IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 87 of 2013

BETWEEN : **RASUAKI SALABABA RALULU and JOKAVETI DOLANAISORO** both of Varadoli Ba, Police Officers.

PLAINTIFFS

A N D : **PREM CHAND, SUSHIL CHAND AND VINOD CHAND** formerly of Nadari, Ba but now residing in Canada and the exact address is unknown to the Plaintiffs.

1st DEFENDANT

A N D : **MOHAMMED HAROON trading as HAROONS HARDWARE** a hardware and construction business having its registered office in Rakiraki, Ra.

2nd DEFENDANT

Appearances : **(Ms) Jyoti Sangeeta Naidu for the plaintiffs**
Mr. Muhammed Nazeem Sahu Khan with Mr Muhammed Sadar Ud-Dean Sahu Khan for the first and third named first defendants.

Hearing : **Thursday, 08th August, 2019**

Ruling : **Friday, 25th October, 2019**

RULING

(A) INTRODUCTION

(01) The first and third named first defendants have filed Summons on 10th June 2019 seeking various orders.

(02) The Summons was first called in Court on 03rd July 2019 on which date the following Orders were made by the Court.

(I) "THAT Plaintiff is granted 21 days to file and serve an Affidavit in opposition which is to be filed on or before 24th July, 2019.

(II) *THAT First and Third named First Defendants are granted 10 days thereafter to file an Affidavit in Response. To be filed on or before 5th August, 2019.*

(III) *"THAT Plaintiff is granted 21 days to file and serve an Affidavit in Opposition which is to be filed on or before 24th July 2019.*

(IV) *THAT the First and Third named First Defendant is granted leave to file a scanned copy of their Affidavit in Response with the original to be filed by the Hearing date on 8th August 2019.*

(V) *THAT there be an interim stay on the Judgment in the matter until 8th August 2019.*

(VI) *THAT at this stage only Orders No.1 and 2 sought by the First and Third named Frist Defendant in the Summons dated 10th June 2019 is set down for Hearing at 2.30pm on Thursday 8th August 2019".*

(03) Thus, the hearing before this Court at this stage is confined to Order No. (01) and (02) sought in the Summons.

(04) The Order No. (01) and (02) sought in the Summons is as follows;

I. *"That this Honorable Court declare that the Writ of Summons issued in this matter be struck out for non-compliance with Order 6 Rule 6 (1) of the High Court Rules 1988, as no Writ which is to be served out of the jurisdiction shall be issued without the leave of the Court.*

II. *That this Honorable Court wholly set-aside the whole proceedings in this matter for non-compliance with Order 6 Rule 6 (1) of the high Court Rules 1988 including the Judgment against the First Defendants and all Orders made in the matter including the Judgment of 13 November 2018 by Justice Mohammed Mackie be discharged and/or set-aside."*

(05) For the purpose of convenience, clarity and consistency, I shall hereafter refer to the first and third named first defendants as defendants.

(B) BACKGROUND

(1) The background facts are adequately reflected in the following quotations taken from the judgment of Hon. Justice Mohammed Mackie dated 13.11.2018.

Claim against the 1st defendants

4. *The plaintiffs were and are the registered owners or proprietors of all that piece of land depicted in plan known as Vatuvaka (part of) containing an extent of 32 perches and around 2/10th of a perch being*

Lot 9 on deposited Plan No. 3500 and situated in the District of Rakiraki in the island of Viti Levu on certificate of Title No: 18172 (the plaintiff's property).

5. *At all times material the 1st defendants were and are the registered proprietors all that piece of Land depicted in Plan hereon known as Vatuvaka (part of) containing an extent 33 perches and around 1/10 of a perch being lot No. 09 on deposited plan No. 4991 and situated in the District of Rakiraki in the Island of Viti Levu on Certificate of Title No. 20298.*

6. *On or about 3rd March 2006, the plaintiffs by a mistake and in error, constructed their residential dwelling valued at $80,000.00 on the 1st defendant's property mentioned in paragraph 5 above.*

