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

**Civil Action No. HBC 25 of 2018**

**BETWEEN** : **CECIL QUAI HOI** an Australian national presently of Korovuto, Nadi, Unemployed.

**Plaintiff**

**A N D** : **THE COMMISSIOR OF POLICE**

**First Defendant**

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

**Second Defendant**

Before : Master U.L. Mohamed Azhar

Counsels: Mr. S. Nand for the Plaintiff
Mr. J. Mainavolau for the 1st & 2nd Defendants

Date of Ruling: 03.12.2021

# RULING

01. The plaintiff took out the summons 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 defendants for default of pleadings. The summons is supported by an affidavit sworn by the plaintiff. The defendants vehemently objected the summons on the basis that, the summons was filed after the defendants had filed the statement of defence. The affidavit in opposition sworn by Director of Legal of Fiji Police Force was filed on behalf of the defendants. The counsel for the plaintiff initially moved to file the affidavit in reply, however later decided not to file and requested the court to fix the summons for hearing.

02. At hearing, the counsel for the plaintiff made lengthy submission on the merit of the matter and even touched the area of summary judgment, even though the summons was filed seeking leave to enter default judgment pursuant to Order 77 rule 6. The counsel for the defendants, on the other hand, confined his submission to the requirement of the

Order 77 rule 6 and submitted that, the plaintiff can only make an application under that rule if the defendants had defaulted in filling of Notice of Intention to Defend and or Statement of Defence. The counsel maintained that, there was no default by the defendants since they had filed the Statement of Defence before the plaintiff took the instant summons. In addition, the counsel submitted that, the plaintiff's action is statute barred. Two issues emerge from the submission of both counsels. First is whether the defendants defaulted in pleadings or not as per the rules of the court? Second is whether the leave can be granted for the plaintiff to enter the default judgment against the defendants?

03. A brief note on the factual background of this matter is necessary to consider the above issues. The plaintiff - an Australian national - was arrested and charged back in 2008 for murder and later in 2010 was acquitted. At the time of his arrest some personal items were allegedly seized from him. After the acquittal, the plaintiff claimed those personal items from office of the first defendant, and his request was allegedly turned down, stating that those items were stolen from the Exhibits Room of first defendant's office. The plaintiff further claimed that, he was unreasonably kept in Fiji for eight years with the expectation that his items would be released. The plaintiff therefore sued the defendants claiming damages for misappropriation of those items and for negligence in processing the release of those personal items and thereby keeping him in Fiji for a period of eight years. The plaintiff calculated his special damages in sum of $ 40,000 for those items. In addition he claimed a sum of AUSD 240,000, being loss of income, a sum of $ 19,200 being rental in Fiji and costs of transportation to and from Police Station in sum of 3,000 together with interest at the rate of 10% from the date of filling the writ.

04. The Acknowledgement of Service was filed on 22.02.2018 and on the same day the Affidavit of Service for the Writ was filed by the solicitors for the plaintiff. Nearly after four months the Statement of Defence of both defendants was filed on 18.06.2018. The current summons was filed on 20.06.2018, two days after the Statement of Defence was filed by the defendants. The summons is clear that, it was filed pursuant to Order 77 rule 6 of the High Court Rules and under inherent jurisdiction of this court. This rule deals with default judgment against the state. It is very common in civil suits that, the default judgments being entered against either party when such party fails to take appropriate steps as required by the Rules or ordered by the court. The default judgment or judgment in default is a judgment entered after hearing or without hearing, against any party for failure to take steps as per the rules of the court, or as directed by the court. The rules of the courts provide for such default which can result in default judgment. The Order 13 and 19 generally deal with the procedure for default judgment in civil suits for default of Notice of Intention to Defend and default of pleadings. They differentiate the procedure depending on the nature of the claim. The procedure to enter the default judgment against the stated is provided in Order 77 rule 6 and it is applicable for both default of Notice of Intention to Defend and default of pleading. it reads:

*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.*

05. This rule in its plain and unambiguous language allows the judgment in default be entered against the state only with the leave of the court. The difference between this rule and the rules under Orders 13 and 19, which deal with default judgment in general, is that, the rules under Orders 13 and 19 require the leave of the court only in certain type of claims. However, this rule (Order 77 rule 6) mandates the leave of the court in all proceedings, including third party proceedings, against the state, irrespective of the nature of claim. The rule evidently sets out the defaults which warrant such course to be taken against the state. It is either the default of Notice of Intention to Defend or default of pleading, like Orders 13 and 19 provide for other proceedings. Accordingly, default of notice of intention to defend or default of pleadings is the condition precedent for a party to seek leave of the court to enter the default judgment against the state in any proceeding. In absence of any such default, no party can invoke the jurisdiction of the court under this rule seeking leave of the court to enter such judgment.

