

IN THE COURT OF APPEAL OF KIRIBATI
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

CIVIL APPEAL NO. 3 OF 2023

BETWEEN

TIEBANE IOTEBWA

Appellant

AND

ABIANG ISLAND COUNCIL

Respondent

Before:

Sir Salika, JA
Nelson, JA
Khan JA

Date of Hearing:

5 December 2024

Date of Judgement:

13 December 2024

Case to be referred as: *Ioptebwa v Abiang Island Council*

CATCHWORDS: Default judgement entered in the High Court – Whether it can be set aside by an application for Judicial Review pursuant to the provisions of Order 61 rule 2 of the Civil Procedure Rules 1964 – Whether an application to aside should be made pursuant to Order 13 of the High Court Rules – Whether Council falls within the ambit of Government under the Government Liability Act 2010.

APPEARANCES:

Counsel for the Appellant:

T Timeon

Counsel for the Respondent:

M Mweretaka

JUDGEMENT OF THE COURT

INTRODUCTION

1. This is an appeal against the decision of the learned Commissioner Mr Uruaaba of the High Court (the Commissioner) granting leave to the respondent to file an application for certiorari pursuant to Order 61 rule 2 of the High Court Rules (the Rules) to review the

decision of the High Court dated 31 October 2019 in which default judgement was entered against the defendant.

BACKGROUND

2. On 2 September 2019 the appellant (plaintiff) filed a writ of summons against the defendant seeking to claim arrears of rent.
3. The writ of summons was served on a clerk of the defendant on 18 September 2019 and in the affidavit of service dated 11 October 2019 the process server, Nei Kai Aron, deposed that she served a clerk of the defendant without identifying the clerk by name or other means.
4. On 31 October 2019 the appellant entered default judgement against the defendant pursuant to Order 13 rule 3 of the Rules in the sum of \$10,090.66 and interest at the rate of 5% together with costs in the sum of \$500.00.
5. On 9 July 2020 the appellant filed a writ of fieri facias pursuant to Order 45 of the Rules which was subsequently executed.
6. On 15 September 2019 the respondent filed a notice of judicial review pursuant to Order 30 rule 1 of the Rules to review the decision of the High Court when it entered default judgment on 31 October 2019. The Notice stated as follows:

Judicial Review

(Order 30, rule 1)

Take Notice that the abovenamed Applicant will on Friday 21 October 2022 at 10.30am or as soon thereafter as Counsel may be heard, move this Court for an order granting leave to apply for Judicial Review in respect of the following:

- 1) An Order for decision of default judgement in HCCC:50 of 2019 dated 31 October 2019 be set aside;
 - 2) Any further order or orders as this Honourable Court may deem just.
7. On 12 May 2023 the Commissioner having heard the parties delivered his judgement and he stated at [7] that:
- [7] It is therefore the decision of this Court to grant leave to the Applicant to file a proper application for review 7 days from the date of this judgement.

He made further orders and stated:

- a) Application for leave is granted to the Applicant to bring its review application within 7 days of this judgement;
- b) Costs is awarded against the Applicant to be taxed if not agreed.

GROUND OF APPEAL

8. The appellant filed an appeal against the decision of the Commissioner on 31 May 2023 and inter alia the grounds of appeal are as follows:
 - 1) (a) The default judgement dated 31 October 2019 could not be reviewed by certiorari because it was a judgement that had not been decided by merit and so the available and correct avenue under the High Court (Civil Procedure Rules) 1964 is to set it aside under Order 29 r.12 rather than reviewing it.
 - (c) Judicial Review is a prerogative writ under Order 61 rule 2 mandated under Section 89(1) of the Constitution enabling the High Court to supervise any civil proceedings against any subordinate court. The decision dated 31 October 2019 was a default judgement of the High Court, it was not a subordinate court so the High Court could not issue a Judicial Review in order to review its own decision because the High Court was not a subordinate court. It is authorized to review a decision of the Magistrate's Court (subordinate court) but in this case granting leave to bring certiorari proceedings in order to review the decision of the High Court was error in law because the High Court is not a subordinate court for the purposes of Section 89(1) of the Constitution.

