

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL CASE NO. HBC 76 OF 2015

BETWEEN : **ABBCO BUILDERS LIMITED** a limited liability company having
its registered office at Nadi Back Road, Nadi.

Plaintiff

A N D : **CHALLENGE ENGINEERING LIMITED** a limited liability
company having its registered office at Sautamata Street, Lautoka.

1st Defendant

A N D : **HEMANT KUMAR** of Maisuria Design Limited of 28 Andrews
Road, Nadi Airport.

2nd Defendant

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Mr Young Chen Bunn for the Plaintiff
Mr Roneel Kumar for the 2nd Defendant

Date of Judgment : 28th September 2016

JUDGMENT

[1] This is an application filed by the 2nd Defendant seeking leave of this Court to appeal the decision of the Learned Master delivered on 15th of January 2016.

[2] The Learned Master in his decision has dismissed the 2nd Defendant's Summons dated 30th of July 2015 and ordered the 2nd Defendant to pay cost in the sum of \$500.00.

- [3] In support of this application the 2nd Defendant submitted his affidavit dated 27th of January 2016, and filed the scanned copy in Court on the 28th of January 2016, and the original on 2nd February 2016.
- [4] The Court, in the interim on the 4th of March 2016 stayed the decision of the Master pending the determination of this appeal.
- [5] The original mater that had been before the Master was that the 2nd Defendant's summons dated 21st July 2015 and affidavit in support to strike out the Plaintiff's Writ of Summons and Statement of Claim. The summons had been listed to be mentioned on 28th July 2015.
- [6] It reveals from the submissions made on behalf of the 2nd Defendant that the Counsel in carriage of the matter for the 2nd Defendant, on 28th of July 2015, thinking that the matter will be called (5th case) according to the cause list, had come to the court after the Learned Master had started the day's sessions. The 2nd Defendant alleges that the matter had been called at 1st in court contrary to the Registry's cause list and the summons dated 21st July 2015 was struck out in the absence of Counsel for the 2nd Defendant. The 2nd Defendant then filed an application before the Learned Master on 30th July 2015 to restore the summons to the cause list.
- [7] The application for that issue was heard on the 15th of September 2015 by the Master and the ruling was delivered on 15th January 2016. The Learned Master in his ruling stated that the 2nd Defendant should have first made a **"formal application"** to set aside the orders dismissing the summons and then asked for orders for reinstatement of the summons. To support his decision the Master has referred to the Fiji Court of Appeal decision of **Suresh Prasad -v- Housing Authority** [2014] FJCA 41; Misc 22.2011 (26 March 2014).
- [8] The 2nd defendant submits that the Learned Master incorrectly read and applied the decision in **Suresh Prasad's** case and failed to properly take into consideration Order 32 Rule 5 (4) of the High Court Rules 1988. The 2nd Defendant says:
- *That, in fact, as we will show below not only did the Learned Master incorrectly read and applied the decision in Prasad's c, he carelessly in three different places at paragraph 7 of his decision stated in bold letters that a "formal application" to set aside the orders was first required before a reinstatement application could be considered.*

- That, *the misread and incorrect application of the Prasad's decision by the Master is particularly ironical and without basis in legal precedent, considering that on 28th July 2015 he had struck out the 2nd Defendant's Summons dated 21st July 2015, without a formal application being made by the Plaintiff.*
- That, *the said Summons dated 21st July 2015 was struck out in court by the Master when it was called out of the order of the registry's cause list that resulted in counsel for the 2nd Defendant miss-timing his attendance in court due to no fault of his. The said summons was called 1st instead of 5th as it was listed in the cause list. Counsel for the 2nd Defendant Nemani Vakacakau in his affidavits has maintained without opposition that had the matter been called according to the cause list he would have made an appearance on time. Counsel for the 2nd defendant made an oral application for re-instatement of the said Summons in Court on the 28th July 2015 soon after he appeared and learned how the summons was struck out. However, the Learned Master did not reinstate with the same speed with which he had earlier struck out the summons.*
- That, *it was easy for the Learned Master to strike out the said summons without the 2nd defendant's presence, but for reinstatement new laws, and hurdles have been created by the Learned Master. These laws created by the Learned Master do not have legal precedent or support under the High Court Rules.*