06. In this case, the defendants filed both Notice of Intention to Defend and the Statement of Defence. Admittedly, the plaintiff's solicitors filed the instant summons for default judgment two days after the Statement of Defence was filed by the defendants. The record itself is evident to this and the plaintiff does not deny the same. The solicitors for the defendants therefore argued that, the defendants did not default for the plaintiff to seek the leave of the court as the defendants filed both the notice and defence. The counsel for the plaintiff did not counter this argument, as he seemed to have concurred with it. Instead he was emphasizing on the case authorities which relate to summary judgment.

07. However, the question is what does "default" mean for the purpose of default judgment. In other word, is it **failure to file** the notice of intention to defend and pleadings or **failure to serve** them on the plaintiff? If it means 'failure to file' then, the argument of the counsel for the defendants, in this case, could be accepted as both notice and defence were filed by the defendants, and the plaintiff cannot invoke the jurisdiction of this court under this rule. If not, the plaintiff can invoke the leave of the court to enter the default judgment against the defendants and argument of their counsel should be rejected. The

Orders 13 and 19 deal with the default of notice of intention to defend and pleading respectively. Likewise, the Order 16 rule 5 (1) deals with the default of a Third Party. The provisions under these rules require either **giving** notice of intention to defend or **serving** the pleadings. The obvious purpose is to give an indication that, a defendant is prepared to defend a cause and to give a clear idea about the defences to plaintiff, so that he would be in proper position to take other steps in his cause, according to the rules. Of course, a defendant has to file the notice and defence before serving them on a plaintiff. However, mere filling them without serving within the stipulated time is not sufficient for the purpose of the rule; nor it would prevent a plaintiff from taking steps to seal a default judgment. The rules are plain and clear in conveying this purpose. Accordingly, the default for the purpose of obtaining default judgment means either **failure to give** notice of intention to defend or **failure to serve** the pleadings, and not failure to file them as argued by the counsel for the defendants. The defendants filed the notice of intention to defend and the statement of defence. However, they did not serve them on the plaintiff. There is no affidavit of service for the proof of service on the plaintiff. Neither the plaintiff's counsel acknowledged the service of notice and defence, nor the counsel for the defendant stated that, they had already been served on the plaintiff. As a result, I am unable to accept the argument of the counsel for the defendants and I hold that, the defendants are at default and the plaintiff is entitled to take the summons under Order 77 rule 6 seeking leave of the court to enter the default judgment against them in this case.

08. Though the Order 77 rule 6 mandatorily requires leave of the court to enter the default judgment, there are no criteria which can guide the court in exercising its power. This court had an opportunity in **Tiko v Permanent Secretary for Health** [2019] FJHC 86; HBC237.2016 (14 February 2019) to comparatively analyze other rules, that allow the default judgment or the summary judgment for absence of the defence, with this Order 77 rule 6 to come to a conclusion on a test that may guide the courts in exercising the power under this rule. The same analysis is *mutatis mutandis* applied in this ruling too.

09. 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 give 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.

10. The counsel for the plaintiff placed much reliance on the authorities under Order 14 which deals with the procedure to enter summary judgment. It has, therefore, become necessary to examine whether the standard adopted by the court, when dealing with the applications under Order 14 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, 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 and Order 77 rule clearly exclude the summary judgment being entered against the state.

11. 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. The reason being that, High Court Rules make specific provision under this Order 77 rule 6 to enter the judgment for default in proceedings against the state and other rules, which deal with entering default judgments against ordinary defendants, are excluded in proceedings against the state.

12. The plaintiff claimed that, the defendants failed to return the items seized from him during the investigation after acquittal by the High Court from the charge leveled against him, despite his repeated requests to get them released. The defendants stated in their statement of defence that, the plaintiff has not shown the specific actions taken by him to get his items released. In reply to that defence, the counsel for the plaintiff stated in his submission that, the formal demand was on 12.02.2018 by filling the Writ in this matter. According to that submission, the plaintiff made his formal demand through this Writ only, and it seems that there was no formal demand by the plaintiff. The plaintiff was acquitted on 27.04.2010. The Writ was filed on 12.02.2018 almost after 8 years from

acquittal. If the Wit is to be considered as formal demand as submitted by the counsel, the formal demand was made after 8 years. It is not, at this stage, clear as why the plaintiff took almost eight years to claim his belongings. It requires the evidence at proper trial to ascertain the same.

