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

CIVIL ACTION NO. HBC 272 OF 2018

BETWEEN: **RAHAMAT ALI** of 153, Vomo Street, Lautoka

PLAINTIFF

AND: **MOHAMMED HANIF** of 34 Belo Street, Samabula, Suva

1ST DEFENDANT

AND: **MERHANT FINANCE AND INVESTMENT COMPANY LIMITED** a duly registered company having its registered office at Level 1, Ra Marama House, Gordon Street, Suva.

2ND DEFENDANT

AND: **CRP INDUSTRIES LIMITED** a limited liability company having its registered office at Market Subdivision, Varoka, Ba

3RD DEFENDANT

AND: **REGISTRAR OF TITLES** Government Building, Suva

4TH DEFENDANT

AND: **ATTORNEY GENERAL OF FIJI** Attorney General's Chambers, Suva

5TH DEFENDANT

BEFORE	:	Hon. Mr. Justice Mohamed Mackie
APPEARANCES	:	Ms. Sadrata for the Plaintiff - Applicant Mr. N. Padarath, for the 3rd Defendant – Respondent 1st Defendant absent and no representation. 2nd, 4th and 5th Defendants are not parties to this hearing.
HEARING ON	:	23rd November, 2022
MODE OF HEARING	:	By way of written submissions
WRITTEN SUBMISSIONS:		On 23rd November, 2022 by the 3rd Defendant-Respondent. No written submission filed by the Plaintiff-Applicant.
DATE OF RULING	:	6th February 2022

RULING

INTRODUCTION:

1. This ruling pertains to the Inter-Partes Summons (the application) preferred by the Plaintiff-Applicant (the plaintiff) seeking **leave to appeal** against the Ruling of the learned Master (the Master) of this Court, pronounced on 17th of June, 2022, after considering a Summons filed by the 3rd Defendant-Respondents (the 3rd Defendant) under Order 18 Rule 18 of the High Court Rules 1988 (HCR).

2. By the said Summons dated 4th July, 2022 filed before this Court on 01st July, 2022 the Plaintiff seeks, *inter-alia*, the following orders:

    1. *That the Plaintiff be granted leave to Appeal against the decision of the Master of the*
    High Court, Mohammed Azhar, delivered on 17th June, 2022.
    2. *An Order that the Costs of this Application be costs in the cause.*

3. The Summons states that the Applicant/ Original plaintiff will rely on his Affidavit duly sworn and filed, and it is made pursuant to High Court rules 1988 and the inherent jurisdiction of this Court. The Summons does not state the relevant Order under which the Application is made. However, I assume that the Summons is made pursuant to Order 59 rule 11 of the High court Rules 1988.

4. The Application is opposed by the 3rd Defendant. The Director of the 3rd Defendant Company, RAJESH KUMAR PATEL, on 13th September, 2022 filed his Affidavit in opposition, which was sworn on 6th September 2022. The Plaintiff on 23rd November, 2022 filed his Affidavit in reply sworn on 22nd September, 2022.

5. Accordingly, when the matter came up for hearing on 23rd November, 2022, learned Counsel for both the parties agreed to have the hearing disposed by way of written submissions, instead of oral hearing.

6. I had the privilege of perusing the written submission filed by the Counsel for the 3rd Defendant on the day fixed for hearing. No written submissions filed on behalf of the plaintiff, though 21 days' time was granted.

BACKGROUND:

7. The Plaintiff on 17th December, 2018 had instituted action against 1st to 5th Defendants seeking reliefs (a) to (k) as prayed for in the prayer to the Statement of claim. The 3rd Defendant filed its Statement of Defence on 9th January, 2019 wherein, among other things, in paragraph 6 thereof, averred that there was no cause of action pleaded against it, thus the action against it should be struck out.

8. The 3rd Defendant's Solicitors on or about 8th January, 2019 wrote to the Solicitors for the Plaintiff and sought that the action against the 3rd Defendant ought to be withdrawn.

9. As there was no response from the plaintiff's Solicitors to the said letter, the Solicitors for the 3rd Defendant, on 2nd July, 2019 , filed an Application under Order 18 Rule 18 seeking to Strike Out the action against the 3rd Defendant.

10. Having heard the said Application on 3rd March, 2021, the Master by his ruling dated and pronounced on 17th June, 2022 struck out the action against the 3rd Defendant. Being dissatisfied of the Master's Ruling, the plaintiff on 1st July,2022 filed the current Application in hand seeking leave to Appeal against the Master's Ruling.

