FIJI DEVELOPMENT BANK v CROWN CORK FIJI LTD, ALFRED YOUNG, ROBERT YOUNG AND SIMON YOUNG (HBC0096 of 2001L)

HIGH COURT — CIVIL JURISDICTION

WICKRAMASINGHE J

23 March 2012

Practice and procedure — default judgment — ex parte — application to set aside judgment — out of time — no extension of time application — strict procedural compliance — statute barred — High Court Rules O 35 r 2(2), r 3.

The High Court delivered an ex parte judgment in favour of the plaintiffs, as the defendants were not present and were unrepresented on the date of the hearing. The defendants sought to set aside the judgment under O 35 r 2 of the High Court Rules 1988. The application to set aside was made two months out of time, and no extension of time application was made.

Held –

(1) Order 35 of the High Court Rules is intended to give a second opportunity to a defaulting party to have his day in Court. However, it is not intended to allow a defaulting party to come before the Court at their leisure and pleasure.

(2) The word "must" in O 35 r 2 denotes mandatory compliance, therefore strict procedural compliance is required if a party wishes to enjoy the benefits of O 35. The Court could use its inherent powers only if the aggrieved party demonstrates some exceptional circumstances to expand the time. If not, the Courts cannot expand the statutory limitation of time in every case disposed ex parte while exercising inherent jurisdiction of the Court or under O 2 r 3.

(3) The Court has discretion to set aside any judgment, order or verdict. The word "any" does not refer to actions that are heard on the substantive merits, after careful consideration of the evidence by a Court. If a defendant is aggrieved by a decision, the proper procedure would be to appeal against the decision and set out the errors in the appeal.

Summons dismissed.

Cases referred to

Bay Marine Pty Ltd v Clayton Country Proprieties Pty Ltd [1986] 8 NSWLR 104; *Clune v Watson* (1882) Tarl 75, cited.

Evans v Bartlam [1937] All ER 646; *Rao v Goundar* [1998] FJHC 72; HBC 0308d 96s (22nd May 1998); *Surendra Singh and Lautoka Sandblasting and Painting Contractors Co Ltd v Commissioner of Inland Revenue et al* HBC 282 of 1988, distinguished.

Faiz Khan instructed by *Messrs R Patel Lawyers* for the Plaintiff.

M. Degei insturcted by *Messrs Haroon Ali Shah* for the Defendants.

Wickramasinghe J.

INTRODUCTION

[1] On 24 January 2011, I delivered a final judgment in favour of the plaintiff ordering the defendants to pay:

(a) Sum of $257,530.66 (Two Hundred Fifty Seven Thousand Five Hundred Thirty Dollars and Sixty Six Cents) be paid by the First and Second Defendants;

(b) Sum of $150,000.00 (One Hundred and Fifty Thousand Dollars) be paid by the Third Defendant; and

(c) Defendants pay cost of $1,800.00 (One Thousand Eight Hundred Dollars) to the Plaintiff within 21 days.

[2] On 15 February 2011, the order was sealed, and was served on the defendants' then solicitor, Mr Nacolawa, on 23 February 2011 (Tab A).

[3] I heard the case *ex parte,* as the defendants were not present and unrepresented on the date of the hearing. The plaintiff led the evidence of Mustahib Hafiz Ali, the Senior Business Manager of the plaintiff's Bank and produced and marked in evidence two bundles of documents as Volume 1 and 2. Volume 1 contained documents 1 to 124 and Volume 2 contained documents 125 to 248. The plaintiff also produced and marked in evidence Exhibits 1 to 7. My final judgment was delivered thereafter, after consideration of all the evidence.

[4] The defendants by their summons dated 18 April 2011, now seek my final judgment to be set aside under O 35 r 2 of the High Court Rules, 1988. The summons is supported by the affidavit of Robert Young sworn on 15 April 2011. The application is opposed by the plaintiff and relies upon the objections to the summons set out in the affidavit of Salote Tavainavesi dated 27 May 2011.

