

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLATE JURISDICTION

CIVIL APPEAL NO. HBA 7 OF 2020

IN THE MATTER of an Appeal from the ruling and/or decision of the Resident Magistrate **MS. NIROSHA KANNANGARA** of Nadi Magistrate's Court dated 14 day of February 2020 in Civil Action No. 165 of 2018.

BETWEEN : **SELVA NADAN** trading as **SELVA TOURS & TRANSFERS** of Malolo, Nadi, Fiji.

APPELLANT

AND : **BUDDY'S TRANSPORT & HIAB TRUCKS PTE LIMITED** a limited liability company having its principle place of business 74 Adelaide Street, Oxley Park, NSW 2760, Sydney, Australia.

RESPONDENT

Appearances : Ms L. Koroitamudu for the appellant
Ms J. Takali with Mr S.F. Koya for the respondent

Date of Hearing : 22 May 2020

Date of Judgment : 26 May 2020

J U D G M E N T

Introduction

[01] This is a timely appeal from a decision of the Nadi Magistrate's Court.

[02] The appellant appeals the decision of 14 February 2020 delivered by the learned Magistrate (*"the Magistrate"*) sitting at Nadi following a formal proof hearing.

[03] At the hearing, both parties made oral submissions.

Background

[04] Buddy's Transport & Hiab Trucks Pte Limited, an Australian Company, the plaintiff/respondent (*"the respondent"*) filed a claim in the Magistrate's Court Nadi, against Selva Nadan trading as Selva Tours & Transfers, a local company the defendant/appellant (*"the appellant"*) for among other things judgment in the sum of \$33,532.00.

[05] The claim which was filed by way of writ of summons endorsed with the statement of claim was served on the appellant by substituted service by publishing the claim in the local newspaper.

[06] On 21 March 2019, when the matter was called the appellant appeared through its solicitor, Mr Chetty who informed the Magistrate that the appellant was willing to settle the matter. As a result, the matter was adjourned to 25 April 2019, for terms of settlement.

[07] The appellant did not file notice of appointment of solicitors and notice to intent to defend since 21 March 2019.

[08] From 25 April 2019, there had been a number of adjournments for various reasons until 6 June 2019.

[09] On 6 June 2019, when this matter was called the appellant defaulted in appearance. This had resulted in fixing the matter for formal proof on 19 September 2019.

[10] On 19 September 2019, the Magistrate heard the evidence presented on behalf of the respondent in the absence of the appellant and delivered her judgment against the appellant as claimed by the respondent.

[11] The appellant appeals that judgment to his court.

Grounds of Appeal

[12] The grounds of appeal are as follows:

1. The Learned Magistrate did not establish that the company was registered in Fiji and as such the issue of jurisdiction and standing was not established.
2. The Learned Magistrate erred in law and in fact in concluding that an attempt to settle means, admission of liability whereas the settlement is always on a without prejudice basis to assist the parties to resolve the dispute between them.
3. The Learned Magistrate erred in proceeding to formal proof when the history of the matter demanded a re-service or issuance of a Notice to attend as all parties were at fault.
4. The hearing was not on merits as the appellant was attempting to resolve the dispute and as such the formal proof hearing was unfair to them and as such caused a miscarriage of justice.
5. The appellant is unaware as to how Australian Dollar became an issue between the parties as he had no knowledge of this and the judgment is unclear and therefore erroneous.
6. The Learned Magistrate did not make a proper finding of proof but merely stated that *“I believe that the plaintiff proved its case”* this is erroneous as the Magistrate was required to find that plaintiff has proved its case on a balance of probabilities.
7. The appellant reserves his right to amend the grounds of appeal upon full disclosure of the transcripts of the proceedings.

Legal framework

[13] Order 30 of the Magistrates Court Rules 1945 (“MCR”) deals with non-appearance of parties at hearing. Rule 3 of that Order provides:

“Of defendant

3 If the plaintiff appears, and the defendant does not appear or sufficiently excuse his or her absence, or neglects to

answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant. [Emphasis provided]

[14] MCR, O 30, R 5 states:

“Setting aside of judgment made in absence of party

5 Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit.”

Discussion

[15] The appellant appeals the judgment of the Magistrate given on the evidence adduced by the respondent in the absence of the appellant.

[16] Undoubtedly, the Magistrate had acted under MCR, O 30, R 3 because the appellant did not appear or sufficiently excuse his absence or answer the claim when the matter was duly called on 06 June 2019. The Magistrate then, having satisfied with the service of the writ of summons through substituted service, fixed the matter for hearing in the absence of the appellant on 19 September 2019. On 19 September 2019, the Magistrate proceeded to hear the case and gave judgment on the evidence adduced by the respondent in the absence of the appellant. The Magistrate’s judgment of 19 September 2019 may be well called a default judgment given under MCR, O 30, R 3.

[17] Basically, the judgment appealed against is a default judgment. Ms Koroitamudu of counsel for the appellant had conceded that the Magistrate’s judgment of 19 September 2019 is a default judgment.

[18] The question then arises whether or not there is a right of appeal against a judgment made in the absence of a party. This issue was raised by the court as a preliminary issue.

[19] MCR, O 30, R 5 clearly states that: *“Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such*

terms as may seem fit." This means there is no right of appeal against a default judgment. Firstly, the party against whom a default judgment is obtained needs to make an application to the court to set aside such judgment.

[20] Since it is a default judgment the appellant has no right of appeal. The appellant should have made an application to court to set aside. Such course of action is still open to the appellant. For that reason alone, I would dismiss the appeal with costs of \$250.00, which is summarily assessed. The file is to be transmitted to the Magistrate's Court, Nadi.

The outcome

1. Appeal dismissed.
2. Appellant shall pay summarily assessed costs of \$250.00 to the respondent.
3. The case record sent back to Magistrate's Court, Nadi.



M. H. Mohamed Ajmeer
26/5/20

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M. H. Mohamed Ajmeer
JUDGE

At Lautoka

26 May 2020

Solicitors:

Anil J Singh Lawyers, Barristers & Solicitors for the appellant

Siddiq Koya Lawyers, Barristers & Solicitors for the respondent