

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

Civil Action No. 58 of 2016

**BETWEEN:**            **DANIELE VAKATAWABAI** of Namosi Village, Namosi, Self  
Employed

**FIRST APPELLANT**  
**(1<sup>ST</sup> DEFENDANT)**

**AND :**                **LAILA MAKARITA** of Lautoka Hospital Quarters, Lautoka,  
Medical Doctor

**SECOND APPELLANT**  
**(2<sup>ND</sup> DEFENDANT)**

**AND :**                **FIJI DEVELOPMENT BANK** a body corporate having its Head  
Office at 360 Victoria Parade, Suva, Fiji.

**RESPONDENT**  
**(PLAINTIFF)**

**Counsel:**            **Plaintiff: Ms. K. Singh**  
**Second Defendant: Ms. I. Sauduadua**

**Date of Hearing: 16.5.2023**

**Date of Judgment: 25.8.2023**

**JUDGMENT**

**INTRODUCTION**

1. This is the summons filed by second Defendant seeking extension of time for leave to appeal and leave to appeal against Master's decision of 7.11.2022, refusing to set aside default judgment. It was entered after acknowledgment of service by both Defendants. Plaintiff had granted a loan to first Defendant and second Defendant was its guarantor. Death of first Defendant after filing acknowledgment on 15.8.2016 cannot be a reason for second Defendant to neglect to file a statement of defence. Second Defendant's main contention on Section 81(1)(a) of Consumer Credit Act 1999. In terms of the presumption contained in Section 11 of Consumer Credit Act 1999, loan granted for first Defendant in expectation of tender of government, for commercial purpose (see LL8 to affidavit in opposition filed on 14.10.2019 written by

second Defendant) had no application of Consumer Credit Act 1999. Second Defendant also relied on technical issue such as wrong provision stated in judgment in default, which is not a reason for setting aside. There are no meritorious defence.

## FACTS

### A. CHRONOLOGY

<b>Date</b>	<b>Brief Particulars</b>
11.03.2016	- Writ of Summons was filed by the Respondent in High Court
12.07.2016	- Appellant's acknowledged service of the Writ No action taken hence Registry served notice in terms of Order 25 rule 9 to show cause and Master made directions on 5.3.2017. accordingly Second Defendant did not take steps as per directions of Master.  In the absence of taking action by Defendant, Master also made directions for the Plaintiff to take actions, and accordingly default judgment was filed on 22.5.2019.
23.05.2019	- Judgment by Default entered by the registry as the judgment was for liquidated sum
26.08.2019	- Second Defendant filed Application to Set Aside Judgment in default entered on 23.5.2019. On following grounds a. second Defendant had some undisclosed 'work commitments' so had no time to sign documents (paragraph 12 of affidavit filed 26.8.2019) b. Second Defendant was not certain whether she was served the summons (though acknowledgment was filed on behalf of Defendants'.) c. Second Defendant cannot defend the action due to death of first Defendant.
14.10.2019	- Plaintiff filed affidavit in opposition
11. 11. 2022	- Interlocutory Ruling delivered by the Master refused the setting side.

23.12.2022 - summons for extension of time for leave to appeal and leave to appeal

## ANALYSIS

2. Second Defendant had filed acknowledgment on 12.7.2016 through a firm of solicitors, along with first Defendant who had died subsequently.
3. Second Defendant did not file statement of defence and or intention to defend.
4. Second Defendant failed to comply with Master's directions made on 5.3.2017.
5. Second Defendant's above continuous failure to comply with the High Court Rules 1988(HCR) and directions of Master led to judgment in default.
6. Even after judgment in default entered the conduct of second Defendant did not improve, and ignored time period set out.
7. Master refused to set aside judgment in default, but again no leave to appeal was sought within stipulated time period.
8. Second Defendant filed summons seeking extension of time for leave to appeal and leave to appeal against Master's refusal to set aside judgment in default.
9. There are two opposing principles to be considered in this application
  - a. Directions of Master made in terms of Order 25 rule 9 of HCR and other rules of HCR were must be complied to expeditious determination of actions.
  - b. Prejudice to second Defendant, if there is a meritorious defence and whether cost can compensate adequately.
10. As the second Defendant had not sought leave to appeal within in time stipulated in terms of Order 59 of HCR the burden is higher to show meritorious defence.
11. In *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc*, [1986] 2 Lloyd's Rep 221, it was held that there is no point in granting setting aside of judgment in default, without sufficient merits on the defence.
12. Second Defendant's merits on the Defence is ascertained from the proposed statement of Defence.
13. Accordingly this proposed statement of defence was contained in the affidavit in support filed by second Defendant relied on following contentions

