IN THE HIGH COURT OF KIRIBATI 2020

MISCELLANEOUS APPLICATION NO 144 OF 2019
(ARISING FROM HIGH COURT CIVIL CASE NO. 48 OF 2019)

	[UEAUA IOTEBWA FOR ISSUES OF	
	[NEI KABAO BATAUA	**APPLICANTS**
	[	
BETWEEN	**[AND**	
	[	
	[ATTORNEY-GENERAL	**RESPONDENT**

Before: The Hon Chief Justice Sir John Muria

25 May 2020

Ms Taaira Timeon for Applicants
Ms Pauline Beiatau for Respondent

JUDGMENT

Muria, CJ: This is again another application involving default on the part of the Attorney-General's Office to file defence on behalf of a Government body within the time allowed under the *High Court (Civil Procedure) Rules*. Last Wednesday 20 May 2020, I dealt with a similar application in *Baate –v- Tierata, Tirae, Waitaake and Attorney-General*. Miscellaneous Application 17 of 2020 arising out of, High Court Civil Case No. 60 of 2019 in which the Court granted leave to the plaintiff/applicant to enter judgment against the second respondents. The plaintiff/applicant in the present case is also seeking leave to enter judgment against the defendant/respondent for failing to file a defence within the time allowed by the Rules.

Brief background

2. The plaintiff issued a Writ of Summons in this case against the Defendant on behalf of the Director of Lands, claiming damages for breach of the lease

agreement entered into between the Government and the plaintiff's predecessor over the land Tabontawana 597-aa/1 at Bonriki. The writ was served on the defendant on 4 September 2019. Appearance was entered for the defendant on 22 September 2019. Since the last day of the period for appearance was 28 September 2019, the defendant's defence should have been filed on or before Monday 14 October 2019, since the 14 days allowed for the defendant's defence to be filed fell on 12 October 2019, a Saturday. No defence was filed on or before 14 October 2019 and no application to extend time to file defence had been sought by the defendant on or before 14 October 2019.

Whether a defence existed

3. The position in law is thus obvious, that as of 14 October 2019, no defence existed on behalf of the defendant. Even accepting, for argument's sake, that the defendant filed a Defence on 18 November 2019, as submitted by Ms Beiatau, that defence was way out of time. There was no application by the defendant to extend time to file defence that late.

4. Consequently, the missing defence said to have been filed on 18 November 2019 was no defence at all unless application for extension of time to file the same had been made. None was made and so no defence existed at the time the plaintiff filed his amended application for leave to enter judgment against the defendant on 21 October 2019. This application was listed for hearing on 16 March 2020 after the Chief Registrar signed the application on 17 January 2020.

5. Again, even by 16 March 2020, still the defendant did not take any steps to seek extension of time to file defence. Instead on 5 May 2020 the defendant purportedly filed a defence to the plaintiff's claim. This defence is said to be a 're-filing' of the 'lost defence' that was said to have been filed on 18 November 2019. However, as I have already stated earlier, the alleged defence filed on 18 November 2019, even if it was indeed filed, was no defence

at all for the reasons which I have already stated earlier. As such any claim by the defendant of 're-filing' on 5 May 2020 of that 'lost defence' cannot be done. It simply exacerbated the defendant's position by having an already out of time defence trying to replace another already out of time defence.

6. Both, the defence said to have been filed on 18 November 2019 and that filed on 5 May 2020, did not have any existence in law. As such one cannot replace the other. It seems that it has never occurred to the defendant that they were out of time to file a defence since 14 October 2019 and that before a defence could be properly filed after 14 October 2019, an extension of time must first be sought. In this case, as I have already stated, no defence to the plaintiff's claim existed up to this moment.