[9] Without prejudice to the 2nd Defendant herein in this ruling, I must state here that the Master or the Judge can call the cases according to the requirement of the day's cause list. Yes, the cause list has its respective serial numbers for each case to be able to adjust the cases in a proper order in the list. But it does not mean that the last case in the list will be called as the last case. The time given in the cause list is specific for all the mention matters. In the instance before the Master, it was not fixed for a specific time but, usually the Master in Lautoka High Court starts his sessions at 8.30 a.m. It is a very well-known practice in the Master's Court. The party or the Counsel cannot decide at what serial number in the list should be called first or the last. Therefore, the reason given by the 2nd Defendant to appeal the Master's decision as it appears to me has no merit in it.

[10] However, now I will see whether or not the application for leave to appeal the Master's decision was filed within time in this Court.

[11] During oral submissions before this Court, the Counsel for the Plaintiff appeared to have raised a basic argument. He submitted that the 2nd Defendant's application seeking leave to appeal the decision of the Master was not filed within time.

- [12] The said submissions by the Plaintiff are contested by the 2nd Defendant.
- [13] The 2nd Defendant says that, the Summons and Affidavit were filed on time and that was on the 28th of January 2016; was sitting with the registry for 6 days before being issued, whose clerks kept informing clerks of counsel for the 2nd Defendant that the application was sitting with the Judge. I do not agree with this because in this particular file it was I who made the initial orders to mention the matter in court having assigned a date. I never keep case records in my chambers for more than 30 minutes. Having gone through the file and the memo of the Deputy Registrar or the Senior Court Officer as the case may be, I dispatch the files back to the Registry then & there as the Court Clerk brings the files for my directions.
- [14] Therefore, if there were any such communications to say that the file was sitting with the Judge for 6 days, it should be a very bad piece of communication from someone which is not clear to me as to why such a fictional communication was transpired and however, that is totally a wrong comment by the counsel for the 2nd Defendant to say so even if the Counsel was told by a law clerk on the same. Because, it does not happen in my chambers.
- [15] Leaving it aside, it is pertinent to see under what Order and Rule should the 2nd Defendant's present application be considered. The Order 59 Rule 11 of the High Court Rules 1988 speaks on this.
- [16] And it states:-
- Order 59, r, 11. :-
"Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment."*
- [17] The Learned Master delivered his decision on 15th of January, 2016.
- [18] The 2nd Defendant argues that the last day to file the application seeking leave to appeal the decision was 29th January, 2016. And that argument is wrong, flawed, and misconceived by the 2nd Defendant's Counsel.
- [19] The 2nd Defendant filed his application (by way of Summons) on 28th January 2016, **one (1) day before the expiry of "14 days mandatory period" stipulated in Order 59, r 11.** And that includes the service of the summons within 14 days period to the other party as well.