- a. Plaintiff cannot proceed against second Defendant without obtaining judgment against first Defendant, who was the person who received the loan.
  - b. Second Defendant is unaware of the details of the loan.
  - c. No notice of seizure issued before any security regained.
  - d. Particulars of the loan known to principal debt.
14. Plaintiff had admittedly granted second Defendant a loan for a commercial purpose in expectation of government tender and this tender was not awarded and this resulted nonpayment of the loan obtained for the business purpose.
15. Having taken this position by writing to Plaintiff 30.3.2017, second Defendant was estopped from taking a different position. Second Defendant had stated in the said letter she would start payment of the debt and submitted a proposal for payment.
16. Having said that and encouraged Plaintiff to settle the debt after institution of this action second Defendant is now seeking to avoid payment claiming section 81 of Consumer Credit Act 1999 which,

Section 81 of Consumer Credit Act 1999

17. Second Defendant's main contention is Plaintiff cannot seek recovery of the debt incurred though the loan granted to first Defendant without obtaining an order against the first Defendant.
18. In this action first Defendant had deceased after acknowledgment of service through a firm of solicitors, but did not proceed to file statement of defence.
19. Second Defendant cannot rely on the death of first Defendant as the guarantor's obligation to pay any debt arising from first Defendant is not affected by the death of him.
20. Second Defendant cannot rely on Section 81 of Consumer Credit Act 1999 due to application of section 11 of the same Act which reads

*"Presumptions relating to application of Act*

11.—(1) In any proceedings, whether brought under this Act or not, in which a party claims that a credit contract, mortgage or guarantee is one to which this Act applies, it is presumed to be such unless the contrary is established.

(2) For the purposes of this Act, credit is conclusively presumed not to be provided wholly or predominantly for personal, domestic or household

purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business purposes or investment purposes or for both purposes.

(3) A declaration under subsection (2) is ineffective for the purposes of this section if the credit provider, or any other person who obtained the declaration from the debtor knew, or had reason to believe, at the time the declaration was made, that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

(4) A declaration under this section is to be substantially in the form, if any, required by the regulations and is ineffective for the purposes of this section if it is not.”

21. Accordingly, from the evidence produced before Master it is clear that the loan was provided for commercial purpose.
22. Second Defendant also relied on alleged irregularity in the judgment where incorrect provision of law stated. This is not a reason to set aside default judgment when there are no merits.(See Bank of Credit and Commerce International(Overseas) Ltd (in liquidation)v Habib Bank Ltd 1998 4 All ER 753.
23. There are no meritorious defence in order to set aside default judgment.
24. Second Defendant had also filed proposed Grounds of Appeal against Master’s decision of 7.11.2022 and they are briefly discussed to consider merits for this application.

### **Discussion of Proposed Appeal Grounds**

Grounds of Appeal and discussions on the merits of success of such grounds are stated – below each appeal ground for convenience.

1. The Learned Acting Master erred in law and in fact by stating that as far as the default Judgement against the First Defendant is concerned, this has not been set aside without considering that the Default Judgement was entered after the death of the first Defendant.

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Death of first Defendant will not invalidate the judgment in default entered against second Defendant.

2. The Learned Acting Master erred in law and in fact, in refusing to set aside default Judgement thus entering Default Judgement against the deceased First Appellant and not against the estate of the First Appellant.

