IN THE COURT OF APPEAL OF TONGA

NUKU'ALOFA REGISTRY **AC 11 of 2008**

BETWEEN : TONGA WATER BOARD

- Appellant

AND : PAU MO LEVUKA LIKILIKI

- Respondent

Coram : **Burchett J**
Salmon J
Moore J

Counsel : ***Mr Fakahua* for the Appellant**
***Mrs Vaihu* for the Respondent**

Date of hearing : **18 July 2008.**

Date of judgment : **25 July 2008.**

JUDGMENT OF THE COURT

[1] This is an appeal against a default judgment given by Andrew J in favour of the Respondent on the 7th September 2007.

[2] The Respondent is the present registered holder of a tax allotment situated at Hihifo, Ha'apai. In the 1970's there was what is described as an informal agreement whereby the appellant was allowed to instal a community water pump on the land at a rental of $50 per month. Since then the appellant has significantly extended its use of the land without advising the holders of the tax allotment. It seems that over the years the rent increased to $300 per month.

[3] The appellant entered into negotiations with the respondent for a further rental increase. Those negotiations were never concluded. Meanwhile the appellant fell into arrears with its rent to the extent where the sum owing at the time of the judgment was $5,500. The respondent issued a writ of summons claiming an eviction order against the Appellant.

[4] No defence was filed to the writ and the respondent applied for judgment by default. The application was heard and evidence was called establishing the respondent's right to the land and the fact that no rent had been paid since October 2006. The Judge was reluctant to order eviction because of the disruption that would cause to the water supply to the Ha'apai community. Apparently the respondent accepted that judgment for the arrears of rent and consideration of an increase would be an acceptable compromise. In the event judgment was given for $5,500 representing rent to the 12th October 2007 and an order was made increasing the rent to $500 per month from that date.

[5] Although not brought to our attention by the appellant we discovered during questioning that the appellant by application dated the 14th September 2007 sought an order setting aside the default judgment. There were 2 affidavits filed in support of the application. In one it was claimed that the appellant had an arguable defence but no details of that defence were given. In the other affidavit the deponent said she understood the appellant had an arguable defence but again no details were given. The application to set aside was dismissed by Andrew J on the

5th October 2007. We have not been provided with his reasons for doing so but have no doubt that it was because the appellant provided no particulars of the defence claimed. No appeal was lodged from this decision.

[6] Again in the appeal document the appellant claimed it had an arguable defence. Again no particulars were provided to us. It is essential that an applicant seeking to set aside a default judgment should provide full particulars of any defence claimed. In its appeal the appellant claimed that the increased rental of $500 was excessive. No evidence to support this proposition was supplied.

[7] In the course of our consideration of the matter we noted that Order 6 Rule 1 (3) of the Land Court Rules required the defendant to be notified of the hearing of an application for judgment by default. The defendant is entitled to be present at such a hearing but is not entitled to be heard. We could find no record on the Court file of such notification in this case. We resumed the hearing to provide counsel with the opportunity to make a submission on the consequences of this failure. Mr Fakahua for the appellant confirmed that his client had not been notified and submitted that if it had been, its position would have been clarified and that the appellant would have had the advantage of hearing the evidence. We accept that if the appellant had attended the hearing this would have been so. However the important questions are the effect of non-notification, in respect of which no submissions were made to us, and whether the appellant has suffered prejudice as a result of the non-notification.

[8] There is nothing in the Land Court Rules dealing with the effect of non-compliance with a rule. Order 2 Rule 2 makes the Supreme Court Rules applicable in such circumstances. Order 4 Rule 1 of the Supreme Court Rules provides that a failure to comply with the rules is an irregularity and does not nullify any judgment or order made. There is power for the Court to set aside any order made in proceedings in which the irregularity occurred but any application to set aside must be made within a reasonable time and before the party applying has taken

any fresh step after becoming aware of the irregularity. In this case the irregularity occurred over 10 months ago and whether or not it was aware of it the appellant has taken the step of applying to set the judgment aside. In our view the fact that the appellant has been able to take the matter back to the Court on that application means that it has suffered no prejudice through not being notified. On the other hand the respondent would suffer prejudice if obliged to re-present his evidence in support of the judgment to the Court.

[9] The appellant has made out no grounds on which this appeal should be allowed. It is therefore dismissed. The respondent is entitled to costs.

.....

Burchett J

COURT OF APPEAL TONGA

.....

Salmon J

.....

Moore J