

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION  
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBC 31 OF 2008

BETWEEN : Nalini Singh of Bowood Crt, Melbourne, Victoria, 3030,  
Australia

PLAINTIFF

AND : Sailesh Kumar of Narewa, Nadi

DEFENDANT

Appearances:

Mr. V. Pillay for the Plaintiff

Mr. M. Anthony for the Defendant.

JUDGMENT

**Introduction**

1. This is an application by the Defendant seeking extension of time to set aside the Judgment in default entered against him on 15<sup>th</sup> September, 2015. This application is made pursuant to Order 3 Rule 4, and Order 35 Rule 2 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
2. By the Motion filed the Defendant seeks inter alia the following Orders from Court.
  - (i) That the Defendant be granted an extension of time to set aside the Judgment in Default dated 15<sup>th</sup> September, 2015.
  - (ii) That the said Judgment in Default be set aside.
  - (iii) That there be a Stay of execution of the decision of the Learned Judge pronounced on the 15<sup>th</sup> of September, 2015 pending determination of this application.
3. The application is supported by an Affidavit sworn by the Defendant on 9<sup>th</sup> February, 2016.

4. The Affidavit in Opposition sworn by a Legal Executive of Messrs Gordon and Company is filed on 26<sup>th</sup> February, 2016.
5. When this matter was taken up for hearing on 17<sup>th</sup> March, 2016 Counsel made their oral arguments. Though they were granted leave to file written submissions I find that they have not tendered their written submissions within the given time.

### **Background**

6. (i) On 3<sup>rd</sup> of September, 2014 when the matter was mentioned in Court to fix a trial date Ms. J. Naidu appeared for the Plaintiff and Ms. Tabuakuro has appeared for the Defendant. On the said date Trial was fixed for 13<sup>th</sup> to 16<sup>th</sup> of April, 2015.
- (ii) Notice of Adjourment hearing (NOAH) was issued by the Registry for the matter to be mentioned on 7<sup>th</sup> April, 2015 as the Trial cannot be taken up on the scheduled dates due to Judicial Officers attending a workshop in Suva during that period.
- (iii) When NOAH was to be issued to Solicitor, "K. Law Chambers" who appeared for the Defendant they have informed the Court Registry that the Defendant has taken the file from them and now they are not appearing for him. Thereafter the Registry has issued the said NOAH to the Defendant.
- (iv) On 7<sup>th</sup> April, 2015 when the matter was mentioned in Court Mr A. Dayal who appeared for the Plaintiff has moved Court to fix a hearing date. The Court has accordingly re-fixed the matter for Trial from 14<sup>th</sup> to 18<sup>th</sup> September, 2015. As the Defendant was absent on the said date Court has also ordered a NOAH to be issued to the Defendant informing him of the fresh Trial dates.
- (v) The Defendant has acknowledged receiving the said NOAH issued on him by signing on a copy of the same which is filed of record.
- (vi) The Trial did not commence on the 14<sup>th</sup> September, 2015 as the Judicial Officers had to attend the Opening Session of the Parliament on that day. However, the matter was taken up on the following day (the day 2 fixed earlier) and a Default Judgement was entered against the Defendant due to his absence on the said Trial date.

## Affidavit Evidence of the Defendant

7. The Defendant deposes in his Affidavit inter alia that:
- (i) He is currently residing in Suva as he is employed by "Total Retreading and Manufacturing Limited".
  - (ii) That the matter was set down for hearing on 15<sup>th</sup> September and that his previous Solicitors "K. Law Chambers" failed to notify him of the hearing date.
  - (iii) On the day of hearing "K. Law Chambers" was on record and did not appear for him. "K. Law Chambers" were still on record and did not file formal application for withdrawal.
  - (iv) He did not receive notice of adjournment from Court regarding his Court dates and he was waiting for correspondences from "K. Law Chamber" in regards to hearing of his matter as some documents and file is still with them.
  - (v) He was given the Order dated 15<sup>th</sup> September, 2015 by his Tenant at the subject property on 20<sup>th</sup> December, 2015, upon inquiry he was told by his Tenant that the document was left in the compound and she did not have any idea of when it was served or delivered to the subject property.
  - (vi) He was not personally served with the Order dated 15<sup>th</sup> September, 2015 and he has a letter from his employers Rahul Maharaj to confirm that he was in Suva on the day of 7<sup>th</sup> October, 2015 (annexed as "A") the day on which it is alleged to have been served on him.
  - (vii) He sought immediate legal advice from Mr. Ravindra Aman Singh in regards to the said Order, however was advised that it was legal vacation and the Judges were not sitting until 18<sup>th</sup> January, 2016. He instructed the Lawyers to file this application.
  - (viii) He intends to defend the claim against him and his previous Solicitors Messrs "Krishna and Associates" file Statement of Defence and Counter Claim dated 17<sup>th</sup> October, 2008.

