

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

**CIVIL ACTION HBC NO. 191 OF 2021
HBC NO. 192 OF 2021**

BETWEEN : **HASRAT BEGG** trading as Hasrat Rashidun Fauzan Investments,
Meigunyah, Nadi, Fiji, Businessman

PLAINTIFF

AND : **ABBAS ALI** and the occupiers of Lot 34, Nasau, Nadi, Occupants
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. A. Narayan (snr) for the Defendant/Applicant/Appellant
Ms. Tunikula for the Plaintiff/ Respondent /Respondent.

DATE OF HEARING : 7th August 2023.

WRITTEN SUBMISSIONS: By the Appellant filed on 7th August 2023.
By the Respondent filed on 23rd August 2023.
By the Appellant on 19th September 2023 (Reply)

DATE OF DECISION: 3rd October, 2023

RULING

A. Introduction:

1. Before me are two Summons dated and filed on 21st February 2023 by the Defendant/ Applicant/ Appellant, (“the Appellant”) seeking leave to Appeal against the ex-tempore ruling of the learned Master (“the Master”) made on 8th February 2023 in the above numbered actions.
2. By the impugned ruling, the Master had rejected Supplementary Affidavit sworn by the Appellant, ABBAS Ali, on 5th December 2022 and filed on 20th January 2023 in the substantial Applications filed by the Plaintiff/ Respondent/ Respondent (“the Respondent”) for the recovery of vacant possession of the subject matter lands pursuant to Order 113 of the High Court Rules.
3. By his Originating Summons before the Master filed on 30th August 2021, supported by his Affidavits sworn on 23rd August 2021, the Respondent had prayed for reliefs, inter alia, the vacant possession of lot No **34** in the State Lease No. 894381 – formerly in the Lot No. 8 SO 3865, and that of the lot No-**6** in the Certificate of Title No - 894597(LD

4/10/6850) formerly Lot 8 So 3865, both in the District of Nadi in the province of Ba Viti Levu. The Appellant had also prayed for summarily assessed costs in a sum of \$2,000.00.

4. By the Summons before this Court, apart from seeking leave to Appeal, the Appellant also seeks that the hearing before the Master fixed for 30th October 2023 of the Actions No. HBC 191 of 2021 & HBC 192 of 2021 be stayed pending the hearing and determination of the Appeals hereof upon granting of leave.
5. The Summons before the Court before this Court were filed pursuant to Order 59 Rule 8(2) and Rule 11 of the High Court Rules 1988 and the inherent jurisdiction of this Court. The Summons were supported by the Affidavits of the Appellant, ABBAS ALI, sworn and filed on 21st February 2023, along with annexures “AA-1” to “AA-3”.
6. The Summons were opposed by the Respondent, namely, HAZRAT BEGG, by his Affidavit in opposition sworn and filed on 6th June 2023, and the Appellant replied it by his Affidavits sworn on 28th June 2023 and filed on 29th June 2023.
7. The hearing into both the Summons was held before me on 7th August 2023, at which both the learned Counsel (“the Counsel”) made oral submissions and filed helpful written submissions as well as stated above. The hearing before me was for dual purpose, which included both the leave to Appeal and the substantial Appeal.

B. Grounds of Appeal:

8. As per the annexure “AA-3” to the Affidavits in support, the Appellant relies on the following grounds of Appeal;
 1. *The Learned Master erred in law in failing to provide written reasons for refusal to grant leave to use/ read the Supplementary Affidavit for the purpose of the substantive hearing and in expunging the same.*
 2. *The learned Master erred in law by refusing to allow and/or grant leave to the Appellant/Defendant to read or use the Supplementary affidavit of the Appellant/ Defendant for the purpose of the substantive hearing of the Plaintiff’s action in all the circumstances and particularly when;*
 - a) *He had directed the Supplementary Affidavit to be issued after it had been lodged for filing;*
 - b) *He failed to distinguish that there had been a change of circumstances from a previous application to file a further affidavit in opposition by the Appellant/ Defendant;*
 - c) *He failed to consider the prejudice which would be caused to the Appellant/ Defendant in disputing the Plaintiff/ Respondent’s interest in the land.*
 - d) *He failed to consider that there would be no prejudice to the Plaintiff/ Respondent in permitting the use of the Supplementary Affidavit which could not be overcome by liberty for the Plaintiff/ Respondent to file a reply.*
 - e) *There had been no date assigned for hearing of the substantive action and the date actually assigned would overcome any prejudice and would have enabled any reply to be filed in advance.*

