

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 303 OF 2020

BETWEEN BLUE DE LA MARE

PLAINTIFF

AND RATU TEVITA NAVALUBALAVU aka DAVINA KUNALANGI

DEFENDANT

APPEARANCES : Ms. Swamy for the Plaintiff
Mr. Turuva for the Defendant

DATE OF HEARING : 21st April, 2022

DATE OF DECISION : 7th July, 2022

DECISION

INTRODUCTION

1. There are two Applications pending for decision pursuant to the joint hearing held before me on 21st April 2022. They are namely;
 - i. The SUMMONS dated and filed, by the **Defendant** hereof (**RATU TEVITA NAIVALUBALAVU aka DAVINA KUNALANGI**),on 27th August 2021 seeking following orders;
 - a. An order that the Amended Orders dated 13th April 2021 be wholly set aside;
 - b. An order that the execution of the Amended Orders dated 13th April 2021 be stayed, pending the determination of this setting aside application; and
 - c. Costs of this application.
 - ii. The NOTICE OF MOTION dated and filed on 31st August 2021 by the Plaintiff hereof (**BLUE DE LA MARE**) pursuant to leave being granted on 30th August 2021, by my predecessor Judge, for an Order of Committal against the Defendant (**RATU TEVITA NAIVALUBALAVU aka DAVINA KUNALANGI**) of Lot 17, Muni Ratnam Road, Olosara, Sigatoka, for his contempt of the Orders of the High Court granted on 5th March 2021 as set forth in the Applicant's Statement and Affidavit of **Evette De La Mare** sworn on 17th August 2021 , filed on 27th August 2021 and served with this application.

2. The aforesaid SUMMONS by the Defendant is purported to have been filed pursuant to Order 2, Rules 1 & 2, Order 19, Rule 9 and Order 45, Rule 10 of the High Court Rules.1988 and the inherent jurisdiction of this Court, while the said NOTICE OF MOTION for an Order of Committal has been made under Order 52 of the High Court Rules 1988.
3. Though, both the above applications were heard before me together, for the time being I shall deal with the Defendant's SUMMONS for setting aside the Amended Order dated 13th April 2021, since the application for Committal commenced by the Plaintiff would become redundant and/or futile, in the event the Defendant's SUMMONS for setting aside is to succeed on any ground adduced on his behalf.

BACKGROUND:

4. The Plaintiff by filing her Originating Summons against the Defendant on 11th December 2021 supported by her Affidavit in support sworn on 10th December 2020, moved for the following substantial reliefs, *inter-alia*:
 - a) *An order that the Defendant forthwith to remove or disable the Instagram post , dated 21st June 2019 and any other social media post made in relation to the Plaintiff by the Defendant or by his agents and servants.*
 - b) *An order that the Defendant publish an apology to the Plaintiff on all media platforms, including the local dailies, as may be directed by this Honorable Court.*
 - c) *An order that the Defendants or his agents and servants not to send similar communications to the Plaintiff or encourage any other person to send similar communication to the Plaintiff or to publish against the Plaintiff on any social media.*
 - d) *An order that the Defendant or his agents and servants not to engage in any conduct which is the subject of the complaint.*
5. The Plaintiff also, simultaneously, filed an EX-PARTE SUMMONS seeking similar reliefs by way of injunction order against the Defendant, his agents and servants pursuant to Section 17 and 21 of the Online Safety Act 2018 and Order 29, Rule 1 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
6. The above Summons being supported Ex-parte on 11th December 2020 for injunctive reliefs, Orders in terms of summons were granted by the then presiding judge for same to be in force until the determination of the originating summons.
7. The Orders were duly served on the Defendant, who in response appeared in person on 19th February 2021. At this juncture, the Counsel for the Plaintiff informed the Court that as the Defendant had complied with the restraining orders, matter could be sorted out if compensation is paid to the Plaintiff, in response to which the Defendant informed the Court that he is unemployed, thus he cannot pay compensation.
8. Accordingly, the Court made its Order as follows;

“The defendant gave an undertaking to be abided by the orders made by the court on 11/12/2020. The remaining issue is the monetary compensation. (Mrs) J. Raman of Legal Aid undertook to assist the Court as a duty Solicitor and to explore the possibilities of a settlement. Mention- 05/03/2021 to explore the possibility of a settlement”

9. Thereafter, when the matter was mentioned before the same judge on 05th March 2021, with due representation of the Defendant by Mrs. J. Raman, from the Legal Aid , on being informed by Mrs. Raman that her client is willing to comply with orders (a), (b), (c) and (d) in the Originating Summons filed on 11/12/2020, but without paying Monetary Compensation, learned Counsel for the Plaintiff responded by saying that they are willing to withdraw the claim for monetary compensation , but seek costs of \$ 5,000.00, on which the Court instantly made the following orders.

“Orders.

I grant order in terms of prayer (a), (b), (c) and (d) of the Originating Summons filed on 11/12/2020, by consent.

The defendant is ordered to pay a cost of \$ 1,000.00 (summarily assessed) to the plaintiff within 14 hereof.

Proceedings concluded”.

