

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. **HBC 368** of 2023

BETWEEN : HOME FINANCE COMPANY PTE LIMITED trading as **HFC BANK** a duly incorporated Company having its registered office at 371 Victoria Parade, Suva, Fiji.

PLAINTIFF

AND : GIANT WHALE PROPERTY PTE LTD a limited liability Company having its registered office at Lot 1, Atoll Place, Pacific Harbour, Viti Levu.

1ST DEFENDANT

AND : MA LI of 301 Princess Road, Tamavua.

2ND DEFENDANT

AND : GIANT WHALE ENTERTAINMENT (FIJI) PTE LIMITED a limited liability Company having its registered office at Giant Whale Restaurant, Rona Street Walubay, Suva, Viti Levu.

3RD DEFENDANT

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Lajendra N. for the Plaintiff

Mr. Leweniqila S. for the Defendants

DATE OF JUDGMENT: 27th March, 2025

JUDGMENT

[Setting aside of Default Judgment]

A. Introduction

1. The Defendant filed a Summons to set aside Default Judgment coupled with an Affidavit in Support of Elena Magitilevu and sought for the following orders:
 - a. An order that the Default Judgment entered against the Defendant by the Plaintiff on the 26th day of February 2024 be wholly set aside;
 - b. An order that the Defendant's be allowed to file Statement of Defence and the matter to take its normal course thereafter.
 - c. Such further orders this Honourable Court deems just and equitable.
2. The application is made pursuant to **Order 19 Rule 9 of the High Court Rules, 1988**.
3. Both parties to the proceedings furnished Court with their written submissions.

Defendants Contention

4. Seek an order to set aside default judgment.
5. On 13 December 2023, Writ of Summons and an Inter Parte Summons with an affidavit was filed seeking for extension of caveat.
6. Interim extension of caveat no. 989182 registered over the Certificate of Title No. 18819 was granted by consent.
7. The Defendants solicitors have prepared the draft statement of Defence which clearly shows there are substantial defence to be tried by the Honourable Court.
8. The issues raised in the Defence can only be determined via trial on merits with viva voce evidence.
9. Default Judgment was entered on 26 February 2024.
10. There has not been excessive and undue delay on the Defendants to apply to set aside the Default Judgment.
11. The Plaintiff will not be seriously prejudiced if setting aside default judgement is heard on merits since Defendants have substantial defence.
12. The Plaintiff will not suffer prejudice and irreparable harm.

Plaintiff's Contention

13. The First, second and third defendants were served with both the substantive Writ of Summons and the Inter-parte notice of motion together with the affidavit in support.

14. The Bank (Plaintiff) has received legal advice and verily believe that the Defendants do not have a meritorious defence. The proposed Statement of Defence does not outline any defence and is nothing but a sham.
15. After the Plaintiff obtained the Default Judgment, it has proceeded to enforce the same through an application for registration of a charge in respect of certificate of Title No. 18819. It was only when this application was served onto the Defendants that they proceeded to file the application for the setting aside of the Default Judgment.
16. The Bank will incur unnecessary legal expenses if matter proceeds to trial.
17. It will unnecessarily delay the inevitable that is Bank succeeding against the Defendants as per its claim.

Determination

18. On 18th December 2023, the First and second Defendants were served with the Plaintiff's Writ of Summons coupled with the Inter-Parte Summons and an affidavit in support, all filed on 13th December 2023.
19. The third Defendant was served with the above applications on 19th December 2023.
20. Counsel Ms. Tikoisua N. represented the first, second and third defendants on 20th December 2023.
21. The applications were adjourned to 24th January 2024, where the Defendants and their counsel representing failed to appear before the Court.
22. On 14th February 2024, the Plaintiff filed a Praecipe, search and a default Judgment.
23. Default Judgement sought for the following orders:
 - a) Judgment against the Defendants jointly and severally for the sum of \$788,811.45 (Seven Hundred Eighty Eight Thousand Eight Hundred Eleven Dollars and Forty Five Cents);
 - b) Interest on the Judgment sum computed from 13 December 2023 until full payment at the rate of 8.95% per annum; and
 - c) Costs of this action.

