

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 16 OF 2011

BETWEEN : RAMESH PATEL & DEVANESH PRAKASH SHARMA
of Suva, Trading as R. PATEL LAWYERS

Plaintiff

AND : RAJNI KANT

Defendant

Counsel : Mr. P. Sharma for the Plaintiff
Mr. A. Singh for the Defendant

Date of Hearing : 28th October, 2013

Date of Judgment : 11th April, 2014

JUDGMENT

[1]. There are two applications before me. They are a summons pursuant to Order 59 Rule 11 and inherent jurisdiction of court seeking leave to appeal and a stay order which states :-

- (i)
 - a) Leave be granted to the Plaintiff to appeal an interlocutory order of the Master of the High Court made on the 14th June 2013; and
 - b) The interlocutory order made by the Master be stayed pending the determination of this appeal.
- (ii) Summons Pursuant to Order 19 Rule 9 and inherent jurisdiction of court to set aside Judgment dated 1 July 2013 which states:

“For an Order that the Judgment entered into by the Acting Chief Registrar dated 1st day of July 2013 be set aside and that the costs of this application be made in the cause.”

Background

The plaintiff Law firm has been retained by the defendant pertaining to a Family Court action. Subsequently the defendant had changed his Solicitor. The plaintiff has filed this action against the defendant to recover the outstanding bill of cost that has been submitted.

It was submitted that the plaintiff had served a demand letter on 9.8.10 and after several correspondence has instituted this action on 19.01.11.

[2]. Chronology of Event

- 4.7.12 - Summons for direction filed.
- 26.7.12 - Orders made in terms of the summons.
- 6.12.12 - Plaintiff has filed the affidavit verifying list of documents.
- 23.5.12 - Plaintiff has filed summons to strike out the statement of defence.
- 11.6.13 - Summons to strike out the statement of defence was to be mentioned before the Master but has been vacated to 14.6.13.
- 14.6.13 - The defendant not present, order made in terms of summons dated 23.5.13.
- Summons for leave to appeal pursuant to Order 59 Rule 11 has been filed dated 21.6.2013.
- The court order dated 14.6.13 has been sealed on 24.6.13.

- Pursuant to the Order dated 14.6.13 judgment has been entered and sealed on 1.7.2013.

- [3]. At the hearing with the consent of the plaintiff, defendant sought to amend the application, made pursuant to Order 59 Rule 11 by deleting the word plaintiff and inserting the word defendant in I(a). The defendant informed court that it was a typographical error and the plaintiff consented as it is a typographical error, court allowed the said amendment thus the summons pursuant to Order 59 Rule 11 seeking leave to appeal should be read as “leave be granted to the defendant to appeal an interlocutory orders of the Master of the High Court made on the 14th June 2013.” Both parties wanted the two summons to be argued together. Accordingly both parties have filed their affidavits, replies and written submissions. Both parties made oral submissions as well.
- [4]. For the convenience of court. I will now deal with the summons dated 21.6.2013 which is an application for leave to appeal.
- [5]. At the argument stage the counsel for the defendant informed court that they are no longer pursuing relief “B” of the summons dated 21.6.2013 pursuant to Order 59 Rule 11.

Defendant’s Affidavit

- [6]. Defendant has deposed:-
- That the Master made the order on the ground that the defendant has failed to file his affidavit verifying the documents.
 - The deponent had arrived in court at 9.20 and was told that his case had been called and order in terms of summons has been issued.
 - As per the direction of court both parties were given time to file their affidavits verifying the documents list. Plaintiff has filed it after 5 months.
 - Defendant has filed the affidavit verifying the document list on or about 27.5.13 but the High Court Registry has returned it.
 - Explaining the delay to file the affidavit verifying documents it is deposed that it took time for the deponent to locate the documents as some of the documents are with the legal independent unit.

- That the deponent has a meritorious defence and deposed the proposed grounds of appeal.

Plaintiffs Reply

[7]. One Lemeki Sevutia has filed an affidavit in reply on behalf of the plaintiff, and has deposed.