10. After the sealed amended order dated 13th April 2021 was, reportedly, served on the Defendant on 29th June 2021, coincidentally, on 27th August 2021 @ 11.30 am the Defendant filed his purported SUMMONS for setting aside the consent Order, supported by his Affidavit , while the Plaintiff too @ 12.10 pm on the same day filed her Ex-parte Application for Leave to issue Committal proceedings against the Defendant, on which leave was granted by my predecessor on 30th August 2021, subsequent to which Notice Of Motion for an Order of Committal on behalf of the Plaintiff was filed on 31st August, 2021.
11. Thereafter, Affidavit in response, to the Affidavit in support by the Defendant for his setting aside application, was filed on 16.09 2021 by the Plaintiff’s Mother **Evette De La Mare**, for which the Defendant did not file any affidavit in reply. This ruling is confined only to the Defendant’s aforesaid setting aside application.

ANALYSIS:

12. Undisputedly, the impugned order sought to be set aside is a consent Order. Hence, my analysis hereof is subject to the settled law in this jurisdiction on this subject. The Defendant purported to have filed his Summons pursuant to Order 2, Rules 1 & 2, Order 19, Rule 9 and Order 45, Rule 10 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
- i. It is needless to mention that Order 2 Rule 1&2 of the High Court Rule 1988 is not meant for an instance of this nature. Hence the Defendant cannot rely on it.

- ii. Order 19 Rule 9 comes into play when an application is made to set aside a **default judgment**. The order sought to be set aside hereof is not a default judgment or order. I am of the opinion that a consent order, as entered in this case, cannot be set aside on an application by resorting to Order 19 Rule 9.
 - iii. The next order & rule relied upon by the Defendant is Order 45 Rule 10, which will have its application is for the stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of judgment or order Hence, the above Orders and Rules relied upon by the Defendant will not come in for his aid.
13. A consent judgment/ order is final decision of the Court for all purposes. A consent judgment or order, which is a final decision, may be set aside on the ground of **fraud or mistake**. In order to set aside a consent judgment or order on that ground a fresh action would be required (*see de Lasala v de Lasala [1980] AC 546 at 561*).
14. The Order entered in this action on 05th March 2021 is a consent Order and with this proceedings have been concluded. The consent Order entered in this action would not be set aside on an application of this nature, without any grounds applicable for the setting aside of a consent judgment or order.
15. The legal principles governing the varying and setting aside consent orders are laid down in the following judicial decisions.
- i. *In Kinch v Walcott, [1929] AC 482 Lord Blane burgh at p.493 declared:*
"an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal".
 - ii. *Gates J (as he then was) in Kelly v Fiji Development Bank, [2004] FJHC 526* cited Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, (3rd Edit) at p.39 as follows:
"Judgments, orders and awards, by consent are as efficacious and those pronounced after a contest in creating cause of action estoppels and effecting a merger of the causes of action sued on"
 - iii. *Basnayake JA in Jai Dhir Singh v Jubilee Juice Distributors (Fiji) Ltd, Civil Appeal No: ABU 0038 of 2012* said :
"A court has no power to vary a consent judgment or order made previously in that court. Where it appears that the order embodies the conclusion of negotiations between the parties, the court will give effect to it where one party is in breach and will not vary it....."
 - iv. On appeal the Supreme Court in *Jubilee Juice Distributors v Jai Dhir Singh, Civil Petition No. CBV 0006 of 2014* stated : *"A judgment by consent is just as effective by way of estoppel as a judgment whereby the Court exercises its mind in a contested case (vide: Re South American & Mexican Co 1985 (1) Ch 37 at 50).*

Upon a compromise being effected, the right of action upon the original claim is lost. Any action thereafter must be on the compromise and not upon the original claim"

16. In arriving at this ruling, I have considered all the submissions made by the parties in relation to this application. The law in this jurisdiction on this issue has been settled by plethora of case law authorities as cited above and below. Consent judgment is capable of being set aside, but once it is passed and entered, it requires a fresh action to be

brought for that purpose of setting aside. A consent order cannot be set aside by application in the same action. A fresh action has to be instituted for that purpose. (See *State Transport Ltd v The Housing Authority [1989] 35 FLR 13*).

17. A consent judgment is a final judgment of the court for all purpose and it may be set aside on the ground of fraud or mistake. (See *Atish Kumar Sen v Sen Brothers Transport Company Civil Action No. HBC 154 of 2013 (29 March 2019)*)
18. In this case, the Order by consent was entered on 05th March 2021, sealed 13th April 2021 and served on 27th June 201. The Defendant made the instant application on 27th August 2021. However, a fresh action is required. It is also to be noted that the Defendant has failed to show that there are elements of **fraud or mistake** involved that led to the issue of the consent judgment. On 05th March 2021 the Defendant through his Counsel has informed the court that he is willing to comply with the Orders (a), (b),(c) and (d). Even to set aside the impugned order for Costs of \$1,000.00, which term was not apparently consented, it requires a fresh action or an appeal as discussed above.

FINAL ORDERS

19. I find the Defendant’s application is misconceived. Accordingly,
 - a) The Defendant’s Summons filed on 27th August 2021, for setting aside the consent order made on 5th March 2021 and sealed on 13th April 2021, is hereby dismissed.
 - b) The Defendant is ordered to pay the Plaintiff \$ 750.00, being the summarily assessed costs within 14 days.
 - c) The application for Committal against the Defendant will proceed.



A.M. Mohammed Mackie
Judge

At High Court Lautoka this 7th day of July, 2022

SOLICITORS:

For the Applicant: Messrs Patel & Sharma

For the Defendants: Turuva Legal