APPELLANT'S SUBMISSIONS

9. The appellant submitted that the respondent invoked the incorrect process to set aside the default judgment; that instead of filing an application to set aside the default judgement pursuant to the provisions of Order 13 rule 8 of the Rules; it filed an application for certiorari to review the decision under the provisions of Order 61 rule 2 of the Rules.
10. The appellant further submitted that an application for judicial review seeking certiorari allows the High Court to review the decision of an inferior Court and Tribunals and not the High Court itself as provided for in Section 89 of the Constitution which states:

The High Court shall have jurisdiction to supervise any civil or criminal proceedings **before any subordinate court** and may make such orders, issue writs and give directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by such court. (Emphasis added)

RESPONDENT'S SUBMISSIONS

11. The respondent submitted that regardless of whether the correct process or procedure was invoked in the High Court that does not render the proceedings void and relied on Order 69 rule 1 of the Rules which states that non-compliance of the rules will not render proceedings void; and that such proceedings may be cured by way of an amendment; and that this appeal is not the proper course and instead an application should have been made by the appellant to correct the irregularities in the court below.

CONSIDERATION

12. The Notice for judicial review referred to in paragraph (6) hereof made reference to Order 30 rule 1 of the Rules which makes provisions for "Summons for Directions".

13. We took the liberty of perusing the original file in the court below and note that the appellant's counsel very strongly objected to the respondent relying on Order 30 and also submitted that this process of judicial review was wrong. The respondent's counsel conceded that he had relied on a wrong Order (Order 30) and stated that the correct Order was O.61 r.2 of the Rules, but he continued to argue and rely on Order 69 of the Rules and stated that his application for judicial review was still valid.
14. Despite the appellant's counsel's assistance in pointing out that the process for judicial review was wrong and advising that the correct procedure was an application to set aside the default judgement the respondent's counsel Mr Mweretaka made no attempts to amend his application.
15. Mr Mweretaka could have easily made an application for this application to be converted into an application to set aside the default judgement but he chose not to do so and insisted on proceeding with his application for review.
16. Unfortunately, the Commissioner fell into an error in granting leave to issue Judicial Review for certiorari and in doing so he acted in direct conflict with the clear provisions of section 89 of the Constitution. Simply put, the Commissioner had no jurisdiction to make the orders that the High Court could review its own decision. The order of the Commissioner is therefore set aside.

WHETHER THE COUNCIL FALLS WITHIN THE AMBIT OF GOVERNMENT LIABILITY AT 2010?

17. In the discussions before us it was raised as to whether the respondent Council enjoys the same rights and privileges as the Government of Kiribati. We have perused the Government Liability Act 2010 and the main body of the Act does not give the definition of "Government" but the Explanatory Memorandum in [2] states that:

 "... 'Government' extends to councils, statutory corporations and Government owned companies or an entity the majority of share is held either by the Government or the council."
18. Explanatory notes do not form part of an Act of Parliament and perhaps the Government Liability Act 2010 should be reviewed to include in the definition of "Government" in the Act that it extends to all the councils in Kiribati and other statutory corporations and Government owned companies or an entity the majority of share is held either by the Government or the council as provided for in the explanatory notes to the Act.
19. If the respondent council fell within the definition of "Government" then before the appellant could have obtained default judgement he would have been required to comply with the provisions of Order 29 r.18 which states:

In proceedings against the Crown no judgement for the plaintiff shall be entered in default of pleading without the leave of the Court, and any application for such leave shall be made by Notice of Motion or Summons served not less than 7 days before the


return date. (Emphasis added) – See *Iotebwa v Attorney General*¹ and *Attorney General v Dennis Kum Kee (trading as Big D Enterprises)*²

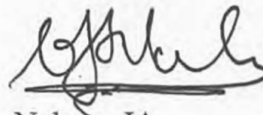
20. The Appeal Record Book was incomplete so we had to peruse the original court file to get a better understanding of this case. In the future parties as well as the Registrar should ensure that all necessary and relevant documents are included in the Appeal Record Book.

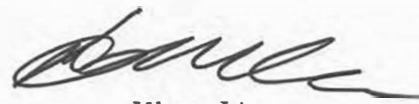
RESULT

21. 1) The appeal is allowed and the order of the Commissioner dated 3 May 2023 is set aside.
- 2) We order that the respondent shall pay the appellant's costs to be taxed if not agreed.

DATED this 13 day of December 2024


Sir Salika, JA


Nelson, JA


Khan, JA

¹ [2020] KIH 11; Miscellaneous Application 144 of 2019 (29 May 2020)

² [2020] KIH 22; Miscellaneous Application 107 of 2018 (8 October 2020)