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16/07/19

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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 14 of 2018

BETWEEN : KALISI KAFO'ATU LANGI FALAHOLA
- Plaintiff

AND : VILI PELE TUPOU
- First Defendant

AND : SINA FIEFIA
- Second Defendant

AND : HEMA SAILOSI AND MALIA SAILOSI
- Third Defendant

AND : MAKASINI SAILOSI
- Fourth Defendant

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mr. H. Tatila for plaintiff.
Mr. S. Tu'utafaiva for defendants.

Submissions : By Mr. Tu'utafaiva on application notice filed 31 May 2019
By Mr. Tatila filed on 7 June 2019.

Ruling : 12 July 2019.

rec'd 16/07/19

RULING ON APPLICATION TO SET ASIDE DEFAULT JUDGEMENT

[1] Default judgement was entered against each of the defendants on 27 November 2018, after a formal proof hearing which was held in this Court on that day, because no defence had been filed for any defendant up to that date. Orders were made in that judgement that all the defendants were to vacate the lands they each occupied by no later than 31 March 2019 and that they were to each pay a sum of $500 as costs, and a sum of $1,000 as damages, to the plaintiff.

[2] Those orders were served upon the third defendants on 4 December 2018 and on the wife of the fourth defendant and on the first defendant on same day, and it was served on the second defendant on 5 December 2018.

[3] No defendant complied with any of those orders and on 4 April 2019, the plaintiff applied for writs of possession against each defendant. Those writs were issued on 14 May 2019.

[4] On 31 May 2019, the defendants filed the present application to set aside the default judgement given on 27 November 2018.

Fault of counsel

[5] I put this heading up and I will comment on it because it needs to be addressed. I understand and I accept that counsel are busy and invariably overlook to attend to essential matters of their clients, even to file a claim before a statute of limitation applies, which is irreversible and cannot be cured by extension of time granted by the Court. But where their attentions are drawn to their overnight and the matter can be cured by extension of time, immediate attendance and action should be given to the matter overlooked. In the present case, that was not done. Counsel was aware of the formal proof hearing before the hearing was held because the defendants were each notified of it as is required by the Land Act. Yet he took no step to seek extension of time to file a defence. He thereby allowed the hearing to proceed. No doubt that when the orders were served upon the defendants, they brought them to the notice of counsel. Yet counsel did nothing about it, except no doubt to advise them to remain on and not vacate the land. Only when the

writs of possession were issued this application was then lodged. That is grossly unfair to the defendants and especially more so to the plaintiff. Instead of having had this matter dealt with last year or early this year, she now has to have it dealt with some 8 months later.

[6] The counsel is the representative of the party to the action. He has the express and implied authority of the party to act and speak for the party. But that authority does not include and is not to be construed as including an authorisation to be negligent or to omit to do an act which is essential to the party's interests. For example, if the party instructs the counsel to file the party's defence within the specified period of 28 days, the party does not thereby authorise the counsel to be careless and not bother to file any defence if the counsel so wishes, because that is contradictory to the instruction given.

[7] The Courts have therefore held that such default by counsel should not be attributable to the party and the party should not be punished or be prejudiced by reason of the fault of that party's counsel.

[8] The defaulting counsel must therefore clearly explain to the Court that it was not the fault of the party but of himself alone that the matter was not attended to. He thereby safeguards or at least attempts to safeguard to the party he represents the right which would otherwise be lost by his default.

[9] In the present application, counsel did not attempt to explain anything other than to say that it was "counsel's fault". That is unacceptable and it is not the fault of the party that no such explanation was given to the Court. I leave the matter at that and trust that such failure will, in future, be a rarity.