7. *According to the statement of claim the total value of the construction amounting to $80,000 was funded partly through a Mortgage Loan for a sum of $50,800.00 from Colonial Bank of Fiji (Now known as BSP) and the balance $29,200.00 through Fiji National Provident Fund (FNPF). Both the Mortgage No:573958 and the FNPF charge on it were registered on 26th September 2005.*

8. *The Plaintiffs did not know about the said mistake and error mentioned above until they received a letter dated 19th May 2007 from M/S Shahu Khan & Sahu Khan advising the plaintiffs about such mistake.*

9. *The defendants, through one Nirmala who was the Administrator of the Estate of Sunil Chand under probate No. 32602 and Urmila Devi aka Sashi as the lawful Attorney of Vinod Chand (3rd named 1st Defendant) under power of Attorney No. 34902 dated 20th August 1999, knew of the Plaintiff's mistake and error and had the opportunity to stop the plaintiffs, though Nirmala and Urmila Devi stood by and said nothing.*

10. *The defendants, on or about 16th November 2007, obtained an Order against the plaintiffs for vacant possession under section 169 of the Land Transfer act from the Lautoka High Court in Civil Action No. 312 of 2007.*

11. *The defendants, having obtained the possession of the house, have rented out it to one Akesa Cavalevu for a monthly rental of $400.00.*

12. *The defendants have benefitted, accepted and acquired the house built by the plaintiffs by accession knowing that they were not built gratuitously.*

13. *The said house built by the plaintiffs through the 2nd defendant was acquired by the 1st defendants by virtue of accession conferred incontrovertible benefit on the defendants and it would be unconscionable for the defendants to keep the benefit and to unjustly enrich out of it, without paying a reasonable sum in return for the enhanced value of the defendant's property.*

Claim against the 2nd Defendant:

14. *The claim against the 2nd defendant, who constructed the house as a contractor for the plaintiffs on the defendant's land as aforesaid, was on the basis of the alleged negligence and breach of contract on his part. Though, the 2nd defendant had filed the statement of defence and was ready for the trial, the claim against him was dismissed on same being withdrawn by the plaintiffs on 2nd September 2016 before Ajmeer J. Subsequently, the 1st prayer in the statement of claim for a declaration against the first defendants was also withdrawn on 5th September 2016. Therefore, no necessity arises for this court to discuss about the case against the 2nd defendant in this judgment.*

Service of writ and SOC on the 1st Defendants

15. *Since the 1st defendants were said to be residing in Canada, the service of the writ and the Statement of claim had not been effected on them personally in Fiji.*

16. *On 28th January, 2014, the plaintiff being directed by the court to show cause as to why the SOC should not be struck out for want of prosecution under Order 25 rule 9 and the affidavit being filed in that regard by the plaintiffs, the then learned Master by his ruling dated 12th May 2014, permitted the plaintiffs to proceed with the action and directed the plaintiff to apply for an order of court granting permission to serve the writ on the 1st defendants out of the jurisdiction.*

17. *Subsequently, an Ex-Parte Notice of Motion being filed on 9th June 2014 for an Order for the service of writ and SOC on the 1st defendants, who were said to be living in Canada, the learned then Master on 11th June 2014 allowed the application to have the writ and the SOC served by way of publishing an advertisement in one of the Newspaper in Canada. In addition to the above, on a further application made on 9th October 2014 for the substitute service, the learned Master on 27th November 2014 allowed to serve the writ by way of registered post at the address of the 1st defendants in Canada. The Master also had on 14th November 2014, extended the period of validity of the writ for further 6 months as per the Ex-parte summons filed on 13th November 2014.*

18. *On 2nd March 2015, plaintiffs filed the affidavit of service of writ and the SOC on the 1st defendants, along with the proof of newspaper advertisement published in Canada.*

19. *The plaintiff's Solicitors having done a search on 11th June 2015 and since no Notice of Intention to Defend or the Statement of defence had been filed by or on behalf of the 1st defendants, on 17th June 2015 filed an interlocutory judgment against the 1st defendants and same was sealed on 24th June 2015.*

