

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 213 of 2015

BETWEEN : **RUKSHANA BIBI** of Lot 3 Tiri Road, Nadawa, Nasinu, Domestic Duties as Administratrix of the **ESTATE OF MOHAMMED SALIM HAFIQ** aka **MOHAMMED SALIM** (Deceased).
PLAINTIFF

AND : **MOHAMMED SHAHEED** of 8066, Center Parkway, Sacramento, CA 95823, USA, Unemployed.
DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Ms. K. Chetty for the Plaintiff

Dates of Hearing : 24 October 2016 and 31 January 2017

Date of Ruling : 26 April 2017

RULING

INTRODUCTION AND BACKGROUND

[1] The Plaintiff instituted these proceedings by way of a Writ of Summons, on 16 June 2015. In her Statement of Claim she seeks the following Orders:

- i) A Declaration that the one undivided half share of the property being Housing Authority No: 397044, Lot 3 on DP 7370, registered under the Defendant's name was and is held by the Defendant in trust for the Deceased, or alternatively,

- ii) A Declaration that the sum of \$3310.00 paid by the Plaintiff to the Defendant constitutes a legally binding agreement for the Transfer of the Defendant's one undivided half share of the said property to the Plaintiff,
- iii) An Order that the Defendant execute all the legal documents required to effect transfer of the said one undivided half share of the property to the Plaintiff,
- iv) An Order that if the Defendant refuses and or neglects to execute the Transfer documents then the Deputy Registrar of the High Court or some other fit person be appointed to transfer and convey in the name of the Defendant to the Plaintiff the one undivided half share of the property comprised in Housing Authority No: 397044, being Lot 3 on DP 7370,
- v) Such other Orders that this Honourable Court deems just in the circumstances.

[2] The Plaintiff is the Administratrix and beneficiary of the estate of her late husband Mohammed Salim Hafiq aka Mohammed Salim. The Defendant is the brother of her late husband.

[3] Since the Defendant was residing overseas the Plaintiff filed an Ex-Parte Notice of Motion, pursuant to Order 11, Rule 2 of the High Court Rules 1988, seeking the leave of Court to serve the Writ of Summons issued in this action by way of substitute service (by registered post) on the Defendant.

[4] On 5 November 2015, the Master of the High Court, granted the Orders in terms of the said Ex-Parte Notice of Motion.

[5] On 20 July 2016, the Plaintiff filed Summons to Seek Leave to Enter Judgement. The said Summons was supported by an Affidavit of the Plaintiff.

[6] At this stage the Master of the High Court referred the matter to me to adjudicate upon the said Summons to Seek Leave to Enter Judgement.

THE SUMMONS TO SEEK LEAVE TO ENTER JUDGEMENT

[7] As per the Summons filed Seeking Leave to Enter Judgement the Plaintiff seeks the following Orders:

1. A declaration that the one undivided half share of the property being Housing Authority No: 397044, Lot 3 on DP 7370, registered under the Defendant's name was and is held by the Defendant in trust for the deceased; or alternatively;
2. A declaration that the sum of \$3300.00 paid by the Plaintiff to the Defendant constitutes a legally binding agreement for the Transfer of the Defendant's one undivided half share of the said property to the Plaintiff;
3. That the Defendant execute all the legal documents required to effect transfer of the said one undivided half share of the property to the Plaintiff;
4. That if the said Defendant refuses and or neglects to execute the Transfer documents then the Chief Registrar of the High Court or some other fit person to be appointed to transfer and convey in the name of the Defendant to the Plaintiff the one undivided half share of the property comprised in Housing Authority No: 397044, being Lot 3 on DP 7370;
5. That this Honourable Court give such further directions for the future conduct of the within action pursuant to Order 19, Rule 3 of the High Court Rules 1988;
6. Other relief as this Honourable Court may deem just.

THE AFFIDAVIT FILED IN SUPPORT OF THE SUMMONS

[8] The Plaintiff filed an Affidavit in support of the Summons, which she deposed on 18 July 2016. However, during the hearing of this application, on 24 October 2016, the Plaintiff was granted leave to file a Supplementary Affidavit in support. Accordingly, the Plaintiff filed the said Supplementary Affidavit on 2 November 2016. The contents of the said Affidavit can be detailed as follows:

1. The Plaintiff deposes that she is aware that the Defendant resides out of the jurisdiction of this Court, at 8066 Center Parkway, Sacramento, CZ 95823, USA.
2. She states that when she had filed the Writ of Summons to initiate this civil action, she had attempted to serve the same on the Defendant out of jurisdiction, after the Writ was issued from the High Court on or about 16 June 2015.
3. When she was made aware of the importance of having this application served on the Defendant, she had sent the Writ to her sister, Nazneen Ali, who is the process sever, as she resided in USA. Upon her request she had served the said documents on the Defendant on 14 August 2015. A copy of the acknowledgement of service is annexed marked "RB1". Therein is an an endorsement by the process server indicating that the Defendant had "refused to receive" the said documents on the 14 August 2015.
4. She had later been advised that this form or service was not accepted by the Court in accordance with the rules of service out of jurisdiction. Thereafter, upon the advice of her Solicitors, she had made an application to seek leave of the Honourable Master to effect service on the Defendant by way of registered post. Accordingly, on 30 October 2015, she filed an Ex-parte Notice of Motion for service of the Writ of Summons on the Defendant by way of substitute service.
5. On 19 November 2015, she had by way of registered post sent the Writ of Summons to the Defendant's last known address being 8066 Center Parkway, Sacramento, CA 95823, USA. A copy of the duplicate receipt and registered post docket is annexed marked "RB2".
6. She deposes that she did not receive any pink slip. Thus she could not have the same filed in Court as evidence of service by registered post.