- That on 27.5.13 the summons to strike out the defence has been served. The summons is on the basis of not filing the defendant's affidavit verifying the list of documents, which amounts to delaying the fair trial and is an abuse of the process of court.
- That subsequently the defendant had filed his affidavit verifying the list of documents without the consent of the plaintiff and without leave.
- That the fact that defendant had filed the document while the strike out application was pending was brought to the notice of the registry and the registry had returned the documents back to the defendant.
- High Court registry has informed parties that the strike out application which was scheduled to be taken up on the 11th had been vacated to the 14th at 9.15 am.
- On the 14th neither the defendant nor the counsel was present and the court had granted the orders as per the summons.
- That after the defence was struck out plaintiff had lodged the judgment.
- That despite the High Court registry informing both parties the defendant or the solicitor was not seen when the case was mentioned on the 14th and even with this application the defendant has failed to annex an affidavit from his former solicitor corroborating his version of arriving late to court.
- That the delay for filing the plaintiff's affidavit verifying documents was because the defendant had filed an interpartes summons to amend the statement of defence after the summons for direction was given. The plaintiff had to wait till the amended statement of defence was served to file the affidavit verifying the plaintiff's documents.

- That the defendant has filed his affidavit verifying the list of documents only after the plaintiff filed the summons to strike out the defence and has filed it without the consent of the plaintiff.
- That if the defendants' documents were before the independent legal unit they could have obtained photocopies.
- That if the defendant disputed the plaintiff's bills of cost he was entitled to have them taxed by the High Court which had not been done.
- That the defendant does not have a meritorious defence nor was he present before the Master to defend the strike out application.
- That the defendant has not challenged or queried the bills of cost sent by the plaintiff but has paid part of it, then has changed the Solicitors.

[8]. The defendant had filed his response to the affidavit in opposition, among other things deponent had reiterated his presence on the day the strike out notice was taken up in court.

Determination

- [9]. To obtain leave to appeal the plaintiff has made this application pursuant to Order 59 Rule 11.
- [10]. As per the affidavits and the submissions it's clear that the orders pertaining to summons for directions had been made on 26.7.12.
- [11]. It is also submitted that after the orders were given there had been an application by the defendant to amend the statement of defence and the process had taken time till September.
- [12]. The plaintiff has explained his delay by stating that he could not file his affidavit verifying documents till the amended statement of defence had been filed.
- [13]. The defendant has alleged that the orders made pursuant to summons for direction was never sealed nor served on the defendant. However as per his submissions the defendant had submitted that he was aware of the said orders and also his subsequent conduct, as submitted negates this opposition.

- [14]. The defendant also has taken opposition to the striking out order on the basis that the application had been made pursuant to Order 18 Rule 18. However the plaintiff submitted that when the defendant was ordered to file his affidavit verifying documents he has failed to comply with the order, even after the expiry of nearly 6 months from the date of plaintiff, filing his documents. It was submitted that this was an abuse of process. In fact the defendant had attempted to file his affidavit, only after the plaintiff had filed summons to strike out.
- [15]. When the summons to strike out was listed before court it had been informed to the parties, this fact is evident by annexure LS 4 annexed with the affidavit of one Lemeki Sevutia on behalf of the plaintiff. This annexure is a notice sent by the registry, sent to both parties and the said notice clearly states that the case would be called on 14.6.13 at 9.15 am, also the annexure LS – 5 of the same affidavit which is the cause list clearly depicts the defendants case is listed on 14th at 9.15am. As submitted the defendant too was aware of the date. However the defendant submitted that he assumed his case was to be called at 9.45am. The defendant should have appeared on that day and taken up the objection he had pertaining to the application before the Court. The defendant's position that he thought his case would be called at 9.45 cannot be accepted as the notice sent by the registry as well as the cause list clearly shows the time.
- [16]. However the defendant has failed to appear before court. In the absence of the defendant or the Solicitor and in the absence of any opposition to the summons, the court had given orders as per the summons.
- [17]. The defendant by his own action has not been present before the court and has not filed an opposition to the application.
- [18]. The Plaintiff has taken serious objection to the defendants leave to appeal application stating that it cannot be maintained as the application is incorrect. The plaintiff further submits the application should be made pursuant to Order 32 or Order 35(2).
- [19]. The defendant answering the allegation has stated that the orders made on 14th of June should be oral orders as no formal order was sealed. However I find that the said order made had been sealed. It was submitted that the said order was sealed on 24.6.13 and there is an affidavit of service dated 26.6.13. Accordingly the defendants said submission becomes incorrect.
- [20]. The plaintiff has taken a preliminary objection pertaining to the first application, stating that the striking out application had been taken up before a Judge and not before the Master. Also it is submitted that the impugned order had been made by a Judge and not