20. *Thereafter, on 10th November 2016, the plaintiff filed an Ex-parte Notice of Motion seeking permission from the Court to have interlocutory judgment and the Notice of the assessment of damages served on the 1st defendants in Canada, by way of publishing an advertisement in the newspaper and orders in terms of summons granting permission were made on 25th November 2016. This being not effected, the plaintiffs filed another ex-parte Notice of Motion on 6th February 2017 and order was granted on 13th February 2017 by the learned subsequent Master to serve the interlocutory judgment and the Notice of the assessment of damages on the 1st defendants by way of registered post.*

21. *Accordingly, having reportedly served the aforesaid papers by registered post, the plaintiffs filed the affidavit of service on 20th February 2017 together with the registered postal article.*

22. *As there was no response from the 1st defendants, when the matter came up for hearing on 2nd November 2017, the learned Master, having decided that the plaintiff's claim should fall under Order 19 Rule 7 of the HCR, proceeded to set aside the interlocutory judgment on the basis that it had been entered irregularly and directed the plaintiff's Solicitor to file the summons under order 19 Rule 7 (2). (Vide Master's note dated 2nd November 2017).*

23. *Accordingly, plaintiff's Solicitors on 20th April 2018 filed Ex-parte Notice of Motion under Order 19 Rule 07 seeking among other reliefs, leave of the court for the plaintiffs to formally prove their claim against the 1st defendant and the hearing on same was taken up before me on 18th September 2018.*

(2) The Court concluded;

58. *Since the claim of the plaintiff was only for an unliquidated amount and the 1st defendants had failed to file the Notice of Intention of defence and/or the statement of defence within the prescribed time period, the plaintiff had the right to enter interlocutory judgment under Order 13 Rule (2) of the High Court Rules 1988.*

59. *The interlocutory judgment entered against the 1st defendants under the above order and rule on 17th June 2015 still remain intact and there was no need to file fresh summons under Order 19 Rule (7) of the HCR as ordered by the learned Master on 2nd November 2017.*

60. *The learned Master on 2nd November 2017 erred by, purportedly, setting aside the interlocutory judgment that had been entered against the 1st defendants. However, what the learned master has in fact set aside on that date is the interlocutory judgment that had been entered against the 2nd defendant on 2nd May 2015, which was not in existence as same had been vacated of consent and by payment of costs before the learned predecessor Master on 29th June 2015.*

61. *The learned Master's decision on 2nd November 2017 directing the plaintiff's Solicitors to file fresh summons under Order 19 Rule (7) cannot stand as a valid order and same should be set aside acting on the inherent jurisdiction of this Court.*

62. *The plaintiffs shall be entitled for a total sum of $85,750 being the assessed compensation, damages and cost.*

63. *The plaintiffs shall also be entitled for interest on the aforesaid total sum at the rate of 3% per annum from the date of this judgment till the total amount is fully paid and settled.*

(3) The Court made the following orders;

a. *The interlocutory judgment entered against the 1st defendants on 17th June 2015 and sealed on 24th June 2015 stand intact.*

b. *The purported, setting aside decision made by the learned Master on 2nd November 2017 had no effect on the interlocutory judgment that had been entered against the 1st defendants on 17th June 2015.*

c. *The direction given by the learned Master on 2nd November 2017 to the plaintiff's Solicitors to file summons under Order 19 Rule 7 against the 1st defendants is hereby set aside.*

d. *A total sum of $85,750.00 is assessed being the compensation, damages and the cost to be paid by the 1st defendants unto the plaintiffs in terms of the interlocutory judgment entered on 17th June 2015.*

e. *The plaintiffs are entitled for interest on the above sum at the rate of 3% from the date of judgment till the said amount is fully paid.*

f. *A copy of this judgment shall be served on the 1st defendants, with the leave of the court being obtained, if they are still residing outside the jurisdiction of this court.*

(C) DISCUSSION

(01) The objection on behalf of the defendants is to the issue of the writ. The defendants raised a preliminary point in *limine* to the issue of the writ. The third named first defendant in his affidavit in support of the summons states that; (reference is made to paragraphs 45 to 48 of the affidavit of Vinod Chand, the third named first defendant, sworn on 07.06.2019.)

