IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. 23 of 2012
& No. 24 of 2012

BETWEEN : **MAFOA KOROSAYA**

APPELLANT

AND : **ERONI VAQEWA**

RESPONDENT

COUNSEL : **Ms Raikaci N.** for the **Appellant**
Mr Sunil Kumar for the **Respondent**

DATE OF JUDGMENT: 14th August 2013

JUDGMENT

1. This is an appeal against the Ruling delivered by the Learned Magistrate of Nasinu on 23rd September 2011.

   Grounds of Appeal filed on 24th October 2011:

   (i) **THAT** the Learned Magistrate erred in law and in fact when he did not properly consider that any judgment obtained by default in the presence of both parties can be set aside.

   (ii) **THAT** the Learned Magistrate erred in law and in fact when he misdirected himself on the Appellant/Defendant's submission that a judgment obtained after trial but for want of or non – compliance with the Rules of the Court is a judgment by default.

(iii) **THAT** the Learned Magistrate erred in law and in fact when he misconstrued the Appellant's submission as to the meaning of *"judgment by default"* to mean *"judgment in defect or defective judgment"*.

(iv) **THAT** the Learned Magistrate erred in law and in fact when he misdirected himself that a judgment in default is obtained where a litigant is usually absent.

(v) **THAT** the Learned Magistrate erred in law and in fact when he failed to properly and/or adequately consider the Appellant's submission with the relevant authorities in support of his application to set aside the judgment by default dated the 9th of December 2008.

(vi) **THAT** the Learned Magistrate erred in law and in fact in failing to properly and/or adequately consider the principle enunciated in the case authorizes submitted by the Appellant in support of his submission to set aside.

(vii) **THAT** the Learned Magistrate erred in law and in fact when he failed to properly consider that the judgment of 5th December 2008 was irregularly obtain notwithstanding the presence of the Appellant, and setting aside of the judgment was as of right.

(viii) **THAT** the Learned Magistrate erred when he failed to consider the Appellant's submission that he was not accorded the right to fair hearing during his trial and its prejudicial effect thereto on his case particularly when opposed by counsel of the Defendant's lawyer's caliber.

(ix) **THAT** the Learned Magistrate erred in law and in fact when he took into account irrelevant consideration in refusing the Appellant's application to set aside the judgment.

(x) **THAT** the Learned Magistrate erred in law and in fact and misdirected himself in considering the guideline principles enunciated in the case of ***Evans v. Bartlam*** [1937] AC 473, when the judgment by default of 5/12/08 was irregularly obtained.

2. When the matter was taken before the Magistrates Court of Nasinu, Case No. 18 and 19 of 2008 were consolidated by the consent of the counsel for both parties. The same application was made before me on 25th September 2012 and both appeals Nos. HBA 23 of 2012 and HBA 24 of 2012 were consolidated by consent and taken up for hearing and submissions were made by the counsel on case No. HBA 23 of 2012.

Sequence of Events

3. Writ of summons was filed by the:

   3.1 The Plaintiff/Respondent filed his Statement of Claim on 18/03/2008 against the Appellant/Defendant for the recovery of $9100.00, the outstanding amount due from the Appellant/Defendant on the monies lent to him on 7th August 2007.

   3.2 On 16th of September, Statement of Defence was filed and disclaimed the liability. Further the Appellant/Defendant had stated that in Civil Action No. 18 of 2008 part of the same claim had been made.

   3.3 Hearing of the case was taken up on 29th October 2008, and 3 witnesses had given evidence on behalf of the Plaintiff/Respondent including the Plaintiff/Respondent and the Appellant/Defendant had appeared in person.

   3.4 The Appellant/Defendant had given evidence and he had admitted not $9000 only $5000 was given to him. Under cross examination he had admitted that he didn't know the exact amount.

   3.5 The Judgment was delivered on 19th December 2008. The Learned Magistrate had carefully analyzed the evidence before him and the admission made by the Appellant/Defendant Judgment was entered for 9,233.13 and further interest at the rate of 5% per annum from the date of Judgment.

4. Thereafter, Notice of Motion on Judgment Debtors summons was filed by the Plaintiff/Respondent on 1st October 2010.

5. The Appellant/Defendant filed Notice of Motion on 11th July 2011 and sought the following Orders:

   (a) The Judgment entered on 19/12/2008 be set aside;

   (b) That the Committal Order made on 23/2/2011 be stayed pending outcome of the motion; and

   (c) Costs.

6. The issue that was to be decided by the Learned Magistrate was as to whether the Judgment dated 19th December 2012 can be set aside.