by the Master. Accordingly the plaintiff states Order 59 will have no application and the correct application should have been under Order 32 or 35. The plaintiff further submitted that as per the cause list as well as in the notice the application to strike out was to be taken up before the Judge and not Master. The plaintiff also submitted that when the defendant filed summons under Order 59 he should have been aware that the order has been given by a Judge, accordingly it was submitted to court that this leave to appeal application cannot be sustained.

[21]. The defendant submitted that they had made the application before the Master and they believed the impugned order had been given by the Master and not a Judge. The defendant failed to give an explanation to the preliminary objection and failed to submit any authority to substantiate his rights to come under Order 59. In fact if the defendant had acted under the specific provision available the doubt as to whether the order of striking out was made before the Master or Judge would not have arisen.

[22]. However as submitted the High Court Rules specifically provides for the procedure for this type of a situation. Order 32 clearly provides for proceedings in absence of party failing to attend. The defendant has failed to make an application under Order 32. No explanation was given as to the failure to act under Order 32 or as to why he has made this application under Order 59.

[23]. As per the submission and documents the summons for leave to appeal has been filed, dated 21.6.13. The sealed order to strike out is dated 24.6.13. Under the circumstances the defendant could have easily acted under Order 32. Unfortunately he had failed to act under the said Order and has filed this application under Order 59. This Court is of the view that Order 32 provides specific provision to the situation that has arisen in this instance. Specifically considering the fact that his defence has been struck out and order had been made due to the defendant and the Solicitor failing to appear. The defendant should have been more cautious. The defendant in fact has filed leave to appeal before the striking out order has been perfected and sealed. When there was specific provision provided for situations of this nature, the defendant has failed to avail that and has made the application under Order 59 which is a general provision pertaining to Master's orders.

[24]. The defendant in leave to appeal application should satisfy court that;

a. The decision was wrong, or at least attended with sufficient doubt to justify granting leave and;

b. Substantial injustice would be done if it's not reversed as held in.

Niemann –v- Electronic Industries Ltd, 1978 VR 431 and also should satisfy court that there are arguable legal issues and the intended appeal has merit. *The Fiji Public Service Commission –v- Manuravalagi Dalituicama Loravula (unreported) FCA Civil Appeal No. 117 of 1989.*

- [25]. Challenging the decision the defendant submitted that the striking out of the defence by court for not filing an affidavit verifying documents was wrong. The plaintiff submitted that the motion filed to strike out the defence was pursuant to Order 18 as well as Order 25. The plaintiff further stressed among other things that the defendant's action by not filing the list of documents was causing prejudice, embarrassment and delay the fair trial of the action and also that it is an abuse of process of court.
- [26]. It was also submitted. That when the striking out order was made there was no defendant or solicitor to represent the defendant. The day the striking out order was made, was the day the summons to strike out was taken up by courts in these circumstances the striking out application goes unopposed.
- [27]. As the defendant was not present, he has failed to submit any of the grounds he now alleges in opposition to the summons to strike out. The plaintiff has satisfied court by submitting the cause list and the notice sent by the registry that there had been sufficient notice to the parties about the day and the time the hearing was. This fact was not opposed by the defendant. The defendants' explanation for getting late due to his own thinking cannot be accepted by the court. Also it was submitted that to corroborate the defendant's version of his late arrival he has failed to file an affidavit from his counsel. Accordingly the summons was unopposed and the strike out Order had been issued.
- [28]. The defendant was aware that he had failed to comply with the order to file the list of documents. He should have been more cautious to appear on the day of the summons and submit his opposition to the summons to strike out
- [29]. The defendant also has failed to submit any authorities to substantiate this application or to support the contention that the court ought not to have issued the said strike out order.
- [30]. For the reasons set out above the defendant has failed to satisfy the court that the decision in the unopposed application to strike out was wrong or that there were any meritorious legal issues to argue. He has failed to give a reasonable valid explanation for his conduct in allowing the striking out application to go unopposed. As submitted the plight that has befallen the defendant in allowing the striking out application to go unopposed is of his own making.