45. *THAT we the First Defendants before migrating (except for Sushil Chand who died in Fiji on 13th August 1995) resided in Fiji we were living at Nadhari in Ba.*

46. *THAT I had migrated to Canada in 1990, the First named First Defendant, Prem Chand had migrated to Canada on or about 16th December 2005, whilst Sushil Chand had in fact died in Fiji on 13th August 1995.*

47. *THAT Nirmala, the wife and Administratix of the Estate of Sushil Chand had also migrated to Canada in May 1999.*

48. *THAT further, neither I, the First named First Defendant, nor the Administratix of the Estate of the late Mr. Sushil Chand were in Fiji and within the jurisdiction of this honorable court and/or Fiji Islands when the Writ of Summons was issued in the matter.*

(02) In arguing on the point, the defendants submit that in those circumstances it is necessary to obtain leave and in this case no application was made for leave to **issue** the writ as required by Order 6 of the Rules of the High Court. In short, so it is said, that the **issue** of the writ is a nullity and the defendants seek an order setting aside the proceedings in this matter.

(03) Counsel for the defendants referred me to the following decisions to support his proposition.

A. Tokomaru Ltd v Fittler [2009] FJHC 148; HBC 118 of 2009L (17 July 2009).
B. Singh v. Victory Mission Church [2015] FJHC 349; HBC 127 of 2009 [14 May 2015]
C. Peter Lowing v Peter Howell [2016] FJHC 578; HBC 154 of 2015 (28 June 2016)
D. Habib Bank Ltd v Raza [2019] FJHC 308; Civil Action 53 of 2005 (21 February 2019)

(04) The authorities do stand for the proposition cited.

(05) I invited the plaintiffs to respond to the challenge mounted by the defendants based on the terms of Order 6, rule 6 of the High Court Rules. (Ms) Naidu, who appeared on behalf of the plaintiffs, frankly admitted that no application was made for leave to issue the writ as required by Order 6 of the Rules of the High Court. In his affidavit in Opposition, Rasuaki Salababa Ralulu, the first named plaintiff states that; (Reference is made to paragraph (32) and (40) of the affidavit sworn on 24.07.2019.)

32. *THAT in response to paragraph 35 and 36 the 1st Defendant knew very well I wished to proceed with my claim. They in fact were trying to avoid the claim. I even tried to get the address from the nephew but he said he was not aware of it. I made so many applications to serve on the nephew and the Solicitor but this was not accepted by the Court and lastly I had to serve by way of advertisement. I then later found one address from the sister in Nadhari but we do not know that address was correct.*

40. *THAT in response to paragraphs 48 and 49 I state that I had not known the 1st Defendants personally. There was no long standing relationship between us that I would know their true whereabouts. I only came to know their existence after wrongly and by mistake my house was built on their property. When they had evicted us by way of Court Order then I filed my claim to seek damages for the property which I built and they were enjoying. Thus, when I filed my claim I had the intention to serve locally and it is later when service locally was not possible we served by way of Advertisement. My solicitor has also done a file search and to our surprise all the records especially minutes of the court from 2013 and 2014 were not there and it is our belief that the Court file does not have all the records.*

(06) The above is adequately reflected in the oral submissions of (Ms) Naidu, Counsel for the plaintiffs. The following quotations are taken from page (12) and (13) of the transcript of hearing.

Ms.Naidu *My Lord, the only issue here of course lies with order 6 rule 6. Now first of all, my Lord when the writ was filed, the intention to serve the writ was within the jurisdiction. If the court sees the number of ex-parte application made for service it was all to serve within the jurisdiction. So the time when they had file the writ there was no intention to serve it out of jurisdiction. Because the whole course of action was within the country, was all within the jurisdiction of Fiji. So their application was made to serve on the agent, to solicitor on the sister of the defendant but at that stage the judge as then was did not accept those application and it is later on then there was no other grounds left, the plaintiff then through their solicitors filing application to seek leave to file out of jurisdiction and advertise.*

