

NAIPOTE VERE v MALAKAI VUETI (HBC0511R of 2002S)

HIGH COURT — CIVIL JURISDICTION

5 JITOKO J

25 May 2004

10 **Practice and procedure — service of documents — whether personal service
ineffective — application to set aside default judgment — High Court Rules O 10, O
19 r 9, O 47 r 1.**

15 The Plaintiff in his writ of summons alleged that the Defendant stopped him and his family from using the anchorage and the “Matadawa” landing along the Namata River. The writ was personally served to the Defendant but he refused to accept it and threw it away. Subsequently, the writ was served through registered mail with the receipt attached to the affidavit of service but the Defendant ignored them.

20 The Defendant did not appear and a default judgment was entered against him. Thereafter, summons for assessment for damages was filed and served on the Defendant in person. Counsel for the Defendant applied to set aside the default judgment and invoked Os 19 r 9, 10 and 47 r 1 of the High Court Rules.

25 **Held** — (1) There was proper service to the Defendant when the writ was served upon him because the court documents were held in his possession even if he threw it away. Moreover, even if it can be said that personal service was ineffective, the service by registered mail was sufficient. Thus, there was no defect on the default judgment relative to the service of the writ.

30 (2) The Defendant presented a triable issue giving merit to his defence because he denied that he owed a duty of care to the Plaintiff and even if he did, that there was no breach of duty. Moreover, a determination of whether the anchorage and landing was private or public property was also raised. These involved mixed issues of facts and law where the liability of the Defendant may or may not arise.

(3) Fijian traditional apologies cannot be equated to the English law concept of guilt and responsibilities nor does it indicate blameworthiness between the parties. It can be gleaned from the facts that the Defendant made an apology in a Fijian customary way for any wrongdoings he may have had against the Plaintiff. By way of response, the Plaintiff accepted the apologies even if there was an understanding of a reduction of damages.

35 Application granted.

Cases referred to

40 *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd’s Rep 221; *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646, considered.

Plaintiff in person

A. *Singh* for the Defendant

45 **Jitoko J.** This is an application by the Defendant to set aside the default judgment entered against him by the Plaintiff on 13 March 2003.

50 On 5 December 2002, the Plaintiff filed his writ of summons against the Defendant alleging the latter of stopping him and his family from using the anchorage and landing known as “Matadawa” landing along the Namata River in Tailevu, for the purpose of mooring. The Plaintiff owns a boat which provides him and his family’s only access to his two farms in the area. The action is in harassment and nuisance and breach of his individual right and freedom of access

and enjoyment, the particulars of which are set out in his writ. The Plaintiff claims special and exemplary damages with general damages not exceeding \$100,000.

5 On 6 December 2002, the Defendant according to the Plaintiff's affidavit of service, was personally served with the writ at Goodenough Street in Suva, but he refused to accept it, and according to the process server, "threw it away". However, the Defendant was subsequently served through registered mail and the receipt is attached to the affidavit of service. The Defendant's argument is that the post office box, to which the documents were sent, did not belong to him, but to
10 the village in which he resides. He nevertheless conceded that he had received some legal documents, but because he was not well-educated, he had paid little regards to them.

On 19 March 2003, the Plaintiff entered default judgment, there being no appearance made by the Defendant. Summons for assessment of damages was
15 filed on 28 March 2003 and served on the Defendant in person on 4 April 2003. The Defendant finally made an appearance, in person, before the registrar on 15 April, where he agreed to file submissions on damages.

Mr Rameshwar Prakash of Mishra Prakash & Associates filed a notice and entered an appearance for the Defendant on 4 August 2003. On 14 August,
20 counsel filed the Defendant's summons to set aside the default judgment, and:

2. That leave be granted to the Defendant to file a Statement of Defence and defend the Claim;
3. *That all further proceedings for Assessment of Damages and Execution of Judgment be stayed until the determination of this application.*

25 The application is supported by the Defendant's affidavit and relies on O 19 r 9 and O 47 r 1 of the High Court Rules.

Court's consideration

As to whether proper service had been made on the Defendant, the court
30 concludes from the evidence before it that this had been done and that the requirement of O 10 of the High Court Rules had been complied with by the Plaintiff. In the first place, there does not appear to be any doubt that the Defendant had actually taken possession of the court documents when given him at Goodenough Street in Suva on 6 December 2002. The fact that he, the
35 Defendant, immediately thereafter "*threw it away*" as described by the Plaintiff, is his own problem and does not negate effective service. This court notes with concern, the increase in the number of incidents where recipients have, as a show of defiant thrown away, in the face of process servers, legal documents served on them. This court takes a serious view of such acts, which can constitute of their
40 own, contempt of court.

