

DEVELOPMENT BANK OF SOLOMON ISLANDS v. MELANESIAN
COMMUNICATION LTD., JOHN MICHAEL ASIPARA AND FRANCIS
WALEILIA

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 185 of 2003

Date of Hearing: 31st October 2003

Date of Ruling: 05th November 2003

G. Fa'aitoa for the Plaintiff

G. Suri for the 3rd Defendant

RULING

Kabui, J. By an amended Notice of Motion filed on 27th October 2003, the 3rd Defendant sought the following orders-

1. Service of the Writ is set aside on the ground of non-compliance with Order 11 Rule 3 of the High Court (Civil Procedure) Rules.
2. The order dated 12th September 2003 be set aside on the ground that the Court did not have jurisdiction to grant the order in respect of the Third Defendant:
 - (a) There was no evidence to support the order for substituted service on the Third Defendant.
 - (b) There was no evidence to support the inference that the Plaintiffs have attempted but were unable to effect service on the Third Defendant in Port Moresby at the address for service on Writ.
3. The Statement of Claim against the Third Defendant be dismissed as disclosing no reasonable cause of action against the Third Defendant or in the alternative, on the ground that it is frivolous and vexatious.
4. Further or other orders as the Court deems meet (sic).
5. The costs of and incidental to this application be in the cause.

The orders being challenged were made by Brown, J. on 12th September 2003.

The Facts.

Melanesian Communication Limited being the 1st Defendant has two directors. The two directors are the 2nd and 3rd Defendants. On 25th November 1992, the Plaintiff lent \$29,500.00 to the 1st Defendant as a loan for a term of 4 years at 14 % interest rate per annum. The repayment was to be done by way of remitting to the Plaintiff, \$807.00 monthly installment. The security for this loan was a joint guarantee executed by the 2nd and 3rd Defendant on 25th November 1992. A further guarantee was a bill of sale duly executed on 25th November 1992 over vehicle registered number 9544. On 13th December 1995, the Plaintiff lent to the 1st Defendant, the sum of \$33,933.00 again as a loan. This loan, added to the remaining balance outstanding on the first loan became \$46,850.00. The interest rate was 16% per annum and for a term of 3 years. The repayment was increased to \$1,650.00 per month. The security was a bill of sale duly executed by the 1st Defendant over its vehicle registered number A3387. On 19th December 1996, the Plaintiff lent to the 1st Defendant the sum of \$306,000.00 as a loan. The total loan then became \$347,359.00 to be repaid over a period of 10 years. The interest rate was 16% and the repayment installment had increased to \$5,819.00 per month. The security for the loan was a registered charge over Parcel Number 191-018-71 plus a further joint guarantee by the 2nd and 3rd Defendants. On 12th March 1998, the Plaintiff lent the sum of \$163,000.00. The total loan by then had increased to \$580,353.27 to be repaid over a period of 10 years. The interest rate remained at 16% per annum. The repayment schedule then became \$9,730.00 per month. The security was a charge over Parcel Number 191-018-7. The guarantee cited in paragraph 6 of the Statement of Claim is denied by the 3rd Defendant. The Defendants have failed to repay the loan despite demand to repay under the terms of the loan agreement. The total sum outstanding is \$596,097.00. The Plaintiff claims this sum with interest until payment.

The issues to be determined.

The issues to be determined are four in kind. The first issue is whether or not the service of the Writ of Summons should be set aside or the order authorizing service be discharged on the ground that none of them complied with Order 11, rule 3 of the High Court (Civil Procedure Rules), 1964 "the High Court Rules." The second issue is whether or not the Court had jurisdiction to make the orders it made on 12th September 2003. The third issue which follows on from the second issue is whether or not there was evidence upon which a substituted service order could have been made in respect of the 3rd Defendant. The fourth issue is whether or not the Statement of Claim discloses a reasonable cause of action as against the 3rd Defendant or in the alternative, the cause of action is frivolous and vexatious.

The first hurdle to overcome before addressing the above issues is one of jurisdiction.

The general rule is that a court has no jurisdiction to vary its own decision after its order has been perfected and entered. I discussed this rule and its exceptions in my judgment in **Yee Bing Store Limited v. Yvette Miu Pong Yuen as Executrix of the Will of Henry Ta Tong Yee**,¹ delivered on 14th September 2001, Civil Case No.12 of 1997. In that judgment, I mentioned the “slip rule” which allows the court to correct clerical mistakes which may occur in judgments, or orders or errors arising therein as a result of omissions or accidental slips. This can be done under Order 30, rule 11 of the High Court Rules, contrary to what I said in that judgment that we do not have Order 30, rule 11 and so the equivalent Order 11 in the The Supreme Court Practice 1973 would apply. Reference to Order 11 in The Supreme Court Practice 1973 was an oversight on my part of the existence of Order 30, rule 11 of the High Court Rules. In addition to the slip rule, I pointed out that the court does have the inherent jurisdiction to vary its own decision so as to clarify its meaning or if necessary to supplement it. Apart from those exceptions, the appropriate remedy is an appeal for the court cannot alter its own decision in substance. The orders of High Court will stand until set aside or reversed on appeal. (See **Reef Pacific Trading Ltd.& Joan Marie Meiners v. Price Waterhouse, Richard Anthony Barber & William Douglas McCluskey**,² Civil Case No. 164 of 1994), **John Edward Mcquade v. Robyn Bycroft**,³ Civil Case No.041 of 1999), **Francis Saemala v. Gordon Kiko Zinehite**,⁴ Civil Case No. 162 of 1999 and **Harold Hilli v. Letipiko Balesi and Another**,⁵ Civil Case No.224 of 2002),.

Appeal as opposed to setting aside of court orders.

