

DEVELOPMENT BANK OF SOLOMON ISLANDS -V- PAUL KUKITI (Trading as or under the name Sustainable Sawmilling Services)

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J).

Civil Case No. 109 of 2003

Date of Hearing: 18th August 2003
Date of Judgment: 22nd August 2003

Mr G. Fa'aitoa for the Plaintiff
Mrs. A. N. Tongarutu for the Defendant

JUDGMENT

Kabui, J. This is an application by Summons filed by the Plaintiff on 24th June 2003, seeking the following orders-

1. The Plaintiff have leave to enter judgment herein against the Defendant in the sum of \$209,355.58 together with interest thereon at the rate of 16% per annum from 31st March 2003 up to and including the date of payment and costs.
2. The Plaintiff have leave to sell by public tender the property within the Fixed Term Estate 192-010-112 situated within the Ranadi Industrial Estate, East Honiara;
3. No tender is to be accepted without the further leave of a judge in Chambers;
4. The Defendant upon notice deliver vacant possession of the property in Parcel Number 192-010-112;
5. Notwithstanding order 4, the Defendant, his servants, agents, invitees, licensees or others entering the land in Parcel Number 192-010-112 under the Defendant's authority forthwith vacate the same and forthwith remove all his or their chattels from the same;
6. The Defendant, his servants, agents, invitees, licensees or others entering the land in Parcel Number 192-010-112 under the Defendant's authority be permanently restrained from entering the said land;
7. The High Court Sheriff or his officers shall attend and enforce, as is reasonably necessary, the terms of the preceding order, by giving vacant possession of the property in Parcel 192-010-112 to the Plaintiff and the Sheriff shall have the assistance of the Honiara Police Commander and his officers, to carry out this order;
8. The Honiara Police Commander to assist the Sheriff in his duties in giving vacant possession of Parcel No. 192-010-112 to the Plaintiff;
9. The Defendant pays the Plaintiff's costs of and in connection with this action including this application;
10. Such further order or other order as this Honourable Court deem [meet.]

Misplacement of affidavit filed on 15th August 2003 in this case.

Before I went into the court room yesterday to deliver my ruling in this case, I discovered by accident an affidavit filed by the Defendant in this case had been placed by mistake in another Court File. This other File is DBSI v. LUKISI Civil Case No. 072 of 2001 listed before me for hearing today. I was checking this File when made the discovery. I revealed this to both parties in open court and told them that this affidavit did contain relevant facts which escaped my attention when I wrote my ruling. I said that I needed to consider these facts and in doing so could alter my decision in this case. I said I would need to adjourn to rewrite my judgment in the light of this discovery. Counsel for the Defendant, Mrs. Tongarutu, was the one who filed the affidavit on 15th August 2003 in support of the Defendant's case and did not object to my suggestion. Counsel for the Plaintiff, Mr. Fa'aitoa, was not present but his lay representative was in Court on his behalf. He too, did not object to my suggestion. I therefore adjourned the sitting for 4:00 pm this afternoon at which time I will deliver my judgment.

The Facts.

An offer was made by the Plaintiff as the lender to the Defendant as the borrower on 12th August 1994. The loan offered was in the sum of \$118,098.00 at the interest rate of 14% for a term of 10 years. The monthly repayment was in the sum of \$1,837.00. A charge was created over the property in Parcel No. 192-010-112 as security for the repayment of the loan together with a bill of sale over the sawmill equipment and truck. The Defendant as the borrower accepted the loan offer from the lender on 16th August 1994. In 1996, the Plaintiff again made an offer of \$55,000.00 to the Defendant as the borrower thus increasing his total commitment to \$172,325.00. The interest rate was 16% per annum. The term of this loan was 8 years with the monthly repayment of \$3,159.00. The Defendant accepted this second offer on 14th April 1996. The existing charge was varied accordingly but the bill of sale remained intact. The Defendant has failed to repay the loans as agreed by him in the said loan agreements.

The Plaintiff's case.

The Plaintiff has come to Court under Order 14, rule 1(a) of the High Court (Civil Procedure) Rules, 1964, 'the High Court Rules'. Mr. Ne'e in his affidavit filed on 24th June 2003, sets out the facts regarding the loans borrowed by the Defendant from the Plaintiff and confirms the outstanding debt owing to the Plaintiff being \$212,110.38 as at 30th April 2003. He states that he believes the Defendant has no defence to the action brought against him by the Plaintiff. The Defendant filed an affidavit on 29th July 2003 in response to the Summons filed by the Plaintiff in which the Defendant spoke about his lease with Seaways Ltd and the tenant's failure to pay rental since January, 2003. The Solicitor for ANT Legal Services did file a Memorandum of Appearance on 18th July 2003. When the Plaintiff's Summons came up for hearing on 29th July 2003, it was not heard. Instead, the Court heard an application by Notice of Motion filed by the Defendant on 24th July 2003 seeking extension of time for the delivery of a memorandum of appearance and defence. I dismissed the application in my ruling dated 30th July 2003. The Defendant then filed his defence on 1st August 2003. The Plaintiff's case is that the defence filed by the Defendant should be struck out and leave be granted to enter judgment against the Defendant for the sum claimed by the Plaintiff there being no defence on the merits or an arguable case.

