

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

APPEAL NO. 3 OF 2024

BETWEEN

GEORGE TIARITE KWONG T/A TOATIN GENERAL
MERCHANDISE Appellant

AND

MATIENWAKE IRATA
AS MATIENTAAKE STORE Respondent

Before: Sir Salika, JA
Nelson, JA
Khan JA
Date of Hearing: 11 December 2024
Date of Judgement: 13 December 2024

Case to be referred as: *Kwong v Matientaake Store*

CATCHWORDS:

Default judgment – setting aside for failure to comply with Order 9 Rule 12 of the High Court Civil Procedure Rules – Where finding that there is substantial defence – where affidavit of service is defective.

APPEARANCES:

Counsel for the Appellant: T Timeon
Counsel for the Respondent: T Taoaba

JUDGEMENT BY THE COURT

INTRODUCTION

1. This is an appeal against the decision of Semilota ACJ setting aside the default judgement and setting aside the writ of fieri facias.

BACKGROUND

2. On 29 August 2019 the appellant (plaintiff) filed a writ of summons against the respondent (defendant) claiming a sum of \$35,315.80 plus costs.
3. On 13 September 2019 service was purportedly effected on the defendant (I shall discuss this in more detail later as to whether service was effected on the defendant).
4. On 17 February 2020 the plaintiff entered default judgement against the defendant in the sum of \$35,315.80 plus costs of \$500.00.
5. On 15 April 2020 the default judgement was served on one of the respondent's staff by the name of Kirata Temamaka.
6. On 17 April 2020 the appellant filed a writ of fieri facias against the respondent.
7. On 30 March 2023 the respondent filed an application to set aside the default judgement and the writ of fieri facias.
8. On 6 December 2023 the application for setting aside was heard by Semilota ACJ.
9. On 8 January 2024 her honour delivered a ruling in which it was stated that under Order 9 rule 15 of the High Court Rules (the Rules) the appellant was required to indorse the writ of the day the month and week of the service thereof within 3 days of service. It further stated that the indorsement was done 9 days after the service and this was one of the reasons for setting aside the default judgement.
10. The other reason for setting aside the default judgement was that the respondent had established that they had a substantial defence to the plaintiff's claim.

GROUNDS OF APPEAL

11. The appellant filed two grounds of appeal which are:
 - 1) The High Court was in error in law in deciding to grant an application to set aside the default judgement dated 17 February 2020 without applying properly the principles governing setting aside default judgement. The High Court granted an application to set aside the default judgement based on the reason that the Respondent had satisfied the Court that he had an arguable defense of "no unpaid invoice" advanced in paragraph 1 of the proposed defense supported by affidavit evidence in paragraphs 8 and 9. This conclusion was an error in law because there was no sufficient evidence deposed by one Kirata Temamaka to support that proposed defense.
 - 2) The High Court was in error in coming to a decision to set aside the writ of fieri facias dated 15 July 2020 when application to state the writ of fieri facias was made in breach of Order 45 rule 19 sub-rules 1 and 3 of the High Court (Civil Procedure Rules, 1964) in that it was brought under Order 13 rule 8 and there was no supporting affidavit to state the grounds of the application and the facts necessary to substantiate them and, in particular, shall in the case of an application on the grounds of the appellant's inability to pay, disclosed his income, the nature and value of any property of his and the amount of other liabilities of his. This application existed without a

supporting affidavit to satisfy the requirement of Order 45 rule 19(3) and without the rule under which it was brought.

APPELLANT'S SUBMISSIONS

12. In her submissions Miss Timeon mainly concentrated on the fact that the respondent had not put forward sufficient material before the court to justify a finding that a substantial defense was made out.
13. She also complained that there were two processes before the Court, firstly, the entry of default judgement and secondly, the issuing of the writ of fieri facias but the respondent only made one application to set aside the default judgement and that the court was wrong in setting aside the writ of fieri facias when it set aside the default judgement.

RESPONDENT'S SUBMISSIONS

14. The respondent submitted that the default judgement was set aside for non-compliance of Order 9 rule 12 of the Rules and that the court was correct in finding that the respondent had established that they had a substantial defense.

CONSIDERATION

15. Ms. Timeon complained that the respondent only filed one application to set aside the default judgment and the writ of fieri facias is misconceived as the writ of fieri facias depended on whether there was default judgment. Once default judgment was set aside the writ of fieri facias died its natural death and therefore in our considered view there was no need for two applications to be filed.
16. During the course of the hearing of this appeal we pointed out to Miss Timeon that her affidavit of service of the writ on the defendant appeared to be defective. The affidavit of service states the writ was served on 13 September 2019 on "Kiribati Uniting Church" (Antebuka). Miss Timeon upon perusing the affidavit of service conceded that the affidavit of service was defective and she also conceded that there was no service of the writ on the respondent.
17. We agree the default judgment should be set aside for defective service and on the basis that the respondent had established substantial defence in the High Court. The High Court did not make any orders as to the filing of the defence and this matter is therefore remitted to the High Court for it to make necessary orders with respect to the defence and other pleading so that it can proceed to hearing in a timely manner.
18. The appeal is dismissed with costs to the respondent to be taxed if not agreed.

DATED this 13 day of December 2024


Sir Salika, JA


Nelson, JA


Khan, JA