- (ix) He continued to reside at the subject property however has temporarily moved to Suva for employment purposes.
8. In summarising the Affidavit evidence adduced by the Defendant he is relying on the following facts in support of his application.
- (a) His Lawyers "K. Law Chambers" did not appear for him on the Trial date and they also failed to inform him of the said date.
- (b) He did not receive a Notice of Adjournment.
- (c) As such he was not aware of the Trial dates.
- (d) He was not personally served with the Order dated 15<sup>th</sup> September, 2015 (Judgment entered in default) on 7<sup>th</sup> October, 2015.

### **The Law**

9. Order 35 Rule 2(i) of the High Court Rule states:

*"Any Judgment, Order or verdict obtained where one party does not appear at the Trial may be set aside by the Court, on the application of that party; on such terms as it thinks just."*

Order 35 Rule 2 (2) states:

*"An application under this rule must be made within 7 days after Trial."*

10. It is clear from the said Rules that the application to set aside a Judgment given in absence of party should be made within 7 days after the Trial. As such the Defendant in this matter should have made the application on or before the 22<sup>nd</sup> of September, 2015. He is making the application nearly 5 months after the Trial.
11. The Defendant is seeking extension of time to make this application pursuant to Order 3 Rule 4 of the High Court Rules.

Order 3 Rule 4(i) states;

*"The Court may on such terms as it thinks just, by Order extend or abridged the period within which a person is required or authorised by these rules, or by any just Order or direction, to do any act in any proceedings."*

12. The above rule gives the discretion to Court to grant extension of time for application of this nature. However, the Court has to exercise the discretion in a judicial manner and also consider whether any prejudice will be caused to the other party as a result of exercising the discretion.

#### **Application of the Law to Facts**

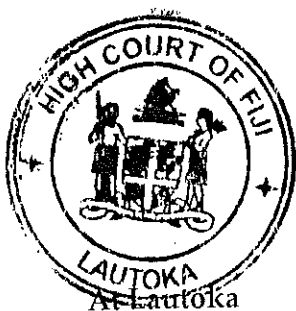
13. The Defendant deposes in his Affidavit that he received the copy of the Order on 20<sup>th</sup> December, 2015 from his Tenant and that the Tenant told him it was left in their compound.
14. The Bailiff deposes in his Affidavit of Service that he served the said Order personally to the Defendant at Narewa, Nadi at 9.15am on 7<sup>th</sup> October, 2015. He also states that the Defendant refused to acknowledge on a copy.
15. To contradict the Bailiff's evidence the Defendant produces a letter from his employer which states that he was at his workplace in Lami on the 7<sup>th</sup> October, 2015 from 8.00am to 5.00pm. This letter cannot be admitted as evidence to contradict the evidence of the Bailiff as it's not a sworn testimony of the defendants' employer.
16. From the evidence before me I cannot believe that the Bailiff has left the Order in the compound of the Defendant's premises as deposed by the Defendant. Although the Defendant states that it was given to him by his Tenant he has not got an Affidavit from the Tenant to prove that fact.
17. From the analysis of the evidence of the Defendant and the Bailiff, I find the evidence of the Bailiff more credible than the Defendants' evidence.
18. In *Shocked and another v Goldschmidt and Others [1998] 1 All ER 372* principles which apply for setting aside a Judgment after Trial was discussed. In the said case it was held:

*"On an application to set aside a Judgment given after a Trial, in the absence of the applicant, different considerations applied than on an application to set aside a default Judgment. In particular, the predominant consideration for the Court was not whether there was a defence on the merits but the reason why the applicant had absented himself and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside, the conduct of the applicant, whether the successful party would be prejudiced by the Judgment being set aside and the public interest in there being an end to litigation....."*


19. According to the principles laid down by authorities the predominant consideration for the Court in granting extension of time to make an application to set aside a judgment in default is to look at the reason why the applicant absented himself at the Trial not whether there is a defence on the merits.
20. In this case the Defendant is making allegations against his Lawyers for not representing him on the Trial date. That is a matter for him to resolve with his Solicitors. There is no need for the Court to inquire as to why his Lawyers did not represent him at the Trial date.
21. The Defendant also states that he was not aware of the Trial date and he was not served with the Notice of Adjournment issued by Court. As I said earlier the Defendant has signed the copy of the NOAH and acknowledged its service. The said copy is filed of record. As such I find that the Defendant is misleading Court by saying that he did not receive a NOAH from Court.
22. In the light of all of the above I hold that the reasons given by the Defendant for being absent on the Trial date cannot be accepted. As such I hold that his absence on the Trial date was deliberate and not due to accident or mistake.

### Conclusion

23. Accordingly, I make the following Orders:
  - (a) The application seeking extension of time to set aside the Judgment in default dated 15<sup>th</sup> September, 2015 and to set aside the said Judgment is dismissed.
  - (b) The Defendant to pay costs summarily assessed in a sum of \$1000.00 to the Plaintiff.



24 May 2016

  
Lal S. Abeygunaratne  
[Judge]