The Order was sealed by the Chief Registrar of the High Court on 26th February 2024.

24. The Defendants now seek for setting aside of the Default Judgment pursuant to *Order 19 Rule 9 of the High Court Rules 1988* which provides:

9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

25. The Court notes that in absence of any notice of intention to defend and Statement of Defence filed by the Defendants that the Plaintiff after a lapse of about 2 months proceeded to obtain Default Judgment against the Defendants.
26. It is requirement under the *High Court Rules, 1988 pursuant to Order 18 Rule 1 (O.18, r.1)* that after service of the writ but before the expiration of 14 days after that defendant(s) gives notice to defend. And if any notice to defend is filed or not, then the Defendants are required to file/serve a statement of Defence within 14 days thereafter (O.18, r.2) refers.
27. The Defendants failed to file any Notice of Intention to Defend leave alone the Statement of Defence and the Plaintiff proceeded to seek for Default Judgment.
28. The Default Judgement granted on 26th February 2024 is a **regular Judgment since the Defendants did not comply with order 12 rule 4 (a) which deals with time limited for acknowledgment of service.**
29. However, the Defendant submitted that the Default Judgement obtained is irregular. Relevance is placed by the Defendants on **Order 13 rule 1 (2)** of the High Court Rules, 1988 which states that if the **interest occurring** after the date of the Writ at an **unspecified** rate shall compute interest at rate of 5% from date of the writ to the date of entering the Judgment.
30. The writ filed the Plaintiff does not have an **unspecified interest** rate rather clarifies the **interest rate of 8.95%** per annum.
31. The Defendant Statement of Defence of the Defendants are not in fact **challenging he interest rate**, therefore as raised by the Defendants, *Order 13 rule 2* of the High Court Rules does not apply.
32. The Plaintiff raised a preliminary objection citing two (2) irregularities:
 - This is a Contentious writ matter.
 - Law Clerks should not depose and file affidavits. However, the affidavit in support in the current application is filed by Elena Magitilevu, a legal clerk in employment with Toganivalu legal.
 - Order 41 rule 5 states **"...affidavits may contain only such facts as the deponent is able of his own knowledge to prove."**
 - At paragraphs 9 and 10 of the affidavit, the Respondent states "that the Defendants solicitors have prepared the draft statement of defence which clearly shows that there are substantial defences to be tried- the question that arises is whether she is a legal person and/or legally qualified to depose this affidavit?"
 - Paragraph 10 states 'she verily believes and has been informed that the issues raised in the Defence can only be appropriately determined via trial and decision made on merits? She deponent only believed and has been informed and not deposing that she has knowledge.
 - The Courts have repeatedly reminded the litigants alike that in such contentious matters, it is not correct for the law clerk to depose affidavits.
 - Further, the deponent has not annexed the authority within her affidavit when she deposed that she is duty authorized to make the affidavit.

33. Base on the above two (2) irregularities concerning the founding affidavit if Elena Magitilevu, when;
- Firstly - it is a contentious matters, and
 - Secondly - there is no authorization annexed within the affidavit which the deponent has deposed.
- It is a defective affidavit per se as a result of which the Summons remains unsupported with any material and therefore fails.
34. The affidavit by Elena Magitilevu was irregular in itself, in as much as the deponent was not a person who could swear positively to the facts and verify the Cause of action and the amount claimed and her affidavit was only made on information and belief.
35. Accordingly the affidavit in support deposed by Elena Magitilevu is defective and is expunged from the records.
36. When there is no affidavit in support the summons seeking for setting aside of default judgement fails.

