

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 79 of 2023

BETWEEN : **JUNG YONG KIM** of Queens Road, Sabeto, Nadi,
Director/Shareholder

FIRST PLAINTIFF

AND : **GRACE ROAD FOOD COMPANY PTE LIMITED, GRACE ROAD PROPERTY DEVELOPMENT PTE LIMITED, GRACE ROAD TRADING PTE LIMITED, GRACE ROAD RESTAURANT PTE LIMITED, GRACE ROAD BEATY PTE LIMITED, GRACE ROAD HEALTH SERVICE PTE LIMITED, GRACE ROAD LAUNDARY PTE LIMITED, GRACE ROAD HOTEL & RESPORT PTE LIMITED and GRACE ROAD ENERGY SOLUTION PTE LIMITED** all limited liability companies duly registered in Fiji under the Companies Act 2015

SECOND PLAINTIFFS

AND : **YUNZAE LEE** of 55, Palgong-ro 101-gil, Don-gu, Daegu,
Republic of Korea

DEFENDANT

Before : Master U.L. Mohamed Azhar

Appearance : Ms. M. Tumalevu on 12.04.2023 for the plaintiff and
Mr. W. Pillay on 20.04.2023.

Dates of Hearing : 12.04.2023 and 20.04.2023

Date of Ruling : 2nd May 2023

RULING

01. The plaintiff filed an Ex-Parte Notice of Motion supported by an affidavit sworn by him and sought the following orders from the court:

Leave to issue Writ of Summons against the Defendant Yunzae Lee

1. Leave be granted, pursuant to *Order 6 Rule 6 of the High Court Rules*, for a Writ to be issued against the Defendant, YUNZAE LEE of 55, Palgong-ro 101-gil, Dong-gu Daegu, Republic of Korea.

Leave to serve the Defendant Yunzae Lee out of the jurisdiction of the Honorable Court

2. Leave be granted to the Plaintiff. Pursuant to *Order 11 Rules (1) and 2 of the High Court Rules*, to serve the Defendant the Writ of Summons, Statement of Claim, Acknowledgement of Services, Ex-Parte Notice of Motion, Affidavit in Support of JUNG YONG KIM sworn on 31st March, 2203, any Summons for Injunction and/or security for costs and/or security for judgment and/or any other application and affidavit(s) in support and any orders made pursuant to this Motion and/or any other documents filed in these proceedings out of this jurisdiction of the Honorable Court.

Leave to serve the Defendant Yunzae by substituted service of proceedings and other documents on the Defendant Yunzae Lee

3. That leave be granted to serve the Writ of Summons, Statement of Claim, Acknowledgement of Services, Ex-Parte Notice of Motion, Affidavit in Support of JUNG YONG KIM sworn on 31st March 2023, any Summons for Injunction and/or security for costs and/or security for judgment and/or any other application and affidavit(s) in support and any orders made pursuant to this Motion and/or any other documents filed in these proceedings by way of substituted service by way of email to the email address lg11111@naver.com.
4. Alternatively, that leave be granted to serve the Writ of Summons, Statement of Claim, Acknowledgement of Service, Ex-Parte Notice of Motion, Affidavit in Support of JUNG YONG KIM sworn on 31st March 2003, any Summons for Injunction and/or security for costs and/or security for judgment and/or any other application and affidavit(s) in support and any orders made pursuant to this Motion and/or any other documents filed in these proceedings on the Defendant in such manner as authorized and/or directed and/or approved and/or authenticated and/or sanctioned by this Honorable Court such as advertisement in a daily newspaper circulated in the Republic of Korea.

