

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO: ABU 0037 OF 2011**  
**(HIGH COURT CIVIL ACTION NO. HBC 220 OF 2010)**

**BETWEEN** : PUBLIC EMPLOYEES UNION  
*Appellant*

**AND** : KUMAR SAMI REDDY  
*Respondent*

**CORAM** : Calanchini, P  
Lecamwasam, JA  
Kumar, JA

**COUNSEL** : Mr. K. Vuataki for the Appellant  
Mr. Krishna for the Respondent

**Date of Hearing** : Tuesday 17 September 2013

**Date of Judgment** : Thursday 3 October 2013

**JUDGMENT**

**Calanchini P:**

[1] I agree that the appeal should be dismissed.

**Lecamwasam JA:**

[2] This is an appeal filed by the defendant / appellant against the judgment dated 31<sup>st</sup> May 2011 of the learned High Court Judge at Lautoka on the following grounds of appeal namely:

- “(i) *The Learned Judge erred in law and or in fact in requiring Viliame Tuwawa Kautia to prove his identification as General Secretary of the Appellant before being allowed to speak on behalf of the appellant and or alternatively not allowing Viliame Tuwawa Kautia to prove his identification as General Secretary of the appellant by sworn oath or by allowing him to complete the sentence he was saying on his identification as Secretary of the Appellant being in his vehicle parked outside the Lautoka High Court building or assisting him as a lay person to get such identification from his vehicle.*
- (ii) *The Learned Judge erred in law and or in fact in not giving the Respondent fair opportunity to present its case before issuing a decision thereon by wrongly refusing to hear the Appellant through its General Secretary Viliame Tuwawa Kautia in absence of its legal counsel or to explain the absence of such counsel and Respondent’s inability to proceed to trial on late notice given by its counsel to withdraw as counsel to and to ask for an adjournment.*
- (iii) *The Learned Judge erred in law and or in fact in causing prejudice to Appellant by wrongly striking out Appellant’s defence and proceeding to hearing Respondent under Order 35 Rule 1(2) of the High Court Rules in absence of and thereby defeating the Appellant’s rights to be heard and causing injustice of striking out its defence and not hearing Appellant on its burden to explain why the Respondent had not met the contractual preconditions to overseas medical evacuation.*
- (iv) *The Learned Judge erred in law and or in fact in ordering the Appellant to indemnify Respondent and pay damages and costs to Respondent in circumstances where Respondent had not fulfilled all the pre-requisites of overseas medical evacuation under the insurance policy.”*

[3] Briefly the facts are as follows:-

- (i) The plaintiff was a member of the defendant union viz Public Employees Union and its welfare health scheme. As the plaintiff was found to be suffering from a medical condition known as *Spinal Stenosis*, he applied to the defendant union for “overseas hospital treatment” which would cover the expenses that would be incurred in the event of overseas medical treatment.

Pursuant to the policy the plaintiff was entitled to overseas treatment provided such facility was not available in Fiji. At the outset the defendant union agreed to bear the expenses for overseas evacuation but later went back on the agreement on the ground that such facility was in fact available in Fiji. Thereafter numerous correspondence was exchanged between the parties, and eventually as the defendant union (appellant) was not facilitating the payment and the condition of the plaintiff was said to be serious, he was taken to Australia at his own expense. He had to stay in Australia for medical treatment from July 2005 to December 2005. The plaintiff had filed the original action against the defendant claiming damages for breach of contract, exemplary and aggravated damages in the above background.

- (ii) The matter was fixed for trial for 8<sup>th</sup> November 2010. When the matter was called in open court on 8<sup>th</sup> November 2010, only the plaintiff was represented by counsel while no counsel had appeared for the defendant. However, one Viliame Tuwawa Kautia who was said to be the General Secretary of the Union had come forward to represent the defendant union. Upon questioning by the learned High Court Judge it was revealed that Kautia had no letter of authority from the union and hence the learned High Court Judge proceeded under Order 35 Rule 1 (2) to hear the matter. Having recorded the evidence of the plaintiff and a medical practitioner, the learned High Court Judge delivered the judgment in favour of the plaintiff on 31<sup>st</sup> May 2011. Aggrieved by the above judgment, the defendant (appellant) has filed an appeal before this Court.

