

**IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION**

Civil Action No. 222 of 2021

BETWEEN : SHARANJIT KAUR SINDHU also known as SHARAN SINDHU also known as SHARAN LATEEF also known as SHARANJIT KAUR LATEEF of 19 Sheoak Street, Middle Park QLD 4074, Australia, Accountant as Administratrix and Trustee of the Estate of Rexina Shireen Lateef

PLAINTIFF/RESPONDENT

AND : SHAZRAN ABDUL LATEEF also known as CAESAR LATEEF of Lot 5 Albert Lee Place, Suva, Former Lawyer

DEFENDANT/APPLICANT

Counsel: Plaintiff: Mr. R. Singh
Defendant: Mr. G. O'Driscoll

Date of Hearing: 21.8.2023
Date of Judgment: 05.10.2023

JUDGMENT

INTRODUCTION

1. Defendant filed this summons on 27.6.2023, after an earlier irregular summons was struck off. The summons in its heading states 'leave to appeal out of time, leave to appeal and interim stay'. Defendant seeks leave of the court to appeal from an interim order of Master refusing to set aside judgment entered by default of statement of defence after acknowledgment of service by Defendant on 31.12.2021.
2. Statement of claim is pursuant to a Settlement Deed (the Deed) entered between Plaintiff and Defendant to repay a debt incurred while administering it, to the estate of Rexina Shireen Lateef (the Estate) by 30.6.2020. This debt was demanded but not paid and claim seeks orders from the court in terms of the Deed, for three payments.

3. After acknowledgement of service Defendant did not file statement of defence and default judgment entered accordingly.
4. Defendant had filed an application for set aside the default judgment on 26.01.2022 and this was refused on 22.8.2022.
5. The proposed statement of defence was annexed to initial application of the Defendant to Master and there are no merits and in defence and doomed to fail. Master was correct in refusal to set aside default judgment entered.
6. There are no grounds to extend the time for leave to appeal and or to grant leave to appeal against Master's order.

FACTS

7. On 27.6.2023, Defendant, filed a summons seeking:

'leave to appeal out of time and leave to appeal against the Ex Tempore Judgment of the Master pronounced on 22 August 2022 and purportedly with written reasons dated 25 August 2022 and thereafter filed on 13 September 2022 and sealed on 14 September 2022 refusing to set aside the Default Judgment and that an interim stay on further proceedings related to the said Default Judgment be granted on such terms as this Honourable Court may direct together with costs.'

8. Plaintiff is the executrix of the Estate.
9. Defendant was the former executor and trustee of the Estate. He was removed by order of the court on 11.9.2019 and Plaintiff obtained Probate for the Estate on 15.9.2021
10. At the time of removal of Defendant as the trustee of the Estate, a Deed of Settlement (The Deed) dated 11.9.2019 Defendant agreed and signed the it which inter alia stated:
 - a. Defendant had incurred a 'Debt' which comprised in the schedule to the Deed as:
 - i. US\$448,255.35;
 - ii. AU\$33,079.44; and

iii. FJ\$1,026,789.60

Any further sum in Recital....'

The Deed further stated;

- b. 'The Defendant acknowledges that he has withdrawn the Debt and he will now repay the Debt to the said Estate in proportion to the currencies in which they were held on the Estate 's behalf at the time to the withdrawal by him as provided in the schedule hereto.'
 - c. 'The Defendant shall repay to the said Estate no later than 30.6.2020.....
- 11. Defendant had undertaken to pay the "Debt" as stated in three denominations for specific amounts by 30.6.2020 and failure to do so had resulted this action seeking a liquidated amount as agreed 'Debt'.
 - 12. In the proposed statement of defense filed Defendant admits the Deed and his signature was witnessed by a senior solicitor S.Parshotam.
 - 13. Following facts of this court proceedings are important:
 - (a) on 1.11. 2021, the Respondent filed the Writ of Summons and Statement of Claim for liquidated sum in terms of the Deed.
 - (b) Defendant was served on 22.11. 2021 and acknowledgment of service was filed on 15.12.2021. No statement of defence filed.
 - (c) The Default Judgment was sealed on 5 .1. 2022
 - (d) 26.1.2022 Defendant filed an application to set aside default judgment.
 - (e) On 1 .2. 2022, Defendant served the solicitors, with a notice motion and his affidavit to set aside the Default Judgement
 - (f) On 4.3. 2022, Plaintiff filed an affidavit in answer to the setting-aside Application.
 - (g) 22.8. 2022, after hearing both parties, the Master dismissed the 'Notice of Motion to set Aside Default Judgment' and summarily assessed costs in the sum of \$1,000 to be paid by Defendant.
 - (h) on 14 .9. 2022, the Order of the Master was sealed.

- (i) Summons for leave to appeal out of time and stay filed 27.6.2023 after a previous summons filed on 9.6.2023 was struck off for irregularity.

