

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 259 of 2014

**BETWEEN** : **RISHNI DEO** and **VINODNI DEO** of Lot 19. Laubu Place, Nadera, Nasinu, Fiji and currently residing in the United States of America.

**PLAINTIFFS**

**AND** : **HOUSING AUTHORITY** a corporate body duly constituted under the provisions of the Housing Act and having its Head Office at Valelevu.

**DEFENDANT**

**BEFORE** : **Acting Master Vishwa Datt Sharma**

**COUNSEL** : **Ms. Lagilevu S. for the Plaintiffs**  
**Mr. Lajendra for the Defendant**

**Date of Hearing** : **19<sup>th</sup> May, 2015**

**Date of Ruling** : **21<sup>st</sup> July, 2015**

**RULING**

**A. INTRODUCTION**

1. The Defendant filed a Notice of Motion to Set Aside the Default Judgment entered against the Defendant on 24<sup>th</sup> October, 2014. This Motion was filed together with an Affidavit in Support of Sisilia Rakesa.
2. Subsequently, upon the service of the motion, the Plaintiffs filed and served their Affidavit in Reply deposed by Viliame Navoka to the Defendant's setting aside Application.

3. The Defendant then filed their Affidavit in Response to the affidavit in reply of Viliame Navoka.
4. The application was scheduled for hearing on 19<sup>th</sup> May, 2015.
5. This court has made a note that the Defendant has not specifically stated anywhere in his application under which provision of the Law this application is made.
6. Both counsels representing the parties to this proceeding filed their written submissions and accordingly argued their respective cases.

**B. BACKGROUND FACTS.**

*The Defendant's case*

7. The Defendant deposed in his affidavit in support as follows:-
  - (i) That the defendant is not aware that the Default Judgment was entered against the defendant as the High Court Registry had accepted the Defendant's Statement of Defence on 15<sup>th</sup> October, 2014.
  - (ii) That the solicitor for the Plaintiff had accepted the Defendant's service of the Statement of Defence on 15<sup>th</sup> October, 2014 and did not advise the Defendant that they have filed the Default Judgment on 13<sup>th</sup> October, 2014.
  - (iii) That the Defendant only became aware of the Default Judgment by the High Court's letter dated 22<sup>nd</sup> October, 2014, by then the Defendant had already filed its Statement of Defence.
  - (iv) That the Defendant had received a copy of the Default Judgment from the Solicitors of the Plaintiff on 29<sup>th</sup> October, 2014; that is; two weeks after the Defendant had filed its Statement of Defence.
  - (v) That the Defendant hereby requests that the Default Judgment sealed on 24<sup>th</sup> October, 2014 is set aside as it has a good and valid defence to the action

by the Plaintiff. A self-explanatory copy of the filed Statement of Defence is attached hereto marked with the letter 'A'.

- (vi) That I have been further advised and verily believe that the case not been decided on the merits of the claim and the Defendant has the right to be heard before the substantive and final orders are made by this Honourable Court in this action.
- (vii) I pray to this Honourable court for orders in terms of the Motion filed herein.

*The Plaintiffs' Case*

8. The Plaintiff filed an affidavit in Reply to this Motion and he deposed as follows:-

- (i) That the Writ of Summons and the Statement of Claim were filed on the 08<sup>th</sup> September, 2014.
- (ii) That the Writ of Summons and the Statement of Claim were served to the Defendant at the office of their Legal Department at the Housing Authority Building, Valelevu, Nasinu on the 10<sup>th</sup> September, 2014.
- (iii) That under Order 18 Rule 2 of the High Court Rules, 1988, the Respondent has 14 days after the date of service to file and serve their Statement of Defence. That the Respondent's Statement of Defence would have been due to be filed on the 08<sup>th</sup> October, 2014.
- (iv) That on 13<sup>th</sup> October, 2014, the firm conducted a File search at the High Court Civil Registry whereby it was found that the Defendant had not filed a Statement of Defence.
- (v) That on the same day, when the firm proceeded to file an application for Default Judgment, the High Court Civil Registry informed the firm that we had to file an application for Summary Judgment.
- (vi) That on the 15<sup>th</sup> October, 2014 before the firm was able to file for summary judgment, the Defendant served the firm with their Statement of Defence which was filed on the same day.
- (vii) That on the 17<sup>th</sup> October, the firm wrote to the High Court Civil Registry requesting that the Statement of Defence of the Defendant be retracted as it was filed out of time and without consent and leave of the Court,