Costs

5. The costs of this application be costs in the cause.

Further orders

6. Such further or other orders as this Honorable Court may deem fit, just, expedient, necessary, required, justiciable and equitable in the circumstances.
02. Even though the Motion seeks several orders, the core point is the leave to issue the Writ out of jurisdiction as the defendant resides overseas. The Motion was initially supported by Ms. Tumalevu an associate of the solicitors for the plaintiff. The defendant was a shareholder of third named second plaintiff. The defendant left Fiji on or about 13th March 2017 and never returned since. It is alleged that, the defendant sent an e-mail to one Felix Chaudhary a journalist at Fiji Times. The e-mail allegedly contains the statement which is defamatory to the plaintiff. The paragraph 10 of the proposed statement of claim states that, the said e-mail identifies the defendant as the author of the e-mail. The supporting affidavit states in paragraph 8 that, inquiries by the plaintiff reveal that, the defendant's e-mail address is: lg711111@never.com . In order to consider the leave the court wanted certain information, especially the evidence to satisfy the court that, the particular e-mail address belongs to the defendant. Ms. Tumalevu who supported the Motion moved for further time to file a supplementary affidavit in order to furnish such information to the court. This was allowed. However, no such affidavit was filed, but the motion was again supported by Mr. Pillay based on the same information available before the court.
03. Issue of Writ is an administrative act which takes place upon its being sealed by an officer of the registry. However, if a Writ is to be served out of the jurisdiction of the court, the rules prohibit issue of such Writ unless it is sanctioned by the court. Order 6 rule 6 of the High Court Rules provides that, no Writ which is to be served out of jurisdiction shall be issued without the leave of the court unless such Writ falls under the exception mentioned therein. The said rule reads:

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

default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ

04. The rule is unambiguous in its language and prohibits issue of any Writ which is to be served out of jurisdiction unless it falls under the proviso. The authorities suggest that the leave is mandatory and failure to obtain the leave is an incurable irregularity which makes the Writ null and void. The very reason for this prohibition is the requirement under Order 11 rule 2 which is interconnected with Order 6 rule 6. The Order 11 rule 2 reads as follows:

2.-(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating—

- (a) the grounds on which the application is made,
- (b) that in the deponent's belief the plaintiff has a good cause of action,
- (c) in what place or country the defendant is, or probably may be found [;] and
- (d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

05. According to this rule a Writ which is to be served out of the jurisdiction should pass two processes before it being issued by the registry. First is that, the applicant or the would-be-plaintiff should discharge the onus on him to satisfy the court to exercise its jurisdiction. In other words, this rule imposes the onus on the would-be-plaintiff to make it sufficiently appear to the court that, the case is proper one for service out of the jurisdiction (**Amin' Rasheed Shipping Corporation v. Kuwait Insurance Company, The Al Wahab** [1983] 2 All ER 884. In order to discharge this burden the plaintiff should support his application with an affidavit stating the grounds and showing the good cause of action or real issue to be tried by the court. Since the would-be plaintiff wants to bring a foreign national to the local jurisdiction, he has to satisfy the court that justice either could not be obtained by him in the alternative forum (in foreign country), or could only be obtained at excessive cost, delay or inconvenience.

06. Second is consideration of granting leave by the court. The jurisdiction exercised by the court is exorbitant according to Lord Diplock [see: **Amin Rasheed Shipping Corporation** (supra) page 891]. The authorities require the court to carefully consider the leave as it has to consider the serious question whether the court should allow a foreigner to be brought to the country to contest his right. Pearson J in **Société Générale de Paris v. Dreyfus Bross** (1885) 29 Ch D 239 at pages 242 and 243 said that:

.... it becomes a very serious questionwhether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

07. The court has to carefully consider nature of the dispute, the Legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. Lord Wilberforce in **Amin Rasheed Shipping Corporation** (supra) said at page 896 that:

‘RSC Ord II, r 1(I) merely state that, given one of the stated conditions, such service is permissible and it is still necessary for the plaintiff (in this case the assured) to make it “sufficient appear to the Court that the case is a proper one for service out of the jurisdiction under this Order” (RSC Ord II, r 4(2)). The rule does not state the consideration by which the court is to decide whether the case is a proper one and I do not think we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different (compare the observations of Stephenson LJ in *Aratra Potato Co Ltd v Egyptian Navigation Co, the El Amria* [1981] 2 Lloyd’s Rep 119at 129). The intention must be to impose on the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted on a foreign defendant. In considering this question the court must take into account the nature of the dispute, the Legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.