Setting aside a judgement

[10] The application of the defendants to set aside the default judgement appears to made in pursuance of the provisions of Order 14 of the Supreme Court Rules 2007. There is no other provision elsewhere for such application to be made. But whereas the Land Court Rules apply all the Supreme Rules, the Land Court Rules (Order 6 Rule 1(3)) appear to provide that Order 14 of the Supreme Court Rules shall not apply in the Land Court at all. It provides as follows:

> *"(3) Order 14 of the Supreme Court Rules (judgement in default of defence) shall not apply. Where the defendant has failed to file a defence, the judge and the assessor shall hear formal proof of the plaintiff's claim and, if satisfied thereof, shall give judgement for the plaintiff. The defendant shall be notified of and may attend such hearing but shall not be allowed to be heard."*

[11] If that provision is applied literally, that is, that Order 14 of the Supreme Court Rules shall not apply in the Land Court, then it means that a default judgement entered in the Land Court cannot be set aside at all because the provision for setting aside a default judgement is set out in Order 14 itself and Order 14 does not apply in the Land Court. Consequently, whereas a default judgement in the Supreme Court for payment of some monetary debt can be set aside and retried by calling and proving of the claim by proper evidence, a default judgement in the Land Court, such as in the present case, which orders the eviction of persons from their homes, cannot be set aside and retried by having the evidence properly contested and proved. That does not appear right because the eviction of a person and his family from his home is much more serious and should be properly tried if there was a good reason for the failure to file a defence.

[12] There may well be a good defence to the plaintiff's claim but that good defence may be lost forever and the defendant is evicted and suffers a grave injustice, simply because his counsel had been at fault in failing to file a defence in time. I do not think that such a result was intended to happen when Order 6 Rule 1(3) of the Land Court Rules was made. I consider that Order 6 Rule 1(3) was intended to apply, and it should be applied, only so far as it provides for the formal proof hearing of the claim, and not to prevent the application of Order 14 to set aside that formal proof judgement. I consider that the provisions of Order 14 Rule 4 which provide for setting aside a default judgement, are still applicable in the Land Court.

[13] The Court has an inherent jurisdiction to ensure that there is no miscarriage of justice. That is what Order 5 Rule 1 of the Supreme Court Rules 2007 is intended to achieve. It provides:

> ***"O.5 Rule 1. Time may be extended or abridged.***
>
> *The Court may, on such terms as it thinks just, order that the time within which a person is required to do or authorised to do any act in any proceedings, whether before or after judgement, be extended or abridged".*

[14] That provision can properly be applied to allow a defendant, such as the 4 defendants in the present case, to file their defence to the plaintiff's claim even after judgement has been entered, by setting aside the default judgement and extending the time for filing the defence to enable that defence to be filed.

[15] The Land Court Rules do not exclude the application of those provisions of Order 5 Rule 1 in the Land Court, and I therefore apply them in the present application.

Was there a good reason for failure to file the defence?

[16] One of the 3 requirements to set aside a default judgement is that there was a good reason for the failure to file the defence in time. As I have stated above I am satisfied that the reason for the failure was due to fault of the counsel, not of the defendants. They should not be deprived of their right to defend the plaintiff's claim simply because their counsel was at fault himself.

Is there an arguable defence

[17] The defendants have filed a proposed statement of defence in which they have each stated that they had made agreements with the plaintiff's husband that if they paid him $6,000 he would surrender the lots they occupied so that they could be granted as their allotments, and that they had paid him that money or part of that money. If those allegations are true there may well be a ground for the defendants to claim the defence of estoppel against the plaintiff herself as well, but that can only be decided upon the evidence and after full argument and consideration of the law applicable thereto. The defence is arguable.

Will the plaintiff suffer irreparable harm?

[18] Given that any harm or loss suffered by the plaintiff if the default judgement is set aside can adequately be compensated by monetary payment of damages, there will be no irreparable harm to the plaintiff if the judgement is set aside.

Costs

[19] I consider however that the plaintiff be paid her costs for the formal proof hearing, and for this application, by the defendants, who may be credited such costs when their counsel bills them for his services.

Orders

[20] Accordingly, I make the following orders:

(a) The default judgement of 27 November 2018 and the consequential writs of possession of 14 May 2019 are set aside.

(b) The defendants shall pay the costs of the plaintiff for the formal proof proceeding and of this application, to be taxed if not agreed.

(c) The defendants shall file and serve their statement of defence to the plaintiff's claim within 14 days from the date of these orders.

(d) The plaintiff shall file her reply to the defence within 14 days of service of the defence on her counsel.

(e) This matter will be called in chambers at **9:00am Monday 12 August 2019** for further direction.

FAKAMAAU'ANGA FONUA
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TONGA

L. M. Niu
JUDGE

NUKU'ALOFA: 12 July 2019.