IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 184 of 2020

BETWEEN:

CARPENTERS PROPERTIES PTE LIMITED
PLAINTIFF

AND:

AMAN AVIKASH CHANDRA t/a GOPINATH THE PURE VEGE HOUSE
1ST DEFENDANT

AND:

TARLOCHAN SINGH
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
Patel Sharma Lawyers for the Plaintiff
Neel Shivam Lawyers for the First Defendant

Date of Hearing:
By way of Written Submissions

Date of Ruling:
08th April 2025

RULING

01. The current application before this Court is for setting aside the Default Judgment entered against the 1st Defendant on 25/01/2022. This application has been made by way of a Notice of Motion and Supporting Affidavit filed on 01/12/2022.

02. The history of the proceedings reveals that the Plaintiff has filed its initial Writ of Summons and the Statement of Claim on 26/06/2020 and an Amended Writ and Statement of Claim on 08/01/2021. The claim is for a recovery of unpaid rent owed to the Plaintiff by the 1st Defendant.

03. It is alleged that the 1st Defendant had entered into a lease agreement with the Plaintiff to rent a portion of the property of the Plaintiff, a commercial building complex, namely, MH City Centre. The lease agreement had been executed on 05/09/2016 between the Plaintiff and the 1st Defendant and the 2nd Defendant being the guarantor for the 1st Defendant.

04. The Plaintiff alleges that the 1st Defendant had defaulted the agreed rental payments for the period from November 2018 to November 2019 to a total sum of $ 132663.07 inclusive of interests. The Plaintiff had then resorted to auctioning the items of the 1st Defendant pursuant to the Distress for Rent Act, and after the adjustments made for the costs of the auction and the amount recovered through the auction, the 1st Defendant is at default of a total sum of $ 132619.07.

05. On 17/03/2021, the Plaintiff filed an Ex-Parte Notice of Motion supported with an Affidavit of Koro Vuli-Muritamana Tuitubou, for Leave to Effect Substituted Service of the Amended Writ and the Statement of Claim on the 1st Defendant. This application had been granted by the previous Master of the Court on 22/03/2021.

06. Following the leave granted by the Court, the Plaintiff had duly served the Amended Writ and the Statement of Claim on the 1st Defendant, by way of an advertisement published in the local daily newspaper, 'Fiji Sun', dated 23/04/2021 and the Affidavit of Service to this effect has been filed on the 18/01/2022.

07. The 1st Defendant failed to file an Acknowledgment of Service and/or a Statement of Defence within the stipulated time as per the High Court Rules and the Plaintiff accordingly entered a judgment against the 1st Defendant by default on 25/01/2022 for a sum of $ 132619.07 along with interest at 13.5 % per annum on the judgment sum, until full payment.

08. The 1st Defendant on 01/12/2022, filed the current Notice of Motion and the Affidavit in Support, to set aside the Default Judgment.

09. The 1st Defendant, Aman Avikash Chandra, in the Supporting Affidavit, has disputed the service of the Amended Writ and the Statement of Claim on him and has stated that he was at all material times residing at 19, 8 Miles, Makoi, Suva and that he does not agree with the contents of Affidavit of Koro Vuli-Muritamana Tuitubou, that was filed in support of the Ex-parte Summons for Leave to Effect Substitute Service. He has also claimed that he is of the belief that the *'Plaintiff without any attempts to effect personal service of the court documents on me, sought leave to carry out substituted service which was prejudicial towards me'*[1].

10. The 1st Defendant has also submitted that he had always lived at the given residential address at 19, 8 Miles, Makoi, Suva, and the fact that the Plaintiff having managed to serve the 'Default Judgment' in October 2022 and the 'Bankruptcy Notice' in November 2022 at the same residential address, proves the fact that the 1st Defendant was actually residing at the same address and had never stopped residing at this address as alleged by Koro Vuli-Muritamana Tuitubou in his Affidavit in Support filed along with the 'Ex-parte Notice of Motion for Leave to Effect Substitute Service'.

