

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HPP 60 of 2016

BETWEEN : **RAHMAT ALI** of Drasa Vitogo, Lautoka, Fiji, Businessman.

APELLANT / ORIGINAL DEFENDANT

AND : **GAZALA RAFIQAH** of Auckland, New Zealand, Student.

RESPONDENT/ ORIGINAL PLAINTIFF

Appearances: Ms. Sadrata for the Appellant/Original Defendant
Mr. Nand for the Respondent/ Original Plaintiff
Date of Hearing: 12 August 2022
Date of Ruling: 13 October 2022

R U L I N G

1. Before me is an application by Summons dated 06 July 2022 seeking the following orders:
 - (1) That the Appellant (Original Defendant) be granted leave file Appeal against the Decision of the Master of the High Court, Mohammed Azhar delivered on the 24th day of June, 2022.
 - (2) An Order that the costs of this application be costs in the cause.
 - (3) Any further relief or orders that this Honorable Court deems just and appropriate.
 - (4) That there be abridgment of time for service of this Summons.

2. The Summons is supported by an affidavit of Rahmat Ali sworn on 05 July 2022. Ali annexes to his affidavit his proposed Grounds of Appeal which are as follows:
 - (1) The Learned Master erred in law and in fact when he stated that, *“the delay on the part of the Defendant in filing the current summons for security for costs alone does not persuade this Court the way the discretion under this rule is to be exercised”*, and as a matter of fact the application was filed on 26th November, 2018, and the Ruling was delivered on the 24th day of June, 2022 and as such caused a substantial miscarriage of justice.
 - (2) The Learned Master erred in law and in fact by failing to consider or consider at all, the defence raised by the Appellant in respect of the Respondent’s action, such that it led him erroneously exercising his discretion to dismiss the Appellant’s application for security for costs.

- (3) The Learned Master erred in law and in fact by failing to consider that the Respondent was an ordinary resident out of jurisdiction and had failed to disclose her residence status in relation the Summons for Security for Costs.
 - (4) The Learned Master erred in law and in fact in taking into consideration that the Appellant's application for summons for security for costs was an attempt to stifle the Plaintiff's action rather than taking into account that an order for security for costs usually requires the party residing overseas to pay money into Court as security for the payment of any costs order that may eventually be made in favor of the other party.
 - (5) That Learned Master erred in law and in fact by failing to consider that the Appellant has a reasonable defence against the Respondent.
 - (6) That the Ruling delivered by Learned Master in all the circumstances of the case was unfair and/or unjust against the Appellant and in the interest of justice.
3. The decision which the application seeks to appeal was that of the Master which was handed down on 24 June 2022. By that decision, the Learned Master had declined the Defendants' application for security for costs. The Master outlined the following principles:
 - a) the power to grant security for costs is a discretionary power.
 - b) the Court will grant security for costs if, having regard to all the circumstances of the case, the Court thinks it just to order security for costs.
 - c) as such, it is no longer an inflexible rule that Plaintiff resident abroad must provide security for costs.
 - d) application for security for costs may be made at any stage of the proceedings, although, ideally, it should be made earlier.
 - e) delay in applying for security for costs is a factor in the exercise of the discretion, though it is not a decisive factor.
 - f) an order for security for costs should not oppress the Plaintiff.
 - g) it may be a denial of justice to order a Plaintiff to give security for costs in favor of a Defendant who has no defence to the claim.
4. At paragraphs 08 – 13 the Master outlined the following:
 - a) the Plaintiff is the niece of the Defendant.
 - b) the Defendant allegedly forged a purported Will of the Plaintiff's father to obtain Probate No: 57691 and became the sole beneficiary of the estate.
 - c) the Statement of Defence contains a bare denial of the allegations in the claim and also contains inconsistent averments.
 - d) The summons for security for costs was filed at discovery stage.

5. The said decision was an interlocutory decision. Order 59 Rule 11 of the High Court Rules 1988 provides:

11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.'

6. The application in question was filed within time.

7. In **Nagiya v Autar** [2017] FJHC 928; HBC69.2012 (7 December 2017), Mr. Justice Mackie reviewed some decisions as follows:

40. In **Rajendra Prasad Bothers Ltd v FAI Insurance (Fiji) Ltd** 2002 FJHC 222; HBC 0295r. 2001s (9 August 2002) Court sets out the basis to be considered in relation to leave to appeal against interlocutory order or decision. It was held in:

"However, in the case before me it is my respectful view that the grounds for appeal are unmeritorious and there are no arguable legal issues of any importance which require some authoritative decision. I do not see how the applicant will be prejudiced if leave is refused. It will still have the opportunity to put its case fully before the court during the hearing of the substantive action. It will have the right of appeal if unsuccessful."

41. In **Fiji Public Services Commission v Manunivavalagi Dalituicama Korovulavula** FCA Civil Appeal No. 11 of 1989 Court held:

*"Whilst I am inclined to agree that Air Canada's case appears to be distinguishable. I must bear in mind that I am dealing with an application for **leave to appeal** and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not."*

42. In **Totis Inc Spor (Fiji) Limited & Anor. V John Leonard Clark & Anor (FCA No. 35 of 1996 at 15** (as cited in **Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd (supra)**) Tikaram J said:

"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principles by principles by granting leave only in the most exceptional circumstances."

43. In **Kelton Investment Limited and Tappoo Limited and 1. Civil Aviation Authority of Fiji Motibhai & Company Limited, Civil Appeal No. ABU 0034.1995**, court held:

*"The courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence **leave to appeal** are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted."*

44. Further, in the affidavit submitted by the Applicant along with his ill-fated application for grant of **leave to appeal** out of time, he does not utter a word that he has a valid grounds/s to appeal against Master's impugned ruling.
 45. He has made explicit admissions that he obtained money from the Respondent on several occasions and agreed to repay it and the Master being satisfied of it, by his impugned ruling has refused to vacate the default judgment in respect of \$1, 12,000.00.
 46. It is observed that the amount of \$1, 12,000.00, with regard to which the Master has refused to vacate the default judgment, is well and truly due to the Respondent in the light of Applicant's explicit admissions, and the purported reason adduced by him that monies were given to him by the Respondent on account of their illicit relationship and the Respondent did not expect to receive it back is not an acceptable defence.
 47. When the facts of this case and the settled law on the **leave to appeal** application remain as stated above, I need not delve further into this question. I am also of the view that even if there had been a proper application on the basis that the order in question is an interlocutory, in the light of the applicable
8. I cannot find any fault in the manner in which the Learned Master had exercised his discretion in his Ruling. In my view, the grounds for appeal are unmeritorious. There are no arguable legal issues of any importance which require some authoritative decision.
 9. The Summons is dismissed. Costs to the respondent which I summarily assess at \$ 800-00 (eight hundred dollars only).



Anare Tuilevuka
JUDGE
Lautoka

13 October 2022