IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA
[CIVIL JURISDICTION]

Civil Action No. HBC 237 of 2016

BETWEEN : **KITIONE WAQA WILKINSON TIKO** of a minor suing by next friend Viliame Tiko of Vatusekiyasawa Village, Rakiraki, Ba.

Plaintiff

A N D : **PERMANENT SECRETARY FOR HEALTH**

First Defendant

A N D : **ATTORNEY GENERAL OF FIJI**

Second Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. Maisamoa for the Plaintiff
Mr. Mainavolau for the 1st & 2nd Defendants

Date of Ruling: 14.02.2019

RULING

01. The plaintiff filed the summons before me, pursuant to Order 77 rule 6 of the High Court Rules and the inherent jurisdiction of this court, seeking leave from this court to enter the judgment against the defendant for default of pleadings. The summons is supported by an affidavit sworn by the plaintiff himself. The defendants, upon service of the summons on them as required by the rule, filed the affidavit sworn by Dr. Rigamoto S. Taito and vehemently opposed it, whilst seeking leave of the court to file and serve their statement of defence. The affidavit has two annexures marked as "A" and "B" respectively. The annexure "A" is copy of e-mail sent by the solicitors for the defendant to one doctor seeking some information regarding the claims of the plaintiff and the annexure "B" is the draft statement of defence. The plaintiff then filed his affidavit in reply. Subsequently, both counsels, having filed their respective written submissions moved the court to make the ruling based on the affidavits and the submissions.

02. The disastrous cause of action, as submitted by the counsel for the defendants in this case, emanated at Ba with an injury caused by a piece of stick under the tongue of an infant, Kitione Waqa Wilkinson Tiko, and reached its tragic conclusion at Lautoka hospital with the untimely death of the said infant, who was just two years of age at the time of death. The plaintiff being the father of the said infant took out the writ, issued by this registry, against both the defendants alleging the death was caused by the negligence of the servants and or agents and or employees of the first defendant, and claimed damages for the same. The details of the said incident, as submitted by the counsel for the plaintiff, are that, on 12.04.2015 the deceased infant got injured under his tongue with a small piece of stick and the plaintiff took him to the Ba hospital where a nurse advised the plaintiff to apply the water mixed with salt and bring back the infant if he was not healing, despite the plaintiff demanding that the infant be seen by a doctor. As he failed in his attempt to show his child to a doctor on that day, he went home back. On the 15th day of same months the infant started experiencing severe pain and his face swollen. The plaintiff then took his child to Ba hospital again and the doctors sent the infant immediately to Lautoka hospital as he needed immediate emergency medical attention. The infant then underwent a surgery and then admitted in the children ward of Lautoka hospital where he died.

03. Though the writ was acknowledged by the defendants, they failed to file and serve the statement of defence within the time prescribed by the rules and this resulted in the instant summons being filed by the plaintiff seeking leave of the court to enter the judgment in default of pleading against the defendants. The Order 77 rule 6, under which the instant summons was filed, reads as follows;

Order 77 rule 6 Judgment in default

6.-(1) Except with the leave of the Court, no judgment in default of notice of intention to defend or of pleading shall be entered, against the State in civil proceedings against the State or in third party proceedings against the state

(2) Except with the leave of the court, Order 16, rule 5 (1)(a), shall not apply in the case of third party proceedings against the state.

(3) An application of leave under this rule may be made by the summons or, except in the case of an application relating to Order 16, rule 5, by motion; and the summons or; as the case may be, notice of motion must be served not less than 7 days before the return day.

04. This rule in its plain and unambiguous meaning completely shuts out the default judgment being entered against the state either for default of notice of intention to defend or of pleading and in third party proceedings against the state, but strictly requires the

leave of the court for the same. The attention of the higher courts was seldom attracted towards this rule and this resulted in no criteria, which can guides the court in exercising its power, is being set by the higher court. Though, there were some applications under this rule heard by the high courts, they do not seem to be setting any guidelines in this regard. Therefore, comparative analysis of the other rules, that allow the default judgment or the summary judgment for absence of the defence, with this Order 77 rule 6 may help the court to set a standard and or a test that may guide the courts in exercising the power under this rule, either to grant or refuse the leave to enter the judgment for default against the state.