13. The counsel for the plaintiff cited in his submission several authorities that deal with release of articles and goods seized during criminal investigation after completion of trial. Among them is the decision in **Chick Fashions (West Wales) Ltd v. Jones** (1968) 2 QB 299, in which Lord Diplock held that, the second purpose of seizure of goods in criminal case is to restore them to the rightful owner. There is no doubt that, any article seized during the investigation should be released after being exhibited at the trial. However, what is important is that it should go to its lawful owner. The defendants in their affidavit in opposition claimed that, the plaintiff failed to demonstrate any proof of ownership of those items claimed by him. The plaintiff did not file the affidavit in reply, nor did he dispute the claim by the defendants. The plaintiff neither claimed those items for almost 8 years after his acquittal, nor did he demonstrate his ownership as claimed by the defendants. In these circumstances, the court cannot grant leave to the plaintiff to enter the default judgment against the defendants without proper trial, because the plaintiff's evidence, regarding ownership of those items and delay in demanding them, should be tested in cross examination for the court to determine the issues in this matter.

14. In opposing the summons, the counsel for the defendant submitted that, the plaintiff's claim had already been statute barred pursuant to section 4 of the Limitation Act. The plaintiff's claim is based on negligence of the defendants in processing release of his belongings. The plaintiff was acquitted in 2010 and this action was filed almost after eight years. The plaintiff pleaded that, he had been requesting to release his belongings. In the same pleadings he said that the formal application was made through this Writ. The counsel for the plaintiff cited the decision of Fiji Court of Appeal in **Maloney v Tam** [1997] FJCA 34; Abu0002u.97s (27 August 1997). The Fiji Court of Appeal affirmed the decision of High Court which followed House of Lords' decision in **Stubbings v. Webb** [1993] A.C to come to conclusion that, proviso (i) of section 4 of Limitation Act only applies to actions for personal injuries arising from accidents caused by negligence, nuisance or breach of a duty of care, so that injuries caused by deliberate assaults and similar intentional acts were subject to the general six-year limitation period. It seems that, the counsel was suggesting that, this action does not fall under the proviso (i), but it is subject to general six years limitation. However, the pleading are not clear to compute the time for the purpose of section 4 of the Limitation Act (Cap 35) as correctly pointed by the counsel for the defendants. The counsel for the plaintiff submitted that, the limitation period is to run from the date of formal demand, and the formal demand was made on 12.02.2018 when this Writ was filed on that date. However, it is the question of law to be determined by the court. The court cannot grant leave to enter the default judgment in any case when a legal question of importance and difficulty is to be determined.

15. The counsel for the plaintiff further submitted that, due to the stop departure order on the plaintiff, he could not leave the country, and he blamed the defendants as they unlawfully

an illegally retained him and prevented his departure to Australia. It must be noted that, stop departure orders are made by the courts, when it is necessary to retain an accused, who is a 'flight risk'. It is a judicial order which can only be either imposed or lifted by the court in a given circumstance. Generally, such orders are lifted when a case is concluded. In suh situation, it is the duty of the person against whom an order was made to make an application for lifting the same. In this case, the court asked the counsel for the plaintiff whether he took such steps. However, he could not give an acceptable explanation for the same. In any event, the court cannot grant leave to enter the default judgment on the ground that, the stop departure order is allegedly in force against the plaintiff.

16. The above discussion concludes that, the plaintiff failed to make out a compelling case for the court to grant leave to enter the default judgment against the state in this matter. Given the higher standard to be adopted in applications under Order 77 rule 6, I decide that, this is not a proper case for the court to grant leave under that rule.

17. 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 defendants should serve the notice of intention to defend and the statement of defence on the plaintiff within 14 days from today,

   c. The plaintiff should thereafter file and serve the reply to statement of defence within 14 days from the date of service of statement of defence on him,

   d. The parties to bear their own cost.

**U.L.Mohamed Azhar**
**Master of the High Court**

**At Lautoka**
**03.12.2021**