MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

KCH-24-119/8-2012

BETWEEN

AVOS (MALAYSIA) SDN. BHD
(Company No. 134950X)
Of Lot 1009, Section 66, KTLD
Jalan Tenun, Pending Industrial Estate
93450 Kuching, Sarawak. ... ... Plaintiff

AND

MAHRUF BIN MD ZAKARIA
(WN. KP 531202-12-5219)
Of No. 3, Lot 400, Section 54, 3rd Floor
Travillion Commercial Center
Jalan Padungan, 93710 Kuching, Sarawak. ... ... Defendant

BEFORE THE HONOURABLE JUSTICE

DATO RHODZARIAH BT. BUJANG

IN CHAMBER

RULING

A judgment in default was entered against the defendant by me on **23rd August, 2012** for the sum of RM1 million with interest and cost, the RM1 million being a personal loan advanced by the plaintiff to him. He has now applied to set aside the said judgment in an application which was filed on **1st February, 2013**. In his affidavit in support of the application, the defendant deposed that he was only aware of the judgment when the

bankruptcy notice was served on him at the office of Messrs. James Lo Advocate, Kuching. His explanation for the delay in filing the application was because his dealing with the plaintiff was more than six years ago and in December, 2012 he was overseas, in Singapore and Jakarta on business but because of the flood in Jakarta, was only able to return to Malaysia at the end of January. Since he is resident in Sabah, he claimed to be handicapped in finding a lawyer to act for him and when he found one, he faced a language barrier since he could not communicate in "Sabah Malay" with his counsel. Time was also needed to look for documents pertaining to the case. He alleged that the judgment is irregular because he was not served properly with the originating summons and pointed out that the originating summons does not even carry his business or residential address.

On the merits of the defence, he averred that the plaintiff had entered into a Sales and Purchase agreement with a company, Panji Keagungan Bhd ("Panji") of which he was the Executive Chairman for the sale of Panji's four units of properties, beneficially owned by it, to the plaintiff company. The purchase price was RM4.1 million and he alleged that the plaintiff has agreed to set off the sum of RM3 million, which included the RM1 million advanced to him, from the said purchase price.

The RM1 million loan, said the defendant was in fact money advanced to Panji and Panji's Board of Directors had resolved to dispose of the company's vehicles to the plaintiff with a value of RM2,339,000.00 but though the plaintiff had taken possession of the vehicles, they refused to effect the transfers of the ownership of the vehicles to themselves.

The defendant also contended that since the loan was purportedly made on 8th January, 2008, the action against him was time-barred.

The delay.

The plaintiff in their affidavit in opposition of its Director, Disney Jaboh deposed that the judgment was served on the defendant on 16th November, 2002 and said the excuse given by him for the delay is not credible as the defendant had on 12th December, 2012 affirmed an affidavit to set aside the bankruptcy notice filed against him pursuant to the judgment in default. He could, I agree, have filed the application during the same period as well. The overseas trip and the flood in Jakarta could not have hampered his effort to act timeously, which is to file the application to set aside the judgment in default within thirty days of its receipt as provided on Order 42 r 13 of the Rules of Court 2012. When the reason advanced for the delay is unacceptable, the courts have ruled that the application for setting aside should not be allowed (see for instance **Tuan Hj. Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd** [1996] 1 MLJ 30).

Irregularity of the judgment.

I do note that in the originating summons, the defendant's address was not stated. It is a grave omission which I must honestly confess, I overlooked at the hearing of the originating summon because the affidavit of service of the originating summon had clearly stated that it was served by courier service to the defendant at a stated address at Warisan Square in Kota Kinabalu, Sabah. However, the plaintiff's affidavit in opposition to this application for setting aside had also deposed that after the service of

the originating summons, the defendant contacted the plaintiffs company promising to settle the debt. In fact the plaintiff company has exhibited a letter dated 27th September, 2012, after the entry of the judgment in default, in which the defendant agreed to pay the RM1 million by six post dated cheques (Exhibit "D" to the plaintiff's affidavit in opposition) and did in fact deliver five post-dated cheques to the plaintiff pursuant to the said agreement. A list of the cheques issued by the defendant and acknowledged by the plaintiff is also exhibited to the affidavit in opposition. The defendant did not file any affidavit in reply to rebut what have been stated above.

All these evidence do not only show that the originating summons had indeed been served on the defendant, despite the absence of the address on the pleading, but would also defeat his allegation that the plaintiff's claim is time-barred since he has given an acknowledgment in writing of the amount claimed against him. This is evidenced by his signing on 1st October, 2012 on the plaintiff's counsels' letter dated 27th September, 2012 under "Acknowledged and confirmed" his agreement to pay the said loan to the plaintiff in six installments by post-dated cheques as stated above. A new limitation period would therefore run from the date of that acknowledgment i.e 1st October, 2012 as provided in section 19 of the Sarawak Limitation Ordinance. As for his other allegation on the set-off agreed between Panji and the plaintiff in the agreement, I noted that the agreement though signed was not dated, nor was it witnessed or stamped. It looked to be an incomplete form of agreement and even worst Panji had been wound up on **23rd August, 2011.** Since it was undated, a question mark is raised on when the agreement was made, before or after the

winding up. Furthermore, the alleged disposals of the vehicles to the company by Panji could not on their face value be taken as evidence in favour of the defendant because as is admitted by him, Panji also owed money to the plaintiff company in the sum of RM2 million as stated in paragraph 13 of the plaintiff's affidavit in opposition.

The defendant did not, as is the accepted practice, exhibited his proposed statement of defence to his affidavit in support. Nevertheless, I chose to dwell on the issues raised by him just the same as the requirement by law is that he shows a defence on merits in his affidavit in support which, unfortunately, he failed to do in this case.

For the above reasons, the application to set aside judgment in default is dismissed, with cost of RM3,000.00.

Sgd.

(Y.A. DATO RHODZARIAH BT. BUJANG)
Judge
High Court II Kuching

Date of Grounds of Judgment	:	20th day of March, 2013
Date of Delivery of Decision	:	11th day of March, 2013
Date of Hearing	:	20.2.2013
For the Judgment Creditor	:	Mr. James Lo Messrs. James Lo Advocate No. 48, 1st Floor, Block F King Centre Kuching Jalan Simpang Tiga

93350 Kuching, Sarawak.

For the Judgment Debtor : Mr. Roland Thomas
Messrs. Ariffinshahzad Advocates
No. 36SF, 2nd Floor Front
Block O, Synergy Square
Jalan Matang, 93050 Kuching.

Notice: This copy of the Court's Grounds for Ruling is subject to editorial revision.