05. Generally, the default judgements against the parties, for default of notice of intention to defend is entered under Order 13 and in cases of specified claims under rules 1 to 5 of the said Order, the plaintiff may routinely enter the default judgment if the defendant failed to file the notice of intention to defend. However in case of the claims falling under the rule 6 of the said order, the plaintiff has to file a summons to seek the leave of the court to enter the default judgment. Likewise, the rules under Order 19 will be applicable for default of pleading and in the same manner, the plaintiff has to file the summons under rule 7, and the court after hearing of such summons shall give judgment as the plaintiff appears entitled in his statement of claim. This procedure is known as 'Formal Proof' of the claim or counter claim as case may be. In third party proceedings too Order 16 (5) (b) and rule 5 (2) provide for entering default judgment. However, all these procedures are not applicable in cases against the state, as Order 77 rule 6 not only excludes these procedures, but also makes separate provision for the same purpose. It follows that, the standard of satisfying the court to get the leave to enter the default judgment against the state must be separate from that of mere standard of formal proof under the above rules against the ordinary defendants.

06. Now I turn to examine whether the standard adopted by the court, when dealing with the applications under Order 14, which deals with the summary judgment, can be applied by the court in deciding whether it can grant leave under Order 77 rule 6 or not? The court's duty, when an application for summary judgment is filed, is to ascertain whether there is a triable issue and no arguable defence to the claim. If there is an arguable issue to be tried and there are matters of facts to be resolved, which can only be resolved in a trial, the court should not allow the application for summary judgment, but should grant leave to defend the matter in a full and proper trail, no matter how strong the plaintiff's case would be (*per: **Greer L.J*** in **Powszechny Bank Zwiakony W Polsch v Paros** (1932) 2 K.B. 353 at page 359; *per: **Browne-Wilkinson V-C*** in **Express Newspapers Plc v News (UK) Ltd and Others** [1990] 3 All E.R. 376 at 379; *per: **Kerr L.J*** in **S.L. Sethia Liners Ltd v State Trading Corporation of India** (1986) 1 Lloyds Rep. 31 at page 38; **Saw v Hakim**, 5 T.L.R. 72; **Electric etc. Corp v Thomson Houston etc Co,** ; **Codd v Delap** (1905), 92 L.T. 510 H.L; **Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FJCA 60; ABU0019U.2006S (10 November 2006). However, this standard cannot be applied in cases under Order 77 rule 6, as the Order 14 rule 12 clearly excludes the summary judgment being entered against the state.

07. Hence, the analogy and the comparative analysis of the rules as discussed above, logically conclude that, the standard to be adopted by the court in deciding a summons or a motion under Order 77 rule 6 should be higher than what is adopted under the rules of Orders 13, 14 and 16 as discussed above. It follows that, the court should grant leave to enter the default judgment against the state only to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment and where, it is inexpedient to allow a defendant to defend for mere purpose of delay. When it is said that, there cannot be a reasonable doubt, it should not be meant and or understood in any way that, the court brought the standard of criminal law to the civil action. In fact, this was the highest standard adopted by Privy Council in a very old case of **Jones v Stone** [1894] A.C. 122 at page 124, which dealt with the summary judgement and I, having considered several rules of this court, of the view that, this higher standard should be appropriate for the summons and or motions under Order 77 rule 6, as this rule excludes all other ordinary ways of entering default judgment and summary judgment against the ordinary defendants in the absence of defence, and makes separate provision for the same in cases against the state.

