

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

Civil Action No. HBC 406 of 2019

**BETWEEN:** **BILALEVU INVESTMENT (FIJI) LIMITED** a limited liability company having its head office at Shop 17, Tebara Plaza, 9 Miles, Nakasi.

**PLAINTIFF**

**AND:** **ASERI TOKALAULEVU** trading as **A1 ACCESS AND TECHNOLOGY** a business entity having its office at Lot 60, Kavuula Road, Delainavesi, Lami, Suva.

**DEFENDANT**

**BEFORE:** Hon. Mr. Justice V D Sharma

**COUNSEL:** Mr. Betakula I. on instruction Raikanikoda & Associates - for the Plaintiff/Respondent  
Ms. Sauduadua I. - for the Defendant/Applicant

**Date of Decision:** 14<sup>th</sup> December, 2020 @ 9.30 am.

**Decision**

*[For leave and extension of time to file statement of Defence]*

## INTRODUCTION

1. The Defendant filed a summons on 3<sup>rd</sup> February, 2020 and sought to the following orders-
  - a) *The time be extended and leave be granted for the Applicant/ defendant to file its statement of Defence,*
  - b) *That costs of this application be costs in the cause.*
2. The application is made pursuant to *Order 3 Rule 4(1) of the High Court Rules 1988* and the Inherent Jurisdiction of this Honourable Court.
3. The application was opposed by the Plaintiff and accordingly filed an affidavit in response citing that the Plaintiff will be greatly prejudiced as a result of the delay in filing the statement of Defence.
4. The Plaintiff filed a Writ of Summons claiming for special and general damages with interest and costs together with restraining orders.
5. The Defence filed the appointment of solicitors.
6. The Plaintiff changed counsels twice during this proceedings. In the interim, other interlocutory applications were filed by the Plaintiff and dealt with accordingly.
7. There is a discretion for extension of time even if there was a slight delay on the part of the Defendant to file and serve a Statement of Defence. Therefore, I do not see any reason how the Plaintiff will be prejudiced in this case if the court is mindful of granting the Defendant's application.
8. The necessary discretion is to be found in order 3 Rule 4 (1) of the High Court Rules 1988 which stipulates -
  - a) *The court may, on such terms as it thinks just, by order extend or a breach the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings;*
  - b) *The court may extend any such period as is referred 2 in paragraph 1 although the application for an extension I not made until after the expiration of that period.*
9. I accept that there was in this case a failure to comply with a court order as to time out when the Defendant was ordered to file and serve the Statement of Defence on 31<sup>st</sup> January, 2020. It is to be noted that the discretion to extend time, conferred by Order 3 Rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an "unless order".
10. The guiding principle is this:

The object of this rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties concerned. When an irreparable mischief would be done by acceding to tardy application, it being a departure from the ordinary practice,

the person who has failed to act within a proper time ought to be the survivor, but in other cases the objection of lateness ought not to be listened to and any injury caused by any delay may be compensated for by the payment of costs.

11. Whilst the rules are devised to promote expedition and requirement to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs. A rigid mechanistic approach is inappropriate. No doubt the length of the delay will be relevant factor but generally the question is what the overall justice of the case requires.
12. However, the instant case is one of not complying with a court stipulated time frame rather than with one stipulated by the rules, the same general approach seems to me to be apt, which is not to say that a court order is to be treated lightly.
13. It is important to recognize that Order 3, Rule 4 of the High Court Rules, 1998 in itself contemplates extensions of time to comply with such orders, even where the application is made after the expiry of the time stipulated. Applying this approach to the instant case, it seems to me to be clear that time should be extended allowing the Defendant to file and serve its statement of defence.
14. Bearing all above in mind, I find that the Plaintiff will not be any way prejudiced as a result of the delay in filing and service of the Statement of Defence as this court will ensure that compliance is carried out by the Defendant.
15. The Writ of Summons filed herein by the Plaintiff is significant of the fact that the Plaintiff and Defendant entered into an agreement whereby the Defendant had agreed with the Plaintiff that the said machines were perfect and are in top working condition to be utilized in the Plaintiff's saw mill operation.

The issue raised by the Plaintiff is that the Defendant delivered the defect machines and the Plaintiff was unable to operate its saw mill and the Plaintiff had therefore suffered loss.

16. The issues within the Plaintiff's Writ of Summons are off tribal nature and therefore this tribal issues need to be heard and determine by this court in a just and fair manner.

**In conclusion**

17. For the foresaid rational, I accede to the Defendants application for leave and extension of time to file and serve its Statement of Defence and accordingly grant the same.
18. Each party to bear their own costs at the discretion of this court. The reason being that both parties are to be blamed for the delay and the manner in which the matter was conducted so far which the parties are well aware off.

**Orders:**

1. The Defendant's summons seeking leave and extension of time to file and serve a Statement of Defence is hereby granted.
2. The Defendant is granted 21 days to file and serve the Statement of Defence onto the Plaintiff.
3. The Plaintiff is at liberty to file and serve any reply within 21 days thereafter.
4. There will be no order as to costs at the discretion of this court.

Dated at Suva this 14<sup>th</sup> day of December, 2020.



Vishwa Datt Sharma  
Judge

cc: Lal Patel Lawyers, Suva.  
Raikanikoda & Associates, Suva.