[31]. In the given circumstances and in the absence of any explanation to the preliminary objection this court is inclined to accept the preliminary objection of the plaintiff and for the reason given above decline to grant leave to appeal as per the summons dated 21.6.13.

Summons pursuant to Order 19 Rule 9 to set aside the judgment

[32]. The second application before the court is the appeal arising out of the sealed judgment dated 1.7.13.

[33]. The defendant filed summons pursuant to Order 19 Rule 9 of the High Court Rules seeking to set aside the judgment sealed on 1.7.13.

[34]. The defendant has filed his affidavit in support of the summons and the affidavit in reply to Lemeki Sevutia pertaining to the summons to set aside the judgment.

[35]. The defendant among other things has deposed that there is a substantive defence on merits and has given a reason for failing to appear in court on 14.6.13 and also has deposed a reason for his failure to file list of documents on time and has pleaded that it would be an irreparable loss to the defendant if the judgment is not set aside.

[36]. At the submissions the defendant also tendered an opposition to the judgment sealed on 1.7.13 and challenged the judgment on the basis that there had been no order for judgment, by the court which makes the sealed judgment an irregular judgment.

[37]. The plaintiff has filed his opposition to the summons to set aside the judgment and taken a preliminary objection on maintainability of the application.

[38]. The plaintiff has submitted that the application to set aside the judgment has been made pursuant to Order 19 Rule 9 which is an incorrect application.

[39]. In deciding the application to set aside the judgment the court will have to first deal with the preliminary objection taken pertaining to the maintainability of the action.

[40]. The summons to set aside the judgment dated 1.7.2013 has been pursuant to Order 19 Rule 9. The said rule states:

“The Court may on such terms as it think just, set aside or vary any judgment entered in pursuance of this Order.”

- [41]. Undoubtedly the rule gives the discretionary power to the court to set aside or vary the judgment entered. However it can be done pertaining to judgments entered pursuant to Order 19.
- [42]. Order 19 deals with specific provision pertaining to default of pleadings. It is submitted to court that the said order deals with situations where the defendant has failed to serve a defence. It was also submitted that judgment impugned is not a default judgment.
- [43]. The scenario in this instance is different. A defence has been filed and served. In this instance the court has struck off the defence for non compliance of orders made pursuant to summons for directions.
- [44]. The defendant has failed to neither answer this objection nor submit any authorities to substantiate his application under Order 19. Thus he has failed to satisfy court pertaining to the maintainability of the application in view of the preliminary objections.
- [45]. For the above stated reasons the court is inclined to uphold the preliminary objection raised by the plaintiff pertaining to the maintainability of this action.
- [46]. The court at this stage takes cognizance of the allegation by the defendant about the irregularity of the judgment, sealed on 1.7.13.
- [47]. The said judgment refers to orders made on 14.6.13. The order is made pursuant to summons to strike out the statement of defence with a date stamp of 23.5.13 The said summons states that let all parties attend before the Master and it goes on to say “as counsel can be heard on an application by the plaintiff to strike out the defendants statement of defence on the grounds.”

“That the defendant has failed to file his affidavit verifying list of documents in breach of the order dated 26.7.12”.