11. 1st Defendant has further averred that the arrears of rental amount as claimed by the Plaintiff is disputed and that he has a meritorious defence against the claim. It is further averred that the Plaintiff has failed to duly make amendments and/or variations to the rental agreement to reflect on an increase of the rent and thus the 1st Defendant is not liable to pay any arrears of rent at the increased amounts. Furthermore, it is averred by the 1st Defendant that the Plaintiff on 21/12/2018 closed the car park to the tenants and their clients. As such it is alleged that there were negotiations that took place between the Plaintiff and the tenants, including the 1st Defendant, on decreasing the rent as the tenants were not able to enjoy the full services they were paying for as tenants. A draft copy of the Proposed Statement of Defence for the 1st Defendant has been annexed with the Affidavit of the 1st Defendant filed on 01/12/2022 for Court's consideration.

12. In the Affidavit in Opposition of Daniel Kingston Whippy filed on 05/01/2023, it is averred that the personal service of the Writ and Statement of Claim on the 1st Defendant could not be effected since *'at the time when the personal service was attempted, **the 1st Defendant was not present at the last known address** being lot 19, 8 Miles, Makoi, Suva'*[2]. (Emphasis added). It is further averred that the Plaintiff solely relies on the Affidavit of Koro Vuli-Muritamana Tuitubou, filed on 17/03/2021, in

[1] Affidavit of Aman Avikash Chandra filed on 01/12/2022 at averment no. 23.
[2] Affidavit of Daniel Kingston Whippy filed on 05/01/2023 at averment no. 11.

verifying the application for substituted service of the Writ and the Statement of Claim on the 1st Defendant.

13. In respect of the merits of the defence, the Plaintiff has averred that the Lease Agreement with the 1st Defendant was extended on a yearly basis from 30/09/2017 by way of letters to that effect. Copies of such letters and acceptance of the 1st Defendant have been annexed with the Affidavit of Daniel Whippy filed on 05/01/2023. However, it is interesting to note that the last of such letters[3] is for the extension of the Lease Agreement with the 1st Defendant from 30/09/2017 to another 01-year period but there is no proof of acceptance of the said offer by the 1st Defendant annexed with the Affidavit. Moreover, there's no proof of such a letter issued by the Plaintiff for extension of the Lease Agreement from 30/09/2018 to another year annexed with the Affidavit.

14. Prior to considering the merits of the application for Setting Aside the Default Judgment, the Court is called upon to decide on a preliminary objection as raised by the counsel for the Plaintiff. The preliminary objection is on the manner and/or form of making the application for Setting Aside the Default Judgment.

15. Written Submissions have been filed by both counsels in this regard. The counsel for the Plaintiff has argued that such an application needs to be made by way of a Summons pursuant to Order 32 Rule 1 of the High Court Rules 1988 and not by way of a Motion. The Counsel for the Plaintiff has relied upon the case authority in ***Maharaj v Matakula; HBC92.2015 (5 April 2019)***.

16. The Court in ***Maharaj v Matakula*** (Supra) however had gone on to hold as follows,

> *"A mistake is made as to the form of the plaintiff's application, viz, a notice of motion is issued instead of a summons. By virtue of Order 2, rule 1(1) such failure shall be treated as an irregularity and shall not nullify the plaintiff's proceedings. By virtue of Order 2, rule 1(2) the court has discretion either to set aside the plaintiff's application or to exercise its power under the rule to allow an amendment to be made or to make an order dealing with the proceedings generally as it thinks fit. Such an approach is supported by the observations of* ***Lord Denning MR*** *in (1)* ***Harkness v Bell's Asbestos Engineering Ltd*** ***(1966) 3 ALL. E. R 843 at 845-846*** *(2)* ***Re Pritchard (deceased)*** ***(1963) 1 ALL.E.R. 873 at 879****.*
> *I do not doubt that the defect in the procedure is fundamental. But there is no draconian provision of the rules of the High Court to prevent the plaintiff in error from curing her mistake".*

[3] As annexed at annexture 'E' of the Affidavit of Daniel Whippy filed on 05/01/2023.

