

IN THE HIGH COURT OF REPUBLIC OF FIJI
AT LABASA
NORTHERN DIVISION
CIVIL JURISDICTION

Civil Action No: 17 of 2014

BETWEEN : **NAUSHAD HUSSEIN** of Tabia, Labasa, and Farmer.

PLAINTIFF

AND : **HIRA LAL** of 19 Pah Road, Papatoetoe, Auckland, New Zealand.

FIRST DEFENDANT

: **I-TAUKEI LAND TRUST BOARD**, a body corporate created under the Native Land Trust Act, having its registered office at 431 Victoria Parade, Suva.

SECOND DEFENDANT

: **THE ATTORNEY-GENERAL OF FIJI**, as legal representative of the Registrar of Title pursuant to Section 12 of the State Proceedings Act.

THIRD DEFENDANT

BEFORE: Master M H Mohamed Ajmeer

APPEARANCE:

Mr. P. R. Lomaloma - for the Plaintiff
Mr. } - for the 1st Defendant
Mr. } No Appearance - for the 2nd Defendant
Mr } - for the 3rd Defendant

DATE OF HEARING: 8th October 2014

DATE OF RULING: 8th October 2014

R U L I N G

[1] This is an Ex-parte Notice of Motion (the application) filed on 3 October 2014 by plaintiff to enter default judgment against the 1st Defendant. This application is supported by an affidavit of Apisalome Yabakidua sworn on 30 September and filed on 3 October 2014.

[2] The application is made pursuant of Order 19 rule 7 of the High Court Rules 1988 (HCR) and the inherent jurisdiction of the court. O. 19, r. 7 deals with entering default judgment in default of defence-other claims. That rule provides that:

'7.-(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

(2) Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendants makes default as mentioned in that paragraph, the plaintiff may-

(a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or

(b) set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.

(3) An application under paragraph (1) must be by summons or motion'.

[3] On 11 April 2014 leave was granted to the plaintiff to serve the writ in this action on the first defendant out of jurisdiction by registered post at his last known address, 19 Pah Road, Papatoetoe, Auckland, New Zealand. This is the address given by the first defendant in the Sale and Purchase Agreement with the plaintiff.

- [4] The writ was sent by the registered post to the first defendant's address. However the registered post has been returned by the New Zealand Post with the remark "**unclaimed**", which is apparent by the sticker affixed by the New Zealand Post. This would mean that the 1st Defendant has refused to accept the post enclosing the writ of summons.
- [5] In the case of the service of process on an individual by post, the date of service will, unless the contrary is shown, be deemed to be the seventh day after the date on which the copy was sent to the address of the defendant in question. The envelope enclosing the copy for service and any accompanying acknowledgement of service must be properly addressed and posted to the proper address, and properly pre-paid, unless prepayment is not required and if it is not returned through the Post Office undelivered it will prima facie be deemed to have been duly delivered to the addresses, but if in fact is returned to the sender through the Post Office undelivered it will be treated as not having been duly served, see 37 Halsbury's Laws (4th edn), para 151.
- [6] In the particular case, the plaintiff posted the properly addressed envelope enclosing copy of the writ for service but it has been returned through the Post Office with the remark 'unclaimed'. In the circumstances, it may be deemed that the writ of summons has been properly served on the 1st Defendant.
- [7] I have considered the application, affidavit in support and submission made by counsel for the Plaintiff. The Plaintiff seeks specific purposes as well as certain declaration. This appears to be other claim as contemplated in O. 19, r.7.
- [8] In **Air Fiji Limited v Shailend Shandil & Island Network Corporation Ltd** [200] HBC 380/99S Decision 29 January 2001, Madam Shameem, J thought that:

'This rule applies to claims that are neither liquidated nor unliquidated, and the court before entering judgment is required to consider what part of the claim the plaintiff is entitled to on default judgment. This being an unliquidated claim for damages for defamation, the application misconceived in that it purports to be made under r.7'

[9] It is important to note that the plaintiff's claims against the first defendant are multiple. The claim on the first cause of action stems from fraud on the part of the first and second defendants. The plaintiff, inter alia, claim that specific performance of the agreement dated 25 July 2009, a declaration that the alleged surrender and purported registration thereof is a nullity, void and of no effect. And on the second cause of action he claims, inter alia, that special damages in the sum of \$47,766.00 against the first defendant for breach of agreement. The claims on first cause of action appear to be unseverable. The counsel for the plaintiff fails to assist the court on what part of the claim the plaintiff is entitled to on default judgment against the first defendant. He was not specific. He said he is seeking orders in terms of his application. In his application, without specifying, the plaintiff seeks for a blind order that default judgment be entered against the first defendant. Pursuant to r.7 (1), in default of defence, the court shall give such judgment as the plaintiff appears entitled to on his statement of claim. It will be noted that the court is not obliged to make blind orders. Court is there to administer justice. It must have inherent jurisdiction to see that it does not become the instruments of injustice. This will apply even to an application made ex parte.

[10] In my view, formal proof is necessary before Judge, before giving any judgment in default of defence in favour of the plaintiff. I therefore adjourn the matter before Judge for formal proof. I accordingly adjourn the matter before Judge for formal proof at 9.30am on 17 October 2014.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

Master of the High Court

**08 October 2014
At Labasa**