08. As mentioned above, the plaintiff claim against the defendant is based on the negligence on part of the employees of the Ministry of Health. Generally in such a civil suit for negligence, the plaintiff has to prove on balance of probability the following four (4) elements in order to get the damages from the defendant. They are (a) duty of care: the defendants or their employees had a duty to others, including the plaintiff, to exercise reasonable care, (b) breach: they breached that duty through an act or omission, (c) damages: as a result of that act or omission, the plaintiff suffered an injury, and (d) causation: the injury to the plaintiff is a reasonably foreseeable consequence of the their act or omission.

09. The defendant both in the affidavit filed in opposition and the proposed statement of defence attached with the said affidavit denied all the particulars of the negligence pleaded by the plaintiff in his statement of claim. As opposed to the claims made by the plaintiff and his narration of history, the defendants explained surrounding circumstances of the tragic incident in their affidavit and the proposed defence. In reply to the allegation that, the deceased was not allowed to be seen by doctor, the defendants stated in paragraph 10 of the proposed defence that Staff Nurse Biudole Sokia was on duty on the morning of Monday 13 April 2015 when the deceased was brought into the IMCI clinic by the Plaintiff with complains of an injury below his tongue. The deceased was not seen in General Outpatient because of his age as all children below the age of five years are seen in the IMCI clinic by the qualified IMCI nurse.

10. Explaining the initial assessment and prescribed medicine the defendants stated that upon initial assessment on 13 April 2015, it was discovered that the deceased was slightly inflamed and pain was obvious in him. Two bottles of Elixir Flucloxacillin (pink coloured fluid) 10mls was issued with instructions that they be given four times daily for 7 days for the treatment of the abscess; and Elixir Paracetamol 7.5ml to be given 6hrly/PRN for pain as per IMCI Guidelines. The Plaintiff was also advised by Staff nurse Sokia on saline gurgle and the deceased was to return. Tetanus injection was not

given as child was still covered from DTP Hep Hib vaccination given in the first three months of birth, i.e. given at 6 weeks, 10 weeks and 14 weeks consecutively and the next dose of tetanus toxoid will be at school entry (Year 1 or 6 years of age). After treatment, the Plaintiff and the deceased were told to go back home. This explanation is completely different from what has been claimed by the plaintiff to have happened on the first visit at Ba hospital.

11. The Defendants stated that on 15 April 2015, the deceased was brought back into the Clinic at Ba Hospital and was attended again by staff nurse Biutoka. The Plaintiff advised staff nurse Biutoka that the deceased had a history of fall on 12 April 2017. He did not mention this in the initial visit. The Plaintiff also advised staff nurse Biutoka that he did not administer the antibiotics given to him by the hospital on the deceased because, according to him, the deceased was not improving. This clearly shows that, the plaintiff neither disclosed the full history at the first visit, nor he administered the antibiotics prescribed by the staff nurse.

12. It is further stated that when Dr. Renita Maharaj examined the deceased, she found that the infant was irritable and had a high fever. She assessed the deceased as having Ludwig's Angina clinically. A cervical X- ray was conducted on the deceased thereafter. Upon consultation with the surgical registrar at Lautoka Hospital, Dr. Maharaj as per the advice of the surgical registrar at Lautoka Hospital transported the deceased to Lautoka Hospital.

13. Describing the condition of the deceased upon admission to Lautoka hospital, the defendants stated that the deceased was admitted to Lautoka Hospital at 1200hrs on 15 April 2017. History and examination showed that the deceased was a 2 year old child. He had a history of injury to his mouth from a stick three days prior. Examination notes in the medical notes stated that he was having a fever. There was a swelling at the right submandibular area (jaw area where it joins the neck). He was drooling saliva and unable to open his mouth. The floor of the mouth was also noted to be swollen. His assessment then was Right submandibular abscess and impending airway obstruction, a medical emergency. A difficult intubation was anticipated and the surgery was done upon the consent was obtained from the Plaintiff for surgery.