Whether leave to enter judgment should be granted

7. Ms Timeon of Counsel for the plaintiff/applicant submitted as no defence has been filed, the only course open to the Court is to grant leave to enter judgment against the defendant, provided the plaintiff has satisfied the Court the defendant had been properly served with the plaintiff's Statement of Claim. Counsel relied on the recent decision of this Court in *Baate –v- Tierata, Tirae, Waitaake and Attorney-General* (20 May 2020) High Court Miscellaneous Application 17/20 arising out of Civil Case 60 of 2019. In that case this Court said:

> **"Since no defence filed by the second defendant on or before 24 October 2019, the plaintiff need only to show that the plaintiff's Writ of Summons and Statement of Claim had been properly served on the second defendant. That, the plaintiff had done and the second defendant had been in default in filing his defence".**

8. In the present case, the purported defences said to have been filed on 18 November 2019 and 5 May 2020 were no defences at all, in law, as no application for extension of time to file them had ever been made before filing

them. Consequently, all that the plaintiff needs to do is to satisfy the Court that he had properly served the Writ of Summons and Statement of Claim on the defendant. That, he had done and he is entitled to be granted leave to enter judgment against the defendant. The question, however, is whether leave should be granted.

9. The two cases *Fugui –v- Attorney-General* HC-SI CC No. 99 of 2013 and *Dakei Construciton –v- Attorney-General* HC-SI CC 16 of 2015 decided by the High Court of Solomon Islands are on a different footing to the application now before me. In the two cases referred by Ms Beiatau, the defendant Attorney-General in both cases applied for extension of time to file defence out of time. The Court was able to deal with both the plaintiff's application for leave to enter judgment against the Crown as well as deal with the defendant's application for extension of time. The defendant succeeded in those two cases, first in their applications for extension of time to file defence. Having succeeded in their applications for extension of time to file defence, the defendant were able to convince the Court that the plaintiff's application for leave to enter judgment should not be granted.

10. The position in the present case is not the same as in the two cases referred to by Counsel. No application for extension of time had been made to the Court before the defences filed on 18 November 2019 and 5 May 2020 in the present case in the first place. Hence, there was no other recourse for the plaintiff to take but to seek leave to enter judgment against the defendant on 21 October 2019.

11. The other two cases referred to by Counsel for the defendant are *Kiribati Ports Authority –v- Shipping Agency of Kiribati* (21 August 2019) Kiribati Court of Appeal Civil Appeal 2/19 and *Kiamaro Riteri –v- Betio Shipyard* (6 August 2013) High Court Civil Case No. 146 of 2011. Both of these cases are on setting aside default judgments. Counsel for the defendant contended that although the cases are concerned with setting aside default judgments, the principles discussed in those cases are applicable to the case now at hand. Like

in the present case, no defences had been filed in the two cases referred to by Counsel and default judgments had been entered against the defendants.

12. There are, however, differences between the two cases, *Kiribati Ports Authority –v- Shipping Agency* and *Riteri –v- Betio Shipyard*, referred to and the present case. First, the defendants in those two cases referred to are not Government bodies and so judgments in default had actually been entered against the defendants without the need for leave from the Court. Secondly, in those two cases, default judgments had already been entered against the defendants, necessitating applications to set aside the judgment first in order to show that they are entitled to defend the plaintiff's claims.

13. Each case is to be considered under its own circumstances. In the present case, the defendant filed defences that were ineffectual in law. As such, instead of just 'sneaking in' defences, the defendant should have done the proper thing first, namely apply for extension of time to file a defence. Only after the Court grants an extension of time can a defendant file a defence recognized by law.

14. It is, however, to be noted in the present case, there is an application filed on 20 May 2020, Miscellaneous Application 66/20 but no date has been given yet for the hearing of the application. In my view, that application is a feature that takes the present case out from the circumstances of *Baate –v- Tierata, Tirae, Waitaake and Attorney-General* where the defendant was simply relying on a defence which was filed out of time without a grant of extension of time to do so. If it was not for the Miscellaneous Application 66/20, filed and now awaiting a hearing date, this present case would be on all-fours with **Baate's** case.

15. The application, having already been filed, although no hearing date has been given yet, I cannot now simply ignore it. It would have been ideal to deal with the defendant's application for extension of time together with the plaintiff's application for leave to enter judgment together as done in *Fugui –v- Attorney-General* (above) and *Dakei Construciton –v- Attorney-General*

(above). Nevertheless the application for extension of time is now before the Court, and it must be dealt with under its general power under O.64 r5 of the *High Court (Civil) Procedure Rules.*

16. If the Court were to give leave to the plaintiff to enter judgment against the defendant now, it would still be open to the defendant to apply to set aside the judgment, as well as ask for extension of time to file a defence. I feel that course of action would result in a multiplicity of proceedings and waste of the Court's and everybody's time. The Court must avoid such wastage and multiplicity of proceedings.

17. An application for leave to enter judgment necessarily requires a defendant to show that he has a good defence on the merit. Leave would be granted to the plaintiff to enter judgment if the defendant fails to show defence on the merit. The defendant can do that on the materials before the Court, including affidavit evidence or a draft defence (if any) attached to the affidavit. See *Raratu –v- Jian Pei Li* [2020] KIHC 1; Miscellaneous Application 22 of 2019 (21 February 2020) where this Court stated that:

> **"The burden is on the defendant to show that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action based on the evidence before the Court".**

18. The case of *Raratu –v- Jian Pei Li* was for leave to enter summary judgment under O.14 r1 of the *High Court (Civil Procedure) Rules*. The principle, in my view, applies equally to application for leave to enter judgment under O.29 r14. The burden on the defendant to show a good defence on the merit applies to applications under O.14 r1 and O.29 r14.

19. I had the opportunity to consider the affidavits filed in this application and the affidavit of Teeko Bauro who is the Lands Management Officer, which

contains what seems to be an arguable defence on the part of the defendant against the plaintiff's claim. Paragraphs 4-9 of Teeko Bauro's affidavit state:

> **"4. I am aware of such non-payment because I am the officer dealing with payments of land lease. This is one of my roles in the office.**
>
> **5. There is no breach of contract although there was no payment of land lease of the said land to the applicants because during these years 2014-2018, the applicant in this case were not registered over the land hence not entitled to the lease payment. Only those who are registered receive land lease.**
>
> **6. In relation to the court minute 163/01 as they claimed to have registered their father namely Iotebwa Rubeia over the land, I denied this claim. This court minute does not relate at all to the land currently disputed which is 597aa/1 neither confirmed the name of Iotebwa Rubeia registration on this land. In fact the subject matter of this court minute is land plot number; 597e. The High Court decision in 2010 Civil Case No. 141 of 2010, explained this and we rectified our record accordingly by having on the record the name of Mariamene as the registered owner. This was done in the year 2018, followed by cease of land lease payment of both issues of Tekaau Bataua and Kabao Bataua.**
>
> **7. *This office received court minute Bik Lan 526/17 confirming the name Taoaba Tabuaki (issue of Tekaau Bataua) to be registered over land 597/aa/1*. The office record was then rectified accordingly and land lease payment was made to this person. Taoaba was also paid the outstanding lease for the years 2014-2018.**
>
> **8. Sometimes in 2019 I received court minute BetLan 362/19 confirming registration of Ueaua Iotebwa for issues of Kabao Bataua for the same land. Accordingly we paid outstanding of 2019 payment to this person.**
>
> **9. I strongly say that the Lands Unit has not breached any contract regarding land lease payment in respect of land plot No: 597aa/1."**

20. In the light of the strong indication of a defence shown by the defendant, I feel that it would not be just to grant to the plaintiff leave to enter judgment in this case. Consequently, the plaintiff's application is refused.

21. As the defendant's application for extension of time has already been filed and is now waiting for a hearing date, the defendant should now ask for a hearing date and the application to be listed for hearing.

22. The plaintiff's application has been brought about due mainly to the defendant's default. As such, the costs of the present application must be paid by the defendant to the plaintiff, to be taxed, if not agreed.

23. **ORDER:**

1. The plaintiff's application for leave to enter judgment against the defendant is refused.

2. Costs to be paid by the defendant to the plaintiff, to be taxed, if not agreed.

Dated the 29th day of May 2020

HIGH COURT OF KIRIBATI

SIR JOHN MURIA
Chief Justice

TE BOW AE E RIETAKA I KIRIBATI