7. The Appellant/Defendant's counsel had drawn attention of the Learned Magistrate to Order VI Rule 2A (a) of the Magistrate Court (Amendment) Rules 2000 which states:

> *"If a claim is signed by a Practitioner it must be endorsed with a statement of the date on which any letter before action was sent to the Defendant".*

8. The counsel for the Appellant/Defendant had argued that the claim filed on 18th March 2008 the requirement under Order VI Rule 2A(a) was not followed and as such Judgment was irregular and submitted that Judgment was a default judgment, and the Learned Magistrate should set aside the Judgment as a Judgment by Default

9. The Appellant/Defendant's counsel had submitted to the Magistrate that the Judgment was *'judgment in defect'* and as such judgment was by default. The Magistrate's findings that the judgment was delivered after hearing the evidence and the Appellant/Defendant had given evidence in the hearing and there is no basis to consider the Judgment was by default.

10. On perusal of the proceedings I find there was a proper trial and the argument by the Appellant/Defendant's counsel that Mr Kumar was a former Magistrate does not carry any merits.

11. Mr Kumar submitted that the Judgment was delivered on merits, I concur; since the Magistrate held a proper trial.

12. The Appellant/Defendant's counsel had cited the case of ***Venkatamma v. Ferrier-Watson,*** Supreme Court Civil appeal No. CBV0002 of 1992 at page 3, it was stated:

> *"we now stress, however, that the Rules are there to be obeyed. In future, practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal. In cases not having the special combination features, is unlikely to be excused".*

The cited case was decided on, not following the statutory provisions, not the rules, and the facts are totally different from the present case. It was an appeal and not a case to set aside a default judgment. The Appellant/Defendant's argument fails for the reason that there

was no default judgment. He had the opportunity to appeal against the Judgment of the Learned Magistrate which was delivered, subsequent to a proper trial. I find there is no basis to consider the Learned Magistrate's Judgment on 19th December 2008 as a default judgment.

13. The submissions made before me by the Appellant/Defendant's counsel on the ground that the Judgment by the Learned Magistrate was a default judgment. For reasons set out in the precedent paragraphs I conclude there is no merit in this argument and the Appellant/Defendant failed.

14. On the other hand, the counsel for the Plaintiff/Respondent submitted that the Default Judgment is the one which obtained in default of Defence, or upon properly served with Writ of Summons, or Appellant/Defendant failed to attend the court and orders were made in absence. In this matter proper trial being held and the Appellant/Defendant gave evidence. The Plaintiff/Respondent's counsel succeed in the argument.

15. I further observe that the Appellant/Defendant had not exercised his right of appeal against the judgment and now attempts to abuse the process of the court for his convenience. In all circumstances, the Judgment delivered by the Magistrate on 23rd December 2008 was not a default judgment and refusing to set aside the judgment is in order.

16. The Appellant/Defendant had failed to exercise his right of Appeal and as submitted by the counsel for the Plaintiff/Respondent, Appellant/Defendant was guilty of laches and there was no default judgment to set aside.

Further Conclusions

17. The Defendant/Appellant's counsel submitted he had denied the claims in his Statement of Defence, however, he had admitted in his evidence he received the monies from the Plaintiff/Respondent and the argument by the Defendant/Appellant does not carry merits and it fails. Further, it was submitted that Judgment was delivered in the absence of the Defendant/Appellant and he did not come to know about the Judgment until enforcement stage. He cannot take up this position and plead that the Judgment was by default. On the completion of the hearing on 29/10/2008, the Learned Magistrate had stated Judgment will be on notice. The Defendant/Appellant would have inquired about the Judgment without waiting until the execution stage which was carried out in 2010.

18. The Defendant/Appellant in his grounds of appeal had stated that the Learned Magistrate had erred in consideration of the Judgment in the case of ***Evans v. Bartlam*** [1937] AC 473.

I refer to paragraphs 31, 32, 33 and 34 of the Ruling of the Magistrate. It was decided the principles in the said Judgment cannot be applied in the present case, which I agree. Once again I reiterate that the Judgment delivered on 19th December 2008 was not a Judgment by Default and the Defendant/Appellant's counsel's submission fails.

19. All the Grounds of Appeal based on *'Judgment by Default'* which this court cannot take into consideration. (Ground 8 was withdrawn in the submission). As hereinbefore stated this court is satisfied that the Judgment was delivered by the Learned Magistrate after proper hearing. The only option which was available to raise the issue of not adhering to Order VI Rule 2A (a) was by way of an appeal against the judgment and the Defendant/Appellant failed and neglected to do so. Having failed to lodge an appeal, the Defendant/Appellant had attempted to abuse the process of the court to prevent the Plaintiff/Respondent having fruits of his Judgment. I conclude, the Defendant/Appellant had abused the process of the court.

20. Accordingly, I make the following Orders:

(a) Appeal dismissed;

(b) Considering the delay caused by the Defendant/Appellant by abusing the process of the court, the Defendant/Appellant is ordered to pay summarily assessed costs of $1,500.00 to the Plaintiff/Respondent.

Delivered at Suva this 14th Day of August, 2013.

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C. Kotigalage
JUDGE