

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 25 of 2017

BETWEEN : SANJESHWAR PRASAD, SHANELWAR PRASAD MAHARAJ and SONITESHWAR PRASAD all of Lot 28 FNTC Road, Narere, Nasinu, Taxi Proprietor, Priest and Bus Driver respectively being the beneficiaries in the **ESTATE OF MOHINI PRASAD.**

PLAINTIFF

AND : GANESHWAR PRASAD MAHARAJ of Morebank, New South Wales, Sydney Australia trustee in the **ESTATE OF MOHINI PRASAD.**

1ST DEFENDANT

AND: DAVINDRA KUMAR of Lot 1 Varani Street, House Number 15, Laucala Bay, Suva.

2ND DEFENDANT

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Chand A. for the Plaintiff

Mr. Reddy J. with Mr Kumar Y. for the First Defendant.

N/A of the Second Defendant.

DATE OF DECISION: 24th April, 2025

DECISION

[Setting aside of Interlocutory Judgment]

A. Introduction

1. The Defendant filed a Summons coupled with an Affidavit in Support of Ganeshwar Prasad Maharaj and sought for the following orders:
 - a. That the execution of the interlocutory judgment entered against the 1st Defendant on the 7th day of August 2020 be stayed pending the determination of this application.
 - b. That the Interlocutory Judgment granted by this Honourable Court dated the 7th day of April 2020 be wholly set aside and;
 - c. That the 1st Defendant be granted leave to defend the statement of claim filed by the Plaintiffs and;
 - d. That the 1st Defendant be granted leave of the Honourable Court to file his Statement of Defence to the Plaintiff's claim.
 - e. That the costs of this application be costs in the cause.
2. The application is made pursuant to **Order 19 Rule 9 of the High Court Rules, 1988**.
3. The first defendant relies on his affidavit in support.
4. Both parties to the proceedings furnished Court with their written submissions.

First Defendants Contention

5. Seek the orders as enumerated in the summons filed on 17 September 2024.
6. Very serious allegations have been made against me which are baseless, false and misleading and have not breached my duties as a trustee nor committed fraud or losses to the Plaintiffs.
7. Interlocutory Judgment was entered against me on 7 August 2020 but as of yet not assessed any damages, interests and costs against me.
8. Allegations against me are false, misleading, frivolous, and vexatious and abuse of court process.
9. Plaintiffs are brother's children.
10. My mother wanted to give the property absolutely to me. However, she made the trustee and bequeathed the property into equal shares to the Plaintiffs.
11. That I was entitled to reimbursement of moneys spent on the Plaintiff's and the property.

12. I do not deny taking out the sum of \$30,418.90. It was done in good faith and on full concurrence and authority of all the Plaintiffs through the consent of the beneficiaries signed before a solicitor on 24 January 2015.
13. The Plaintiffs are renegeing on their consent.
14. At the time of the Estate property settlement, I had no bank accounts. So asked second Defendant who is my brother in law to deposit the money in his account. Second Defendant paid back money to me
15. Also referred to clause 5 of mother Mohini Lata's Will where I was entitled to \$9,000 from her estate which he took out of the Estate.
16. Bijma Wati Maharaj and Kamlesh Wati was paid out of their entitlement from the estate funds suffer injustice and prejudice and suffer irreparable harm, damages and losses if the default judgment stands against me.
17. Clause 5 of the deceased's will is relevant, I was entitled to \$9,000 which I took.
18. Bijma Wati Maharaj and Kamlesh Wati was also paid out their entitlements.
19. If orders are not granted by this Court, then, I will suffer injustice prejudice, irreparable harm, damages and losses.

Plaintiffs Contention

20. Leave was obtained to serve the Court documents to the first defendant overseas.
21. First Defendant was well aware of the allegations made against him in my claim.
22. The claims pleaded are not baseless, misleading, frivolous or vexatious.
23. First Defendant took money from the Estate without showing any justification.
24. Mohini Prasad's Will was drafted and the Plaintiffs were made beneficiaries.
25. During the distribution of the Estate money, the First Defendant took \$30,418.90 without any reasonable cause.
26. First Defendant was not entitled to any reimbursement since Mohini Prasad's Will does not state that Trustee is entitled to his expenses, Second Defendant has admitted that he forced his mother Mohini Prasad to become trustee which shows he had a bad intention.
27. The amount of \$30,418.90 has been stolen and misappropriated fraudulently by the First Defendant and had the intention to cheat the beneficiaries for his and second defendant's personal gain and benefit.
28. Never signed annexures D, E, F, and I that is within First Defendant's affidavit.