- [48]. The summons is clear; it is to strike out the statement of defence for the failure of the defendant to act as per orders made.
- [49]. On the day of the summons, neither the defendant nor the Solicitor was present, accordingly it was submitted that the court had made the order. “In terms of the summons dated 23rd May 2013.” It is further submitted that the only order the court has made on that day is an order in terms of the summons. This order has been sealed on 24.6.13.

[50]. It was submitted by the defendant that thereafter what is available is a sealed judgment dated 1.7.13. As per the sealed judgment it says:

“Upon the defence being struck out pursuant to an order made on the 14.6.13 it is this day adjudged that the defendant does pay the plaintiff.”

[51]. The defendant strenuously argued that there is no application before court to get judgment and when the defence was struck out there was no order by court to enter judgment nor an application for default judgment.

[52]. The only order court has made is an order in pursuance of the summons to strike out the defence. There is no other application seeking judgment nor an order by court allowing judgment as prayed for in the statement of claim. Accordingly it was submitted that the sealed judgment become an irregular judgment.

[53]. Order 2 Rule 1 of the High Court rules deals with irregular judgments. A judgment entered in non compliance with the rules is to be treated as an irregular judgment. Order 2 Rule 2 provides the courts the discretion to set aside an irregular judgment.

[54]. The defendant making submissions on the irregular judgment
Submits that the court’s decision was only for “order in terms of the summons” and it was submitted that the summons does not reflect any amounts to be paid. It also does not stipulate the figures that are in the sealed judgment. It was further submitted that as the claim was pertaining to the legal fees challenged by the defendant, the claim cannot be a liquidated claim and the amounts have to be proved.

[55]. In answer, the plaintiff submitted that the original statement of defence has been struck out and therefore the plaintiff could seek judgment and also on the same basis the amount becomes a liquidated amount. Court is not inclined to accept this explanation of the plaintiff.

[56]. It was submitted that there is no agreement pertaining to the Solicitors fee. There was no agreement pertaining to the amounts in the bill of cost. It was further submitted that as the defendant challenged the accuracy of the bill of cost it was not paid. Considering all these factors, I think the claim will not fall into the category of a liquidated claim and even if the defence is struck out the plaintiff still has to prove the claim. Also the plaintiff to obtain a sealed judgment in this instance there should have been an application and a court order. In considering all the submissions that have been made it is my view that the sealed judgment dated 1.7.2013 has been obtained without complying with the High

Court Rules, thus making it irregular. The court is inclined to accept the defendant's submission pertaining to the irregular judgment.

- [57]. It was submitted that since it's an irregular judgment the court has to set it aside and it was also submitted that court can exercise its inherent jurisdiction in this instance and set aside the sealed judgment. It was also submitted that an application has been made within a reasonable time. The court can set aside a judgment on irregularity under order 2 rule 2 of the high court rules and inherent powers of court.
- [58]. . The plaintiff has failed to respond to the submission pertaining to the irregular judgment and has failed to satisfy court as to why the court should not set aside the irregular judgment

Conclusion

- [59]. The defendant has filed leave to appeal application pursuant to Order 59. The plaintiff has vehemently objected to the said application on the basis it is a wrong application. For the reason's I have set out above court is inclined to accept the preliminary objection, and court refuses to grant leave to appeal.
- [60]. The defendant has filed a summons under Order 19 Rule 9. The plaintiff has strenuously objected to the summons arguing no order has been made under Order 19 for the defendant to make an application under Order 19 Rule 9, for the reason that the court has set out in this judgment, I hold that there is no order made by court pursuant to Order 19, for the defendant to make an application under Order 19 Rule 9. Accordingly the application made pursuant to Order19 Rule 9 is dismissed.
- [61]. As submitted by the defendant this court finds that there is no corresponding order made by court for the plaintiff to obtain a sealed judgment. For the reasons set out in this order the sealed judgment becomes an irregular judgment. Accordingly I set aside the sealed judgment dated 1.7.13.
- [62]. No costs.



Mayadunne Corea
Mayadunne Corea
JUDGE
11.4.2014