14. In nutshell, the defendants stated that deceased infant was given the best treatment available for such condition and the infant was duly cared by employees of the first defendant, adding that the surgery was successful. The comprehensive defence attached by the defendant with their affidavit puts the plaintiff to strict proof of his claim. Thus, the plaintiff is under duty to prove the breach of duty of care, causation and the damages. Accordingly, it cannot be said that, there is no reasonable doubt that the plaintiff is entitled for judgment in this case, given the burden of proof on the plaintiff and the proposed defence taken up by the defendants.

15. Furthermore, the court is aware that, there have been several discussions between the solicitors of the plaintiff and the defendants to amicably settle this matter. The proposals were exchanged between them, though it was not finally eventuated. The defendants'

affidavit is also evident that, they were facing some bureaucratic issues in getting all the information necessary to file the statement of defence in this case and this process was further slowed down due the additional factor of negotiating an amicable settlement of this matter. Thus, I am of the view that, it cannot be said it is inexpedient to allow the defendant to defend this matter for mere purpose of delay. As a result, I am fortified in my view that, this is not a suitable case where this court can grant leave under Order 77 rule 6 to the plaintiff to enter the judgment against the defendant for default of filling defence within the prescribed time.

16. Apart from the above observation and the decision, there is an irregularity in the mode of institution of this action by the plaintiff as the counsel for the defendant rightly pointed out in his submission and also mentioned in the affidavit filed on behalf of the defendants. The plaintiff, who is the father of the deceased infant, instituted this action as a *next friend* of the deceased infant. According to Order 80 rule 2 (1) a person under disability will bring an action by his next friend or guardian *ad litem*. The said rule reads as follows;

> *"A person under disability may not bring, or make a claim, in any proceedings except by his next friend and may not acknowledge service, defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment, order, notice of which has been served on him, except by his guardian ad litem."*

17. The above rule clearly stipulates that a person under disability to bring any proceedings through the next friend or guardian *ad litem*. The purposes and the reasons underlying this rule are numerous. In the context of litigation, rules as to capacity is designed to ensure that plaintiffs and defendants, who otherwise be at a disadvantage, are protected and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained. Furthermore the pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity, and the court is concerned not only to protect its own process but to provide protection for both parties (paragraphs 31 and 65 in **Masterman Lister -v- Brutton Co**. (Nos. 1 and 3) [2003] 1 WLR 1151). The cost of litigation is another factor which needs to be ensured by making a person answerable for the same. Thus the next friend is appointed to ensure the same as held by the Federal Court of Australia in **NSW Insurance Ministerial Corporation -v- Abualofaul** [1999] FCA 433, because the next friend is liable pay all the cost as affirmed in **Bligh v Tredgett** (1857) 64 ER 1024.

18. In this case, the infant Kitione Waqa Wilkinson Tiko is not a person under disability as the Order 80 rule 2(1) provides, but he died due to the negligence of the first defendant's employees as alleged by the plaintiff - the father of the deceased infant. Hence the father of the deceased infant cannot bring any proceeding as *next friend* of his deceased son. The correct procedure is to institute the action under the provisions of Compensation to Relatives Act No 17 of 1920 and Law Reform (Miscellaneous Provisions) (Death and Interest) Act No 07 of 1935 at it may be appropriate. For the benefit of the plaintiff I

would like to make a brief note on these two small pieces of legislations, namely Compensation to Relatives Act No 17 of 1920 (hereinafter referred to as **"CTR"**) and Law Reform (Miscellaneous Provisions) (Death and Interest) Act No 07 of 1935 (hereinafter referred to as **"LRM"**). Both **CTR** and **LRM** were enacted for different purposes; however, their application is, sometimes, confused. The **CTR** relates to payment of compensation to the families of persons killed by accidents, as per the plain meaning of its long title. Containing 12 sections, the **CTR** provides how the action is maintainable where the death is caused by neglect etc. Accordingly, where the death of a person is caused by wrongful act or neglect or default, an action can be brought for the benefit of the wife, husband, parent and child of the person, whose death has been so caused. This action can be brought by the Executor or Administrator of the deceased and the court may grant such damages to such parties, for whose benefit the action was brought. In every such action the plaintiff on the record shall be required to deliver to the defendant or his barrister and solicitor, together with the statement of claim, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