- (viii) That when the Statement of Defence of the Defendant was retracted, the firm filed an application for Default Judgment as per High Court Rules and this was accepted by the High Court Civil Registry as the right and proper procedure and application to make.
- (ix) That the High Court Civil Registry accepted the application for Default Judgment and dated it as on the day we initially tried to file an application for Default Judgment, which was on 13<sup>th</sup> October, 2014.
- (x) That the Default Judgment was granted in the Plaintiff's favour for failure of the Defendant to file a Statement of Defence within time as per the High Court Rules.
- (xi) That it is not a statutory duty that we inform the Defendant of the Firm's intention to file an application for Default Judgment as it is already stated in the Writ of Summons that judgment may be entered against the Defendant should they fail to file a Statement of Defence.
- (xii) That the Plaintiff's had Approved Plans contrary to what the Defendant is claiming in their Statement of Defence. Approved plans by Nasinu Town Council are annexed marked 'E'.
- (xiii) That at the time the Plaintiff's build the fence, they verily believed that they did not restrict and interrupt the right of way as there was no common access registered over the property; which was a result of two court actions; in each instances, the court ruled in the Plaintiff's favour. Court Rulings annexed and marked as 'F'.
- (xiv) That the Defendant wanted our client's driveway to be a common access, they should have registered an easement on the Title H.A Sub-Lease 183928 before leasing the land to the Plaintiff's but the Respondent failed to do so.
- (xv) That we hereby request this Honourable court to dismiss the Defendant's application to set aside Default Judgment as the Defendant has not sufficiently explained why they failed to file a Statement of Defence within the prescribed time.
- (xvi) That we hereby request that this Honourable court dismiss the Defendant's application to set aside Default Judgment as they do not have a valid and meritorious defence.

C. Principles on setting aside a default judgment

9. Order 13 Rule 10 of the High Court Rule, 1988 states as follows:-

*'Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.'*

10. Under Or.13 r.10 the Court may set aside or vary 'any judgment' unconditionally or on terms.

11. The Court has a very wide discretion in an application of this nature but it is also guided by certain well known principles.

One of the principles is that:

*"Unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure". (Per Lord Atkin in Evans v Bartlam [1937] A.C. 473)*

12. The basic principles applicable to setting aside judgments in the exercise of Court's discretion are set out in Halsburys Laws of England Vol 37 4th Ed. para 403, inter alia, thus:

*"In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits stating the facts showing that the defendant has a defence on the merits,.... For this purpose it is enough to show that there is an arguable case or a triable issue".*

13. It is further stated therein:

*"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desirable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed".*

14. A useful summary of the factors to be taken into consideration in setting aside is to be found under Notes to Or.13 r.9 of The Supreme Court Practice 1995 Vol 1 at 142 which inter alia states as follows:

*"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred."*

It goes on to further state as follows;-:

*"The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., at p. 223, where the earlier cases are summarised. From that case the following propositions may be derived:*

*(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.*

*(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

15. Also on the subject of setting aside default judgment, in *Davies v Pagett (1986) 10 FCR 226* at 232 a Full Court of the Federal Court of Australia said;-

*"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in*

*our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation. The problem of delays in the courts, egregious as it is, must be dealt with in other ways; for example, by disciplinary actions against offending practitioners and by a comprehensive system of directions, hearings or other pre-trial procedures which enable the court to supervise progress - and, more pertinently non-progress - in all actions".*

- 16 In *Eni Khan v. Ameeran Bibi & Ors* (HBC 3/98S, 27 March 2003), His Lordship Justice Gates set out the principles applicable to setting aside default judgment, referring to *Burns v. Kondel* [1971] 1 Lloyds Rep 554; *Evans v. Bartlam* [1937] AC 473; *Vann v. Awford* (1986) LS Gaz 1725; The Times LR (23 April 1986); and *Fiji National Provident Fund v Datt* [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988). So, too, His Lordship Justice Pathik in *South Pacific Recordings Ltd v. Ismail* [1994] FJHC 134; Hbc0597].93s (30 September 1994) and also in *Pravin Gold Industries Ltd v. The New India Assurance Company Ltd* [2003] FJHC 298; HBC0250d.2002s (4 February 2003), referring to *Pankaj Bamola & Anor v. Moran Ali* (FCA 59/90), amongst others. In *Kaur v. Singh* [2008] FJHC 158; Appeal Case 61 of 2008 (5 August 2008) the authorities were also explored.
15. In *Wearsmart Textiles Ltd v. General Machinery Hire Ltd* [1998] FJHC 26; Abu0030u.97s (29 May 1998) the Court of Appeal similarly addressed the question of setting aside judgment, by reference to the authorities including *Farden v. Richter* (1889) 23 QBD 124; *Hopton v. Robertson* [1884] WN 77, reprinted 23 QBD 126n; *Richardson v. Howell* (1883) 8 TLR 445; *Watt v. Barnett* (1878) 3 QBD 183; *Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc, The Saudi Eagle* [1886] 2 Lloyd's Rep 331 (CA); and *Vann v. Awford* (1986) 83 LS Gaz 1725; The Times LR (23 April 1986).
16. The principles therein distilled and a number of other authorities provide:
- *Defendant does not need to show a good defence on the merits - '... need only show a defence which discloses an arguable or triable issue': Burns v. Kondel* [1971] 1 Lloyds Rep 554.
  - *Applicant must produce to the court 'evidence that he has a prima facie case': Evans v. Bartlam* [1937] AC 473, at 651;-
  - *'The defendant's application is brought pursuant to Order 13 Rule 10 which confers on the court a discretion to set aside or vary any default judgment on such terms as it thinks just. The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been*

