

SUZUEI

-v-

COMMISSIONER OF LANDS

First Defendant

SOLOMON KITANO MENDANA HOTEL LTD

Second Defendant

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 141 of 1991

Hearing: 8 September 1991

Judgment: 24 September 1991

A. H. Nori for the Plaintiff

P. Afeau for the First Defendant

F.S. Waleilia for the Second Defendant

PALMER J: This is an application by the Plaintiff to set aside a default judgment obtained against it on the 27th of July 1992 by the Second Defendant.

A writ was issued by the Plaintiff on the 18 May 1991. A memorandum of appearance was filed by the Second Plaintiff on the 1st of June 1991. A defence was filed on the 6th of June with a counter-claim.

On the 27th of July 1992 a judgment in default of filing a defence to the counter-claim was obtained.

Mr Nori, Counsel for the Plaintiff has lodged 3 affidavits in support of his application, one by Mr Lee, the Managing Director of South Pacific Development Company Ltd, one by Steve Elundy, a solicitor in the office of A. H. Nori, and the last one by Mr Nori himself.

The basis for setting aside default judgements has been aptly set out in the case of *Kayuken Pacific Limited -v- Harper 1987 SILR* page 54.

The main factor to consider is whether there is a prima facie defence to the action. In this case whether there is a prima facie defence against the counter-claim. And in so applying, an affidavit of merit must be lodged. This has been done through the affidavit of Mr Lee.

I have had the opportunity to go through the counter-claim and the affidavit of Mr Lee and I am more than satisfied that there is a viable defence.

The boundaries of Parcel 191-017-64 and 191-017-18 are matters that can easily be settled through the Surveyor General. I am sworn that an existing road once open to members of the public, but since the granting of the fixed-term estate in Parcel 191-017-64 to the Plaintiff has been closed off for security reasons and other reasons as well. That gate has subsequently been opened pursuant to orders obtained on the 4th of August 1992.

Reference has been made to section 123 of the Land and Titles Act and in particular to a letter written by the Commissioner of Lands and dated 29 April 1991 in which he ordered that the access way through the road fenced off by the Plaintiff be removed.

But it has been submitted that the erection of the fence had been done with the consent of the Commissioner of Lands and that the objection from the Commissioner of Lands had only arisen as a result of complaints from the Second Defendant. See affidavit of Mr Lee paragraphs 8 and 9.

The application of section 123 therefore is in dispute and is a matter that can be raised in detail in trial.

The Second Defendant clearly does not have any registered interest over Parcel 191-017-64. The only interest that is being submitted is through the use of the road prior to the granting of the fixed-term estate to the Plaintiff. And this is specified in paragraph 201 and 202 of the counter-claim of the Second Defendant.

That interest comes directly it seems under section 123 of the Land and Titles Act.

Whether the use of the word prior to the granting of the timed-term estate will give weight of use to the second Defendant is a matter for trial. The question of whether section 123 applies to this particular word is a matter for trial as well.

Clearly, I am satisfied there are triable issues disclosed.

Hence, Order 23 Rule 12 comes into play.

I have considered the explanation provided by Mr Nori for the failure in filing a defence. I accept his explanation.

I am satisfied there was no unnecessary delay in the filing of the summons to set aside judgement.

On the question of prejudice, I am satisfied there will be no or little prejudice involved if a trial is allowed and especially if there are conditions in the setting aside of the default judgement.

I order accordingly that the default judgement of the 27th July 1992 be set aside and leave given to the Plaintiff to defend. The only condition imposed is that access to the road shall be restored to the first and second Defendants and no one else. I am sure a suitable arrangement can be made between the parties in respect of the gate locks, keys and times for the closing and opening of the gates. If not then the matter can be referred back to me for directions.

Costs of this application are to be borne by the Plaintiff. )

I also make the following directions:-

- (i) Discovery to be done within 14 days

- (ii) Inspection 14 days after
- (iii) A hearing date to be fixed on Certificate of Readiness being filed by the parties.

(A. R. Palmer)

JUDGE