17. Further, the Court did not dismiss the application made by the applicant in ***Maharaj v Matakula*** (Supra) on the preliminary objections but granted leave to amend the application.

18. Counsel for the 1st Defendant had relied in the case of ***Davern v Musket Cove Resort Ltd; HBC201.2019 (7 July 2023).*** It was held in this case as follows,

> *"[8] The Defendant points out a preliminary objection to the Plaintiff's application. Order 32 Rule 1 states that any application in chambers which has not made ex-parte must be made by summons. The Defendant's view is that the rule provides a mandatory requirement and therefore Plaintiff should not be allowed to maintain an application made by way of a Notice of Motion.*
>
> *[9] I was assisted by the following reference in* ***The Supreme Court Practice 1999****. At 32/6/3*
> *Interlocutory applications – normal procedure (rr1-6) both in the Ch D and QBD interlocutory applications are normally made by summons in Chambers. The former practice in the Ch D of making such applications by motion has been much restricted and should only be adopted in very special cases.*
>
> *[10] The relevant Chancery Division Practice Direction it is quite clear that mode of making an interlocutory application relates to the urgency of the application. The Practice Direction allows an application to be made by way of motion when there is sufficient degree of urgency or such other reasons to justify. Otherwise, they should be made by summons.*
>
> *[11] Mere fact that Plaintiff's application was made by way of a Notice of Motion does not invalidate the whole application. Therefore, I now proceed to consider the application".*

19. Having due regard to the provisions in Order 2 Rule 1 (1) and the above cited case authorities, I find that the form under which this current application being made, although irregular, is not fatal to the application *per se*. Moreover, considering the fact that this is a matter initiated in 2020, and that the current application being filed on 01/12/2022, it is in the interest of justice to reject the preliminary objection raised by the counsel for the Plaintiff and to proceed to consider the merits of this application. Accordingly, the Court refuses and rejects the preliminary objection and moves to consider the merits of the application.

20. Both parties have filed comprehensive written submissions on the substantive application to set aside the Default Judgment. The Court shall consider the affidavit evidence and the written submissions of the parties in making the ruling on the substantive application.

21. The law on setting aside a default judgement is well established both in English common law and in the local jurisdiction. It is an unconditional discretion. There are a number of authorities which are frequently cited by the courts when exercising such discretion to set aside the judgments entered for the default of either party. Some of the important foreign and local cases are Anlaby v. Praetorius (1888) 20 Q.B.D. 764; Mishra v Car Rentals (Pacific) Ltd [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985); O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 762; Evans v Bartlam [1937] 2 All E.R. 646; Burns v. Kondel [1971] 1 Lloyds Rep 554; Fiji National Provident Fund v Datt [1988] FJHC 4; (1988) 34 FLR 67 (22 July 1988); Eni Khan v. Ameeran Bibi & Ors (HBC 3/98S, 27 March 2003; Wearsmart Textiles Limited v General Machinery Hire limited and Shareen Kumar Sharma(1998) FJCA26; Abu 0030u.97s (29 May 1998) and Fiji National Provident Fund v Datt [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988).

22. The courts are given discretion to set aside any judgment entered for the default of any party. However, when exercising this discretion, the courts have adopted two different approaches in dealing with regular and irregular judgments. This distinctive approach is clearly stated by **Fry L. J**. in **Anlaby v. Praetorius** (1888) 20 Q.B.D. 764. His Lordship held that:

> *"There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief."*

23. In **O'Shannessy v Dasun Hair Designers Ltd** [1980] 2 NZLR 762 **Greig J** said at pg 654:

> *"The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled ex debito justitiae to a setting aside. Accordingly, if the judgment was obtained irregularly, the applicant is entitled to have it set aside ex debito justitiae, but, if regularly entered, the Court is obliged to act within the framework of the empowering provision (see: **Mishra v Car Rentals (Pacific) Ltd** [1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985). Thus, the defendant against whom an irregular judgment was entered in default has the right to have it set aside and the courts have no discretion to refuse to set aside."*

24. In the present case the 1st Defendant has contested the service of the Writ and the Statement of Claim by way of personal service. It is the contention of the 1st Defendant that the Plaintiff had not duly attempted and/or made a genuine attempt for

personal service of the Writ and the Statement of Claim on the 1st Defendant before making an application for leave to effect substituted service.