*formulated as prudent considerations in the determination of the justice of a case, none [has] been or can be elevated to the status of a rule of law or condition precedent to the exercise of the court's unfettered discretion. These judicially recognised "tests" may be conveniently listed as follows:*

- (a) Whether the defendant has a substantial ground of defence to the action;
- (b) Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
- (c) Whether the plaintiff will suffer irreparable harm if the judgment is set aside.

#### Consideration of the Application

17. The Plaintiff filed a Writ of Summons on 08<sup>th</sup> September, 2014.
18. The same was served on the Defendant on 10<sup>th</sup> September, 2014 and accordingly an acknowledgment of service was filed on 12<sup>th</sup> September, 2014.
19. As per the requirements of Order 12, Rule 4 (a) of the High Court Rules, 1988, that deals with 'Time limited for acknowledging of service' states as follows-  
*'in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these Rules, to that time as so extended; (underline is mine for deliberation)*
20. Whereas, Order 18 Rule 2 (1) dealing with the 'Service of Defence' states as follows:-  
*'Subject to paragraph (2), a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him, whichever is the later.*
21. The question that is paused now is whether any defence was filed? If yes, then when?



22. Reference is made to paragraphs 9(a) to (g) of the affidavit in response deposited by Sisilia Rakesa, filed on 06<sup>th</sup> March, 2014;-

- In essence the Defendant confirms that a defence should have been filed within 14 days, by 24<sup>th</sup> September, 2014, and the required time under the rules had lapsed. But adds that because the High court civil registry had accepted the defence, they were under the impression that it was filed within time and had served the Plaintiff with the defence.
- Further reference is also made to paragraphs 7 to 11 inclusive of the affidavit in reply to the application to set aside default judgment deposited by Viliame Navoka, filed on 02<sup>nd</sup> December, 2014 respectively.

- In essence, the Plaintiff confirms they had conducted a file search for defence on 13<sup>th</sup> October, 2014, and defence was not filed by then. However, on the same day when the Plaintiff proceeded to file an application for a default judgment, the High Court civil registry informed the Plaintiff to file an application for summary judgment. (The reason that can be ascertained as to why the registry gave this advice was because the defendant had only filed an acknowledgment of service and not any defence. O14, r.1 (1) refers.)

The Plaintiff further states that on 15<sup>th</sup> October, 2014, before the Plaintiff was able to file for summary judgment, the Defendant served the Plaintiff with their Defence filed on the same day. Later, the Plaintiff complained to the registry that the defence was accepted out of time and without any consent for late filing. Eventually, the defence was retracted and the Plaintiff filed a default judgment accordingly.

23. According to the Defendant's argument and their written submissions furnished to court, they state the default judgment entered was irregular based on two factors-

- (i) At the time when the Plaintiffs proceeded to file their application for Default Judgment, the defendant by such time had already filed its statement of defence, but Registry erroneously returned the defence and accepted the Plaintiff's Default Judgment; and
  - (ii) The default judgment obtained is not consistent with the relief sought in the Writ of Summons.
24. It is trite law that a Plaintiff seeking to obtain Default Judgment is only capable of doing so in line and consistent with the orders sought in their Writ of Summons filed into court. The Default Judgment does not correspond with the relief sought at paragraph 15 of the Writ of Summons when there was no relief sought for any claim made for cost of erecting a fence.
25. It is also noted that under the category of special damages under paragraph 1, the Default Judgment obtained stipulates that the special damages are to be assessed by the court. It is established principle of law that only general damages are to be assessed. To quantify the general damages component, the court will need to look at the evidence produced in relation to factors which the Plaintiff produces to justify the grant of general damages. Based on these factors that the court uses its discretion to estimate what should be the appropriate general damages in the circumstances.  
However, in respect of special damages, the fact that such damage are fixed and precise that it does not require the same to be assessed by the court If it is pleaded in the Writ of Summons the rules of pleadings require the precise amount to be recorded in the relief category.
26. Again referring to Order No. 2, the Plaintiff obtained an order for default judgment for interest to be assessed by court. How is this possible when a claim for interest is not pleaded in the Plaintiff's Writ of Summons?
27. How did the registry then proceed to seal the order for default judgment?