Grounds for setting aside default judgment

37. I reiterate that the default judgement herein was entered regularly. Why? The defendants after service of the writ of summons failed to file any notice of intention to defend and or an acknowledgment, leave aside failing to file/serve a statement of defence thereafter, the High Court Rules by the Defendant have not been honored.
38. For a Regular Default Judgment to be set aside, the Court must exercise its discretion.
39. The Grounds for setting aside has been summarized in the case of **Coral Sun Ltd v Aubrey Whippy** Civil Action No. HBC 006 of 2009 as follows:

"A defendant applying to set aside a default judgment must satisfy the following in order to succeed:

- a. *a meritorious defence which has a real prospect of success and carry some degree of conviction. It must have a realistic as opposed to a fanciful prospect of success. A supporting affidavit disclosing the condescending particulars of a meritorious defence is mandatory: **Wearsmart Textile Limited v General Machinery Hire Limited and Anor** Civil Appeal No. ABU 0030/1997.*
- b. *some explanation as to why the default judgment was allowed: **Evans and Bartlam** [\[1937 2 All ER 646\]](#).*
 - (i) *some explanation for the delay in making an application to set aside: **Pankanj Bamola & Anor v Moran Ali** Court of Appeal Civil Appeal No. 50/90.*
 - (ii) *that the Plaintiff will not be prejudiced that may be caused to the Plaintiff as a consequence of setting aside the default judgment **Shiri Dutt v FNP** (1988) 34 FLR67."*

40. Therefore it is mandatory for the defendant to have a support affidavit clearly showing that she has a real prospect of success and the defence must carry some degree of conviction. Further in the case of **Ganesh Chand v Pushp Chand**, Civil Action No. HBC 02 of 2011, the Honourable Master Amaratunga (as he was then) quoted the case of **Alpine Bulk Transport. Co v Saudi Shipping Co Inc (1986) 2 Lloyd's Rep, 221**;

"(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."

41. In **Charan Jeath Singh v Sukha Singh**, supra, the Honourable Master Amaratunga (as he was then) sighted the Supreme Court Practice 1997 (Volume 1) page 145, as follows:

*"Regular judgment - if the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason, "per Huddleston B *ibid.* p. 129 approving Hopton v Robertson [1884] 8. T.L.R. 445, and Watt v Barnett (1978) 3 Q.B.D. 1983, p 363)."*

42. The Affidavit in Support of the Defendants does not contain any evidence or state facts that will show a defence on merit. Further, the proposed Statement of Defence annexed to the Affidavit in support does not disclose any defence at all leave aside one which demonstrates a real likelihood that the Defendants have a realistic prospect of success. It is mandatory for the Defendants to have a supporting affidavit disclosing meritorious defence. The Defendants have failed to include the same in their Affidavit in Support.
43. First Defence that Former solicitors of second defendant and bank officer forced second defendant to sign the loan agreement.
44. The other defence which the second defendant had put forward is that out of \$600,000 which was loan amount and purchase price, he did not receive anything back from his solicitors.
45. Above prospective defences raised by the defendants is nothing but a sham defence.

Prejudice to the Plaintiff

46. The Plaintiff informed Court that it is costing the Bank substantially in terms of legal fees.
47. The Plaintiff will be relieved from having to prove a claim which has no real defence and thereby save considerable costs, Resources and time.

48. The Defendants on the other hand will also be relieved from further costs and disappointment.

In Conclusion

49. Interlocutory default judgement was entered jointly and severally against the Defendants on 26 February 2024.
50. Interest on the Judgment sum computed from 13 December 2023 until full payment at the rate of 8.95% per annum.
51. There are two (2) irregularities:
- Firstly - this being a contentious matters and the affidavit in support and her affidavit is based on information, belief and part if the facts.
 - Secondly - the affidavit states that she has been duly authorized. However, he fail to annex any authoritative in her affidavit in support.
52. The founding affidavit in support therefore is defective and doom to fail.
53. The summons seeking to set aside the interlocutory default judgment is hereby dismissed in its entirety.

Costs

54. The Defendants to pay the Plaintiff a summarily assessed cost of \$2,000 within 14 days timeframe.

Orders

- (i) The Defendants Summons seeking to set aside the interlocutory default judgment of 26th February 2024 is dismissed in its entirety.
- (ii) The Defendants to pay the Plaintiff a summarily assessed costs of \$2,000 within 14 days timeframe.

Dated at Suva this 27th day of March ,2025.



VISHWA DATT SHARMA
PUISNE JUDGE

cc. Toganivalu Legal, Suva
Lajendra Lawyers, Suva.