- [20] The summons was supported by the Affidavit of the 2nd Defendant sworn on the 27th of January 2016 before a Notary Public in Australia by the name of Robert John Bax. A scanned copy of the said affidavit was filed on 28th January 2016 by a cover affidavit of Manoj Kumar Rai stating that the 2nd Defendant was in Australia and the original was on its way for filing.
- [21] The 2nd Defendant submits that this practice of filing a scanned copy of the sworn affidavit with an undertaking to file the original as soon as practicable is accepted by our courts. The Lautoka High Court registry duly filed the Summons and Affidavit on 28th January 2016 - the backing of the documents show the High Court's stamp dated 28th of January 2016. The original affidavit of 2nd Defendant was filed on 2nd February 2016.
- [22] The Order 59, r.11 does confer any such power with the court to take such an undertaking to file proper papers later in any given case or matter.
- [23] The 2nd Defendant further submits that for reasons only known to the High Court registry at Lautoka the following documents (i) Summons seeking leave to appeal filed on 28th January 2016 (within time); (ii) Affidavit of Manoj Kumar Rai sworn and filed on the 28th of January 2016 annexing the scanned copy of the affidavit of Hemant Kumar sworn on the 27th of January 2016; (iii) and the original of the said affidavit of Hemant Kumar filed on the 2nd of February 2016; were issued by the High Court registry on the 3rd of February 2016.
- [24] Not only that. The 2nd Defendant further says that it has been a practice of the High Court at Lautoka that documents are not issued at the same time when they are filed. The documents are first checked by the Master or the presiding Judge before being issued. The litigants in the Fijian Judicial system who file their applications on time cannot be penalized because the High Court registry takes time to issue the documents after they are filed. If the litigants are penalized in such instances due to the registry's delays, enquiries will have to be called into why the registry does not issue documents as soon as they are filed.
- [25] The 2nd Defendant alleges in his written submissions that it will be clearly seen that the Summons seeking leave to appeal Master's decision made on the 15th of January 2016 has a "filed" stamp at the backing of the document as 28th January 2016 but is stamped "dated 3rd February 2016". The stamp dated "3rd" of "February" is handwritten by a clerk of the court, presumably after the Master or the Judge gave the clearance to issue the documents. In fact the month "January" is cancelled off with a pen and "February" written with pen by a clerk of the

court. On 3rd February 2016 the Summons and Affidavits were issued. On the same day they were served.

- [26] Having submitted the above line of argument, the 2nd Defendant is of the opinion that the application for leave to appeal was filed on time, sitting with the High Court registry for 6 days from 28th January 2016 to 3rd February 2016 before being issued, and once issued immediately served by 2nd Defendant to the Plaintiff and 1st Defendant. The 2nd Defendant has done all it could to comply with filing and serving the application for leave to appeal on time.
- [27] It is very interesting to notice that the 2nd Defendant had not properly filed the affidavit within the 14 days period along with his summons seeking leave to appeal the Master's ruling. The original affidavit was filed on 2nd of February, 2016. See paragraph 19 above.
- [28] Then, there was no properly filed application by the 2nd Defendant seeking leave to appeal the Master's decision until the Registry received the original affidavit of the 2nd Defendant on 2nd February 2016. The Registry can only issue duly filed papers to the parties. The Registry cannot issue incomplete papers. It can issue the papers only when the party who files and supports the application fulfills the requirements.
- [29] It is then only the Court will consider all these issues once the case is called in open court and then to give time and opportunity for the parties to file their respective submissions.
- [30] In the instance, the summons for seeking leave filed by the 2nd Defendant was not a complete application until 2nd February 2016 and that was when the original affidavit of 2nd Defendant was filed in the Registry.
- [31] Actually speaking, there had been no proper application made by the 2nd Defendant to seek leave to appeal the Master's decision until 2nd February 2016.
- [32] The Order 59, r 11, is mandatory that any party who seeks leave to appeal an interlocutory order or judgment shall have to make the application within 14 days from the date of the delivery of the order or judgment. It is not only required to file, but the service should also be done within the said 14 days period and that is mandatory too.