THE LAW:

11. The Plaintiff seeks **leave to appeal** the interlocutory order dated 17th June, 2022 delivered by the Master of this court. An interlocutory order made by the Master may be appealed with the leave of a High Court Judge under O.59, r.11 of the HCR, which reads:-

Order 59 Rule 8 of the High Court Rules requires a party to obtain leave before an appeal can be lodged.

Order 59 Rule 9 states that an appeal in relation to any interlocutory Order shall be filed and served within 7 days from the date when leave to appeal has been granted.

> **Time for appealing an interlocutory order O.59, r.11**
> *O.59, r.11-Any application for **leave to appeal** an interlocutory order or judgment shall be made by summons with a supporting affidavit, **filed and served** within 14 days of the delivery of the order or judgment. (Emphasis added)*

Test for granting Leave to Appeal

12. In ***Prasad v Republic of Fiji & Attorney General (No 3)*** *[2000] FJHC 265; [2000] 2FLR 81* Justice Gates (as his Lordship then was) dealing with an application for **leave to appeal** to set aside interlocutory order stated:

> *"In an application for **leave to appeal** the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see Rogerson v. Law Society of the Northern Territory [1993] NTCA 124; [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.*
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> *Fiji's legislative policy against appeals form interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith [1901] ArgusLawRp 51; (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose a patent mistake*

of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given Niemann (supra) at 432. If is not sufficient for an appeal court to gauge, that when faced with the same material or situation. It would have decided the matter different. The court must be satisfied that the decision is clearly wrong (Niemann at 436).

Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties Bucknell (supra) at 225; Dunstan v Simmie & Co. Pty Ltd [1978] VicRp 62; [1978] VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand," Dunstan (supra) at 670; Darrel lea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd [1969] VicRp 50; [1969] VR 401 at 408."

13. I am also guided by the decision in ***Ali v. Radruita [2011] FJHC 302 (26 May 2011***. This was an application for **leave to appeal** an order made by the Master that the defendant should pay $10,000.00 as interim damages to the plaintiff within 28 days.

Calanchini J (as His Lordship then was) said that *"It is well settled that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said*

"The exceptional circumstances that the Defendant is required to establish in the present application are that the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded in so much out of all reasonable proportion to the facts proved in evidence. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed".

DISCUSSION:
The preliminary issue – Application filed out of time.

14. The ruling of the Master dated 17th June, 2022, which struck out the Plaintiff's Action against the 3rd Defendant, together with an order for costs, is an interlocutory order. There is no issue or dispute on this point.

15. It is important to bear in mind that the impugned Ruling by the Master was made on 17th June, 2022. The Summons seeking leave was filed on 1st July, 2022 well within the time allowed for same. But the service of the Summons, on the City agents of the Plaintiff's Solicitors, was done only on the 11th July, 2022 as evidenced by the affidavit of Service filed on 18th July, 2022. Thus, this summons was not served within the prescribed time period of 14 days from the date of the impugned ruling of the Master, as provided in O.59, r.11 of the HCR.

16. Counsel for the 3rd Defendant, raising a preliminary issue, submits that the application filed by the Plaintiff, which was served on the 3rd Defendant, is out of time and cannot be entertained and therefore should be dismissed.

17. I find, inter-alia, following case law authorities too in support of the above position.

i. ***Panache Investments Ltd v New India Assurance [2015] FJHC 523,***
ii. ***Deo v Metal Works & Joinery Ltd [2015] FJHC***
iii. ***Hawkes Bay Hide Processors v CIR (1990) 3 NZLR 313 at 315.***

In **Panache Investment and Deo** cases (above), the High Court held the failure to comply with the service requirement is fatal.

Justice Cooke in 'Hawkes' case (above) said:

> *"The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."*

18. O.59, r.11 of the HCR dictates specific time limit within which an application for **leave to appeal** any interlocutory order with a supporting affidavit must be filed and served. The word "shall" in rule 11 denotes that the time limit prescribed therein is mandatory and must be strictly complied with.

19. The affidavit in support filed on behalf of the plaintiff does not give any reason for not having the application for **leave to appeal** served on the 3rd defendants within the prescribed time period.

