

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

**Civil Action No. HBC 51 of 2019**

**BETWEEN** : **RAJENDRA KUMAR** **PLAINTIFF**

**AND** : **URMILA DEVI and ANAL NAIDU** **1<sup>st</sup> DEFENDANTS**

**AND** : **RAKESH NARAYAN** **2<sup>nd</sup> DEFENDANT**

**Appearances** : Mr. Dayal R for the Plaintiff

**Ruling** : 1 April 2020

## **RULING**

### **Background**

1. This is an ex parte application by the Plaintiff seeking leave to serve the writ of summons on the 2<sup>nd</sup> Defendant, by substituted service.
2. In support of the application, the Plaintiff deposes in a supplementary affidavit that:
  - a. this action was commenced by a writ of summons issued out of the High Court on 22 November 2019;
  - b. the last known address of the 2<sup>nd</sup> Defendant was at Qarawalu, Taveuni;

- c. his solicitors and their agents and bailiffs had made several attempts to serve the writ on the 2<sup>nd</sup> Defendant but were unsuccessful as he could not be located at Qarawalu, Taveuni;
- d. numerous attempts by his solicitors, agents and bailiffs to find out the current whereabouts of the 2<sup>nd</sup> Defendants have been futile;
- e. the Plaintiff and his solicitors do not know of any address where personal service of the writ can be effected on the 2<sup>nd</sup> Defendant;
- f. the 2<sup>nd</sup> Defendant's neighbours and relatives say that the 2<sup>nd</sup> Defendant is still residing in Fiji and is evading service of the writ;
- g. for the foregoing reasons, it has become very difficult for him and his solicitors to serve the writ on the said Defendant, and;
- h. owing to the delays in service of the writ, he has been prejudiced from obtaining the relief he seeks in this action.

### Service

3. Order 10 deals with service of originating process. A writ served within jurisdiction must be served personally, or by ordinary post to the defendant at his usual or last known address, or by inserting a copy through the defendant's letter box. (Order 10 r.1 (1) (2).
4. Order 10 rule 1 is subject to "...the provision of any Act and these Rules and in particular to any enactment which provides for the manner in which documents may be served on bodies corporate." (Order 10 rule 1(7)). Thus the provisions of Order 10 must be read in conjunction with other rules on service in the High Court Rules 1988, namely, Order 65 which deals in much more detail with service of originating process and other documents, as well as with substituted service.
5. Order 65 rule 2 provides that

Personal service of a document is effected by leaving a copy of the document with the person to be served.

6. Order 65 rule 4 deals with substituted service and states:

- (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally or a document to which Order 10, rule 1, applies, it appears to the Court that it is impracticable for any reason to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document.
- (2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.
- (3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

#### Analysis

7. The issue for the Court's determination is whether leave ought to be granted for the Plaintiff to serve the writ of summons on the 2<sup>nd</sup> Defendant by substituted service. In doing so, the Court needs to decide whether it is impracticable to serve the writ by personal service or by the alternative methods in Order 10 r. 1 (2).

8. *The Supreme Court Practice 1999* Vol 1 at 65/4/10 states:

On an application for an order for substituted service in a case to which O.10 r.1 applies, the court must have evidence showing how and why service of the document in the manner prescribed by O.10, r.1, was impracticable (*Paragon Group Ltd. v. Burnell* [1991] Ch. 498; [1991] 2 W.L.R. 854).

9. "Impracticable" is defined in *The Shorter Oxford English Dictionary*, 3<sup>rd</sup> edition as "Not practicable; that cannot be carried out or done; practically impossible."



10. The Plaintiff deposes that his solicitors and their agents and bailiffs had made several attempts to serve the writ on the 2<sup>nd</sup> Defendant but were unsuccessful as he could not be located at Qarawalu, Taveuni; that his solicitors, agents and bailiffs had also made numerous attempts to find out the current whereabouts of the 2<sup>nd</sup> Defendant, without success; that the 2<sup>nd</sup> Defendant's neighbours and relatives say he is still in the country and is evading service of the writ.

11. On the material before me, I am of the view that the Plaintiff has not shown to the Court's satisfaction that it is impracticable to serve its summons personally on the 2<sup>nd</sup> Defendant. Apart from saying the 2<sup>nd</sup> Defendant could not be located at Qarawalu, no mention is made of when, and where attempted service was made – at home, a last known address; a place of work, etc. Additionally, while it is deposed that neighbours and relatives say that the 2<sup>nd</sup> Defendant is in the country and evading service, I find it odd that they do not say where in Fiji the 2<sup>nd</sup> Defendant is, and why they say he is evading service.

12. On evading service, paragraph 65/4/7 of *The Supreme Court Practice 1999* states:

The Master will not make an order for substituted service on the mere statement that the defendant is evading service. The grounds for the statement must be given in the affidavit in support, which must state the efforts which have been made to find the defendant, and the reasons for believing that he is keeping out of the way to evade service.

13. Some guidance may be had from *The Supreme Court Practice 1999* (supra) at 65/4/9 which states:

**Proceedings in ordinary cases-** The following proceedings will be some guide to practitioners for obtaining an order:

1. Two calls should be made.
2. The calls should be made at the defendant's residence, permanent or temporary, if known: otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelope addressed to the defendant.
3. The calls should be made on weekdays and at reasonable hours.

4. Each call should be on a separate day...

...The affidavit in support of the application should deal with all the foregoing requirements...

The affidavit should also show whether the defendant is within the jurisdiction or whether he is believed to be so. If the defendant is evading service...the affidavit should state the deponent's belief to that effect, giving the facts upon which the inference is founded...that the substituted service which is proposed will probably come to the knowledge of the defendant.

14. Substituted service, when effected in compliance with an order of the Court, has all the effects of personal service. (*Re Urquhart* (1890) 24 Q.B.D. 723 at 726. The result is that judgment on such service is regular notwithstanding the defendant may not have had any knowledge of the action. In such a case, a defendant will only be able to defend upon proof of the existence of a defence on the merits. (*Watt v. Barnett* (1878) 3 Q.B.D. 363 at 366)
15. It is therefore of utmost importance that an order for substituted service be made only where there is evidence of, and the Court is satisfied, as to how and why service of the document in the manner prescribed by O.10, r.1, is impracticable (*Paragon*, supra)
16. The Plaintiff has not adduced such evidence and I am not satisfied an order for substituted service of the writ on the 2<sup>nd</sup> Defendant ought to be made.
17. The application is accordingly refused.



S.F. Bull  
**Master**