29. First Defendant was not entitled to any monies from Mohini Prasad's Estate. First and Second Defendant's conspired and fraudulently had the \$30,418.90 funds transferred to second defendants bank account.
30. No evidence shown by First Defendant of money taken from Second Defendant.
31. Estate funds were to be distributed equally to the beneficiaries (Plaintiffs) as per the Deceased's Will.
32. Further, whether beneficiaries, Bijma Wati Maharaj, Kamlesh Wati and Selvin Singh were paid their entitlements.
33. Service of the Writ of Summons was served on First Defendant, when in Fiji, First Defendant resided with the Second Defendant. First Defendant was well aware of this case, also evaded service by the bailiffs.

Determination

34. The Plaintiffs filed a Writ of Summons against the First Defendants, Ganeshwar Prasad Maharaj and second defendant, Davindra Kumar seeking substantive order for the refund of other orders as enumerated in the Plaintiffs Statement of Claim from paragraphs 29 - 33 inclusive.
35. The First Defendant, Ganeshwar Prasad Maharaj was served on 26 July 2017 through postal serviced at 246 B. Nuwarra Road, Hammondui New South Wales, 2170 Australia. There is a pink slip annexed to the affidavit which says that the First Defendant refused to sign.
36. The second Defendant filed its Acknowledgement of services together with a statement of defence whilst the First Defendant, Ganeshwar Prasad Maharaj failed to file his acknowledgment of service, Notice of Intention to Defend the claim and/or any statement of defence.
37. The Plaintiffs filed a praecipe, search for acknowledgement of service and statement of defence of the first defendant, Ganeshwar Prasad Maharaj and **an Interlocutory Judgment for damages, interests and costs to be assessed accordingly.**
38. The pleadings were filed and the cause of action was completed and orders in Order 34 Summons was granted to enter the substantive Action for trial before a Judge of the High Court.
39. An Interlocutory Summons was filed by the Second Defendant, Davindra Kumar seeking for an order to dismiss the action against the second defendant, Davindra Kumar.
40. However, a decision was delivered declining the second defendants summons with costs of \$1,000.
41. Then matter came an allocation to a Judge who on 16th August 2023 scheduled it for Mention to fix for trial on 01st November 2023.

42. Accordingly, the matter was subsequently scheduled for trial for 3 consecutive dates 6th to 8th May 2024.
43. The Second Defendant, Davindra Kumar filed a notice of change of solicitors on 25 April 2024 followed by the First Defendant, Ganeshwar Prasad Maharaj on 11 September 2024 respectively.
44. On 17 September 2024, Jiten Reddy Lawyers representing the First Defendant, Ganeshwar Prasad Maharaj filed a summons seeking for certain orders and in particular to wholly set aside the Interlocutory Judgment entered against him on 07 April 2020, some 4 years 5 months later.
45. Thus, the hearing with written submissions was concluded in 18 March 2025.

Principles of setting aside default judgment.

46. A default judgment can be entered at two (2) different stages of civil action.
 - The **first** is when the Defendant fails to 'give notice of intention to defend' pursuant to Order 13, and
 - The **second** is under Order 19 of the High Court Rules 1988 for 'default of pleadings.'
47. When applying under Order 13 or Order 19, the **basic principles** for '**setting aside default judgment**' remains the same.
48. Principles upon which default judgments are set aside fall into two (2), distinct categories, which are '**regular**' and '**irregular**'.
49. Thus, for an '**irregular default judgment**', the Defendant is entitled as of right to have the Judgment set aside and for '**regular default judgment**', the Court has the discretion to impose conditions when considering such application.
50. Therefore, the **First issue** to be considered by this Court is '**whether the interlocutory default judgment** entered on 07 August 2020 was '**regular**' or '**irregular**'?
51. As stated above, the writ of summon was served onto the first defendant, Ganeshwar Prasad Maharaj on 26 July 2017 by Postal services to his address in Hammondville, New South Wales and thus failed to sign and/or acknowledge receipt of the same on the pink slip.
52. The first Defendant failed to file either an acknowledgement of service and/or a Statement of Defence as per the High Court Rules, 1988.
53. Under such circumstances, *Order 13 Rule 1 (1) of the High Court Rules, 1988* became operative which provides-