25. When considering the content in the Affidavit in Support of Koro Vuli-Muritamana Tuitubou filed along with the 'Ex-Parte Notice of Motion for Leave to Effect Substituted Service' on 17/03/2021, the Court notes that the said Affidavit fails to duly outline the information as to the belief of the deponent that the 1st Defendant was not residing at the last known address, Lot 19, 8 Miles, Makoi, Suva. I shall reproduce the averment which states the belief of the deponent on the issue *in verbatim* for clarity in this ruling,

> *"6. **That** on or about 25th January 2021, I attempted personal service on the First Defendant, however, the First Defendant does not reside at Lot 19, 8 Miles, Makoi, which was the last known address for the First Defendant. I further attempted to obtain the First Defendant residential address from known associates, however, I have been unsuccessful."*

26. This is the sole averment in the said Affidavit of Koro Vuli-Muritamana Tuitubou that supports the application for substituted service. It is quite clear from the said averment that the deponent of the said Affidavit had only attempted personal service on the 1st Defendant once on 25/01/2021 and had concluded that the 1st Defendant does not reside at the given address at Lot 19, 8 Miles, Makoi, Suva. It is also evident that he had only **attempted** to obtain information on the residential address of the 1st Defendant but to no avail.

27. I further find that the position regarding the failure to effect personal service of the Writ and the Statement of Claim on the 1st Defendant, as per the above quoted averment, is contrary to the position taken by Daniel Whippy in the Affidavit in Opposition filed on 05/01/2023. In the said Affidavit at averment no. 11, it is averred that the personal service could not be made on the 1st Defendant **as he was not present** at the last known address at Lot 19, 8 Miles, Makoi, Suva and not because the 1st Defendant **was not residing** at the said address.

28. In the above context, I find that the Supporting Affidavit of Koro Vuli-Muritamana Tuitubou is, in fact, misleading the Court into allowing the application for substituted service. This fact is further fortified by the fact that the same Koro Vuli-Muritamana Tuitubou was successful twice in 2022 to serve process on the 1st Defendant at the same given address at Lot 19, 8 Miles, Makoi, Suva.

29. In view of the above findings, this Court concludes that there has not been a due attempt made on personal service of the Writ and the Statement of Claim on the 1st

Defendant and the substituted service by way of an advertisement in a local daily newspaper is therefore an abuse of the process of the Court.

30. The Court further accepts the fact, as submitted by the 1st Defendant, that he had no access to the advertisement in the local daily newspaper which could have duly effected service of the Writ and the Statement of Claim on him. It is therefore the conclusion of the Court that there was no proper service of the Writ and the Statement of Claim on the 1st Defendant.

31. Accordingly, the Court concludes that the Default Judgment entered against the 1st Defendant is therefore irregular and the 1st Defendant as of a right shall have the said Default Judgment set aside.

32. In ***O'Shannessy v Dasun Hair Designers Ltd*** *[1980] 2 NZLR 762 Greig J* said at 654,

> *"The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled ex debito justitiae to a setting aside. Accordingly, if the judgment was obtained irregularly, the applicant is entitled to have it set aside ex debito justitiae, but, if regularly entered, the Court is obliged to act within the framework of the empowering provision (see:* ***Mishra v Car Rentals (Pacific) Ltd*** *[1985] FJCA 11; [1985] 31 FLR 49 (8 November 1985)*. *Thus, the defendant against whom an irregular judgment was entered in default has the right to have it set aside and the courts have no discretion to refuse to set aside."*