- [33] The 2nd Defendant in this application before me had filed the summons on the 28 January 2016. That was one day before the expiration of 14 days period speaks in Order 59, r 11.
- [34] This is confirmed by his Counsel's oral and written submissions. If that is the case, the 2nd Defendant's summons should have been served to the other parties on the following day being 29th January 2016.
- [35] The summons was incomplete because the affidavit of the 2nd Defendant was not there to support the summons. It is also a requirement under O.59, r.11 that an application for leave to appeal an interlocutory order or judgment should be made by summons with a supportive affidavit.
- [36] The fact that the affidavit was sworn in Australia is not a matter for the Registry or the other parties to be considered as an exception to the Rules and Orders of the High Court Rules 1988.
- [37] The Plaintiff points out that the Order 59, Rule 11 is mandatory. It uses the word "shall" and states the "*application shall be... filed and served within 14 days of the delivery of the Order or judgment*". The requirements must be strictly complied with.
- [38] There is no provision in Order 59 for extension of time to file and serve application for leave. Rule 10 provides for extension of time for the filing and service of a notice of appeal or cross appeal to be filed under rule 9 but does not deal with leave application. The omission of provision for extension of time for leave application is therefore deliberate. The Counsel for Plaintiff stresses.
- [39] Failure to strictly comply with the service requirement is fatal: **Panache Investment Ltd v New India Assurance** (2015) FJHC 523; **Deo v Metal Works & Joinery Ltd** (2015) FJHC 584; and **One Hundred Sands Ltd v Te Arawa Ltd** [2015] FJHC 487.
- [40] The Plaintiff's Counsel very correctly opines that filing of the Application in Court within the time is no answer because the doctrine of substantial compliance cannot apply to fixed time limit. In **Hawkes BAY Hide Processors v CIR** (1990) 3 NZLR 313 at 314 Cooke P said:

"The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words

as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."

(Added Italic)

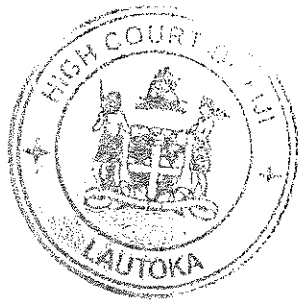
- [41] Furthermore, I accept the argument advanced by the Plaintiff that Order 59 does not give the Court the power to extend the time to file and serve an application for leave to appeal the Master's Interlocutory order or judgment. The power given by Order 59 rule 10 to extend time relates to appeals against a Master's final order or judgment.
- [42] Order 59 deliberately differentiates between an application for leave to appeal against a final order or judgment and against an interlocutory order or judgment by giving the Court power to extend only in the case of the former but not in the case of the latter.
- [43] Order 59 is a code dealing with all matters relating to the jurisdiction of the Master and for the appeals from the Master's decision. Thus the clear intention of Order 59 is that its specific provisions are to apply over the general provisions of Order 3, r. 4 of the High Court Rules. In *AG V Howard* (2011) 1 NZLR 58 the New Zealand Court of Appeal held that an appeal against a decision of Human Rights Tribunal could not be regularized under another legislative framework when the Human Rights Act 1993 specifically sets out procedural requirements of how an appeal is to be concluded.
- [44] With all the facts before me it is because for reasons also known to the 2nd Defendant himself that the Registry could not issue the summons to be served within 14 days period because of the summons was so late and was not supported by an acceptable affidavit.
- [45] There should be enough time for the Registry to go through it and serve the same to the other parties concern. When the application is incomplete, the Registry cannot issue it to the parties. The requirements that are necessary under O.59, r.11 cannot be fulfilled at a later stage. Then the meaning of these Orders and Rules would become of no use at all.
- [46] The 2nd Defendant should blame himself for his own delay. Not the Registry or the Master, or the Judge.
- [47] Therefore, it is very clear that the summons filed by the 2nd Defendant to seek leave to appeal the Master's interlocutory decision is out of time.

[48] And it should be dismissed on the ground of delay itself.

[49] When the application is clearly out of time to seek leave to appeal the Master's decision, this court is not interested or not required to look into the merits or demerits of the interlocutory decision of the learned Master.

[50] Therefore, the Court makes the following orders:

1. The summons filed by the 2nd Defendant seeking leave to appeal the Learned Master's decision is dismissed with costs to be the costs of the cause payable to the Plaintiff by the 2nd Defendant.
2. The case shall now take its regular course before the Master's Court.



R. S. S. Sapuvida

[JUDGE]
High Court of Fiji

On the 28th day of September 2016
At Lautoka