

IN THE HIGH COURT OF KIRIBATI) HIGH COURT CIVIL CASE 67 OF 2011
CIVIL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

BETWEEN: SUNDARJEE BROS (AUST) PTY LTD PLAINTIFF

AND: BOBOTIN KIRIBATI LTD DEFENDANT

FOR PLAINTIFF: KIATA KABURE

FOR DEFENDANT: BIRIMAKA TEKANENE

Date of Hearing: 27 July 2011

JUDGMENT

(Ex Tempore)

This is an application to set aside Default Judgment entered on the 5 July 2011. I heard this application on 27 July. There was no agreement to set aside default judgment. At the end of the hearing I gave my judgment that judgment in default must be set aside. I now publish my reasons.

As a background information, a writ was issued on the 1st of June. Appearance was filed on 16 June. There was no defence filed and so default judgment was entered on 5 July.

Order 29 rule 12 is the most appropriate rule to be applied here. It states as follows:

“Any judgment by default, whether under this Order or any other of these Rules, may be set aside by the Court, upon such terms as to cost or otherwise as such Court may think fit.....”

The rule provides for the Court's discretionary power to set aside default judgment.

In cases as such the primary consideration for the Court is whether the defendant has a substantial ground of defence to the action. This was demonstrated in the statement of **Lord Denning M.R. in Burns v Kondel** (1971) 1 Lloyd's Rep. 554 at 555:

"We all know that in the ordinary way the Court does not set aside a judgment in default unless there is an affidavit showing a defence on the merits. That does not mean that the defendant must show a good defence on the merits. He need only show a defence which discloses an arguable or triable issue."

After reading the defendant's affidavit and oral submissions, they disclosed the fact that they are in dispute with the amount owing against them. From the defendant's Counsel, he stated that there is a **big difference** in the amount stated in the default judgment and what they believe they owe the plaintiff. I take this as an arguable or triable issue.

Having settling that, there are also other important issues to be considered by the Court. In *Kayuken Pacific Ltd v Harper* [1987] SILR 54, the following questions were also asked:

- What was the reason for the failure by the absent party to appear?
- Has there been an undue delay by the absent party in launching his/her proceedings for a new trial?
- Will the other party be prejudiced by an order for a new trial?


For part one, the defendant failed to provide a reasonable explanation for their failure to file their defence. For part two, I believe that there was no undue delay. The defendant had promptly acted to set aside the default judgment. They filed their application four working days after judgment date. For part three, I believe the plaintiff will not be prejudiced if an order for a new trial is made. Rather, the defendant will be prejudiced if their triable issue is not heard.

In her submission to the Court, Counsel for the plaintiff referred me to a case of *Kiribati Port Authority v Central Pacific Producers Ltd* (2011), HCCC 56/2010, as authority not to grant the application. Having read that case, I believe that it is very different from this case before me. The reason for refusing the application in that case authority was because the Judgment was by consent therefore setting aside should also be by consent. There was no consent so the Court refused the application. This case before me is that Judgment was by default of pleadings.

Counsel for Defendant referred me to the case of *Dr Teraira Bangao and Others v Public Utilities Board (2011), HCCC 159/2010*. This is an authority for cost in setting aside default judgment.

In all the circumstances of this case, I order that Default Judgment is set aside with cost of \$150. Defendant is given time to file their defence by Wednesday 3 August 2011.

Dated 28 July 2011



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TETIRO M SEMILOTA
Commissioner