

IN THE HIGH COURT OF KIRIBATI 2020

MISCELLANEOUS APPLICATION NO 16 OF 2020
(ARISING FROM HIGH COURT CIVIL CASE NO. 67 OF 2019)

	[IEKERUA KIAUA	APPLICANT
	[
BETWEEN	[AND	
	[
	[RUBENTAU AKURA	RESPONDENT

Before: The Hon Chief Justice Sir John Muria

27 April 2020

Ms Taaira Timeon for Applicant
Mr Tabibiri Tentau for Respondent

JUDGMENT

Muria, CJ: The applicant in this application is the defendant in the present substantive High Court Civil Case 67/19. He failed to enter Appearance and to file Defence to the plaintiff's claim. The plaintiff has sought to enforce the judgment in default entered against the defendant who now applies to set aside the default judgment.

2. The plaintiff's claim is for damages in the sum of \$25,480.00 for deprivation of the use and enjoyment of his lands Teumatoro 693-K/1/i and 693-K/2/i. The plaintiff's claim is that the defendant has trespassed onto his land since 2016 and still continuing. He claims \$20.00 per day against the defendant for occupying his land and now wants the defendant to pay for the days the defendant has been occupying his land and to have the defendant removed from his land. The plaintiff filed his claim on 14 October 2019.

3. The claim was served on the defendant on 25 October 2019. The defendant failed to appear to the Writ of summons and so judgment in default of appearance was entered against the defendant on 14 November 2019.

4. There can be no doubt that the defendant was served with the plaintiff's claim and that he failed to enter appearance to the claim. The *High Court (Civil Procedure) Rules 1964*, in particular, O.13 r3, entitles the plaintiff to enter final judgment against the defendant for the liquidated amount claimed for failure to enter appearance to the claim. The default judgment was regularly entered against the defendant in this case.

5. The defendant now says that his failure to enter appearance or take steps to defend the plaintiff's claim was due to the legal advice given to him by his previous lawyers (OPL). The advice given to him, sworn to in his affidavit, was that his other case, High Court Land Review No. 70 of 2016 over the boundary of his land Teumatoro 693-K with that of the plaintiff was still pending in the High Court. As such, the defendant was advised that the plaintiff could not proceed with his case (High Court civil Case 67/19) until the High Court Land Review Case 70/16 has been dealt with by the Court.

6. Sadly, the legal advice given to the defendant by his previous lawyers had not been followed up with the necessary procedural steps to prevent the defendant from falling into default in the case now against him (High Court Civil Case 67/19) while waiting for High Court Land Review 70/2016 to be dealt with by the Court. The fact that High Court Land Review 70/16 was filed and pending before the Court cannot and does not preclude the plaintiff from proceeding with his case in High Court Civil Case 67/19. That was what the plaintiff did. He brought his claim in High Court Civil Case 67/19. If the defendant felt that the plaintiff ought not to have proceeded with his claim in HCCC 67/19, pending the determination of his case HCLR 70/16, the defendant should have taken the necessary steps to prevent the plaintiff from doing so or taken steps to avoid

falling into default as that occurred in this case. The pendency of HCLR 70/16 before the Court cannot be an acceptable reason to justify the defendant's default.

7. As I have already stated, the default judgment was properly entered against the defendant. The only issue is whether it should be set aside and the defendant to be given a chance to answer the plaintiff's claim. That requires the defendant to demonstrate to the Court that despite his default, the Court should exercise its discretion to set aside the default judgment. The Court must exercise that discretion judiciously and for a cogent reason, bearing in mind the principle that unless and until the merit of the case between the parties is determined, the Court retains the discretionary power to revoke the expression of its coercive power where that has been obtained only by a failure to comply with the rules of procedure: *Evans –v- Bartlam* [1937] AC 473; *Korieta –v- Broadcasting and Publications Authority* [2012] KHC 51; Civil Case 8/2011 (29 October 2012).

8. In addition to the Court's discretionary power to “**revoke the expression of its coercive power**”, the Court will also bear in mind three considerations that impact upon the exercise of the Court's discretion. The three factors are set out in *Waysang Kum Kee –v- Abamakoro Trading Ltd* [2001] KICA 9; Civil Appeal 06 of 2000 (5 April 2001) namely:

1. whether the defendant has a substantial ground of defence to the plaintiff's claim;
2. whether the defendant's failure to take any steps, or to appear at the hearing, was excusable; and
3. whether the plaintiff will suffer irreparable harm if the judgment is set aside.

9. The Court in *Korieta –v- Broadcasting and Publications Authority* also applied the three considerations stated in *Waysang Kum Kee –v- Abamakoro*. In my view, the above three considerations are very much applicable in the present application.

10. The evidential burden is on the defendant to show that he has a good defence. The defendant has not filed any draft defence in this case. However, this Court can still consider whether the defendant has an arguable defence to the plaintiff's claim based on the affidavit materials before the Court. See *Raratu –v- Jian Pei Li* [2020] KHC 1; Miscellaneous Application 32 of 2019 (21 February 2020).

11. The affidavit evidence filed by the defendant shows the defendant owns a portion of land in Teumatoro 693-k and claims that the land on which he resides is his portion of the land Teumatoro 693-k. If that is established, the plaintiff's claim in this case would likely fail. As this Court said in *Raratu –v- Jian Pei Li*, the facts disclosed in the affidavit evidence of the defendant are “**sufficient to test the merit of the defendant's defence now raised**” and that is “**good enough reason**” to have the case proceeded to trial.

12. With regard to the defendant's failure to take steps after being served with the plaintiff's claim, it is clear to the Court that the defendant had relied on the legal advice from his lawyers. He was entitled to rely on the skills and expertise of his lawyers. As such the failure to take steps to defend against the plaintiff's claim cannot be attributed solely on the defendant. His lawyers had also failed him.

13. However, it must also be said that the failure by legal counsel to take steps to defend a claim is in itself not a cogent ground to set aside a default judgment. This is because a competent litigation lawyer can hardly justify failing to take steps to defend a claim after knowing that the Writ of Summons had been served on his client. Failure on the part of Counsel in this regard is not an acceptable explanation for not complying with the rules of procedure. See the Jamaican case of *Nanco –v- Lugg & Another* [2012] JMSC Miscellaneous Civil 81.

14. The third consideration is whether the plaintiff would suffer prejudice if the default judgment is set aside. The plaintiff had obtained a default judgment regularly. As such he has a judgment in this favour and he ought not to be deprived of the benefit his judgment *Korieta –v- Broadcasting and Publications Authority* (above) unless there are good and compelling reasons to do so: *Nanco –v- Lugg & Another* (above).

15. In this case, while observing the principle that a party ought not to be deprived of the fruit of his judgment, I feel that the arguable defence shown in the defendant's affidavit is good and compelling reason to allow the defendant to defend the plaintiff's claim. This can be done by setting aside the default judgment in question and the plaintiff's claim to proceed to trial.

16. The defendant's application to set aside the judgment in default of appearance entered for the plaintiff on 14 November 2019 is granted. The defendant is given 14 days to file defence. The other matters on pleadings to proceed in the usual way.

Although the applicant/defendant is successful in his application, the circumstances of this case do not justify granting him costs. There will be no order on costs.

Dated the 28th day of April 2020

