hotels Limited, Aleem Investment Limited and Accountant of the defendant in this matter. The said Anil Kumar also filed an affidavit in reply to the Amended Motion and he claimed in his affidavit that, he was duly authorized to swear and depose an affidavit on behalf of the defendant. In fact, Anil Kumar admitted in his affidavit that, the purchase price was fully paid in respect of the said property.
04. The then Master of the court, having considered all the affidavits granted order on 19.11.2012 that, the subject property be transferred to the plaintiff. Thereafter, on application of the plaintiff, the then Master granted order to serve all necessary documents in this matter on the defendant out of the jurisdiction of the court by way of registered post. The plaintiff after filling the affidavit of service, sealed the interlocutory judgment on 09.07.2015 for default of pleadings. The main relief sought by the defendant in the current summons is to set aside the above order made on 19.11.2012 and the interlocutory judgment sealed on 09.07.2015.
05. The relief sought by the defendant in the Motion is to stay the execution of those impugned order and interlocutory judgment and the proceeding in Civil Action No. 184 of 2019 until determination of the substantive matter in the current action. Civil Action No. 184 of 2019 is an application by the plaintiff pursuant to section 169 of the Land Transfer Act Cap 131 seeking vacant possession of the subject property which is now occupied by one Bissun Kumari. Granting the reliefs sought in the Motion depends on the decision of the court on the main relief sought in the summons that is setting aside the impugned order and interlocutory judgment.
06. The sole argument advanced on behalf of the defendant is that, both the order made on 19.11.2012 and the interlocutory judgment entered on 09.07.2015 are irregular for two reasons. Firstly, the writ and other documents were not served on the defendant, and secondly, the leave of the court was not obtained before the writ was issued on the

defendant who was out of the jurisdiction at the time the writ was issued. Conversely, it was argued on behalf of the plaintiff that, all necessary documents were served on both the defendant and on his agent. It was further argued that, the leave was not necessary as the defendant is resident within the jurisdiction.

07. It is the settled law that, if a judgment or an order was obtained irregularly a defendant is entitled to have it set aside *ex debito justitiae*. A defendant against whom an irregular judgment or order was entered in default has the right to have it set aside and the courts have no discretion to refuse to set aside. The rationale behind this is that, such irregular judgments and orders are considered as “*void orders*” that resulted from a ‘fundamental defect’ in proceedings (**Upjohn LJ in Re Pritchard (deceased) [1963] 1 Ch 502 and Lord Denning in Firman v Ellis [1978] 3 WLR 1**). Such judgments and orders are also considered as resulting from a ‘without jurisdiction’ or ultra vires act of a judicial office (**Lord Denning in Pearlman v Governors of Harrow School [1978] 3 WLR 736**).
08. A ‘fundamental defect’ includes a failure to serve process where service of process is required (**Lord Greene in Craig v Kanssen [1943] 1 KB 256**); or where service of proceedings never came to the notice of the defendant at all (e.g. he was abroad and was unaware of the service of proceedings); or where there is a fundamental defect in the issuing of proceedings so that in effect the proceedings have never started; or where proceedings appear to be duly issued but failed to comply with a statutory requirement (**Upjohn LJ in Re Pritchard [1963]**). Failure to comply with a statutory requirement includes rules made pursuant to a statute (**Smurthwaite v Hannay [1894] A.C. 494**).
09. The affidavit of service sworn by Jackson Yavala filed by solicitors for the plaintiff states that, the deponent served the documents pertaining to this matter on 07.05.2012 at 11, Kennedy Avenue, Nadi on one Anil Kumar who acknowledged the service. Anil Kumar stated that, he acknowledged on behalf of the defendant and would inform him. Anil Kumar also stated that, the defendant at that time was away in overseas. This is not disputed by the defendant, and in fact, the deponent of the supporting affidavit has annexed a copy of the said Affidavit of Service marking as **Exhibit D**. However, the deponent stated that, Anil Kumar was not authorized by the defendant to accept the service.
10. It should be noted that, the said Anil Kumar had not only acknowledged the service of documents on behalf of the defendant, but also sworn the affidavit in reply to the Motion filed by the plaintiff seeking the order for transfer of the subject property. In his affidavit, he claimed to be the financial controller of three companies related to the defendant and the accountant of the defendant. In addition he confirmed that the purchase price to

transfer the subject property was fully paid by the plaintiff and annexed some Tax Invoices for the proof of payment. However, the deponent of the supporting affidavit stated that, the defendant did not authorize Anil Kumar and it was done without the knowledge of the defendant.