Even if personal service on the Defendant of 6 December 2002 was to be deemed ineffective, then the postal service by registered mail to the Defendant's last known address namely, to his village at Namata, Tailevu was sufficient. It matters not that the post office box did not belong to the Defendant in person but
45 registered to the village headman (Turaga ni Koro) on behalf of the members of the village. A common PO Box for all the members of the village, meets the legal requirement for postal service.

A corollary to the finding that there has been effective service is that, subject to the Plaintiff observing the requirements of time for response, a regular default
50 judgment may be entered at his pleasure. In this instance, the court finds that the judgment of 19 March 2003 was regularly obtained. Under the circumstances, the

Defendant does no longer have the right to have it set aside. It becomes a matter for the exercise of the court's discretion.

In the light of this finding, the court will proceed to consider other grounds advanced by the Defendant, which may constitute matters that, in the court
5 exercise of its discretion, favours the Defendant's submission. In *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221, the court laid down the guideline in respect of the exercise of the court's discretion as follows: (at 223):

10 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.

In support of his case to set aside the Defendant argued that there were valid and adequate reasons why the judgment was allowed to be entered by default; that he
15 had acted promptly to apply to set aside the judgment; and at any rate there was merit in his defence.

1. Adequate reasons for judgment to be allowed to be entered by default

In respect of the first ground, counsel had attempted to show that the
20 Defendant was not well-educated and therefore not familiar with the court processes and especially, the need to file appearance and defence to the action against him. However, as clearly shown from the Plaintiff's affidavits and also from the Defendant's affidavit himself of 3 December 2003, the Defendant did not seem to care much for legal documents served on him. He certainly did not
25 make any attempt to find out what they were or meant. Even an illiterate under the Defendant's circumstances, would have consulted a solicitor, or at the very least, someone who was in a position to explain the contents of the documents to him. The truth of the matter is that the Defendant failed to appreciate the contents of the documents served on him because he just simply refused to have any
30 dealings with the Plaintiff. He cannot now come before this court and plead innocence as the reason why he was unable to enter appearance and file his defence on time. This ground fails.

2. Whether the action to set aside was made promptly

35 The summons to set aside was filed by the Defendant's solicitors, 5 months after default judgment had been entered. This was after the Defendant had appeared before the registrar on the Plaintiff's summons for assessment of damages, and agreeing to file submissions. While there had been delay as the Defendant to act, the solicitors who finally received the Defendant's brief, did
40 not. The Defendant's application was filed 10 days after appearance. The court is satisfied that the Defendant's application had been made promptly.

3. Merits in the defence

The Defendant's draft statement of defence is premised on his denial that he
45 owed a duty of care to the Plaintiff and in any case, even if he did, the losses suffered by the Plaintiff did not result from the breach of duty. There is also the issue of whether the anchorage and landing at which the incident occurred, is private or public property. These are mixed issues of facts and law upon which the question of liability or otherwise of the Defendant ultimately depends. I am
50 satisfied that the Defendant has raised triable issues which in turn satisfies the requirement of merit in the defence.

Counsel for the Defendant also argued that the Defendant will not suffer irreparable harm if the judgment is set aside. The facts of the case supports this contention. The Plaintiff may have initially suffered setbacks from the alleged breach committed by the Defendant, to his farming activities, but such a
5 disruption would not have paralysed completely the Plaintiff's mobility to continue to service his farm from elsewhere. The court agrees that the Plaintiff will not suffer irreparable harm should the default judgment be set aside.

Finally there is the question, whether the Plaintiff, in accepting, after default judgment had been entered, the Fijian traditional rite of apologies and thereafter
10 agreeing to a lesser sum of damages, had in fact approbated the judgment. "*The foundation of doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates*" [Editorial Note: *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646]. While the Fijian traditional apologies cannot be equated strictly to English law concept
15 of guilt and responsibilities; it does nevertheless tend to indicate blameworthiness between the parties. The fact of this case is that the Defendant had apologised through Fijian customary way for any wrongs that he may have been deemed to have committed against the Plaintiff. In return, the Plaintiff has accepted the apologies albeit partially, on the understanding that the damages
20 allegedly caused by the Defendant will be reduced. In the circumstances, that I have explained, this court believes that it is only appropriate that its discretion should be exercised in favour of the Defendant to set aside the judgment. I will however award costs to the Plaintiff as this process could have been easily avoided if the Defendant had not been obstinate and had asked for legal
25 assistance much earlier.

In the final, this court orders that the judgment of 19 March 2003 be and is hereby set aside. The Defendant is to file his defence within 14 days.

Costs of \$200 against the Defendant to be paid within 14 days.

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Application granted.

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