[5] The application was first fixed for hearing before the Master and was later transferred to me, which in my view is the correct procedure, for hearing. I then heard the parties on 22 February 2012. I have also had the benefit of the written submission and further oral submissions of the parties in making a finding on the summons.

[6] The matter was fixed for hearing by Inoke J on 7 December 2009. The case record bears witness that Mr Nacolawa was present in Court that day when the matter was fixed for hearing. Mr Robert Young in his supporting affidavit deposed that he was unable to contact Mr Nacolawa despite several attempts. He also deposed that the defendants were unaware that they had to be present on the hearing date. I do not know the reason why Mr Nacolawa did not appear in Court nor did Mr Robert Young explain the reasons or attach an affidavit of Mr Nacolawa setting out the reasons. The defendant also filed civil action no 407 of 2007 in the High Court of Lautoka against the plaintiff on the same grounds. The defendant alleges that the default judgment will weaken the civil judgment.

[7] Before commencing the hearing on 21 September 2010, I satisfied myself that the defendants were not present in Court nor represented. As a routine, the court list for each week is published, at the latest, by the Friday of the preceding week informing the solicitors and clients about their cases. Mr Nacolawa is a regular practitioner in Lautoka Court and often appears before me. I recorded the above reasons and request the plaintiff to continue with the hearing.

[8] The defendant by its *inter partes* summons dated 21 November 2008 made an application before this court to seek deferment of this case until the conclusion of civil action no. 407 of 2001. Singh J heard the application and the summons was dismissed. Up until then, it appears that the defendants did not experience difficulties locating their counsel. Mr Khan submits that if the defendants had difficulty in finding their counsel, then they should have called the Registry for information. I am unable to accept that the defendants were unable to contact their counsel Mr Nacolawa from 7 December 2009 to 21 September 2010, a period of nearly nine months.

LEGAL MATRIX

[9] The plaintiff's objections are twofold:

(a) The application is barred under O35 r 2(2)
(b) Application has no merits or justification.

[10] Order 35 r 2 of the High Court Rules, 1988 states:

"Judgment, etc. given in absence of party be set aside

(1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.

(2) An application under this rule must be made within 7 days after the trial."

[11] It is apparent on plain reading of the above Order that the Court could, in exercising its discretionary power, set aside a judgment, order or verdict; but an application for this must be made within seven days.

Order 35 r 2(2) - Time barred

[12] Order 35 r 2 (2) requires an application to set aside a judgment to be made within seven days after the trial.

[13] The judgment was delivered in open court on 24 January 2011. It was sealed on 15 February 2011 and served on the defendants' solicitors on 23 February 2011. Accordingly, the defendants were required to make the application within seven (7) days after the trial i.e., seven days after the date of delivery of judgment. The application to set aside was made on 18 April 2011, belated by over two months.

[14] The defendants in their submissions are seeking to extend time under the courts inherent jurisdiction or extend time under Or 2 or Or 3 of the High Court Rules, 1988.

[15] The defendants also drew my attention to several authorities that support the proposition that delay can be excused and justified. *Surendra Singh and Lautoka Sandblasting and Painting Contractors Co Ltd v Commissioner of Inland Revenue et al* HBC 282 of 1988; *Rao v Goundar* [1998] FJHC 72; HBC 0308d 96s (22nd May 1998); *Evans v Bartlam* [1937] 2 All ER 646.

[16] I am conscious that 'rules must be the servant and not Masters of the Court' as observed by in *Clune v Watson* (1882) Tarl 75 and reiterated by Kirby P in *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 at 108.

[17] Mr Faizal Khan submits that it is not for the Court to provide excuses for a party or be moved on grounds of sympathy. The Court has to be impartial and in an adversary system it is for the parties and their counsel to place before the Court grounds and facts that shall entitle them to relief. Mr Khan also submits that when the defendant fails to file an application under O 35 r 2 within the mandatory seven-day period after the trial it is a representation to the plaintiff that the decision has come to finality. He therefore urged the Court not to ignore or consider the representations lightly.

