

(a) ***“O.14 Rule 4 Setting aside judgement***

(1) *A judgement entered under rule 1 may be set aside if the defendant satisfy the Court that*

- (a) *there was a good reason for the failure to file a defence in time;*
- (b) *there is an arguable defence; and*
- (c) *the plaintiff will not suffer irreparable injury if the judgement is set aside.”*

The word “and” which I have underlined is the word that requires that all three things (a), (b) and (c) are satisfied by the applicant defendant.

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

[2] In his affidavit filed in support of his application, all that the first defendant says about his reason for his failure to file his defence in time is as follows:

- “2. About February 2019, the Direction Notice and Statement of Claim was served to my wife (Vasiti) at Pahu but my wife forgot to inform myself because I was at ‘Eua at the time.
- 3. That on 17 April 2019, I was served with a copy of the Statement of Claim together with the Judgement in Default of a Defence dated 15 April 2019.
- 4. That on the same day, 17 April 2019, I had instructed my lawyer to act for me and I was told to obtain all relevant documents that related to my affiliation with the kava on which the claim was based.”

[3] There is a certificate of service in the Court file signed by counsel, Mr. Tatila, that he served the first defendant personally at Hala’ovave, Kolomotu’a, with the direction notice, writ of summons and statement of claim on 20 February 2019. Mr. Tatila informed me at this hearing that that service was made by him on the first defendant’s wife and not on the first defendant personally and I accept that evidence from him. That supports the statement by the first defendant that

the service of the documents was made upon his wife and not him personally. Mr. Tatila stated that subsequent to that service, he realised that that service was ineffective because he had not had leave of the Court to effect substituted service on the wife. So he had another set of the same documents served upon the first defendant personally at 'Eua on 8 March 2019. That service was effected by one Va'inga Tonga who signed a certificate of that service on 14 March 2019 and that certificate was filed in this Court on 18 March 2019.

[4] The first defendant says nothing about that service by Va'inga Tonga in his affidavit as I have quoted above. I asked Mr. Mo'ale at the hearing about it, and he informed me that the first defendant told him that he had been served with a sealed envelope with documents inside whilst he was at the shipping office in 'Ohonua, 'Eua. Mr. Mo'ale said that when the first defendant was served with the default judgement, the first defendant told him that he then brought it together with the unopened envelope and only opened it when he was at his law office at Nuku'alofa.

[5] Yet, the first defendant has not explained how and when he knew that his wife (Vasiti) had been served with the plaintiff's claim, and why he had not opened the sealed envelope he was given at the shipping office at 'Ohonua. He has not even acknowledged that he was so served or to deny that he had been so served. It is clear that he is mistaken or he has wrong fully stated that the statement of claim was served together on him with the default judgement, in order to cover up his failure to file his defence in time. I do not accept that the statement of claim was included with the default judgement when it was served on him on 29 April 2019. I am satisfied that he had already been served with the statement of claim on 8 March 2019 at the shipping office at 'Ohonua by Va'inga Tonga and that he knew of the claim then. That was why he brought it with him together with the default judgement to his lawyer.

[6] The first defendant has therefore failed to satisfy me that he had a good reason for not filing his defence in time. In fact he has failed to provide a reason at all. What he has tried to justify is that he had not been served with the claim at all until after the default judgment had been given. But that is not what his ground of

application is. His ground for his application is stated by his counsel in his application as:

“1. There are good grounds for the failure to file a defence in time.”

I am therefore not satisfied that the first defendant had a good reason for his failure to file his defence in time.

Arguable defence?

[7] That is enough for me to dismiss the application of the first defendant, because he has failed to satisfy me of his first hurdle. But I wish to point out that his defence and counter claim are not arguable either. He has admitted in his proposed statement of defence-

- (a) that he was looking after the kava plot for, and as the property of, the plaintiff;
- (b) that he, and the second defendant, went to the plaintiff to seek the plaintiff's consent that the plot be sold to the second defendant as is, that is, with the kava still being in the ground;
- (c) that the plaintiff agreed that he, the first defendant, could do as he himself pleased and for whatever price he thought was fit;
- (d) that the price of powdered kava at the time was \$150 per kilo (refer para. 30 of defence);
- (e) that the costs of harvesting, processing, drying and pounding and packing of the kava would all be covered by such a high price of kava, with a sizable profit to be made from the plaintiff's kava;
- (f) yet he sold the whole plot which he says only had 200 kava plants to the second defendant for only \$20,000 (refer para. 10 (ii) of the defence); that is an average of \$100 per kava plant, but out of those 200 plants, the second defendant only took out 165 plants, and he himself took out and processed and sold the other 35 plants for \$9,000 (refer para. 30). That equates to \$257 per plant.

[8] If as the first defendant says in his proposed defence the plaintiff had agreed that he do with the plot as he saw fit (which is of course denied by the plaintiff), the

first defendant was under an obligation to act reasonably and to obtain the best possible price for the plot, and it is clear from the figures that he has given in his defence as stated above that he had failed in that duty, and an implied term to act reasonably as agent for the plaintiff in the sale of the kava to the second defendant.

[9] I do not consider that his defence that he owed no such duty to the plaintiff is arguable.

Irreparable injury?

[10] I accept that the plaintiff will not suffer irreparable injury or loss which money cannot compensate.

Conclusion

[11] Because the first defendant has not satisfied me that he had a good reason for failing to file his defence in time and has failed to satisfy me that he has an arguable defence to the plaintiff's claim, I rule that his application to set aside the default judgement is dismissed with costs, to be taxed if not agreed.

NUKU'ALOFA: 4 June 2019.



A handwritten signature in black ink, appearing to read "L. M. Niu", is written over the seal.

L. M. Niu

JUDGE