

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBA 5 OF 2021

BETWEEN : **ABDUL KALAM & FARZEENA BANU** of Cuvu, Sigatoka
APPELLANT
(The original second named Defendant)

AND : **NACANIELI TALENIWESI** of Malolo, Nadi
RESPONDENT
(The original Plaintiff)

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. E. Dass – for the Appellant- The original second named Defendant
Mr. R. Prakash- for the Respondent – The original Plaintiff

WRITTEN SUBMISSION: On 11th November-, 2021 by the Appellant.
On 17th June, 2022 in reply by the Respondent.
On 06th September, 2022 Supplementary by the Appellant.

DATE OF HEARING : 6th September, 2022

DATE OF DECISION : 21st November, 2022

RULING

1. This is a timely appeal, purported to be preferred by both the defendants (admittedly **husband & wife**), against the judgment dated and pronounced on 5th February, 2021 by the learned Magistrate at the Magistrate’s Court of Nadi, exercising her Civil Jurisdiction, ordering the second named defendant – appellant (“**FARZEENA BANU**”) to pay unto the Plaintiff – respondent (“**the respondent**”) a sum of \$35,000.00, together with \$500.00, being the summarily assessed costs.
2. The learned Magistrate in her impugned judgment, also stated in paragraph iii of the reliefs granted that “The monetary jurisdiction to be limited to \$50,000.00”, the applicability and the legality of which will be discussed later in this judgment.
3. It is also pertinent to mention at the outset that though this appeal appears to have been preferred by both the defendant , for the reasons to be discussed later in this judgment, both in fact and in law, it has to be treated and disposed as an appeal only by the second named defendant (wife) against whom the learned Magistrate has pronounced the impugned judgment after a trial only against her , which was not warranted for several reasons to be discussed below.

4. It is on record that the action being filed against both the defendants for the recovery of \$35,000.00, a claim well within the monetary jurisdiction of the Magistrate's Court in terms of Section 16 1.(b) of the Magistrate's Court Act, by an "ORDER BY CONSENT" dated 18th July ,2019 , the matter has been settled ordering the First named defendant (husband) to pay a sum of \$35.157.50 as he had not disputed the claimed amount.
5. But, unfortunately, in the same breath a further order has also been made for the second named defendant wife, the appellant hereof to file her Statement of defence, which was not warranted in view of the aforesaid settlement.
6. The fact that the whole action came to an end and the Court became *functus officio* as far as the total claim in the Statement of Claim was concerned, with the entering of the ORDER BY CONSENT on 18th July, 2019 by and between the Plaintiff and the First named defendant husband, seems to have had escaped the attention of the learned Magistrate and the learned counsel for both the parties.
7. When the matter was settled as aforesaid, the claim against the second named defendant (the Appellant hereof stood wiped out and the Court became defunct with regard to the claim. Accordingly, no order by consent or otherwise could have been entered against the second named defendant who is the appellant hereof, to file her Statement of defence or to proceed against her for a culmination against her in this manner.
8. It is pertinent to reproduce here the paragraphs 2 and 3 of the Statement of Claim, on careful reading of which, the basis on which the second named defendant has been made a party to these proceedings becomes crystal clear.

"2. THAT the Defendants are husband and wife who work together interchangeably as agents of each other and for that the male husband may use his wife to hold assets under her name only"

"3. THAT accordingly and further to para 2 above some form of assets and vehicles are either held under both the Defendants names or under the wife only"

9. Accordingly, it appears that the second named defendant (the appellant) was made a party to the action in hand only as an agent of the first named defendant husband on the basis that she may be used by the first named defendant to hold assets for and on his behalf or she may hold her husband's/ assets or vehicles, and not as a party who is directly liable to the respondent.
10. It is to be noted that even in the prayer to the Statement of Claim, the relief asked for by the plaintiff is not jointly and severally against both the defendants. What the respondent has prayed for is just \$35,000.00 from both the defendants. I don't find any specific pleadings implicating the second named defendant as to what exactly she committed or omitted throughout the time material in order to become liable to the respondent. However, I need

not deeply delve into this as there could not have been a distinct proceedings against the second named defendant (appellant), in view of the settlement entered by and between the first named defendant and the respondent.

11. The first named defendant, who has already entered into a settlement as aforesaid, while the said settlement stands valid without being formally set aside by a separate action, cannot become an appellant in this appeal in order to have the consent judgment against him set aside. The reference as the "Appellants" in the caption and in averments of the pleadings in this appeal should denote only the second named defendant and not the first named defendant.