7. In addition to the above (substituted service), she had then effected personal service of the documents on the Defendant by the process server, Nazneen Ali of Solanto Country, USA. She had sent the documents by post to the said Nazneen Ali, who had then upon receipt served the same on the Defendant.
8. On 10 May 2016 the Affidavit of Service of Nazneen Ali was filed in the High Court Registry. This Affidavit of Service was duly sworn on 13 April 2016 before a Notary Public. A copy of the said Affidavit of Service is annexed marked "RB3".
9. The Plaintiff further deposes that, with respect to the property, approximately 2 weeks after the passing away of the deceased, on 24 October 2013, the Plaintiff and the Defendant had agreed that the Defendant would transfer his share in the property to the Plaintiff and or her children, provided the Plaintiff pays a sum of \$3,310.00 being the Defendant's FNPF monies and extra charges demanded by the Defendant. The Plaintiff confirms that she had paid this sum of money to the Defendant's FNPF Account via bank cheque, on 10 April 2014. A copy of the said cheque is annexed marked "RB4".
10. However, although the Defendant had received the monies and acknowledged the same, he did not execute any documents with respect to the transfer as he had promised. Instead he had left Fiji within one week after receiving the payment of \$3,310.00.
11. She deposes that since the death of the deceased, the property has been looked after and maintained by herself. The copies of receipts and invoices indicating the costs of renovations and improvements on the property is annexed marked "RB5".
12. The Defendant has not filed and served the Acknowledgement of Service within the prescribed time limit.
13. The Defendant has not filed nor served any Statement of Defence to the Plaintiff within the prescribed time limit.
14. Accordingly, she seeks an Order in terms of the Summons filed.

LEGAL PROVISIONS AND ANALYSIS

[9] This Court is satisfied that notice of these proceedings had been duly communicated to the Defendant, who is currently residing outside the jurisdiction of this Court. Therefore, the Plaintiff was entitled to seek a judgement in default.

[10] The Summons to Seek Leave to Enter Judgement is filed in terms of Order 19, Rule 3 of the High Court Rules 1988. The provisions of Order 19 could be invoked where there has been a default of pleadings. In the instant case there is no doubt a default by the Defendant for failure to file his statement of defence within the prescribed time period.

[11] However, in this case it is admitted that there is a failure on the part of the Defendant even to give notice of intention to defend. Therefore, the Plaintiff should have invoked the provisions of Order 13 of the High Court Rules, instead of Order 19.

[12] To further aggravate matters the Plaintiff considers this to be a claim for unliquidated damages. Order 19, Rule 3 deals with "Default of defence: claim for unliquidated damages" and is reproduced below:

"Where the plaintiff's claim against the defendant is for unliquidated damages only, then, if that defendant fails 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, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any."

[13] It is the view of this Court that invoking the provisions of Order 19, Rule 3 in this case is clearly erroneous. From the Statement of Claim, as well as from the Summons to Seek Leave to Enter Judgement, it is patent that the claims in these proceedings are of a declaratory nature.

[14] Thus the Summons in these proceedings should have been filed in terms of Order 13, Rule 6 (Dealing with 'other claims') or at least under Order 19, Rule 7 (Dealing with 'default of defence: other claims'). The said two Rules are reproduced below:

Order 13, Rule 6 (Other Claims)

6. (1) *Where a Writ is indorsed with a claim of a description not mentioned in rules 1 to 4 then, if any defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time and, if that defendant has not acknowledged service, upon filing an affidavit proving service of the writ on him and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had given notice of intention to defend.*
- (2) *Where a writ issued against a defendant is indorsed as aforesaid, but by reason of the defendant's satisfying the claim or complying with the demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter judgment with the leave of the Court against that defendant for costs.*
- (3) *An application for leave to enter judgment under paragraph (2) shall be by summons which must, unless the Court otherwise orders, and notwithstanding anything in Order 65, rule 9, be served on the defendant against whom it is sought to enter judgment.*

Order 19, Rule 7 (Default of defence: other claims)

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) mentioned must be by summons to motion.*

[15] I reiterate that since no notice of intention to defend has been filed in this case, the Summons should rightly have been filed in terms of Order 13, Rule 6.

[16] During the hearing of this matter the Counsel for the Plaintiff urged Court to act in terms of Order 2 of the High Court Rules, which are the provisions dealing with the 'Effect of Non Compliance' of the Rules.

Order 2, Rule 1 is reproduced below:

1. (1) *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) *Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or*

otherwise as it thinks just, set aside either wholly or in part the proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by any originating process other than the one employed.

[17] As I have stated earlier, in this case there has been a failure on the part of the Defendant even to give notice of intention to defend. Accordingly, the Plaintiff should have invoked the provisions of Order 13 of the High Court Rules, instead of Order 19. To exacerbate matters the Plaintiff has wrongly considered this to be a claim for unliquidated damages.

[18] In the circumstances, this Court is not in a position to treat these matters as mere irregularities that could be cured in terms of Order 2, Rule 1(1) of the High Court Rules.

[19] Accordingly, I make the following Orders:

ORDER

1. The Summons to Seek Leave to Enter Judgement is dismissed.
2. I make no order for costs.

Dated this 26th day of April 2017, at Suva.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI