

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 198 of 2006L**

**BETWEEN** : **AHMED KHAN** father's name Ibarat Khan of Tailaiya, Ba,  
Farmer

**1<sup>st</sup> Plaintiff**

**AND** : **MOHAMMED YUSUF KHAN** father's name Ahmed Khan  
of Tailaiya, Ba, Farmer

**2<sup>nd</sup> Plaintiff**

**AND** : **NATIVE LAND TRUST BOARD** a statutory body created  
under the Native Land Trust Act Cap 134

**Defendant**

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**INTERLOCUTORY JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing: Mr. Qoro on instruction of A K Lawyers for the  
Plaintiffs  
Mr. Tuifagalele Nemani for the Defendant**

**Solicitors: A. K. Lawyers for the Plaintiffs  
Vuataki Qoro for the Defendant**

**Date of Hearing: Judgment on the papers  
Date of Judgment: 23 September 2009**

**INTRODUCTION**

[1] On 12 July 2006, the Plaintiffs, Ahmed Khan and his son Mohammed Khan, filed a Writ of Summons and Statement of Claim against the Defendant, the **Native Land Trust Board** (hereinafter "**NLTB**"). They are suing the

NLTB in respect of 21 acres of sugar cane farm land in Ba leased from the NLTB which they were occupying until evicted by the landowners.

[2] The claim is based on an agreement by the NLTB to give the Khans two registered leases of the cane farm. Following initial negotiations and agreement, Ahmed Khan and his son moved on to the farm, cultivated and harvested sugar cane. But before the formal lease was issued, the landowners decided to give the farm to one of its members. The Khans allege that they were forced out and that the NLTB had breached their agreement. They seek damages from the NLTB. It is not a claim against the landowners.

### **THE BACKGROUND**

[3] These facts are not disputed. Prior to the expiry of the lease (31 December 2005), Ahmed and his son Mohammed applied to the NLTB on 6 December 2004 for its renewal.

[4] On **11 January 2005**, NLTB offered them two separate leases of the same land subdivided equally in area, being Cibanaoci No1 to Ahmad Khan and Cibanaoci No2 to Mohammed Khan of 4.0467 hectares each. Both leases were subject to the same conditions: terms of 30 years and \$700 annual rent. On acceptance, the Plaintiff's were to pay \$3,404.80 each which included the first year's rent.

[5] On **14 January 2005**, the offer was accepted and the parties signed the instrument of tenancy and the Ahmed Khan and his son paid \$2704.80 each minus the first year's rent. The rent was subsequently paid on 12 August 2005 from the 2005 cane proceeds from the farms. Formal leases were to be issued by the NLTB in due course.

[6] The NLTB did not issue formal leases and the landowners evicted the Khans and took possession of the farms. Ahmed Khan and his son allege that they have not been able to re-enter since and accepts that the NLTB has repudiated the agreement to provide them with a formal lease and claimed damages which included the value of the house on the property and standing cane crop (\$85,000), loss of future earnings (\$450,000), special and general damages. The Writ and Statement of Service were filed on **12 July 2006**.

[7] The Writ and Statement of Claim were sent by registered post on **18 July 2006** from the office of Khans' solicitors in Ba and receipt acknowledged by the NLTB in Suva by return of the accompanying pink slip. A copy was also served at the Lautoka office of the NLTB on **14 July 2006**.

[8] No Acknowledgment of Service having been filed by the NLTB, the Plaintiffs' solicitors entered **Default Judgment** two months later on **21 September 2006**.

### **NLTB'S APPLICATION TO SET ASIDE DEFAULT JUDGMENT**

[9] On **11 October 2006**, NLTB's solicitors filed a Summons to set aside the Default Judgment and for leave to file its Defence. The application is supported by an affidavit sworn by the litigation clerk and a second affidavit by the NLTB filed officer in Lautoka, both filed on 11 October 2006. Mohammed Khan filed two affidavits in reply on 24 November 2006. Both Counsel filed written submissions on 10 and 14 April 2007 and judgment was to be delivered on notice by the Judge then seized of the matter. It remained outstanding till 11 September 2009 when both Counsel agreed that I deliver judgment which I now do.

### **THE AFFIDAVIT MATERIAL**

[10] The explanation given by the NLTB litigation clerk in her affidavit for the failure to file the Acknowledgment of Service was:

*"I only became aware of the writ on the 11<sup>th</sup> day of September 2006 when I cleaned up a tray used by our former Senior Legal Officer who had resigned from our Lautoka office. My subsequent enquiries shows that a service by Registered Mail had been effected on Defendant's General manager on 21<sup>st</sup> July 2006...On discovering the writ to be a new action I asked the manager North West for consent to sent the writ to Vuataki Qoro to file Acknowledgment of Service while one of our officers attended to the brief for them. Before our office could forward the brief and land file to our solicitors and before they could file Acknowledgment of Service, Defence and Appointment as solicitors the Default Judgment was served upon them."*

[11] The affidavit of the field officer supports what the litigation clerk says and complains that service should have been effected on the Secretary of the Board as required by **s 22(1)** of the **Native Land Trust Act** [Cap 134]. Had this been done, he says, the delay in this case would not have happened. He further says that a member of the landowning unit was also interested in the same land. The landowning unit gave their approval to this person and gave back the goodwill payment which the Plaintiffs had already made to the landowners. Several attempts by the NLTB, landowners and the Khans, amidst threats of violence by some members of the landowners, failed to resolve the matter. He says that the NLTB has a good defence. It turned out that some members of the landowning unit did not agree to grant the renewed leases to the Khans. He claims that representations made on behalf of the Khans that the landowners had agreed were false and had led the NLTB to act to its detriment. He claims a defence of estoppel could arise. He also claims that the NLTB was willing to give the Khans their leases back but the Khans did not want this option. It seems that the threats of violence had gotten to them.

[12] Two issues were raised in this case. Firstly, whether service of the Writ on the NLTB was good and proper service thereby making the Judgment in default of Acknowledgment regularly entered. Secondly, if so, whether the NLTB has a good defence.

## **THE LAW**

[13] This is a type (a) application to set aside according to the leading case of **Shocked** v **Goldschmidt** [1998] 1 All E R 372. That case dealt with setting aside of a judgment delivered after a hearing on the merits in the absence of the defendant so the principles there enunciated are of limited assistance in this case.

[14] In **BW Holdings Ltd** v **Graham Eden and Associates Ltd** [2002] FJCA 66; ABU0027U.2000S (16 August 2002), a case similar to this, the Court of Appeal set out the applicable law as follows:

“The granting of leave to come in and defend an action is discretionary. At the end of a 9 page careful examination of the arguments advanced by counsel for the parties the Resident Magistrate came to the conclusion that the Company was not advancing a bona fide defence giving rise to triable issues. I agree.”

The Resident Magistrate dealt with this issue in these terms:

“The judgment being regular the defendant was required to show a defence on merits. The central requirement for the applicant to satisfy the court by evidence is that the defendant has a good defence on the merits. That the defendant has put forward a bona fide defence giving rise to triable issues....The affidavit material presented does not disclose a defence on the merits....The onus at all times was on the defendant to establish sufficient cause. They have not shown sufficient cause for the exercise of discretion in their favour.”

[15] Similarly, in **Evans** v **Bartlam** [1937] 2 All E R 646, a decision of the House of Lords, where judgment in default of appearance was sought to be set aside, Lord Wright, at p 656, said this:

“In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits, to which the court should pay heed; if merits are shown, the court will not *prima facie* desire to let pass a judgment on which there has been no proper adjudication...”

He clearly shows an issue which the court should try. He has been guilty of no laches in making the application to set aside the default judgment, though as **Atwood** v **Chichester** (1878) 3 QBD 722 and other cases show, the court, while considering delay, has been lenient in excluding applications on that ground. The court might also have regard to the applicant’s explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently

punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose.”

### **WAS THE DEFAULT JUDGMENT REGULAR?**

[16] Thus it is necessary to first establish whether the default Judgment was regularly entered which in turn depends on whether service on the NLTB is proper and effective.

[17] **Section 22(1)** of the **Native Land Trust Act** [Cap 134] provides that service on the NLTB “of all legal processes and notices shall be effected on the Secretary.”

[18] Counsel did not refer to **s 24** but I think it is also relevant. It provides:

**24.**-(1) Any application, statement, demand, instrument, notice or other document authorised or required by this Act, or any regulation made thereunder, may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode or by sending it through the post in a registered letter addressed to him there.

(2) Where any such document is to be served on a person by being sent through the registered post it shall be deemed to have been served not later than the fourteenth day succeeding the day on which it was posted, and for proof of such service it shall be sufficient to prove that the letter containing the notice was properly addressed, registered and posted.

[19] **Order 10** of the **High Court Rules 1988** is also relevant. **Order 10 r 1(1)** provides that a Writ must be served personally on the defendant. **Rule 1(2)(a)** says that a writ may be served on a defendant within the jurisdiction by ordinary post at his usual or last known address. **Rule 1(7)** provides that this rule shall have effect subject to the provisions of any Act and these Rules and in particular to any enactment which provides for the manner in which documents may be served on bodies corporate.

[20] It is my opinion that the combined effect of **ss 22** and **24** of the **Native Land Trust Act** [Cap 134] is that the Writ could be served by registered post instead of personally on the Secretary of the NLTB. Section

24 is not inconsistent with the provisions of Order 10 r 1 of the High Court Rules. I would interpret these provisions liberally and practically. The whole intention of these provisions is to ensure that someone with authority receives the document being served. See also the High Court decision in **BW Holdings v Graham Eden & Associates Ltd** [2000] FJHC 3; Hba0023.1999s (10 January 2000) which dealt with service on a company. **Section 391(1)** of the **Companies Act** [Cap 247] provides that “a document may be served on a company by sending it by post to the registered postal address of the Company in Fiji or by leaving it at the registered office of the Company.” Scott J said this in respect of service on an address which appeared on the Company’s annual return rather than its actual registered office:

“In Fiji’s circumstances where there is a notoriously high failure to comply with a detailed requirements of the [Companies Act](#) and where prosecutions for such failures are virtually unknown, I am firmly of the opinion that these provisions of the [Companies Act](#) should be read permissively. The purpose of these provisions is to provide the way in which service should *ordinarily* be effected on Companies. Where, as here, the Company has not fully complied with Section 110(1) the fundamental question is whether the service, as in fact effected, will have reached the Company’s Management. Where (sic) this not the correct approach than (sic) there could never be substituted service upon a company. But where compliance with the service provisions of the Act is impossible or extremely difficult the Court has not hesitated to allow another form of service to take place. Thus, for example, where a company no longer had an office at all, service was properly effected when the former Chairman and Secretary of a company were served (see [Gaskell v. Chambers \(No. 1\)](#) (1858) Ch. 26 Beav. 252). In the present case it is not disputed that the Company’s postal address was in fact P.O. Box 2449 and neither is it disputed that the address (Vishnu Deo Road Nakasi) is defective. In these circumstances I am satisfied that the Resident Magistrate was correct in concluding that the Company had been properly served with the writ and that therefore Eden was entitled to Judgment in Default of Appearance or Defence.”

[21] The Court of Appeal approved this approach on appeal. The Court said:

“Counsel for the appellant submits that as the respondent relies on service of the writ on the address stated in the appellant’s Annual Return, this cannot be a valid service in view of s 110 (2) of the [Companies Act](#). This argument was rejected by the High Court. The Court ruled that as the appellant did not dispute postal address P. O. Box 2449 as its address, he held that the Resident Magistrate was correct in concluding that the appellant was properly served with the writ.

We do not consider that the High Court made any error of law in coming to this conclusion. We note from the undisputed facts that the appellant used the address

P. O. Box 2449 as its postal address in its letterheads and received correspondence in the same address. The appellant gave no explanation why the writ was not claimed at the post office and returned to the respondent. The appellant is estopped from claiming that this is not its registered postal address. We would dismiss this ground of appeal.”

[22] It would be very difficult if all legal processes had to be personally served on the Secretary. If the Secretary is unavailable or sick for instance or goes on holidays, then it would be impossible to effect service if these provisions are interpreted literally. I interpret the reference to “place of abode” so far as the NLTB and its Secretary is concerned, to mean “its offices wherever the relevant office is located”.

[23] Similarly, the English Court of Appeal came to the same conclusion in respect of service of a writ on a company that had moved from its registered office but did not change its records at the Companies Office in **A/S Cathrineholm v Norequipment Trading Ltd** [1972] 2 All E R 538.

[24] Thus, it is my view that service on the Secretary may be effected by leaving the Writ at the relevant office or by sending it through the post in a registered letter addressed to the General Manager of the relevant office. Such service complies with ss 22(1) and 24 of the Act and O 10 r 1 of the High Court Rules.

[25] The facts of service in this case are as follows. The Writ was served at the Lautoka office of the NLTB on 14 July 2006. It was found in the tray of a former NLTB lawyer on 11 September 2006. A copy of the Writ was also sent by registered post to the NLTB headquarters in Suva on 18 July 2006. The NLTB letter head gives the Suva address of its head office and the Post Office box number that the Writ was addressed to and states “Please address all correspondence to the General Manager”. The Lautoka office letter head gives the Lautoka address and contacts and states “Please address all correspondence to Manager (North/Western Region). It is not denied that the Writ was not received in either the Suva or Lautoka offices. The

complaint is that it was not served on the Secretary as required by s 22(1) of the Act.

[26] I disagree with the submissions of Counsel for the NLTB. NLTB is a body corporate by virtue of s 3(6) of the **Native Land Trust Act** which clearly states that it is. The word “shall” in s 22(1) of the Act does not mean that proceedings must be served on him and him alone. That provision must be read together with other provisions of the Act and other laws. To interpret it as suggested would mean that it is not possible to serve legal documents on solicitors acting for NLTB and other modes of substituted service would not be allowed.

[27] I therefore conclude that service of the Writ in this case complied with s 22(1) of the Act and the Default Judgment was regularly entered.

### **THE DEFENDANT MUST SHOW A DEFENCE ON THE MERITS**

[28] The Defendant must show a “defence on the merits” to have the Judgment set aside: **BW Holdings** (supra), **Evans** (supra) and **A/S Cathrineholm** (supra).

[29] I find that there was a binding agreement on **14 January 2005** between the Khans and the NLTB for the NLTB to issue to Ahmed Khan and his son a registered lease each. It is formed by the two Tenancy Agreements offered by the NLTB on 11 January 2005 and accepted and signed by the Khans on 14 January 2005 and the payment of moneys due under their terms. For the purposes of this judgment I will refer to both agreements as one. The existence of the agreement is not seriously denied by NLTB. In fact, the way that it has pleaded its proposed defence and what was said in its affidavits suggest this fact is impliedly admitted.

[30] In **Photo Production v Securicor [1980] AC 827**, a decision of the House of Lords, Lord Diplock<sup>1</sup>, explained the parties obligations under a contract as follows:

“A basic principle of the common law of contract, ... , is that the parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, if they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.

Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law – generally common law...The contract however, is just as much the source of secondary obligations as it is of primary obligations; ...

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of the parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the “general secondary obligation”. It applies in the cases of the two exceptions as well.

The exceptions are: (1) Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression “fundamental breach” is to be retained, it should, in the interests of clarity, be confined to this exception.) (2) Where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation (“condition” in the nomenclature of the Sale of Goods Act 1893), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. (In the interests of clarity, ... , “breach of condition” should be reserved for this exception.)

Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged. This

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<sup>1</sup> At p 848F to 849G..

secondary obligation is additional to the general secondary obligation; I will call it "the anticipatory secondary obligation."

In cases falling within the first exception, fundamental breach, the anticipatory secondary obligation arises under contracts of all kinds by implication of the common law, except to the extent that it is excluded or modified by express words of the contract..."

[31] The present case falls within the first exception. There has been a fundamental breach of the agreement by the NLTB by failing to give the Khans the two registered leases. They have accepted the breach as repudiation of the agreement and terminated it. The Khans are entitled to (a) monetary compensation for the loss sustained by them in consequence of the failure to issue the leases, and (b) to be discharged from their unperformed primary obligations under them.

[32] The NLTB defence is based on one single fact and it is this. The NLTB field officer swore in his affidavit that two members of the landowners wrote letters to the NLTB as representatives of the Khans confirming that the landowners had consented to the subdivision and the issue of the leases to the Khans. He says that such confirmation was not correct. He says that the NLTB had relied on these misrepresentations to their detriment by agreeing to give the Khans the leases.

[33] I have to disagree with him. I agree with Counsel for the Plaintiff that examination of the letter clearly shows that the author of the letter wrote it on behalf of the landowners and not as an agent of the Plaintiffs.

[34] Further, a translation of a letter dated **10 May 2005** from the Tui Ba to the Manager, NLTB Lautoka, stated that "The Tui Ba confirmed that the landowning unit had consented to the lease and the \$7,500 balance of goodwill was given to (the two persons in question)." The letter also confirmed that: "The Tui Ba called the two Mataqali Representatives (in question), who confirmed that the Landowning Unit had consented to the lease and the \$7,500 balance of goodwill was given to (the two Representatives)."

[35] Mohammed Khan said in his affidavit filed on 24 November 2006 that the two persons in question never acted for or on behalf of them. They, on no occasion, dealt with the landowners directly. The application for lease was made to the NLTB by them. They only dealt with the NLTB through its officers in particular, one officer who received the \$8,000 goodwill payment on behalf of the landowners. That officer later confirmed by a letter dated 14 January 2005 that the payment of \$8,000 for goodwill had been received by the landowners for renewal of the lease and that the lease was under process and the tenant would be informed soon after the lease was returned from the Titles Office.

[36] The facts do not show that the two persons in question were acting as agents for the Plaintiffs. In the final result, I am not convinced that the facts in this case, even if the matter went to trial, would support a finding of agency which could base the defence and counter-claim of the NLTB.

[37] Further, the parties and the landowners are in a special relationship with each other. One of the obligations of the NLTB as lessor and the Khans as lessee is for the NLTB to ensure that the lessee enjoys the peaceful and quiet enjoyment of the land. It is a term that is usually expressly stated in such leases and implied by the common law. It is no answer to say that the Police can be called if the lessee is threatened by the landowner. I also agree with Mohammed Khan that it was the NLTB's responsibility to consult with the landowners and confirm that they agreed to lease. The NLTB as the trustee for the beneficiary landowners grants leases on their behalf. It has an obligation under **s 9** of the **Act** to be satisfied that any "*native land proposed to be leased is not being beneficially occupied the Fijian owners and is not likely during the currency of such lease to be required by the Fijian owners for their use, maintenance or support.*" The obligation can not be delegated to the proposed lessee. To hold otherwise would only create more uncertainty.

[38] It seems to me that the NLTB in this case has not only breached its obligations against the Khans but has also breached its obligations against

the landowners by not verifying the needs of the landowners first. The latter breach has now been rectified by the issue of a lease of the subject land to one of the members of the landowners. As for the breach against the Khans, even if they asked for specific performance, this Court will not be able to grant that remedy in the circumstances of this case.

[39] As to the explanation of non-appearance, I think it is unacceptable. The in-house Counsel for the Plaintiff that was eventually given the Writ should have filed the Acknowledgement of service in time. It should not be a matter for consultation or instruction for him to do that. It was a matter that any lawyer could do. Also, the need to brief outside Counsel is not a good enough reason, in my view, for the delay in filing the Acknowledgement of Service.

[40] Finally, Counsel for the Defendant cited the unreported decision of Connors J in **Kanta v LTA** [2005] FHC; HBC 340 of 2005L to the effect that there was a third requirement that there must be no prejudice to the Plaintiff if the default judgment was to be set aside. He argues that the Plaintiffs have not shown prejudice. The question however, only arises if the Defendant has shown a defence on the merits or that the default judgment was irregularly entered.

[41] I therefore find that the NLTB has no good defence at all and therefore refuse to set aside the Default Judgment entered on **21 September 2006**.

[42] The matter needs to go to the Master for assessment of damages.

### **COSTS**

[43] The NLTB has lost its application and should pay the Plaintiff's costs of \$800 within 21 days.

**ORDERS**

[44] I therefore make the following Orders:

1. The Defendant's application to set aside the Default Judgment entered for the Plaintiff on 21 September 2006 is dismissed.
2. The matter is adjourned to the Master on Thursday 24 September 2009 at 9.00am to fix a date for assessment of damages.
3. The Defendant is to pay the Plaintiffs' costs of \$800 within 21 days.

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**Sosefo Inoke**  
**Judge**

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