IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0042 OF 2003S
(High Court Civil Action No. HBC00882D of 1999B)

BETWEEN:

MOHAMMED SHAMEEM
MOHAMMED SAIYEED

Appellants

AND:

TOYOTA ISUSHO (S.S.) LTD

Respondent

Coram: Sheppard, JA
Gallen, JA
Penlington, JA

Hearing: Thursday, 8 July 2004, Suva

Counsel: Mr. R. P. Singh for the Appellants
Mr. A. Parshotam for the Respondent

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

The respondent in these proceedings obtained a judgment in the High Court of Fiji at Labasa which was entered by default on the 29th of December 1999. Subsequently the appellants moved to set aside that judgment which motion was dismissed in the High Court of Fiji at Labasa on the 24th of June 2003. This appeal is against that decision.

In this case the chronology of events is of importance. The writ of summons was filed in the court on 1st of October 1999. The respondent claims that that writ was served on the appellants on the 13th of November 1999 and relied on the return from the serving

bailiff in support of this contention. There having been no response from the appellants, judgment was entered by default on the 29th of December 1999. On 27th of September 2001, there having been no response by the appellants, a bankruptcy notice was issued out of the court and in the absence of any response on the 21st of December 2001 the respondent as creditor petitioned for bankruptcy. It is not clear what the present position of the bankruptcy petition is but we were informed from the bar that it has been stayed pending the outcome of these proceedings. On the 29th of July 2002 a motion to set aside the judgment was filed on behalf of the appellants with an affidavit in support. When the motion was argued in court, the appellants indicated that there were two issues (a) that the appellants had not been served with the original writ of summons and (b) that the appellants contended they had a meritorious defence.

As to the first issue the appellants relied upon affidavit evidence in which they asserted that they had never been served. The respondent relied upon an affidavit from a process server asserting that service had been effected and gave some information asserting what was alleged to have occurred at the time of service. No oral evidence was led before the Judge, both parties relying on the affidavit material before him.

Order 38 rule 2(3) of the High Court rules provides that the court may on the application of any party order the attendance for cross examination of the person making any .. affidavit. No application was made by either party for any of the deponents to be called for cross examination. The Judge was therefore left to make a decision as to whether or not the writ had been served solely on the affidavit evidence before him. The Judge analysed the material before him and came to the conclusion that he was able to find that the writ had been served.

In this court counsel for the appellants (who was not counsel at the time of the original proceedings) submitted that the Judge had made a decision on credibility without the advantage of hearing or seeing the witnesses where testimony was in conflict.

No doubt there are circumstances where a decision, even on credibility can be made without hearing oral evidence where the material before the court is such that a decision can be made without such evidence. In this case the Judge can hardly be blamed for coming to the conclusion to which he did on the material before him when neither party sought to cross examine or call oral evidence.

Counsel submitted that the decision as to service was a decision on an irregularity. We agree with the contention of the respondent that in any event the point must fail because of the delay involved. Order 2 rule 2(1) provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. If the application is not made within a reasonable time then the application shall not be allowed.

There is no dispute that the appellants received the bankruptcy notice and took legal advice having received that notice. The process server stated in his affidavit that he had served the bankruptcy notice on the appellants on the 17 of October 2001 and also asserted that he had served the appellants with the bankruptcy petition on the 6th February 2002. Both are acknowledged by the appellants. The motion to set aside judgment was not filed until the 29th July 2002. Bearing in mind that the appellants had taken legal advice the delay cannot possibly be categorised as reasonable.

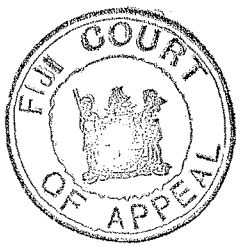
The Judge in the High Court accepted that the judgment could be set aside in any event if there was merit in the defence. The merits upon which the appellants relied were set out in affidavit form and were considered by the Judge. He noted that the appellants contended that there had been misrepresentation by the respondents and that the terms of the bill of sale had not been adequately explained to them. The Judge rejected both contentions. The allegations contained in the affidavits are general in nature and insufficiently specific to give rise to credibility. Nor are they supported by independent evidence.

We note that in a letter dated 14th November 1997 from the solicitors to the appellants to the respondent there was an allegation that there was a representation that the truck was in good running condition and a further allegation that it had begun to break down. No details are given of the defects which had required repair. More significantly there was no mention at all of any complaint regarding the bill of sale. A perusal of the documentary material of the record gives some support to the contention of counsel for the respondent that in this case the defence was formulated and perhaps conceived as the proceedings developed. The material before the Judge and before this court falls far short of establishing a defence on the merits to a sufficient extent to justify setting the judgment aside.

We agree with the conclusions at which the Judge arrived.

The appeal cannot succeed and will be dismissed.

The respondent is entitled to costs which we fix the sum of $750 together with disbursements to be fixed by the Registrar.



J.A.

Sheppard, JA

Gallen, JA

P.A.

Penlington, JA

Solicitors:

Messrs. Kohli & Singh, Suva for the Appellants
Messrs. Gibson & Company, Labasa for the Respondent