Judge: *Seek leave to serve writ out of jurisdiction?*

Ms. Naidu: *Yes. So, the time to issue the issue the writ there was never an intention to serve it out of jurisdiction because order 6 rule 6 very clearly says no writ which has to be served it has nothing to do with any course of action outside or the party to be outside but if the writ is to served outside jurisdiction then only leave is important. So when they had filed the writ they have never intention to serve it outside jurisdiction because they had no address of the defendants. They had only come to know of the defendant was through this whole situation with the property and their intention wants to serve the solicitor or the agent who had been serving them the notice the eviction notice, the eviction court order and the letters of Mr. Nazim and others so the whole time their intention was to serve within the jurisdiction because even the plaintiffs financially were not in a position to serve outside jurisdiction.*

Ms. Naidu: *Then the foregoing provision shall not apply to the writ my Lord. And Sir another point to note my Lord is that the defendant is not originally outside the jurisdiction, they had invented based themselves within the jurisdiction. They have the property is within the jurisdiction which has been the course of action in this matter. So my only argument here remains my Lord is that the time to issue the writ was never had questioned service out of jurisdiction and it is for that reason the counsel for the plaintiff may not have sought the leave because there was never intention to serve out of jurisdiction and again though my learned friend said that order 2 is of no assistance but in this case the judgment has been obtained. So if any judgment has been obtained then we have no other way but to rely on order 2 rule 2 here to have the non- compliance the regularity to be accepted by the court and that certain order.*

Furthermore my Lord now, coming back to the judgment. My Learned friend here has stated the case authority of Singh and Victoria Church. The point to note my Lord is a default judgment and an Ex-parte judgment. Here the case was of a default judgment which is entered on the order 19 on no defense been filed. Here a proper trial has been conducted on an ex-parte basis and judgment has been entered on the basis of the judge's ruling. So if judges has not pointed out this technical error and has given a judgment then the first thing to do here is to find the order under which they can set aside the judgment and they can also target order 6 rule 6 here. But in this case nobody has talking about extension of time for setting aside the judgment. Setting aside the judgment the only thing they talking about is order 6 rule 6 which is all on a technical ground. So my submission to that ground would be Singh v Victoria Mission is not a very relevant case in this situation because they are talking about the same order, they are talking about the similar situation not the exact judgment type. I'm not talking about the exact judgment but the judgment type. The judgment types are different.

(07) As I understood (Ms) Naidu, her oral submissions were as follows;

(A) When the writ was filed, the plaintiffs never intended to serve the writ out of the jurisdiction because they had no overseas address of the defendants.

(B) It was only after the Court refused the plaintiffs' application for leave to serve the writ on the defendants' solicitors or defendants' agents, the plaintiff decided to serve the writ out of the jurisdiction.

(C) The failure to comply with Order 6, r.6 should be treated as an irregularity and shall not nullify the proceedings [Order 2, r.1].

(D) The Court shall not wholly set aside the proceedings on the writ.

(E) The judgment dated 13.11.2018 by Hon. Justice Mohammed Mackie is an ex parte judgment after the formal proof hearing held before the court on 18.09.2018.Accordingly, this matter is to be distinguished from the authorities upon which the defendants placed reliance.

(08) I turn to consider defence counsel's Order 6, rule 6 argument. The defendants' objection calls into consideration Order 6 of the Rules of the High Court. Order 6, Rule 6 reads as follows;

Issue of writ (*O.6, r.6*)

6. –(1) No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court.

Provided that if every claim made by a 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 of the Court or that the wrongful act, neglect or fault giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ.

(2) Issue of a writ takes place upon its being sealed by an officer of the Registry.

(3) The officer by whom a concurrent writ is sealed must mark it as a concurrent writ with an official stamp.

(4) No writ shall be sealed unless at the time of tender thereof for sealing the person tendering it leaves at the Registry a copy thereof signed, where the plaintiff sues in person, by him or, where he does not so sue, by or on behalf of his solicitor and produces to an officer of the Registry a form of acknowledgement of service in Form No.2 in Appendix [1] for service with the writ on each defendant.

(09) I note that the defendants name and address as mentioned in the writ in the present suit is;

"Prem Chand, Sushil Chand and Vinod Chand formerly of Nadari, Ba but now residing in Canada and the exact address is unknown to the plaintiffs...."