The defence filed by the Defendant.

Counsel for the Defendant, Mrs. Tongarutu, argued that the case should proceed to trial because the defence had been filed. She pressed for the Summons filed on 24th July 2003 by the Plaintiff to be

struck out on the ground that it undermined the action proceeding to trial. I have studied the defence filed by the Defendant and have come to the conclusion that the essence of the content of that document is that there were legitimate reasons which caused the Defendant to default in his repayments of the loans. Paragraphs 5, 6 and 8 of the defence do raise the same issue addressed in the Defendant's affidavit filed on 29th July 2003 referred to above. The failure of Seaways Ltd. to pay rental to the Defendant being that issue is of no significance in absolving liability from the Defendant. That issue is not and cannot be a good defence or a fact which entitles the Defendant to defend the action generally. The other issues raised in the defence are not issues constituting grounds for a good defence on the merits or which would entitle the Defendant to defend the action generally. The Defendant however filed a subsequent affidavit on 15th August 2003 in which he said that he had repaid the sum of \$126,947.00 leaving the balance of the loans owing being \$45,000.00. The Defendant has admitted in his affidavit evidence filed on 15th August 2003 that he owed the balance of \$45,000.00 to the Plaintiff. That part of the debt is clearly undisputed. Clearly, under Order 14, rule 1(a) of the High Court Rules, the Court may act in favour of the defendant only on the basis that the facts disclosed by the defendant do disclose a good defence on the merits or are sufficient to entitle the defendant to defend the action generally. The Statement of Claim claims the sum of \$209,355.58 but with interest calculated to 30th May 2003, the total sum may well be \$335,295.37. The Defendant is clearly disputing the accuracy of the total claim by the Plaintiff. The other issue similarly intertwined is the amount already paid by the Defendant as alleged by him in his affidavit. Clearly, the Plaintiff does not admit that the Defendant has paid \$126,947.00, leaving only \$45,000.00 outstanding. These two issues clearly do constitute a dispute over facts which must proceed to trial. (See *Lynde v. Waithman* [1895] 2 Q.B.D. 180). For that reason, I do hereby give leave to the Defendant to defend the action on that basis.

The counter-claim.

I will not disturb the Defendant's counter-claim. I will deal with it at the trial stage of the action.

Leave to enter judgment under Order 14(1)(a) or under Order 34(6) of the High Court Rules.

The Plaintiff did not for some reason apply under Order 34(6) of the High Court Rules for judgment on the admission made by the Defendant in his affidavit filed on 15th August 2003. The admission apparently was made well after the Plaintiff's application for leave to enter judgment on the ground that the Defendant had no defence. For this reason, I will have to proceed on the basis that the Defendant had no defence to the whole amount claimed by the Plaintiff and put aside any notion of applying Order 34(6) of the High Court Rules to this case.

The power to enter judgment under Order 14, rule 1(a) of the High Court Rules is discretionary because if there is a good defence or good reason for the defendant to defend the action, no leave should be granted. This is fairly clear from the wording of the last sentence in Order 14, rule 1(a) of the High Court Rules. However, Order 14, rule 1(a) of the High Court Rules should not be invoked in all applications for the procedure is intended for proper cases only in that the procedure should not be used where there is clearly a good defence on the merits to be raised. (See *Dott v. Brown* [1936] 1 All E.R. 543). As I have said, the facts deposed to in the affidavit filed on 15th August 2003 do disclose a good defence on the merits. I do not therefore have any reason to refuse leave to enter judgment against the Defendant for the sum of \$45,000.00 with interest. The Plaintiff's application is granted to that extent. I grant leave to enter judgment accordingly for the sum of \$45,000.00. I will reserve costs until the end of the trial. The judgment may have to be entered in accordance with Form 6 in Appendix F as set out in the High Court Rules. This is not the case of seeking leave to enter judgment under Order 13, rule 11 or Order 29, rule 13 of the High Court Rules. This being the case, the Plaintiff will have to come back for an order for sale of the charged property and other

ancillary orders under Order 54 of the High Court Rules. In this case, it may be wise to wait until the trial is concluded before an order for sale is made and other relevant orders as the case may be. The orders of this Court therefore are-

1. Leave to defend the action is granted;
2. Leave is granted to enter judgment against the Defendant for the sum of \$45,000.00 with interest.
3. That costs be reserved until the trial of the action is concluded.

F. O. Kabui
Judge