The rule that the court cannot vary its decision in substance, apart from the exceptions mentioned above, is based upon the notion of finality in the exercise of the court’s jurisdiction in matters that come before it. The court cannot sit to hear an appeal from its own decision. On the other hand, the decision of the court may be set aside without an appeal being necessary. This can be done under Orders 12, rule 17 (setting aside service of writ or notice of writ etc.) , 13, rule 8, (setting aside of judgment in default of appearance) 29, rule 12, (setting aside of judgment in default of defence) 38, rule 7, (setting aside of judgment in default of appearance at trial) 44, rule 12, (setting aside of registration or suspension of execution of foreign judgment) 54, rule 14, (setting aside of sale of property for irregularity) 64, rule 10, (setting aside of awards) and 69, rule 2 (setting aside of proceedings for irregularity) of the High Court Rules. A judgment or order may also be set aside on the ground of fraud. A judgment or

¹ *Civil Case No.12 of 1997*

² *Civil Case No. 164 of 1994*

³ *Civil Case No.041 of 1999*

⁴ *Civil Case No. 162 of 1999*

⁵ *Civil Case No.224 of 2002*

order obtained in default of appearance or defence is final until it is set aside within a reasonable time.

Understanding the procedure adopted by the 3rd Defendant.

By an Exparte Summons filed on 6th October 2003, the 3rd Defendant sought an order for leave to file a conditional appearance and in the event that the 3rd Defendant failed to file an application to set aside the service or to strike out the Plaintiff's action within 14 days, the conditional appearance would cease to be conditional. The 3rd Defendant filed a conditional appearance two days later on 8th October 2003 together with the defence, followed by an amended defence filed on 9th October 2003. The exparte summons filed on 6th October 2003 was heard by the Registrar on 7th October 2003 and granted the orders sought therein. On 13th October 2003, the 3rd Defendant filed the present amended Notice of Motion. Having done this within 14 days, the conditional appearance remains intact. The application by amended Notice of Motion cited above is the action taken by the 3rd Defendant to set aside the service of the Writ on him and to set aside the order made by Brown, J. on 12th September 2003. This application obviously falls within the ambit of Order 12, rule 17 of the High Court Rules. That rule states-

“... A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons or serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service...”

It is clear from the affidavit filed by Mr. Suri, the Solicitor for the 3rd Defendant on 7th October 2003 that the 3rd Defendant is currently residing in Port Moresby in Papua New Guinea. This fact was also stated in paragraph 6 of the affidavit filed by Mr. Tonawane in support of the application for substituted service. Paragraph 10 of Mr. Tonawane's affidavit did state also that the application for substituted service was to be in respect of the 1st and 2nd Defendants only. However, the order itself clearly applies to the 3rd Defendant as well for there were three Defendants to be served, reflecting the notes taken by the trial judge. I was rather surprised to hear Counsel for the Plaintiff, Mr. Fa'aitoa, saying in argument that service on the 3rd Defendant under Order 11, rule 3 of the High Court Rules was yet to be done. He said that this was the intention. If that was so, the order for substituted service ought to have been corrected under the “slip rule” to accord with the intention of the order. An application to delete the word “three” in each second line in paragraphs 1 and 2 of the order and replacing it with the word phrase “1st and 2nd” would have done the job. This of course had not been done, either out of ignorance or was an oversight. The result therefore is that the 3rd Defendant has challenged the substituted service on him on the ground that the service of the writ has violated Order 11, rule 3 of the High Court Rules and was irregular and ought to be set aside. The Plaintiff does not dispute the fact the 3rd Defendant resides in Port Moresby in Papua New Guinea. The

suggestion by Counsel for the Plaintiff, Mr. Fa'aitoa, that Mr. Suri could now accept service in Solomon Islands on behalf of the 3rd Defendant was quickly put aside by Mr. Suri by explaining that he had not received any instructions to accept service on behalf of the 3rd Defendant other than instructions to apply to set aside service of the writ on the 3rd Defendant. The first hurdle is now got over in that the Court does have jurisdiction to set aside the service of a writ or the order authorizing such service under Order 12, rule 17 cited above.

Deciding the issues stated above.

Clearly, the case for setting aside service of the Writ has been made out. I grant the order sought accordingly and set aside the service of the writ on the 3rd Defendant. That I think is enough because Order 12, rule 17 cited above appears to say that setting aside service of the writ and discharging the order authorizing service are remedies available in the alternative. There is a practical problem also. If I do discharge the order made on 12th September 2003, substituted service on the 1st and 2nd Defendant is adversely affected unnecessarily for the 1st and 2nd Defendants are resident in Solomon Islands and substituted service cannot be impugned on that basis. I will not set aside the order made on 12th September 2003 for that reason. It is for the Plaintiff to correct it in the light of my setting aside of the service of the writ. For the moment, service of the writ by substituted service upon the 3rd Defendant was no service and therefore no judgment in default of appearance can be entered against him. The first, second and third issues have therefore been decided. I also refuse to grant order 3 sought in the amended Notice of Motion. This order is being sought by a wrong procedure. The proper procedure is to apply under Order 17, rule 11 of the High Court Rules to strike out the 3rd Defendant as being improperly joined as a party. This application is granted in part in that I set aside the substituted service of the Writ but refuse to set aside the order made by Brown, J. on 12th September 2003 and refuse to dismiss the action against the 3rd Defendant. The orders of the Court therefore are that-

1. The substituted service of the Writ of Summons on the 3rd Defendant is set aside.
2. The order to set aside the order made on 12th September 2003 is refused.
3. The action against the 3rd Defendant be allowed.
4. Costs be in the cause.

F.O. Kabui
Judge