1.-(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time enter final judgment against that

defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

54. Therefore, the Plaintiff's made an application for an order for Interlocutory Default Judgment to be entered against the first Defendant, Ganeshwar Prasad Maharaj pursuant to Order 13 Rule 1 (1) of the High Court Rules 1988 and accordingly granted and sealed.
55. The Interlocutory Default Judgment entered and sealed on 07 August 2020 was a '**regular Judgment**', since the first Defendant did not comply with *Order 12 Rule 4 (a)* which resulted in the Plaintiff's exercising their rights pursuant to *Order 13 Rule 1 (1) of the High Court Rules, 1988*.
56. The first defendant's contention is that he was never served with the substantive writ of summons and the statement of claim and therefore, he reckons the interlocutory default judgment is 'irregular'.
57. However, the affidavit of service clearly deposes that on 26 July 2017, DIVNEEL DIVKASH CHAND has personally sent the true copy of the writ of summons issued on 02 February 2017 to the first defendant, Ganeshwar Prasad Maharaj on address 246B Nuwarra Road, Hammondville, New South Wales 2170, further that the annexure marked 'DDCT' is evident of the fact that the first defendant received the documents, however only refused to sign the pink slip dated 26 July 2017 for the reasons best known to him.
58. Further, this Court notes that the first defendant is related to the second defendant and that whenever the first defendant came to Fiji from abroad, he would reside at the second defendant's residence. Definitely the first defendant would have known well about this case from the second defendant and its case status in Court that Interlocutory default judgment has already been entered against the first defendant. That is why it prompted the first defendant to engage the services of legal representative to file his application for setting aside of interlocutory default judgment.

Grounds for setting aside default judgment

59. To set aside an Interlocutory default judgment entered regularly, the court must exercise its discretion.
60. The grounds for **setting aside of default judgment** was summarized in Case of **Coral Sun Ltd v Aubrey Whippy** Civil Action No. HBC 006 of 2009 as follows:
 - a) Meritorious Defence which has a real success and carry some degree of conviction. Therefore, meritorious defence is mandatory - refer to case of **Wearsmart Textiles Ltd v General Machinery Hire Limited and Anor**; Civil Appeal No. ABU 0030/1997.
 - b) Some explanation as to why Default judgment was allowed. **Evans vs Bartlam** [1937] 2 All ER 646:

- i) Some explanation as to the delay in making an application to set aside:
Pankaj Bamola & Anor v Moran Ali, Court of Appeal Civil Appeal No.
59/90.

61. 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.
62. If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered injustice before exercising the court's discretion to set aside.
63. For the current matter, the affidavit in support of the first defendant has annexed a **draft statement of defence of the first defendant**, as marked 'G' does not contain any evidence or state facts that will show a defence on merits.
64. The first defendant admits the contents of paragraph 23 of the Plaintiff's Statement of the deceased's Will and Testament of late Mohini Prasad that it states at paragraph 4 clearly that the **Plaintiffs are to have the property in equal shares and as per the consent of beneficiaries of 24 July 2015, the distribution of the shares from the sale proceeds of the estate property should have been equally distributed to the Plaintiffs.**
65. However, the first defendant has raised the following substantive defences:
- Denies it has breached its duties as a trustee,
 - Denies that the second defendant acted fraudulently in gaining financial advantage for the estate money.
 - Denies that the second defendant has acted fraudulently in breaching the last Will and Testament of Deceased Mohini Prasad and puts the Plaintiff to strict proof.
 - That each of the Plaintiff's knew at the time of distribution and reimbursements to be paid out to the first defendant.
66. Notably, the first defendant admits that the second defendant, Davindra Kumar was not a beneficiary of the deceased's estate of Mohini Prasad, however, he still accepted the sum of \$30,418.90 from the Estate money and proceeds of sale of property since the first defendant did not have a bank account in Fiji. The money was later given back to the first defendant.
67. He further admits paragraph 16 and 17 of the Plaintiff's Statement of claim wherein the Plaintiffs as beneficiaries received an unequal amount of monies without any reasons and the money distributed was from \$129,199 from the sale proceeds of \$170,000. Payments to Fiji Revenue and Customs Services, R Patel Lawyers were made out from the sale of proceeds.
68. Now, whilst examining the Defences hereinabove, Deceased's Mohini Prasad's Will does not authorize the first defendant as the Executor/Trustee to take any monetary part of the proceeds of sale from the property and/or any monetary sum for himself since the will did not entitle him to do.

