IN THE HIGH COURT OF KIRIBATI 2012

CIVIL CASE NO. 8 OF 2011

	[TERETIA KORIETA	**PLAINTIFF**
	[	
BETWEEN	**[AND**	
	[	
	[BROADCASTING AND PUBLICATIONS	
	[AUTHORITY	**DEFENDANT**

Before: Hon Chief Justice Sir John Maria

12 June 2012

Mr Banuera Berina for Plaintiff/Respondent
Ms Batitea Tekanito for Defendant/Applicant

JUDGMENT

Muria CJ: The applicant/defendant in this case seeks to set aside the default judgment entered against it on 27 April 2011. The background facts of this case were set out in the judgment of the Court delivered on 31 October 2011. I need not repeat them here, save to set out the chronological events in the matter.

CHRONOLOGY OF EVENTS

On 14 February 2011 writ issued against applicant

On 22 February 2011 writ served on applicant

No appearance by applicant

27 April 2011	Default judgment with damages to be assessed entered against applicant
26 May 2011	Respondent filed application for assessment of damages
20 July 2011	Hearing on assessment of damages fixed for 9 August 2011
9 August 2011	Court directed notice of hearing on assessment of damages to be served on applicant and fixed hearing for 9 September 2011
2 September 2011	Notice of hearing served on applicant
9 September 2011	Hearing on assessment of damages. Applicant did not appear.
30 October 2011	Judgment on assessment of damages delivered, awarding $20,000.00 general damages plus $226.30 special damages – total damages awarded $20,226.30.
30 November 2011	Applicant filed application to set aside the Default Judgment.

I repeat what the Court said in its judgment given on 31 October 2011 that the applicant had taken no steps at all to defend the matter since the service of the Writ upon it until the filing of its application to set aside the Default Judgment.

PRINCIPLES TO BE APPLIED AND ARGUMENTS

The Court retains the discretion to set aside any judgment obtained by default upon such terms as may be just. See Order 13 r8 of the *High Court (civil Procedure) Rules 1964*.

That discretion is unfettered.

The rule does not set out what matters should be taken into account by the Court when exercising its discretion in an application to set aside default judgment. The case law, however, has provided guidelines to be taken into account in such application. One such case is *Evans –v- Bartlam* [1937] AC 473, referred to by Counsel for the applicant, which lays down the general principle that:

> ***"..... unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".***

Ms Tekanito also made references to other cases in support of the applicant's case.

Mr Berina of Counsel for the respondent did not seek to resile from the general principle that the Court retains the unfettered discretion to grant or refuse an application to set aside a default judgment. Counsel, however, urged that the Court would have to take into account the circumstances of the default when exercising its discretion.

The principles to be applied in an application such as this, are stated in *Waysang Kum Kee –v- Abamakoro Trading Ltd* (5 April 2001) Court of Appeal of Kiribati Civ. App. No. 6 of 2000. The Court of Appeal, in that

case, restated three principles which the Court should apply, namely: whether the defendant has a substantial ground of defence to the plaintiff's claim; whether the defendant's failure to take any steps or to appear at the hearing was excusable; and whether the plaintiff will suffer irreparable harm if the judgment is set aside. The Court of Appeal went on to reiterate that the onus is on the defendant to establish a defence of sufficient substance to justify delaying the plaintiff in obtaining the fruits of the judgment.

In this case, the second of the three considerations is of no moment to the applicant. There is absolutely no acceptable reason or explanation for not taking any steps in the proceedings against it. The affidavit of Betarim Rimon, the Acting General Manager of the applicant/defendant, filed in support of the application deposed:

> **"2. THAT a court document marked as "Writ of Summons", issued on 14th February 2011 was brought to my attention on or about 25th February 2011.**
>
> **3. THAT at the time the writ was submitted to me I was new of the position of Acting General Manager and so I instructed one senior staff to advise me on this matter.**
>
> **4. THAT no advice was given and believing that the amount claimed was only $226.30 and the remaining to be assessed by the Court I advised the accountant to immediately settle the payment.**
>
> **5. THAT I did not realize that in a personal injury action the Plaintiff could enter interlocutory judgment and proceed to enter judgment because I was under the impression**

that a formal hearing would take place to determine whether the facts alleged against me were in fact true.

6. THAT I now realize that my understanding was probably wrong".

The above explanations coming from an ordinary person from the village with very limited education and very little knowledge or understanding of the machinery of the Courts can be accepted but certainly not from a person in the caliber of a CEO of an organization. The failure by the applicant to take steps to defend the action in this case is, in my judgment, inexcusable.

The main consideration for the Court in this application is whether the applicant has a substantial defence to the respondent's claim. In its draft defence, the applicant raised the defence of contributory negligence. However there must be evidence to demonstrate that the defence is of sufficient substance.

It must be pointed out that the matters set out in the draft defence are assertions or claims of alleged defence. They are not evidence. So that apart from the assertions or claim of alleged defence of contributory negligence, there is absolutely no evidence in the affidavit of the Acting General Manager pointing to any contributory negligence on the part of the plaintiff/respondent. On the other hand, the affidavit of the plaintiff/respondent sworn to on 23 January 2012 in response to the Acting General Manager's affidavit rebutted the applicant's claim of contributory negligence.

The onus is on the applicant/defendant. It has failed to discharge that onus of establishing a defence of sufficient substance in this case.

Having found that the applicant/defendant has no excusable explanation for failing to take steps to defend the plaintiff/respondent's claim and that no defence of sufficient substance has been shown, it is unnecessary to proceed to consider the third consideration set out in *Waysang Kum Kee –v- Abamakoro Trading*.

The applicant/defendant has failed to offer any justification for depriving the plaintiff/respondent the fruits of her judgment. For the above reasons, the application to set aside the judgment of the Court dated 27 April 2011 is refused.

In passing, I wish to make the following remarks.

While the cases decided by the Courts in other jurisdictions are helpful, I feel the first place to look to for guidance when dealing with legal principles in cases coming before our Courts should be in the judgments of our highest court, the Court of Appeal of Kiribati. Where legal principles have been firmly established by or own Courts, endeavours should be made to cite decisions of our own Courts in such matters, and only continue to look elsewhere for guidance where legal principles are yet to be settled by our highest Courts. By doing so we will begin to develop our own local jurisprudence.

Dated the 29th day of October 2012

SIR JOHN MURIA
Chief Justice