ANALYSIS

14. Both parties filed written submissions after hearing and relevant submissions are dealt in analysis.
15. Order of Master refusing to set aside default judgment according to written submissions filed by Defendant is a final order hence no leave is required.
16. I do not wish to deal this issue at length. It is an interlocutory decision and that required leave of the court. In Goundar v Minister for Health [2008] FJCA 40 Court of Appeal stated.

“37. This is the position. Where proceedings are commenced in the High Court in the Court’s original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:

1. an application to stay proceedings;
2. an application to strike out a pleading;
3. an application for an extension of time in which to commence proceedings;
4. an application for leave to appeal;
5. the refusal of an application to set aside a default judgment;
6. an application for leave to apply for judicial review.”

17. So the refusal of set aside default judgment of Master was an interlocutory decision and the contention of Defendant refused.
18. Order 59, Rule 11 of the HCR states:

“Application for leave to appeal (O 59, R 11)

11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of delivery of the order or judgment.”

19. Defendant had failed to seek leave of this court within 14 day time period. Hence this application seeking leave to appeal out of time, which is in other word extension of time for leave to appeal and leave to appeal, taken together.

20. Defendant had not sought extension of time specifically in the summons, but I do not consider that as fatal error to dismiss this application without considering merits. This is considering inordinate delay and inconvenience to parties if merits are not determined.

21. Order 3 rule 4 of the High Court Rules of 1988 states as follow;

'4(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceeding'. (emphasis added)

22. Accordingly, time period for leave to appeal can be extended exercising the discretion of the court.

23. In Totis Inc Spor (Fiji) Limited v John Leonard Clark & Anor FCA No. 35 of 1996 the court held at pages 15-16:

"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principles by principles by granting leave only in the most exceptional circumstances."

24. In Sundar v Prasad [1997] FJCA 39, the Court of Appeal highlighted the principles governing an application for leave to appeal out of time. The Court of Appeal held at page 6:

"The factors that are normally taken into account when dealing with an application for leave to appeal out of time are --

(a) the length of the delay;

(b) the reason for the delay;

(c) the degree of prejudice to the Respondent if the application is granted; and

(d) the prospect of the intended appeal succeeding if the application is granted."

25. The Application was filed more than 10 months after the Master's Decision was made. This is not determinative though the delay is inordinate. Court is mindful that there should be end to litigation and finality of decision is an important factor to be considered.
26. According to Plaintiff, the delay was because:
- (a) he was not provided any written ruling "*with reasons as to why the setting aside application was refused by the learned Master*";
27. The explanation given by Defendant for the 10 month long delay is not acceptable. Even if I am wrong on that this is not determinative of this application hence other factors considered.
28. The paramount consideration in granting leave to appeal out of time is the prospect of success of the proposed appeal.
29. Defendant's main grounds of appeal are that:
- (a) the Default Judgment was irregular; and
- (b) the Applicant has a "*valid case*" to defend the Claim on merits.
30. Both grounds are not meritorious for the reasons given.
31. According to submissions of the Defendant alleged irregularity was that the claim of Plaintiff was not liquidated hence no judgment on default could be entered.
32. Statement of claim was based on the Deed and sums specifically stated in the Deed, which was attested by solicitors. Plaintiff admit entering in to the Deed as settlement of an action against him regarding his function as executor and trustee and use of funds belong to the Estate. Defendant had agreed to return the said amounts stated in the Deed, which was the basis of statement of claim and judgment entered by default.
33. Supreme Court Practice (UK) 1988 , p 114 13/1/11 state
Liquidated demand.

'judgment in default may be signed hereunder if the claim indorsed be for a stated sum of **money alleged to be due from defendant** to plaintiff, the claim not being in the nature of damages'(emphasis added)

Further at p 36, 6/2/7

'Liquidated damages and penalty- Where a sum of money is stipulated as being payable by way of damage in the event of a breach

of contract, and that sum represents a genuine pre-estimate of the damage which would probably have arisen from such breach, it is treated as 'liquidated damages' and become for the purpose of this Rule a liquidated demand'

34. Accordingly statement of claim was based on the Deed where in the Schedule specified the three amounts Defendant consented to pay before 30.6.2020, but yet to be fulfilled.

35. In Supreme Court Practice (UK) (1988) p332 ,19/2/2 state

'Failure to serve a defence

If the defendant makes default in serving defence, **all the allegations in the statement of claim are admitted** (*Crib v Freyberger* [1919] W.N. 22, C.A.)' (Emphasis added)

36. Defendant had admittedly failed to file the stamen of defence, to the statement of claim based on the Deed. Said three specific debts are liquidated hence the claim was for only a liquidated sum, This was the basis of Default Judgment for the three specific Debts.