69. What the first defendant in his capacity as the Executor/Trustee should have done was to provide the beneficiaries of the Deceased's Estate (Plaintiffs) with a proper audited breakdown of estate account together with all details of expenses incurred by him and other payments made to others.
70. I have also perused the consent of beneficiaries annexed in the first defendant affidavit and took into consideration paragraphs 10 and 12 of the Plaintiff's Statement of Claim wherein the Plaintiffs allege that the first defendant's continues pressure on the Plaintiff left them with no choice but to execute the documents without fully reading the contents and without any proper independent legal advice.
71. The draft defence annexed by the first defendant to its affidavit as Annexure 'G' is a sham defence and holds no water and must fail in its entirety.

Delay

72. The substantive Writ was served onto the first defendant by postal services on 26 July 2017 by legal executor, Divneel Divkash Chand and the first defendant refused to sign the attached pink slip.
73. Since 26 July 2017, the first Plaintiff having knowledge of the court documents since he refuse to sign upon receipt failed to file any Acknowledgment of Service and its Statement of Defence to challenge the Plaintiff's Claim, but endeavored to stay away from the proceedings.
74. Interlocutory Default Judgment was entered against the first defendant in 07 August 2020.
75. It was not until 17 September 2024 that the first defendant came to known of interlocutory judgment already entered against him that he instructed his counsel to file a summons and seek for orders to wholly set aside together with other orders.
76. There is an inordinate delay of some 04 years after the first defendant had filed his summons for the setting aside of the Interlocutory Judgment. Thus, the delay is unusually or excessively long and inordinate.

Prejudice to the Plaintiff's

77. The Plaintiff's will suffer great prejudice if the Interlocutory Default Judgment is Set Aside since this action has been impending finalization against the second defendant since 2017, ongoing for some 08 years as of now.
78. It will costs the Plaintiff's substantially in terms of legal fees.
79. The Plaintiff's will be relieved from having to prove a claim which has no real and/or sham defence now. Therefore saving considerable costs, resources and time accordingly.
80. The second defendant will also be relieved from further costs and disappointment.

In Conclusion

81. The Interlocutory Default Judgment entered against the first defendant on 07 August 2020 is a regular Judgment since no acknowledgment of service and Statement of Defence was filed in terms of the High Court Rules, 1988, the first Defendants, proposed draft statement of defence is without merit and is a sham defence. It has no chance of success, leave aside meeting the high test that the Courts have sets of real likelihood of success high carries some degree of conviction.
82. Interlocutory Default Judgment entered against the first defendant, Ganeshwar Prasad Maharaj was for damages, interest and costs to be assessed as per the Plaintiff's statement of Claim.
83. The Plaintiff's in their Statement of Claim allege that the first Defendant paid the sum of \$30,418.91 to the second defendant without providing any explanation nor accounts. The particulars of fraud are set out against the second defendant.
84. The Plaintiff's also allege misappropriation of funds and fraud against the second defendant and seek that the first and second defendant jointly and severally refund the sum of \$30,418.90 and aggravated damages from both defendants.
85. However, the Interlocutory Judgment entered against the first defendant does not defeat the claim against the second defendant.
86. I reiterate, the Interlocutory Default Judgment is regular against the first Defendant and on the balance of probabilities prompts me not to set it aside as sought for by the first defendant.
87. The Summons of the first defendant is disallowed and dismissed in its entirety.

Costs

88. The first defendant to pay the Plaintiff's a sum of \$2,500 as summarily assessed costs within 14 days timeframe.
89. This matter is now getting of age, since its commencement on 2017 still remains undisposed and this Court needs to take into consideration *section 15 (3) of the 2013 Constitution* and Expediently disposes of the matter in its entirety.

Orders

- (i) The First Defendant's Summons filed on 17 September 2024 seeking for the execution to be stayed coupled with an order for wholly setting aside of the

Interlocutory Default Judgment and leave to defend the Statement of Claim by the Plaintiff's is disallowed and dismissed in its entirety.

- (ii) The First Defendant, Ganeshwar Prasad Maharaj to pay the Plaintiff's a sum of \$2,500 as summarily assessed costs within 14 days timeframe.
- (iii) The action impending against the Second Defendant, Davindra Kumar to be scheduled a quick trial date, heard and determine expeditiously.

Dated at Suva this 24th day of April ,2025.



VISHWA DATT SHARMA
PUISNE JUDGE

cc. Amrit Chand Lawyers, Nabua
Jiten Reddy Lawyers, Nakasi.