19. In case where, there is no executor or administrator of the deceased person, or that there being such executor or administrator, and no action is brought by executor or administrator within six months after the death of the deceased person, then such action may be brought by and in the name or names of all or any of the persons, who are beneficially interested and for whose benefit such action would have been, if it had been brought by and in the name of the executor or administrator (section 10 of **CTR**). The person or the persons, who bring the action, should follow the procedure that is ordinarily followed by an Executor or Administrator as provided in section 9 of **CTR**. Whether the action is filed by the Executor or administrator or by the any person beneficially interested, only one action shall lie and such action shall be commenced within 3 years after the death of a person. To put in simple words, if a person dies due the negligence act of another, the Administrator or Executor of deceased has cause of action to sue the person caused the death. If there is no Administrator or Executor or there being Administrator or Executor, and no action is brought by them within 06 months of death, the relatives mentioned in section 10 of **CTR** have cause of action to sue the person caused the death.

20. On the other hand, the purpose of the **LRM** was to amend the law as to the effect of death in relation to the causes of action and to awarding interest in civil proceedings. The **LRM**, which contains only four sections, provides in its section 2 for the effect of death on certain causes of action, whilst the section 3 and 4 deal with awarding interest in civil suits with the certain limitations therein. Briefly, the section 2 provides as to how all causes of action, that were subsisting against or vested in a person, shall survive against or, as the case may be, for the benefit of, his or her estate after his or her death. The main difference between these two pieces of legislation is that, **CTR** gives the cause of action to the Administrator or Executor or to the relative of a person upon his or her death and the **LRM** provides for the survival of cause of action that was subsisting against or vested in a person for the benefit of the estate upon the death of such person.

21. Accordingly, under the provisions of **LRM**, only the Executor or the Administrator has the cause of action for the benefit of the estate of deceased, if such causes of action were subsisting against or vested in the person at the time of his her death. If an Executor or an Administrator files an action, he can do so only after the grant of administration. However, under the **CTR**, both the Executor or Administrator and the beneficially interested persons have cause of action for the benefit of family members mentioned in section 4 (**Railala v Yuen Yin Hum** [2001] FJHC 44; Hbc0528D.1992s (13 July 2001). In other words, the plaintiff under the provisions of **LRM** should be an Executor or an Administrator. However, the plaintiff under the provisions of **CTR** should not necessarily be an Executor of an Administrator, but can be a person mentioned in section 10. (**Tanuku v Attorney-General** [2000] FJHC 13; Hbc0134d.95s (26 January 2000) and **Jamieson v Dominion Insurance Ltd** [2012] FJHC 15; HBC132.2009 (20 January 2012).

22. In this case, the plaintiff being the father of the deceased should have brought the proceedings under the provisions of **CTR** and or **LRM** as it may be appropriate, since there is nothing before the court to say whether he obtained the letter of Administration or not. However, he wrongly brought this action as the *next friend* of the deceased infant. Though it is an irregularity in commencing the proceedings by the plaintiff, it does not nullify the proceedings and I think it is just to allow the plaintiff to amend the writ issued in line with the provisions of the **CTR** and **LRM** as it may be appropriate.

23. In result, I make the following final orders;

a. The leave to enter the default judgment against the state is refused and summons filed by the plaintiff for leave is hereby dismissed,

b. The plaintiff should file and serve the amended writ within 14 days from today,

c. The defendants should thereafter file and serve their statement of defence within 14 days from the date of service of amended writ on them,

d. The plaintiff should then file his reply to defence (if any) within 14 days from the date of service of statement of defence by the defendants, and

e. The parties to bear their own cost.

HIGH COURT OF FIJI LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
14.02.2019