11. This court takes judicial notice of a connected which is Civil Action No. 231 of 2018 filed by the defendant against the plaintiff and Anil Kumar. The defendant alleged that, Anil Kumar fraudulently assisted the plaintiff to transfer the subject property to the latter. The defendant also claimed that, Anil Kumar was not authorized to swear affidavit to facilitate transfer of the subject property to the plaintiff. The defendant identified Anil Kumar as Financial Controller in that case. However, the defendant discontinued the said action and even paid cost to the plaintiff for consenting to discontinue the same. Two pertinent questions arise here. First is that, if Anil Kumar fraudulently acted without the authority of the defendant, why the defendant discontinued the action in which he alleged that, Anil Kumar fraudulently acted without authority to facilitate transfer of the subject property. Second is how the deponent – Ayesha Khan can state in her that, Anil Kumar did not have authority when the defendant himself had withdrawn his case against Anil Kumar. Thus, I am unable to give weight to the averment of Ayesha Khan. It appears that, Anil Kumar acknowledged service of documents and sworn the affidavit on behalf of the defendant and it was within the knowledge of the defendant.
12. The court when made the order on 19.11.2012 had read the affidavit of Anil Kumar which supported the motion filed by the plaintiff. Accordingly, the said order was made regularly and in fact, it was a consent order. It is evident from the record that, the plaintiff thereafter served the documents with the leave of the court on the defendant at his foreign address. This was followed by the interlocutory judgment entered by the plaintiff on 09.07.2015. In fact, the defendant filed the Civil Action 231 of 2018 in order to nullify the transfer of the subject property to the plaintiff. The proceedings and the steps taken by the plaintiff in this matter were within the knowledge of the defendant. It clearly appears to the court that, the current attempt by the defendant to set aside on technicality is an after-thought triggered by the reasons best known to him. For these reasons, I decide that, the impugned order and the interlocutory judgment are regular.
13. The second ground submitted by the counsel for the defendant is that, the leave was not obtained by the plaintiff pursuant to Order 6 rule 6 of the High Court Rules before the writ was issued by the registry. It is mandatory to obtain the leave from the court if a writ to be served out of the jurisdiction of the court. However, the Order 6 rule 6 applies in a situation where the writ is to be issued on a person who is subject to another jurisdiction. In other words, only if a foreigner is to be brought to the local jurisdiction of the court the Order 6 rule 6 applies and the leave is required.

14. The authorities require the court to carefully consider the leave as it has to consider the serious question whether the court should allow a *foreigner* to be brought to the country to contest his right (*Amin Rasheed Shipping Corporation* [1983] 2 All ER 884). Pearson J in *Société Générale de Paris v. Dreyfus Bross* (1885) 29 Ch D 239 at pages 242 and 243 said that:

.... it becomes a very serious questionwhether this court ought to put a *foreigner*, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction. (Emphasis is added).

15. If the defendant relies on the mandatory provisions of the Order 6 rule 6, he should satisfy the court on the balance probability that he was a foreign national subject to another jurisdiction at the time of issue of the writ. In this case, the defendant is subject to the local jurisdiction and he left the country for medical purpose and Order 6 rule 6 is not applicable to the circumstances of this case. As the result, the argument of the counsel for the defendant is flawed and misconceived.
16. Even if I am wrong in holding that the impugned order and the default judgment are regular, the defendants' application for setting aside them for the alleged irregularity should be dismissed for failing to comply with the Order 2 rule 2 (1) of the High Court. The Order 2 rule 2 (1) provides as follows:

Application to set aside for irregularity (O.2, r.2)

2 (1). An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

17. According to the above rule an application to set aside any proceedings, any step taken in any proceedings or any documents, judgment or order on the ground of irregularity shall not be allowed unless it is made within reasonable time and before taking any step. The facts in *Shameem v Toyota Isusho (SS) Ltd* [2004] FJCA 44; ABU0042.2003S (16 July 2004) are similar to the case before me. It was alleged in that matter that, the writ was not served. However, the application to set aside was made after almost 2 years and 7 months. The Court of Appeal unanimously held that:

Counsel submitted that the decision as to service was a decision on an irregularity. We agree with the contention of the respondent that in any event the point must fail because of the delay involved. Order 2 rule 2(1) provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. If the application is not made within a reasonable time then the application shall not be allowed. (Underlining is original).

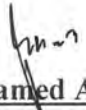
18. In this matter, the impugned order made on 19.11.2012 and the interlocutory judgment sealed on 09.07.2015. However, the defendant filed the current application to set aside the same only on 15.09.2020 almost after 8 years from the order and 5 years from the interlocutory judgment. There is no explanation and or reason whatsoever for such long delay of 8 years. The defendant filed number of actions and especially filed the Civil Action No. 231 of 2018 for the purpose of nullifying the transfer of the subject property that took place by virtue of the impugned order in this matter. However, all other matters were withdrawn by defendant at hearing of this application. In addition, the defendant paid the costs also to the plaintiff to withdraw those matter. This shows that the defendant was constantly advised by the solicitors on the issues related to this matter. However, he failed to bring the application within reasonable time. The current application should therefore be dismissed on this ground alone.
19. The plaintiff in his affidavit in opposition sought the costs on indemnity basis. The defendant was aware of the steps taken and especially the impugned order and the interlocutory judgment. He filed the Civil Action 321 of 2018 in order to nullify the transfer of subject on the ground of fraud and misrepresentation by Anil Kumar. When he realized that, he won't be successful in that action, he withdrew the same paying cost and tries to re-open this matter. The defendant withdrew allegation in that matter that Anil Kumar fraudulently acted without his authority; however, he authorized the deponent – Ayesha Khan to plead the same in her affidavit filed to set aside the impugned order and interlocutory judgment. It appears that, he switched to the procedures from time to time which can suit him. This is in my view an abuse of the process of the court. This conduct is inexcusable and the plaintiff should be entitled for indemnity costs. However, considering the age of this matter and the delay might be caused in dealing with assessment of indemnity costs, I decide that the cost on high scale will do justice in this matter.

20. Accordingly, the final orders are;

- a. The Summons filed by the defendant, to set aside the orders made on 19.11.2012 and the interlocutory judgment sealed on 09.07.2015, is dismissed,
- b. The motion filed by the defendant to stay the execution of above order, interlocutory judgment and the proceeding in Civil Action No. 184 of 2019 and
- c. The defendant should pay a summarily assessed cost of \$ 7500 to the plaintiff within a month from today.

At Lautoka
15.06.2023




U.L. Mohamed Azhar
Master of the High Court