

C & I DISTRIBUTORS LIMITED-v-JOHN AO

HIGH COURT OF SOLOMON ISLANDS
(Mwanosalua, J.)

Civil Case No. 81 of 2002

Hearing: 6th April 2005

Ruling: 16th November 2005

A. Radclyffe for the Plaintiff

D. Nimepo for the Defendant

RULING

Mwanosalua, J: By Notice of Motion filed on 15th February 2005, the Defendant sought the following orders –

1. That the default judgment entered against the Defendant on 19th July 2002 be set aside;
2. That execution of Writ of Fieri Facias issued by this court on 12th August 2002 be stayed until further orders.
3. The Defendant's defence be filed and served on the Plaintiff within 7 days;
4. Costs in the Cause.
5. Such other orders as this Honourable Court deems fit.

Facts

The Plaintiff is a company incorporated in Solomon Islands and sells electrical goods including refrigerators. In or about February 2001 the Defendant, using a forged local purchase order in the name of Sylvania Products, obtained from the Plaintiff a refrigerator valued at \$6,150.00. On or about 19th February 2001 the Defendant collected the refrigerator from the Plaintiff's premises and signed the Plaintiff's invoice number A60511. On discovering the forgery the Plaintiff demanded from the Defendant the sum of \$6,150.00 which the Defendant has refused to pay. The Plaintiff therefore filed a Writ of Summons and a Statement of Claim for the recovery of the total of \$6,150.00 from the Defendant. The Defendant having failed to file an appearance within the prescribed time, the Registrar entered a default judgment against the Defendant 19th July 2002. The Defendant did not file any application to set aside the default judgment entered against him on that date. On 17th August 2002, the Registrar issued a Writ of Fieri Facias directing the Sheriff of the High Court

of Solomon Islands to seize the goods, chattels and property of the Defendant. The Writ of Fieri Facias was served on the Defendant on 13th August 2002. The Defendant filed a draft defence to the Plaintiffs action on 19th August 2002. He filed this Notice of Motion to set aside the Default judgment after the Sheriff went to his wife's shop to execute the Writ of Fieri Facias.

The Defendant's Case

The Defendant makes these points in support of his application. First, he has a viable defence. Second, the delay in initiating the application to set aside the default judgment was caused by the failure of his former counsel to file an application to set aside the default judgment and third, that the action be stayed pending the completion of criminal proceedings against him for forgery. Attached to the affidavit of the Defendant is his draft defence which he intends to file in court.

The Plaintiff's Case

The Plaintiff opposes the Plaintiff's application. Learned Counsel for the Plaintiff, Mr. Radclyffe, urges the court to refuse the application on two grounds. First, there was delay of more than two years before the application to set aside the default judgment was brought and second, there is no law in this jurisdiction to prevent the Plaintiff from pursuing his civil action when there is no criminal proceedings pending against the Defendant in court.

Decision of Court

The Writ of Summons and the Statement of Claim were served on the Defendant on 5th July 2002. As he filed no appearance by 18th July 2002, a default judgment was entered against him on 19th July 2002. On that very day, the Defendant instructed his former Counsel to lodge an application to set aside the default judgment. His former Counsel wrote to the Registrar of the High Court on 19th July 2005 that she would make an application on behalf of the Defendant to set aside the default judgment and for a stay of the execution of the Writ of Fieri Facias. She filed no application in court. The Defendant heard nothing more from his Counsel and believed that his instructions to set aside the default judgment and stay the execution of the Writ of Fieri Facias had been carried out successfully. The delay in lodging the application to set aside the default judgment was due to the failure of his former Counsel to comply with his instruction to file an application in court to set aside the default judgment. Whilst the Defendant ought to see that his Counsel acts upon his instructions after they were given, I consider that it would result in injustice to the Defendant if I were to hold that delay against the Defendant.

I have considered the affidavit evidence filed by the Defendant. There is evidence that someone who returned to his home Province of Malaita for good had sold the

refrigerator to the Defendant. This discloses an arguable defence which has reasonable prospects of success if supported by evidence.

It seemed from the above facts, that the Defendant had committed offences under sections 336(2)(a) and 345 of the Penal Code Act (Cap.26). These are felonies which ought to be investigated by the Police. There is no evidence before the court to show whether an criminal investigation has been carried out on this case. The Defendant suggests that an investigation be done by the Police into the allegations made against him by the Plaintiff.

It can be seen from the Statement of Claim in this case that the action is based upon an alleged felony by the Defendant against the Plaintiff. There is a rule of law which says that a plaintiff against whom a felony has been committed by a defendant cannot make that felony a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his non-prosecution. In such a case, if action is being brought against the defendant who is either in the process of being prosecuted for the felony or is liable to be prosecuted for the felony, the proper course is to stay the action if the present statement of claim is persisted in, until criminal proceedings have been taken against the defendant – (See *Smith and Wife-v-Selwyn* [1914] 3 KBD 98). This rule has been adopted in this jurisdiction in *Jimmy Ganifiri-v-Mahlon Toito'ona, Nelson Toito'ona, Rex Konofilia and Australia and New Zealand Banking Limited, Civil Case No. 172 of 2003*. I will stay the present action against the Defendant under this rule of law. It follows that the execution of the Writ of Fieri Facias against the Defendant be stayed as well.

The court would set aside the default judgment entered against the Defendant on 19th July 2002 and stay the civil proceedings against the Defendant.

Orders of the Court:

1. Allow application by the Defendant
2. Set aside the default judgment entered against the Defendant on 19th July 2002.
3. Stay the civil proceedings against the Defendant until criminal proceedings are taken against the Defendant and prosecuted for forgery.
4. The execution of the Writ of Fieri Facias issued by this court on 12th August 2002 be stayed until further orders.
5. The Defendant pays into court the sum of \$7,000.00 within one week from 16th November 2005.

6. The Plaintiff is at liberty to apply on 7 days notice for relisting or for further order.

The Court