GROUND OF APPEAL:

12. The learned Counsel for the appellant has adduced 6 grounds of appeal, out of which I shall consider the only ground which may be relevant in the light of what is discussed above.
 1. *That the Learned Resident Magistrate erred in law and in fact and or misdirected herself in law and in fact in holding that the Respondent/Plaintiff had proved his claim on balance of probabilities against the Appellant/Second Defendant.*
 2. *That the Learned Resident Magistrate erred in law and in fact and/or misdirected herself in law and in fact in holding that the Respondent/Plaintiff and the Appellant/Second Defendant were ever engaged in business transaction and to have any business contract or Agreement made between themselves for purpose of any business relation concerning the Appellant/Second Defendants business 'Banu Investment'.*
 3. *That the Learned Trial Magistrate failed to have regard to admission by the First Defendant that it was the First Defendant who took the whole sum of monies form the Respondent/Plaintiff without informing the Appellant/Second Defendant and not being as an agent or employee of the business namely 'Banu Investment'.*
 4. *That the Learned Trial Magistrate failed to give sufficient weight to the first Defendants admission and acknowledgment of repayment of the whole money of monies owed to the Respondent/Plaintiff to a sum of \$35,000.00 (thirty five thousand dollars).*
 5. *That the Learned Trial Magistrate failed to give weight to the Consent Orders made by the First Defendant and the Respondent/Plaintiff for the payment of the whole sum of \$35,000.00 to be made by the First Defendant to the Respondent/Plaintiff.*
 6. *That the Learned Trial Magistrate erred in law and in fact and/or misdirected herself in law and in fact in exceeding the sum claimed by the Respondent to a sum of \$35,000.00 and exceeding the jurisdiction of the Magistrates Court by order the Second Defendant/Appellant for payment of \$35,000.00 to the Respondent/Plaintiff while there being a previous order of the court to the Appellant /first Defendant for the payment of the same amount of \$35,000.00 totaling the sum of \$70, 00.00.*

13. In my analysis , the purported 1st and 2nd grounds of appeal are redundant and do not warrant any consideration as there could not have been any valid cause to proceed against the appellant when the action stood settled between the respondent and the first named defendant husband.
14. In view of the settlement with the first named defendant, the proceedings against the second named defendant could not have proceeded and brought any relief to the respondent. The action proceeded against the appellant after the said settlement was redundant and waste of precious time and resources of the court.
15. Now, what is left for the respondent is to execute the consent Order against the first named defendant, and in the event he fails and neglects to honor the consent judgment against him, the second named defendant can be pursued for the recovery of it, if it is found that she held assets for and on behalf of the first defendant after the consent order was entered on 18th July, 2019 or presently holds or will hold in times to come.
16. The grounds 3,4 and 5 are in relation to the CONSENT ORDER entered into by and between the respondent and the first named defendant and I find those grounds are with merits. Once the consent order was entered for the total sum claimed, the whole action came to an end and it could not have proceeded against the appellant, unless the respondent had a distinct cause of action against the appellant.
17. When the total claim was only \$35,000.00 and once the respondent had entered into a settlement with the first defendant for the payment of it, learned Magistrate could not have proceeded with the action any further sum. It tantamount to “**double dipping** “ as correctly stated by the Counsel for the respondent in paragraph 9 of his reply submissions filed on 17th June,2022, which I would call as “double jeopardy”.
18. By proceeding against the appellant when it was not warranted and finding her liable for a further sum of \$35,000.00, the learned Magistrate has, wittingly or unwittingly, exceeded the jurisdiction conferred on her by the Magistrate’s Court Act. As the subsequent proceedings against the appellant could not have had any legal recognition, the resultant judgment against the appellant stands null and void *ab-initio*. Thus, the question of violation of Section 16 (1) (b) of the Magistrate’s Court Act will not arise for consideration.
19. On the other hand, If the proceeding against the appellant and finding her liable for a further sum of \$35,000.00 were found to be correct, then the question of violation of section 16 (1) (b) would have arisen for consideration and it would have undoubtedly shaken the validity of the judgment against the appellant as the Magistrate will have obviously exceeded the jurisdiction. Under these circumstances only, the 6th ground of appeal would have become material for consideration.
20. In view of the above, by considering the grounds of appeal Nos. 3, 4 and 5 in favor of the appellant, I decide to allow the appeal and set aside the impugned judgment dated 5th

February, 2021 and the proceedings that led to the impugned judgment against the appellant.

21. This appellate judgment shall not have any adverse effect on the CONSENT ORDER entered into by and between the respondent and the First named Defendant on 18th July, 2019.
22. Considering the circumstances, no cost ordered and the parties shall bear their own costs.

FINAL ORDERS

- a. Appeal by the second named defendant FARZEENA BANU, appellant is allowed.
- b. The impugned judgment dated 5th February, 2021 pronounced against the second named defendant is set aside.
- c. The proceedings that led to the said judgment against the second named defendant is also set aside.
- d. This appeal judgment shall not in any manner affect the consent judgment dated 18th July, 2019 and entered into by and between the Respondent Plaintiff and the first named defendant.
- e. The original case record, along with a copy of this judgment, shall be dispatched to the Magistrate's Court of Nadi forthwith.
- f. No costs ordered and the parties shall bear their own costs.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 21st day of November, 2022.

SOLICITORS:

For the Appellant:

Pillai Naidu & Associates

For the Respondent:

Messrs Niudamu Lawyers