28. Now, I will move on to deliberate and determine in terms of the following three (3) tests whether the default judgement should be set aside or not;-

*Whether the defendant has reasonably explained the delay in filing the Statement of Defence;*

29. I reiterate paragraphs -B-7 (i) to (vi) of the Defendant's together with the Plaintiff's case at paragraph -B-8 (i) to (viii) outlined hereinabove.

30. In fact, the Writ of Summons and the Statement of Claim were filed on the 08<sup>th</sup> September, 2014, served on the Defendant on 10<sup>th</sup> September, 2014. Acknowledgment of service was filed by the Defendant within time on 12<sup>th</sup> September, 2014 and further the Defence was filed on 13<sup>th</sup> October, 2014. Subsequently, the Defendant served the Plaintiff with their Defence on 15<sup>th</sup> October, 2014.

31. On the other hand, the Plaintiff submits in their written submissions and has also stated in the affidavit that the Defendant should have filed their Defence on or before 08<sup>th</sup> October, 2014. But it is noted that the Defence was filed on 13<sup>th</sup> October, 2014, about 5 days late. No doubt, the registry accepted and issued the Defence in error.

32. The Defendant maintains because the Defence was already filed, there was no delay on their part.

33. The Defendant in the affidavit deposed by Sisilia Rakesa at paragraph 9 (c) and (d) admits the time of 14 days to file the Defence had lapsed but after the registry accepted their Defence, the Defendant was under the impression that it has been filed within time.

34. I look at this explanation as an 'inadvertent error' and or a mis-calculation of time in terms of the Rules to file their Defence.

35. I accept the explanation of 5 days delay to be unintentional and reasonably explained.

**Whether The Defendant has a Defence on Merits which has some Prospect of Success.**

36. According to the Plaintiff, the Defendant does not have a meritorious Defence and claims the Defendant's failure to register an easement on Lot 19 on DP 3866 when the property was leased to the Plaintiff. Further, when the easement No. 756056A was registered on the property, by the Registrar of Titles, by virtue of power under section 159 (6) of the Land Transfer Amendment Decree 2011, the value of the property dropped.
37. On the other hand, the Defendant says that the Plaintiff's had breached the terms and conditions of their lease on the following basis-
- (i) *It did not have any approved plans to construct the fence;*
  - (ii) *Did not obtain the consent of the Defendant as the head lessee for building of the fence; and*
  - (iii) *In building the fence illegally the Plaintiffs have restricted and interrupted the right of way to common access by the residence of the neighbouring lot at Lot 20.*
38. We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue': *Burns v. Kondel* [1971] 1 Lloyds Rep 554, at 555, per Lord Denning, MR.
39. Having carefully considered the written submissions together with the affidavits filed in court, I find that the defendant has shown defence on merits and not merely raised triable issues on the affidavit filed by them.
40. It would be appropriate for the court to hear the triable issues raised and then determine the matter accordingly rather than allowing the neighbours to continue fighting over the issue of easement and or the illegal construction of the fence and interrupt the right of way to common access to the neighbours.

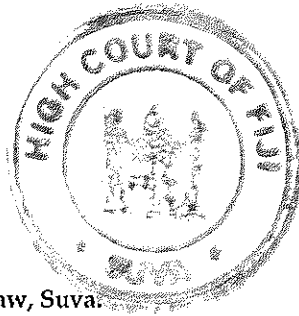
**Whether Plaintiff's will be Prejudiced?**

41. The plaintiff will not be prejudiced in any way and it will be able to recover payment of any judgment as it cannot be said that the defendant is not able to meet his obligations if judgment goes against him.
42. The Plaintiff did not demonstrate any particular prejudice by reason of the delay of the Defendant's solicitors in filing their defence. Under such circumstances, a proper exercise of the judicial discretion calls for the setting aside of the default judgment.

**In Conclusion**

- (i) The judgment entered by Default is hereby ordered to be set aside forthwith.
- (ii) With costs against the defendant in the sum of \$300.00.
- (iii) The defendant is ordered to file a Statement of Defence within 14 days from the date of this judgment failing which the judgment will stand.

Dated at Suva This 21<sup>st</sup> July, 2015



A handwritten signature in black ink, appearing to read "VISHWA DATT SHARMA".

.....  
**VISHWA DATT SHARMA**  
Acting Master of High Court, Suva

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