

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

**Civil Action No. HBC 07 of 2017**

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**BETWEEN** : **MOHINESH PRASAD** of Naleba, Labasa, Fiji, School  
Teacher.

**PLAINTIFF**

: **NITESHNI CHAND** of Naleba, Labasa, Fiji, School  
Teacher.

**PLAINTIFF**

**AND** : **ZAINAL MAHMOOD BEGG** of Naiyaca Subdivision,  
Labasa, Fiji, Student.

**1<sup>st</sup>DEFENDANT**

**AND** : **MAHMOOD BEGG** of Naiyaca Subdivision, Labasa,  
Fiji, Businessman.

**2<sup>nd</sup> DEFENDANT**

**Appearances** : Messrs. Kohli & Singh for the Plaintiff  
No appearance for 1<sup>st</sup> Defendant  
Mr. Ratule, K for 2<sup>nd</sup> Defendant

**Ruling** : 30 May 2017

## **RULING**

1. This is my joint ruling on two separate ex-parte applications by the Plaintiffs for leave to serve their writs on the 1<sup>st</sup> Defendant whom they say is now resident in New Zealand. The applications also seek leave for substituted service by advertisement in a New Zealand newspaper.

2. In support of the applications, both Plaintiffs depose that they had been involved in a traffic accident which was caused by the negligence of the 1<sup>st</sup> Defendant who had driven a vehicle belonging to the 2<sup>nd</sup> Defendant. The Plaintiffs have each filed an action against the Defendants and whilst the 2<sup>nd</sup> Defendant has been served, service could not be effected on the 1<sup>st</sup> Defendant as he could not be located anywhere in Fiji. The 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant's grandfather, has informed the Plaintiffs' counsel that the 1<sup>st</sup> Defendant is in New Zealand, though he does not know where exactly. The Plaintiffs also say that the chief clerk for one of the Labasa solicitors has confirmed that the 1<sup>st</sup> Defendant is in New Zealand though he too does not know the precise address. Numerous attempts have been made by their solicitor's office to find the exact location of the 1<sup>st</sup> Defendant but the only information they have received is that he is in New Zealand.
3. The Plaintiffs seek leave to serve the writ on the 1<sup>st</sup> Defendant by advertisement in the New Zealand Herald, a newspaper they say is circulated all over New Zealand.

### Analysis

4. Order 11 Rule 1 (1) permits service of writ out of jurisdiction, with leave in certain cases specified in (a) to (m). Order 11 Rule 1 (2) does not require leave to serve writ out of jurisdiction where each claim by the writ is one which, by virtue of an enactment, the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction.
5. In this case, the Plaintiff's claim appears to fall within the provisions in (f) of Order 11 Rule 1 (1) and leave is therefore required. Order 11 Rule 1 (2) has no application in this case.

6. Under Order 11 Rule 2, an affidavit in support of an application for leave to serve a writ out of the jurisdiction must state:

- (a) the grounds on which the application is made,
- (b) that in the deponent's belief the plaintiff has a good cause of action,
- (c) in what place or country the defendant is, or probably may be found, and
- (d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

7. Order 11 Rule 2 (2) makes it clear that leave shall not be granted "unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

8. Though I am satisfied that leave is required, I am of the view that the evidence in support of the applications is insufficient to warrant the granting of leave. For instance, the affidavit fails to comply with the requirements of Order 41 Rule 5 and with the rules of evidence. The affidavit in support contains double hearsay on crucial evidence as to the whereabouts of the 1<sup>st</sup> Defendant. The deponent relies on information given by the 1<sup>st</sup> Defendant's grandfather to the Plaintiff's solicitors, in breach of the hearsay rule and without stating the source of his information. In *Westpac Banking Corporation v Sibary* [2013] FJHC 431; HBC43.2013 (26 August 2013) at 9, Amaratunga J stated:

The Plaintiff's affidavit in support is not in compliance with the High Court Rules and the court cannot rely on double hearsay evidence in the averments in the affidavit in support. Though I am not inclined to strike out this application on the basis that averments in the affidavit are double hearsay and not the facts known to have been perceived by the affirment, this should not be considered that such non compliance of basic rules are condoned.

9. The evidence before the Court being inadmissible under the Rules of the Court and of evidence, the applications are left devoid of any evidence in support.
10. The mandatory provisions of Order 11 Rule 1 (2) make it clear that no order for leave shall be granted unless it shall be made sufficiently clear to the Court that the case is a proper one for service out of the jurisdiction. I am not satisfied that the Plaintiff has discharged the onus it bears of satisfying the Court that leave ought to be granted. This finding is sufficient to deal with both applications but I go on anyway to discuss the requirements for substituted service.

#### Substituted service

11. Under the general provisions for service of originating process under Order 10 Rule 1 (1), a writ must be served personally on each defendant by the Plaintiff or his agent.
12. Rule 1 (2) of Order 10 states that a writ served within the jurisdiction may, instead of being served personally on a defendant, be served by sending it to him by post at his last known address or, by inserting it through a letter box (if there be one) at that address.
13. Order 65 deals with service of documents. Rule 1 provides that a document does not need to be served personally on any person unless specifically required by the rules to be so served. This rule however does not affect the Court's power to dispense with the requirement for personal service.
14. Order 65 Rule 4 gives the Court power to order substituted service where it appears to the Court that it is impracticable for any reason to serve a document in the manner prescribed on that person. An application for substituted service must be supported by an affidavit stating the facts on which the application is founded. (Order 65 Rule 4 (3)).

15. *The Supreme Court Practice 1999* at 65/4/2, p. 1290 states that

Substituted service may take the form of service by letter, advertisement, or otherwise, as may seem just (*Jay v Budd* [1898] 1 Q.B. 12 at 16).

The steps which the Court may direct in making the order for substituted service must be taken to bring the document to the notice of the person to be served.

16. At 65/4/5 of *The Supreme Court Practice* (supra), the effect of substituted service under this order is stated as follows:

When effected in accordance with the order of the Court substituted service has all the effects of personal service (*Re Urquhart* (1890) 24 Q.B.D. 723 at 726). Such service is equivalent in all respects to personal service, and judgment thereon is regular though the defendant had no knowledge of the action. He can only be admitted to defend if he can show that he has a defence on the merits (*Watt v. Barnett* (1878) 3 Q.B.D. 363 at 366).

17. On the papers before me, the Plaintiff has failed to satisfy the Court that substituted service by advertisement ought to be ordered. As I have found in (8) above, the information as to the whereabouts of the 1<sup>st</sup> Defendant is double hearsay in the affidavit in support and, being inadmissible, cannot be considered in this application.

18. Further, the failure to state the source of the deponent's information and belief that the 1<sup>st</sup> Defendant's grandfather and a local law clerk have informed the Plaintiff's solicitors of the 1<sup>st</sup> Defendant's whereabouts is in breach of Order 41 Rule 5 (2). Order 41 Rule 5 (1) requires that a deponent swears only to facts that he is able, of his own knowledge, to prove. The only exception is in interlocutory proceedings such as this, where a deponent may aver statements of information or belief, provided the source of information or grounds of such belief is given. (Order 41 Rule 5 (2)). Thus, apart from the double hearsay in the affidavits in support, the Plaintiffs have failed to