08. The defendant in this case is a Korean national and a former shareholder of the third named second plaintiff – Grace Road Trading Pte Limited. The alleged e-mail was sent this year on 14th March 2023 and whereas the defendant left the country and the third named second plaintiff on 19th May 2017, after serving in Fiji from 7th August 2015. It

has been nearly 6 years since he left the company and the country. All of a sudden an e-mail has just come now from the address: lg711111@never.com. The mail is also allegedly sent to Felix Chaudhary a journalist at Fiji Times.

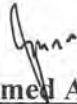
09. A serious question arises as to what made the defendant, who left the country and the company six years before, to send such mail to another person – a journalist - who not related to their business at all. Even though the said question is left aside, the main question is whether this e-mail address does belong to the defendant in order to attribute the same to him. The paragraph 8 of the supporting affidavit simply states that the inquiries by the plaintiff reveal that, the defendant's email address is lg711111@never.com. The plaintiff failed to state in his affidavit as how he ascertained that this e-mail address (lg711111@never.com) belongs to the defendant. The defendant is not a stranger to the plaintiff. He has been the shareholder of the company in the Grace Road Group of Companies and left the company six years before. Being the shareholder the defendant could have used his e-mail for several communications with the plaintiff who is the fellow national and the managing director of group of companies. The plaintiff could have, in his supporting affidavit, given details of the email correspondences by the defendant to show that this particular e-mail address belongs to the defendant. However, the plaintiff failed to do so.
10. The paragraph 10 of the proposed statement of claim merely states that, the e-mail identifies the defendant as the author of the e-mail. The e-mail addresses can be created by anyone as they want, in this digital era and it can be used for the respective purposes of creators. The mode of publication of defamatory statement in this case was sending the said purported e-mail. Therefore, the plaintiff should satisfy the court to form an opinion that, the e-mail to be attributed to the defendant. By saying this it should not be understood that, the court requires the plaintiff to prove the element of defamation now at this stage. The court requires this information to see whether the plaintiff discharged the burden of making it sufficiently appear to the court that, the case is proper one for service out of the jurisdiction as stated in the rule and affirmed in **Amin Rasheed Shipping Corporation v. Kuwait Insurance Company, The Al Wahab** (supra). It must be noted that, the said e-mail is not even pleaded and mentioned in the proposed statement of claim. It is the supporting affidavit that states that, it is defendant's e-mail address.
11. The body of the mail as mentioned in paragraph 11 of the proposed statement of claim starts with the greeting "Hello" and then states "I am Lee Yoon-jae, representative of the Action Committee for Grace Road, Church in Korea...." and continues. Accordingly, the person allegedly sent said purported mail was "Lee Yoon-jae". The defendant named in the proposed is "Yunzae Lee". The rules of the court requires the pleading must be endorsed with the name of the parties (Or 18 rule 5 (4)) to ensure the correct persons are

suing and sued. This requirement is more important when foreign nationals are sued as their names are not familiar to our jurisdiction. It could be said that, the defendant's named is spelled in the caption in the way that it is usually pronounced and it is a typo. However, when there is a question of authenticity of the alleged e-mail which is base for this action, this discrepancy could aggravate it. Furthermore, there could be another person in same country with the name as it is spelled in the caption as opposed to the one who allegedly sent the said e-mail.

12. In the absence of any evidence to show that, this particular e-mail (lg711111@never.com) belongs to the defendant, the said e-mail address becomes anonymous and it cannot be attributed to the defendant. In this circumstance, it is difficult to hold that, there is a good cause of action against the defendant for allegedly defaming the plaintiff.
13. For above reasons I am of the view that, the plaintiff, who owes the onus to make it sufficiently appear to the court that, the case is proper one for service out of the jurisdiction, failed to discharge his duty. The plaintiff was given an opportunity when the associate of the solicitors supported the current motion to file a supplementary affidavit to make it sufficiently appear to the court as required by the rules and authorities mentioned above. However, the plaintiff failed to do so. The Order 11 rule 2 (2) provides that, no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under that Order. Therefore, I am unable to exercise the jurisdiction which is exorbitant according to Lord Diplock [see: Amin Rasheed Shipping Corporation (supra) page 891].
14. Accordingly, the leave is refused; the Ex Parte Motion is dismissed and the plaintiff to bear the cost of this application.



At Lautoka
02.05.2023


U.L. Mohamed Azhar
Master of the High Court