33. It is settled law that the applicant must show a defence on merit if the judgment was regularly entered. **Evans v Bartlam** [1937] 2 All E.R. 646 is an important case, among others, which sets out the principle of setting aside a default judgement entered regularly. In this case, **Lord Atkin** explained the nature of the discretion of the courts and the rule that guides them in exercising such discretion. His Lordship held at page 659 held,

> *The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing*

judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

34. There are several local authorities which recognized the above tests, and which have been often cited by Court. **Fiji National Provident Fund v Datt** [1988] FJHC 4; [1988] 34 FLR 67 (22 July 1988) is one of those judgments which clearly sets out the judicial tests. **Fatiaki J** in this case held,

The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the states of a rule of law or condition precedent to the exercise of the courts unfettered discretion.
These judicially recognized "tests" may be conveniently listed as follows:

(a) whether the defendant has a substantial ground of defence to the action;
(b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
(c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.

In this latter regard in my view, it is proper for the court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed.

35. If a defence on merits is shown, a court will not allow any such judgment entered without proper hearing, to stand. **Lord Denning MR** in **Burns v. Kondel** [1971] 1 Lloyds Rep 554, very briefly explained the principle and stated,

We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He needs only (to) show a defence which discloses an arguable or triable issue.

36. Legatt LJ in **Shocked v Goldsmith** (1998) 1 All ER 372 held at p.379 ff that;

These cases relating to default judgment are authority for the proposition that when considering whether to set aside a default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and any delays, as well as against prejudice to the other party.

37. In view of the facts averred by the 1st Defendant in his Supporting Affidavit and the Affidavit in Reply, and as per the draft copy of the Proposed Statement of Defence, the Court also finds that the 1st Defendant has a meritorious defence to the claim.

38. Pursuant to the foregoing discussions and findings, it is the overall conclusion of the Court that the Default Judgment entered against the 1st Defendant on 25/01/2022 must be set aside as of a right. The Court is of the further view that the interest of justice also dictates that the Default Judgment is set aside as per the circumstances in this matter as discussed in the foregoing paragraphs of this ruling.

39. Accordingly, I make the following orders.

1) The application filed by the 1st Defendant on 01/12/2022 is hereby accepted as a Summons filed by the 1st Defendant as per the discretion provided to the Court pursuant to Order 2 Rule 1 of the High Court Rules.

2) The said application is accordingly allowed,

3) The Default Judgment entered against the 1st Defendant and sealed on 25/01/2022 is hereby wholly set aside.

4) Costs of this application shall be in the cause.

5) To expedite these proceedings, the Court makes the following additional orders.

   I. That the Plaintiff shall duly serve a copy of the Amended Writ and the Statement of Claim to the 1st Defendant by close business tomorrow.

   II. That the 1st Defendant shall, within 07 days from tomorrow (that is by 22/04/2025) file and serve the Acknowledgment of Service and a Statement of Defence.

   III. In failure to comply with the above order, the Plaintiff shall be at liberty to enter a Default Judgment against the 1st Defendant.

   IV. Upon being served with a Statement of Defence of the 1st Defendant, the Plaintiff shall file and serve a 'Reply to the Statement of Defence' 07 days after (that is by 01/05/2025).

V. That the 1st Defendant shall file and serve Affidavit Verifying List of Documents 07 days after (that is by 13/05/2025).

VI. Parties shall attend to inspection of documents 07 days after (that is by 22/05/2025).

VII. That the Plaintiff shall convene the PTC and file and serve PTC minutes 14 days after, (that is by 05/06/2025).

VIII. In failure to finalize and file PTC minutes by the above date, the PTC shall stand dispensed with.

IX. The Plaintiff shall file and serve Order 34 Summons and Copy Pleadings 07 days after (that is by 16/06/2025).

X. In failure to comply with the above orders (from orders (5) IV to VI and (5) IX above), the pleadings of the defaulting party shall stand struck out subject to a cost of $ 5000.00, as summarily assessed by the court, to be paid to the other parties, as costs of this cause.

XI. The matter shall be mentioned before the Court on 17/06/2025.

L. K. Wickramasekara
Acting Master of the High Court

At Suva
08/04/2025.