

In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Appeal No. 04 of 2016

Between: Josaia Cokationo

And: Joana Sekinairai

Appellants

And: I Taukei Land Trust Board

Respondent

Appearances: Mr N.Tuifagalele for the appellant

Ms Q.Vokanavanua for the respondent

Date of hearing: 30th May, 2016

Judgment

1. The appellant appeals from a judgment of the Magistrates Court on the following grounds of appeal :

- 1) *That the Learned Magistrate erred in law and in fact when she allowed the Respondent to file its setting aside of default judgment application for the second time after she made a ruling to dismiss the Respondent's first setting aside application.*
- 2) *That the Learned Magistrate erred in law by misinterpreting Section 36(1)(b) of the Magistrates Court Act Cap 14 allowing the Respondent to file its second setting aside application after the first setting aside application was dismissed when the only option available to the Respondent was to appeal the learned Magistrates ruling to the High Court.*
- 3) *That the Learned Magistrate erred in law by continuing to preside over the proceedings in the Magistrates Court making her functus officio under Section 36(1)(b) after she delivered her ruling by dismissing the Respondent's setting aside application.*

The proceedings in the lower court

2. On 2nd September, 2014, the appellants filed amended statement of claim in the Magistrates Court claiming compensation from the respondent, the iTLTB for destruction of their crops.
3. On 22nd December, 2014, default judgment was entered against the respondent.
4. On 9th January, 2015, the respondent filed notice of motion and affidavit in support to set aside the default judgment under “*Order XXXI Rule 11 of the Magistrates Court Rules*”.
5. The Learned Resident Magistrate, in her Ruling of 18th March, 2015, made Order that the “*motion filed by the Defendant for this matter to be reinstated pursuant to Order XXXI Rule 11 is procedurally wrong*” and dismissed the motion .
6. On 25th March, 2015, the respondent filed a second notice of motion and affidavit to reinstate the matter under Order XXX Rule 5.

The Ruling of the Learned Resident Magistrate of 2nd March, 2016,

7. On 2nd March, 2016, the Learned Resident Magistrate allowed the second application and set aside the judgment by default on the ground that the respondent had a satisfactory explanation for non appearance on the day default judgment was entered and a substantial ground of defence.
8. In her Ruling, the Learned Resident Magistrate held that the submissions of the plaintiff (appellant) that the Magistrates Court is functus officio and the defendants’ (respondent) application is an abuse of process, do not “*qualify to be considered*”.

The appeal

9. The grounds of appeal raise the simple question whether the Learned Resident Magistrate could have entertained the respondent’s second notice of motion and set aside the default judgment, when her first Order of 18th March, 2015, dismissing the motion was not set aside.

10. At the hearing, Mr Tuifagalele counsel for the appellant submitted that the lower court was functus and the only option available to the respondent was to appeal from the Order of 18th March,2015, under section 36(1)(b) of the Magistrates Court Act.
11. The riposte of Ms Vokanavanua, counsel for the respondent was that multiple applications could be made by a defendant to set aside a default judgment.
12. I disagree. In my judgment, the Learned Resident Magistrate was functus and could not entertain the second application, as her Ruling of 18th March,2015, was not set aside.
13. In my judgment, the appeal succeeds on the first ground of appeal.
14. I do not find it necessary to deal with the second and third grounds which urge that the lower court misinterpreted section 36(1)(b) of the Magistrates Court Act. I find that the Learned Resident Magistrate had not considered that provision in her Ruling.

15. **Orders**

- (i) The appeal is allowed.
- (ii) The respondent shall pay the appellants a sum of \$ 750, as costs summarily assessed.



A.L.B. Brito-Mutunayagam

Judge

21st June , 2016