20. As was held in Hawkes case (above) the doctrine of substantial compliance cannot apply to the fixed time limit. The Master made the impugned ruling on 17th June, 2022. The plaintiff should have served his application for **leave to appeal** on or before 1st July, 2022. The application was filed on 1st July, 2022 and served on 11th July, 2022. The plaintiff has failed to comply with the requirement of O.59, r.11. Non-compliance as to the specific time limit prescribed by rule 11 is fatal and cannot be cured by invoking O.2, r.1 (1) or other Orders/rules of the HCR.

21. In view of the provisions under Order 59 rule 11, there is no proper application for **leave to appeal** the Master's ruling dated 17th June, 2022. The application for **leave to appeal** filed by the plaintiff is out of time because though it was **filed within 14 days, the requirement of service was not fulfilled** within the said 14 days and therefore should be dismissed.

22. The plaintiff waited till 1st July, 2022, being the last date to file and serve the application and filed it only at 3:50 pm on that day, without showing interest in having it sealed and served before the closure of the business on that day. This being a Friday, it was issued

only on next Monday, the 4th July, 2022, and was served only on 11th July, 2022. This shows the failure on the part of the plaintiff's Solicitors to act diligently in pursuing with the application for **leave to appeal.**

23. In the supporting affidavit of the plaintiff, nothing has been averred for the obvious failure to serve in time. No allegation leveled against the registry. The application for **leave to appeal** filed by the Plaintiff could be dismissed for the non-compliance with the provisions of O.59, r.11 of the HCR alone. However, without prejudice to what I have observed above on the preliminary issue, for the sake of completeness, I would consider the merits of the application as well.

Merits of the Application

24. Though, the plaintiff is guilty of delay as observed above, the court is not precluded from granting leave, provided that the Plaintiff has adduced compelling and convincing grounds to show that the order intended to appeal against is manifestly wrong and the Master has acted upon a wrong principle, or has failed or neglected to take into account something relevant, or has taken into account something irrelevant as pointed out by His Lordship Calanchini –J, as he then was, in ***Ali v Radruita [2011] FJHC 302; HBC403.2009 (26 May 2011)***

25. The court may grant **leave to appeal** an interlocutory order, if the order to be appealed from: (i) is clearly wrong or at least attended with sufficient doubt and causing some substantial injustice or (ii) has the effect of determining the rights of the parties.

GROUNDS OF APPEAL:

26. The plaintiff has adduced 3 grounds of appeal to the following effect.

    1. *THE Learned Master erred in law and in fact by failing to consider that the Appellant has standing/ locus standi to institute proceedings against the 3rd Respondent and as such there has been a substantial miscarriage of justice.*

    2. *THAT Learned Master erred in law and in fact by failing to consider that the Plaintiff has a reasonable cause of action against the 3rd Defendant as a party to the transaction.*

    3. 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.

27. I have carefully gone through the impugned ruling of the Master, which is sought to be attached before me, and the reasons adduced by the Master for striking out the Plaintiff's action against the 3rd Defendant by the said Ruling dated 17th June, 2022.

28. The law on leave to appeal an interlocutory order was set out in **Bank of Hawaii v Reynolds [1998] FJHC 226 by Pathik, J** (as he was then). Referring to the case of Ex Parte Bucknell [1936] his lordship stated in the judgment that:

"At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt on exhaustive statement of the considerate which should be regarded as a jurisdiction for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment".

29. The Court in Bucknell went on to state at page 225:

"But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success to the proposed appeal"

30. On leave to appeal, the following extract from the decision of the President, Fiji Court of Appeal in ***Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr. (Civ. App. 51/95)*** is also relevant and I adopt the same view to the facts and circumstances of this case:

"... In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted"

31. Court of Appeal in ***Shankar –v- FNPF Investments Ltd and Anr. [2017] FJCA 26; ABU 32 of 2016, 24 February 2017*** at paragraph 16:

"The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous ***occasions****. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong, it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (****Nieman –v- Electronic Industries Ltd [1978] V.R. 431 and Hussein –v- National Bank of Fiji (1995) 41 Fiji L.R. 130).****"*

32. So the Plaintiff should demonstrate injustice, if the interlocutory order remained. There should be some injustice that is continuing and could not be cured in the appeal after final decision is made. So it should be an immediate injustice or a loss that cannot be cured later.

33. The Master has had a full-scale hearing before him, before he made the impugned ruling to strike out the action and has made a well-considered ruling justifying his decision in striking out the Plaintiff's action against the 3rd Defendant.