(10) It is clear from the writ that the defendants are not within the jurisdiction. It is also clear that in those circumstances, it is necessary to obtain leave to issue the writ. In this case the plaintiffs have not sought any leave to issue the writ and the court has made no order for leave to issue. There can be no uncertainty about the court's jurisdiction to hear the

present claim and there is no enactment which gives the High Court jurisdiction to hear a claim for unjust enrichment. The plaintiffs' claim **does not fall** within the exception mentioned in the proviso to order 6, rule 6(1), so leave is required. I therefore accept the defendants' submissions on Order 6, Rule 6 and hold that it was necessary for the plaintiffs to first obtain leave of this court before issuing the writ.

(11) Order 6, rule 6 (1) is a mandatory provision which a Court is bound to take Notice of. In other words, the Court cannot use its discretion when a provision is mandatory. In **Lowing v Howell** (supra), the High Court at paragraph (26) and (27) of the judgment stated as follows;

> *[26] The case authority of **Wellington Newspapers v Rabuka [1994] FJCA 14; Abu0004j.93s (22 March 1994)**, cited by the plaintiff, is not authority for the proposition that non-compliance with the requirements of O.6, r.6 could be cured by O.2, r.1, which states that (1) where, in beginning or purporting to being any proceedings, ... There has by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, ... or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings.*
>
> *[27] The word 'shall' used in O.6 suggests that the provisions are mandatory and must be complied with. Therefore, I am of the view that failure to comply with the mandatory requirements of O.6 is fatal and could not be cured by seeking assistance of O.2, r.1. I accordingly find that the writ of summons should be set aside on the ground that the service on the defendant is irregular.*

(12) I therefore reject the plaintiff's submission that non-compliance with the requirements of Order 6, rule 6(1) could be cured by Order 2, rule (1) of the High Court Rules. Such an error is fundamental which the court cannot, in its discretion rectify as mere non-compliance under Order 2, r.1 of the High Court Rules. The failure to obtain leave under Order 6, rule 6 (1) cannot be cured by Order 2, rule 1 as the failure is a fundamental defect and **not a procedural irregularity**. See also, **Habib bank Ltd v Raza (2019) FJHC 308**

(13) (Ms) Naidu, Counsel for the plaintiffs in her oral submissions explains why Order 6, rule 6 (1) is not complied with as follows; (reference is made to page 12 of the transcript of hearing).

> *My Lord, the only issue here of course lays with order 6 rule 6. Now first of my entire Lord when the writ was filed, the intention to serve the writ was within the jurisdiction. If the court sees the number of ex-parte application made for service it was all to serve within the jurisdiction. So the time when they had file the writ there was no intention to serve it out of jurisdiction. Because the whole course of*

action was within the country, was all within the jurisdiction of Fiji. So their application was made to serve on the agent, to solicitor on the sister of the defendant but at that stage the judge as then was did not accept those application and it is later on then there was no other grounds left, the plaintiff then through their solicitors filing application to seek leave to file out of jurisdiction and advertise.

Judge: *Seek leave to serve writ out of jurisdiction?*

Ms. Naidu: *Yes. So, the time to issue the issue the writ there was never an intention to serve it out of jurisdiction because order 6 rule 6 very clearly says no writ which has to be served it has nothing to do with any course of action outside or the party to be outside but if the writ is to served outside jurisdiction then only leave is important. So when they had filed the writ they have never intention to serve it outside jurisdiction because they had no address of the defendants. They had only come to know of the defendant was through this whole situation with the property and their intention wants to serve the solicitor or the agent who had been serving them the notice the eviction notice, the eviction court order and the letters of Mr. Nazim and others so the whole time their intention was to serve within the jurisdiction because even the plaintiffs financially were not in a position to serve outside jurisdiction.*