As there was no substitution for first Defendant the court needed to wait till that is done for first Defendant. So the judgment in default entered against a dead person cannot have any legal effect and no need to set aside, but this had no effect on judgment in default entered against second Defendant.

3. The Learned Acting Master erred in law and in fact in finding that the reason for delay in filing a defence is insufficient without considering that the probate for the 1st Defendant needs to be taken out.

Probate for first Defendant is not a reason for delay statement of defence for second Defendant. In any event second Defendant had not sought extension of time for that, despite Master giving directions for doing that.

4. The Learned Acting Master erred in law and in fact, in failing to ascertain the service of the Writ of Summons and the Notices allegedly sent or copied to the Second Appellant with any annexure of the Affidavit of service of the Writ of Summons by the Respondent and acknowledgements by the Second Appellant on the said Notices.

Service of summons is not an issue as acknowledgment of service was filed for both Defendants.

5. The Learned Acting Master erred in law and in fact in finding that the Second Appellant is without merits without considering the Proposed Statement of Defence.

Proposed statement of defence is doomed to fail and only defence is that death of first Defendant and reasons arising from death. As the loan was obtained and defaulted prior to death second Defendant cannot rely on death for refusal to pay on guarantee.

6. The Learned Acting Master erred in law and in fact in failing to consider that the Second Appellant had denied instructing Fa & Co and failing to ascertain the same from the filing of the Acknowledgement of Service by Fa & Co on 12th July, 2016 and a letter that the Second Appellant personally wrote to the High Court on 17th July, 2016.

This is not an appeal ground as second Defendant had not complied with directions of Master when she was represented by another law firm.

7. The Learned Acting Master erred in law and in fact in failing to consider that the Respondent failed in its duty to the Second Appellant as the Guarantor.

Plaintiff had demanded the debt owed by the principal debtor from guarantor of the loan and there is no obligation other than this.

8. The Learned Acting Master erred in law and in fact, in failing to consider that the Respondent was not forthcoming and was evasive in the provision of the documents being requested by the Second Appellant to ascertain for herself the balance of the debt.

A statement of loan account was provided. for perusal.

9. The Learned Acting Master erred in law and in fact in refusing to set aside the Default Judgement thus entering Default Judgement in the sum of \$82,388.18 [Eighty Two Thousand Three Hundred and Eighty Eight Dollars and Eighteen Cents] and not considering that the Second Appellant had paid a substantial sum of \$11,000.00 [Eleven Thousand Dollars].

If second Defendant had paid a part of debt that can be deducted at the time of recovery as banks accept payments without prejudice basis. This is not a ground to set aside the judgment.

10. The Learned Acting Master erred in law and in fact in failing to consider the payment of the substantial sum of \$11,000.00 by the Second Appellant and the fact that the interest of 15.6% is charged to the sum of \$82,388.18 per annum from 24th November, 2014.

This is again not a ground to set aside judgment in default.

11. The Learned Master erred in law and in fact in failing to consider that the Plaintiff has to Amend its Writ of Summons and Statement of Claim to change the 1st Defendant and the amount claimed.

There was no need to amend the statement of claim or writ of summons due to death of a party after institution of action. Substitution can be made regarding such party but the action against other parties are not stayed and in default can proceed for judgment in default.

## **CONCLUSION**

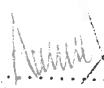
25. Second Defendant's proposed statement of defence has no merits and doomed to fail. Master was correct in refusal to set aside default judgment on a proposed statement of defence that lacked merits. Second Defendant is misconceived that her claim cannot proceed with the death of first Defendant. Guarantor's liability does not depend on the death of first Defendant. Consumer Credit Act 1999 has no application to a business loan provided by Plaintiff. Accordingly summons filed on 23.12.2022 is struck off. Cost is summarily assessed at \$1000.

## FINAL ORDERS

- a. Summons seeking extension of time for leave to appeal and leave to appeal struck off.
- b. Cost of this summons summarily assessed at \$1,000.

Dated at Suva this 25<sup>th</sup> day of August, 2023.



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