34. The burden is on the Plaintiff to establish as to what is the alleged error in the impugned interlocutory Ruling that causes him substantial injustice. On careful perusal of the impugned Ruling, and the contents of the purported grounds of appeal adduced by the Plaintiff, it would become apparent that there is no error of law nor any error in the Ruling of the Master.

35. The issue of locus standi of the Plaintiff to institute proceedings against the 3rd defendant was not a matter to be considered before the Master or decided by him. The pivotal question before the Master was whether the Plaintiff had a reasonable cause of action against the 3rd Defendant. The 3rd Defendant had relied on all the available grounds to strike out the action against it.

36. In paragraph 10 of the impugned Ruling, Master has correctly observed that there is no allegation whatsoever against the 3rd Defendant in the statement of claim. The only mention in relation to the 3rd Defendant are that contained in paragraph 6 , 7 and 8 of the SOC, summary of which is reproduced bellow for easy reference.

> *" that the said Crown Lease No.17197 was transferred by Transfer No.758490 'A' on 3rd day of May , 2012 unto the Merchant Finance & Investment Limited for a sum of $1,096,929.58 without the knowledge and consent of the Plaintiff. That the same was transferred to the 3rd Defendant on 3rd day of June, 2014 without the Plaintiff's consent or knowledge and that the 1st and 2nd Defendants transferred the said property to the 3rd Defendant fraudulently and unlawfully."*

37. In relation to the above allegations, the Master in paragraphs 10, 11 and 12 of his impugned ruling has given justifiable reasons as to why those averments in the SOC are not enough to disclose a reasonable cause of action. As observed by the Master, the 3rd Defendant was not under obligation to obtain the consent from the predecessors in title in order to buy the property. Vide **Breskwar v Wall (1971-72) 126 CLR at page 400.**

38. The averments against the 3rd Defendant in the statement of claim are not sufficient enough to commence and continue with this action against it and bring home a judgment against it. The factors that the Master considered to arrive at his conclusion in respect of the 3rd Defendant is correct and this Court stands convinced that there is no reasonable cause of action against the 3rd Defendant.

39. The Master has also correctly observed that the 3rd Defendant Company was not the direct transferee from the Plaintiff or the 1st Defendant. The land was first transferred to the 2nd Defendant and thereafter to the 3rd Defendant Company. The 3rd Defendant company was not under obligation to obtain the consent from the Plaintiff, who was only a onetime owner thereof. Because the Torrens System of registration introduced by the Land Transfer Act cuts off the retrospective or derivative character of the title upon each transfer or transaction , so as that each freeholder is in the same position as a grantee direct from the Crown (per; Windeyer –J in Breskvar v. Wall (1971-72) 126 CLR 376 at page 400).

40. When there is specific provision in the HCR (O.59) dealing with the appeal from the Master's Court, the plaintiff is not entitle to invoke inherent jurisdiction to seek **leave to appeal** an interlocutory Ruling given by the Master. Presumably, even if I exercise my inherent jurisdiction, I would not grant leave because the plaintiff failed to demonstrate any exceptional circumstances that warrant the hearing of the appeal.

CONCLUSION:

41. The Plaintiff failed to serve the application for leave to Appeal within the prescribed time period under Order 59 rule 11 of the HCR. The Application of the Plaintiff should fail on this preliminary issue alone. However, for reasons stated above, I do not find that the intended Appeal would have real prospect of success on the proposed grounds of appeal, since they are devoid of merits. I could not find any compelling reason why the leave should be granted and appeal be heard. I have no option other than to refuse leave to appeal the interlocutory ruling of the Master dated 17th June, 2022. I also find it is justifiable for this court to order the plaintiff to pay summarily assessed costs of $500.00 to the 3rd Defendant.

FINAL OUTCOME:

a. Application of the Plaintiff for **leave to appeal** the Master's ruling dated 17th June, 2022, is hereby refused.

b. Plaintiff shall pay the 3rd Defendant $500.00 , being the summarily assessed costs at this forum.

c. The matter shall be mentioned before the Master on 13th February, 2023 to proceed against the rest of the Defendants in the normal cause.

HIGH COURT OF FIJI LAUTOKA

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 6th day of February, 2023.

SOLICITORS:
For the Plaintiff: **Iqbal Khan & Associates**
For the 3rd Defendant: **Samuel Ram Lawyers**