Ms. Naidu: *Then the foregoing provision shall not apply to the writ my Lord. And Sir another point to note my Lord is that the defendant is not originally outside the jurisdiction, they had invented, based themselves within the jurisdiction. They have the property is within the jurisdiction which has been the course of action in this matter. So my only argument here remains my Lord is that the time to issue the writ was never had questioned service out of jurisdiction and it is for that reason the counsel for the plaintiff may not have sought the leave because there was never intention to serve out of jurisdiction and again though my learned friend said that order 2 is of no assistance but in this case the judgment has been obtained. So if any judgment has been obtained then we have no other way but to rely on order 2 rule 2 here to have the non- compliance the regularity to be accepted by the court and that certain order.*

(14) In my view, this submission clearly misunderstands the provisions in Order 10, rule (1) which deals with service of originating process and the provisions in Order 65, rule (4) which deals with substituted service.

The writ says that the defendants are living in Canada. I regard as ridiculous the claim that "*when the writ was filed the plaintiffs never intended to serve the writ out of jurisdiction because* ***they had no overseas address of the defendants.***" The plaintiffs could have served the writ out of the jurisdiction by way of publishing an advertisement in one of the newspapers in Canada. The plaintiffs actually have done that.

(15) I note para (17) and (18) of the Judgment of Hon. Justice Mackie;

> *17. Subsequently, an Ex-parte Notice of Motion being filed on 9th June 2014 for an Order for the service of writ and SOC on the 1st defendants, who were said to be living in Canada, the learned then Master on 11th June 2014, allowed the application to have the writ and the SOC served by way of publishing an advertisement in one of the Newspaper in Canada. In addition to the above, on a further application made on 9th October 2014 for the substitute service, the learned Master on 27th November 2014 allowed to serve the writ by way of registered post at the address of the 1st defendants in Canada. The Master also had on 14th November 2014, extended the period of validity of the writ for further 6 months as per the Ex-parte summons filed on 13th November 2014.*
>
> *18. On 2nd March 2015, plaintiffs filed the affidavit of service of writ and the SOC on the 1st defendants, along with the proof of newspaper advertisement published in Canada.*

(16) Thus, I find it difficult to understand (Ms) Naidu's argument addressed to the Court; "*When the writ was filed the plaintiffs never intended to serve the writ out of the jurisdiction because they had no overseas address of the defendants*". I must confess, as best as I tried to understand this submission, (Ms) Naidu has failed to convince me.

(17) In the present matter, there can be no uncertainty about the judgment of Hon. Mohammed Mackie dated 13.11.2018. It pertains to assessment of damages. A judgment by default has been entered by the plaintiffs against the defendants and it is on foot. The relevant portion in the judgment reads as follows;

> *28. The plaintiff's claim against the 1st defendants, obviously, being for unliquidated damages and when the defendants failed to give* ***Notice of Intention to defend*** *the plaintiff was entitled to enter interlocutory judgment as per Order 13 Rule 2 of the High Court Rules 1988, which is an administrative act. It is to be noted that the plaintiffs had already withdrawn the declaratory relief against the 1st defendants. The only remaining claim was for an unliquidated sum of money. Thus, the applicable Order and Rule were Order 13 Rule (2).*

29. *The fact that the 1st defendants had failed to file the Notice of Intention to Defence has escaped the attention of the learned Master, in which event the Rule (2) of Order 13 comes into play. The learned Master has chosen to set aside the interlocutory judgment entered under Order 13 Rule (2) on the basis that it was an irregularly entered judgment as the 1st defendant had failed to file the Statement of defence.*

30. *When the claim is for an unliquidated amount and the defendant fails to file the Notice of Intention to Defend, undoubtedly, it is Rule (2) of the Order 13 that comes into play and the plaintiff in this case has rightly obtained the interlocutory judgment under the above order and rule. It is when a defendant, having filed the Notice of Intention to Defend, fails to file the statement of defence only, the plaintiff can move for judgment under relevant rule of Order 19 of HCR.*

31. *In my view, that the learned Master has erred both in law and in fact when he decided to set aside the interlocutory judgment entered on 17th June 2015, on the basis that it had been irregularly entered and by ordering the plaintiff to file summons under Order 19 Rule (7).*