- [4] Though Viliame Kautia was present in Court on the 8<sup>th</sup> November 2010 had he been in a position to produce an authorisation to appear for the Union such appearance could not have been allowed in view of the provisions of Order 5 Rule 6 of the High Court Rules. According to Section 144 of the Employment Relations Promulgation 2007, a Registered Trade Union is a body corporate. High Court Rules Order 5 Rule 6(2) states:-

*“6(2). Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.”*

- [5] The rule expressly stipulates that a trade union being a corporate body can be represented in a court of law only by barrister or solicitor and no other. This position is further strengthened by what is stated in Halsbury's Law of England 4<sup>th</sup> Ed. Vol.3 at paragraph 1158 which states that 'a corporate litigant cannot appear in person' and in the Notes to this statement it is stated:

*"Whilst a corporation may be represented in chambers by a solicitor he can be represented in Open Court only by counsel: Frinton and Walton UDC v Walton District Sand and Mineral Co. Ltd [1938] All E.R.649"*

- [6] In State v Arbitration Tribunal, ex parte PAFCO Employees Union [2003] FJHC 315; HBJ00020r. 2002S (6 August 2003) a similar situation arose wherein the General Secretary of the applicant union who is not a Solicitor appeared in Court representing the union. On an objection raised by counsel for the respondent the court made an order and considered Order 5 Rule 6(2) of the High Court Rules and Section 17 of the Trade Union Act in relation to the position of a body corporate. Pathik J concluded that the applicant had to engage the services of a Barrister and Solicitor to appear in that particular case.

- [7] The same view was expressed in Engineers' and Managers' Association v. Advisory Conciliation and Arbitration Services and Another (No.1) [1979] 3 All E.R.223 Lord Denning, M.R observed at page 224 thus:

*"If the trade union had been a body corporate then under RSC Order 5 Rule 6(2) and RSC Order 12 Rule 1 it could not appear or carry on proceedings except through a solicitor."*

- [8] However, whether the appellant union is aggrieved or not by the decision of the learned High Court Judge, it has not exhausted all available remedies to correct the decision of the learned High Court Judge prior to appealing to this court. High Court Rules Order 35 Rule 2 provides as follows:

*"35(2)-(1) Any judgment or order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just."*

- (2) *An application under this rule must be made within 7 days after the trial.*”

Basnayake, JA (with Calanchini, AP (as he then was) and Mutunayagam, JA agreeing) in Rajendra Prasad Udit Mishra v. the Director of Public Prosecutions [2012] FJCA 40; ABU 0050.20 (8 June 2012) held that the procedure adopted in that case was flawed citing the judgment of WEA Records Ltd v. Visions Channel 4 Ltd., and Others [1983] 1WLR 721 wherein Sir John Donaldson, M.R. with Dunn and Purchas L. JJ agreeing dismissed the appeal not on the merits but on the ground that it is an abuse of process of the court. And Donaldson, M.R further observed that:

*“...Ex parte orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists its application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.*

*This being the case it is difficult, if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first affording the Judge who made it or, if he is not available, another High Court Judge an opportunity of reviewing it in the light of arguments from the defendant and reaching a decision. This is the appropriate procedure to be followed even when an order is not provisional, but is made at the trial in the absence of one party”.*

[9] In light of the above, as rightly submitted by the appellant I find that the procedure adopted in this case is wrong and amounts to an abuse of process of this court. Once an ex parte order is handed down by the Court it is obligatory on the part of the appellant to take steps before the same Judge or the same court to canvass the said order before appealing to the Appeal Court. The case before us is an appeal filed in the Court of Appeal to vacate an ex parte order made by the learned High Court Judge. The said appeal is procedurally flawed on the above grounds.

[10] As the procedure adopted in this case is flawed, the appeal is dismissed with costs fixed at FJD\$1,500.00 payable to the respondent by the appellant.

**Kumar JA:**

I agree with the findings of Lecamwasam, J.

**Orders of the Court**

1. Appeal is dismissed.
2. The cost of \$1,500 to be paid to the Respondent by the Appellant.

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**Hon. Justice William Calanchini**  
**PRESIDENT, FIJI COURT OF APPEAL**

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**Hon. Justice Susantha Lecamwasam**  
**JUSTICE OF APPEAL**

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**Hon. Justice Kamal Kumar**  
**JUSTICE OF APPEAL**