[18] As I see, the defendants have several hurdles before them. Firstly, the defendants have not made an application to extend time. Only when the plaintiff took objection did the defendant address the issue of delay in their written and oral submissions. Therefore, there is no summons before the court to consider extending time. Secondly, the affidavit evidence contains an uncorroborated statement by Robert Young, where he deposed that the defendants were unable to locate their solicitor Mr Nacolawa, and therefore were unaware that they were required to be present at the hearing. Neither does he explain how he came to

know about the judgment if he had lost contact with his solicitors or the details of his search. It is therefore impossible for me to determine whether the search was adequate. Mr Nacolawa is a practitioner in Lautoka and often appears before me. The defendants had simply changed solicitors without any explanation. It is the parties' prerogative who acts as their solicitor. However, the lack of explanation stated above, which is necessary to make a determination on this crucial issue, does not help. I am further handicapped by the silence of the counsel in both oral and written submissions on the issue except the simple statement that his client could not locate Mr Nacalowa.

[19] I have carefully considered the legislative intention of the Rules. It appears on a plain reading of O 35 of the High Court Rules that it intended to give a second opportunity to a defaulting party to have his day in court in line with the well-settled principles that all parties must be heard on their cause. However, in doing so I do not think the legislature intended a defaulting party(s) to come before court at their leisure and pleasure.

[20] The word "must" stated in O 35 r 2 has the same meaning as 'shall'. The word 'shall' denotes and has been construed as meaning mandatory compliance. In my mind strict procedural compliance is therefore required if a party wishes to enjoy the benefits of Or 35. The Court could use its inherent powers only if the aggrieved party demonstrates some exceptional circumstances to expand the time. If not, it is my considered view that the courts cannot expand the statutory limitation of time in every case disposed *ex parte* while exercising inherent jurisdiction of the court or under Or 2 r 3.

[21] Order 35 r 1 provides discretion in the court to set aside 'any' judgment, order or verdict.

[22] In the absence of a party on a date of hearing, the courts are empowered to either dismiss the case if the plaintiff is not present or hear the case *ex parte*if the defendant is not available. In the latter situation, the plaintiff must still prove its case on a balance of probability.

[23] I have considered in detail all the above cited judgments and fully agree with the dicta and the findings. However, I find that all of them were dismissed for want of appearance and prosecution and the matters were considered in those circumstances. The causes in those cases were not considered on merit. Therefore in my mind the above cases are clearly distinguishable from the instant case.

[24] The final judgment delivered by me was subsequent to a full hearing and after due consideration of all evidence. I even considered the defence, in the interests of justice, to ensure that the defendants were 'not denied their day in Court'. I was satisfied that the plaintiff proved its case on a balance of probability before I delivered my judgment.

[25] When a case is heard *inter partes* an aggrieved party must appeal against such judgment as set out in the law. In my mind, same rule applies to cases concluded *ex parte.* Therefore it is my considered view that the words 'any' stipulated in the case does not refer to actions that are heard on the substantive merits, after careful consideration of the evidence by a Court. If a defendant is aggrieved by the decision then in my mind the proper procedure would be to appeal against the decision and set out the errors in the appeal.

[26] I do not have an application to expand time. Nor have the defendants adduced sufficient explanation or reasons for me to exercise my discretionary power under O 35 r 1. I have no reason before me to set aside my judgment to

the prejudice of the plaintiff who took the trouble to bring counsel from Suva to Lautoka along with witnesses and conduct a trial with 248 documents.

[27] In the circumstances I conclude that the defendants' application is statute barred and the defendants' application to set aside does not merit the court to expand time or to set aside the judgment dated 24 January 2011.

[28] Accordingly, I dismiss the summons.

Summons dismissed.