32. *However, on careful perusal of the record, it transpires that what has been set aside by the learned Master on 2nd November 2017 is the interlocutory judgment that had been entered against the 2nd Defendant on 5th February 2015 and not the interlocutory judgment entered against the 1st defendants on 17th June 2015. There was no an interlocutory judgment entered against the 1st defendants on 5th February 2015.*

33. *The interlocutory judgment against the 1st defendants has actually been entered only on 17th of June 2015, after carrying out a search on 11th June 2015, which has been sealed on 24th June 2015. The interlocutory judgment against the 1st defendants remain intact and only the interlocutory judgment against the 2nd defendant has, purportedly, been set aside by the Master as aforesaid, which in fact had already been vacated of consent by payment of cost by the 2nd defendant unto the plaintiff before the predecessor Master on 29th June 2015.*

34. *This mean that the Master on 2nd November 2017 has purportedly, set aside an interlocutory judgment, which had not been either entered against the 1st defendant or did not exist against the 2nd defendant since it had already been vacated as aforesaid.*

35. *Since there was an interlocutory judgment in records against the 1st defendants and they had not responded to the Notice of it and the Assessment of Damages, I am of the view that the learned Master could very well have proceeded with the hearing for the assessment of damages against the 1st defendants. The plaintiff need not have resorted to file summons under Order 19 Rule 7 to enter another judgment against the 1st defendants, while the interlocutory judgment already entered remained intact.*

36. ***In view of the above, this Court need not proceed to enter another judgment against the 1st defendant on the evidence adduced before me at the formal proof hearing and there was no necessity to lead evidence when the court had acted administratively and entered an interlocutory judgment against the 1st defendants under Order 13 rule (2) High Court Rules of 1988.***

37. *However, I can act on the evidence so led before me at the formal proof hearing for the purpose of the assessment of damages, for which there is no bar as the 1st defendants have not responded to the notice of interlocutory judgment and assessment of damages.*

38. *Thus, the only duty before this court is the assessment of compensation and damages due to the plaintiffs, on account of building their house on the land belonging to the 1st defendants, instead of building it on their own land purchased by them as per the Transfer No. 573957 registered on 26th September 2005 as evidenced by P-1 document (Certificate of Title).*

39. ***The plaintiffs have proved that they obtained loan for a sum of $50,800.00 from the Colonial National Bank by mortgaging their land for the construction of the house and obtained a further sum of $7,750.00 from the same bank using their FNPF for the fencing and improvement of the property. The fact that the plaintiffs have constructed their house on the land belonging to the 1st defendants is not in issue. The liability on the part of the 1st defendants towards the plaintiff has already been decided by the interlocutory judgment and what remains is the assessment.***

(Emphasis added)

(18) At the time of filing of the writ, the plaintiffs should have sought leave of the Court to issue the writ out of the jurisdiction as required by Order 6, rule 6 (1) of the rules of the High Court. The plaintiffs failed to do so. Certainly, the plaintiffs cannot get a second bite of the cherry. It is disingenuous to say that the plaintiffs did not form the intention to serve the writ out of the jurisdiction until the court declined their application to serve the writ on the defendants' solicitors or the defendants' agents.

(19) The defendants are not within the jurisdiction. The leave of the Court was not obtained before the writ was issued. The failure to comply with Order 6, rule 6(1) is a fundamental defect and the noncompliance vitiates the entire proceedings. The issue of the writ and the proceedings is a nullity.

Before I take leave of the matter, I ought to mention one thing. It is unfortunate that the defendants' application reaches this court some six years after the filing of writ of summons and the statement of claim. The proceedings have taken on a marathon character for the last six years. The plaintiffs have been put to considerable expense in the meantime. All of those circumstances , however unfortunate, do not relieve me of the duty of determining the correct meaning of Order 6, rule 6(1) of the rules of the High Court and its proper application in the circumstances.

(D) ORDERS

(01) The amended writ of summons and the statement of claim filed by the plaintiffs on 21.01.2014 and the whole proceedings in this matter including the judgment delivered on 13.11.2018 is set aside.

(02) There will be no order as to costs.

25/10/2019.

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Jude Nanayakkara
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
Friday, 25th October, 2019