37. In Supreme Court Practice (UK) (1988) p 332 ,19/2/1/

'Effect of rule –

...the plaintiff may enter final judgment against the defendant who is in default of serving his defence for the amount claimed and costs without application to or leave of the Court and he can enter interlocutory judgment for interest to be assessed.'

38. Plaintiff submitted that it was never disputed that the judgment was irregular before Master. Master had held that judgment was regular. There was no evidence of that issue being raised before Master.

39. In submissions of the Defendant state the '**debt was somewhat unliquidated**'. This is the irregularity that is stated in the written submissions. I reject this contention due to definition of liquidated claim and position of the said claim in the absence of statement of defence which was discussed above. The debt stated in the statement of claim based on the Deed, is liquidated hence final judgment can be entered for said sum and for cost.

40. Defendant also had raised issues as to the date of the default judgment which is not material irregularity to set aside it.

41. Supreme Court Rules (1999) p 361 19/2/3 stated

“But an error in entering judgment arising from an accidental slip or omission may be corrected (*Armitage v Parsons* [1908] 2 K.B. 410. CA).

42. Such an error can be corrected by the same court that made the error or slip by making appropriate application and setting aside of default judgment for such an error is not required and waste of time of the court and parties due to obvious reasons which I have dealt in *Ariya Pratindhi Sabha of Fiji v Trustees of Bula Fiji Tourism Exchange* [2018] FJHC 393.

43. In *Bank of Credit and Commerce International(Overseas) Ltd v Habib Bank Ltd* [1998] 4 All ER 753 held,

“... Even though there were irregularities in the writ or the judgment or both, the substantive content of the judgment is right, the court will not set the judgment aside. The only effect if it did would be to put the parties to further expense and delay to reach a regular judgment for the same amount.

Further, it is the same in principle if the court is satisfied from the affidavits and exhibits that, although the amount in the default judgment was wrong, it (the court) knows what the correct amount was. The court will not set the incorrect judgment aside and made the plaintiff start again. It will vary the judgment to the correct amount.”

44. In the circumstances Defendant had not shown any irregularity to set aside the judgment to justify Plaintiff to start from beginning. If the Defendant is allowed to file the proposed statement of defence it will only result in Plaintiff obtaining the judgment for the amounts Defendant had agreed to pay in terms of the Deed by way of summary judgment or any other similar order. This only adds to delay to frustrate Plaintiff.

45. Since the leave to appeal outside the time period is struck off, the application for stay cannot be considered in isolation, hence struck off.

46. As the Defendant had not shown meritorious grounds of appeal in the proposed grounds of appeal annexed to the affidavit in support of this application. I do not wish to deal with each ground of appeal in detail but dealt briefly belows

Ground I - there was no right of appeal against interlocutory decision.

Ground II. - This is not a ground of appeal to set aside default judgment.

Ground III. - Master had considered correct provision of law in copy record provided in the ex-tempore ruling.

Ground IV - Master had exercised discretion correctly.

Ground V - there is no equitable claim in the proposed defence.

Ground VI - the defence of disadvantage position was not a reason to set aside judgment on default due to nature and circumstances of the Deed and need to reimburse admitted funds taken from the Estate.

Ground VII- Plaintiff has the status to institute this action.

Ground VIII- Not relevant Agreed sums in the Deed, are liquidated sums.

Ground IX- Defendant in paragraph 3 of the affidavit in support of the application for set aside default judgment stated that he had contacted Mr Naidu the solicitor for the Plaintiff for a meeting and upon refusal in paragraph 4 he stated that he had requested more time. This shows Defendant was aware of time period which is contrary to present position.

Ground X- not an appeal ground.

47. There is a prejudice to the Estate if funds are not reimbursed by Defendant.

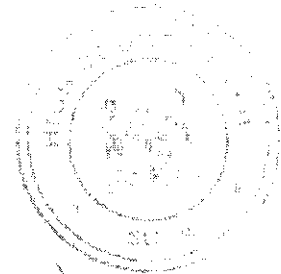
CONCLUSION

48. The claim of Plaintiff is based on the Deed. It was a settlement Plaintiff and Defendant entered when Defendant was removed as trustee of the Estate. Defendant had agreed to pay the amounts stated in the Deed before 30.6.2020 and more than three years had lapsed from that. Due process of law cannot be abused to frustrate a liquidated claim for the said amounts that is yet to be settled by Defendant. The claim of Plaintiff was liquidated and Defendant was not able to show irregularity of the judgment that required setting aside of it so as to start again. Accordingly application for leave to appeal out of time is struck off. Cost of this application is summarily assessed at \$2,000 to be paid within 28 days.

FINAL ORDER

1. Summons seeking leave to appeal out of time and stay is struck off.
2. Cost of this application is assessed summarily at \$2,000.

Dated at Suva this 05th day of October, 2023.



[Signature]
Justice Deepthi Amaratunga
High Court, Suva