3. *That the learned Master failed to apply the correct principles for the exercise of his discretion for the grant or refusal of leave to use or read the Supplementary affidavit of the Appellant / Defendant and in expunging the same and/or failed to consider the relevant factors and/or took into account irrelevant factors in the exercise of discretion.*

C. Events Before the Master:

9. For the sake of clarity, the sequence of events occurred before the Master are as follows;
 - a. The Originating Summons, together with the Affidavits in support by the Respondent were filed on 30th August 2021.
 - b. Same were, reportedly, served on the Appellant on 6th September 2021 and the acknowledgment of service were filed on 27th September, 2021.
 - c. Notices to hear originating summons being filed on 8th December 2021, same were, reportedly, served on 20th December 2021, returnable on 22nd February 2022.
 - d. Accordingly, when the matters came up on 22nd February 2022, being the first mention date, it being informed, as per master's minutes, to the effect "***Plaintiff is to consider the Summons as there is a writ action by the defendant under sale and purchase Agreement***" both the matters were fixed for mention on 4th April 2022.
 - e. On 4th April 2022 directions were given for the Affidavits in opposition to be filed before 2nd May 2022 and the Affidavit in reply to be filed before 23rd May 2022 and the matters were fixed for mention on 1st June 2022.
 - f. The Affidavits in opposition by the Appellant being filed on 2nd May 2022 as per the direction, when the matters came up on 1st June 2022 further time being moved on behalf of the Respondent to file reply, it was directed to be filed before 22nd June 2022 and the matters were fixed to be mentioned on 02nd August 2022.
 - g. On 2nd August 2022, further time being moved on behalf of the Respondent, it was directed to be filed before 30th August 2022 and the matters were fixed for 9th September 2022.
 - h. When the matters were called on 9th September 2022, since no Reply Affidavit had been filed, it was directed to be filed before 23rd September 2022 and the matters were fixed to be mentioned on 13th October 2022. However, the Reply Affidavits were filed at 11:00 pm on the same day 9th September 2022.
 - i. Accordingly, when the matters were mentioned on 13th October 2022, it being brought to the notice of the Master by the Appellant's Counsel that there are new matters averred in Affidavit in reply, which was refuted by the Respondent's Counsel, the Master, having said that he does not see new matters and no need for further Affidavits, fixed, both the matters for 1st December 2022 in order to fix a hearing date.

- j. As the Master did not sit on 1st December 2022, when the matters were mentioned on 20th January 2023, the Appellant's Counsel had once again sought time to file Supplementary Affidavits. The move being objected by the Respondent's Counsel, the Master made order for the supplementary Affidavits that had already been tendered at the Registry on 5th December 2022 to be issued for the Appellant's Solicitors to peruse it and raise their concern on the next date. It was informed by the Master that the admissibility of the Supplementary Affidavits will be determined on the next date; ie, 08th February 2023.
- k. Finally, when the matters came up on 8th February 2023, as the Respondent's Counsel had objected for the supplementary Affidavits being admitted, the Master rejected the same, and expunged them stating that the Appellant had enough time to prepare the defence. Accordingly, substantial hearing was fixed for **30th October 2023**.

D. The events & hearing before this Court:

10. On 4th April 2023, being the first call date before this Court, directions were given for the Affidavit in opposition to be filed in 21 days and the reply thereto be filed in 14 days thereafter. On this date, an oral Application being made by the Counsel for the Appellant for both the leave and substantive Appeal hearings to be taken up together, and this move being objected by the Counsel for the Respondent, the matters were fixed to be mentioned on 16th May 2023.
11. When the matters came up on 16th May 2023, since the Respondent had not filed his Affidavits in opposition, as per the above direction, further 14 days period was granted for the same and the Reply thereto by the Appellant to follow 14 days thereafter and the matters were fixed for 16th June 2023. At that juncture, having considered the delay and the upcoming hearing before the Master on 30th October 2023 in the absence of a stay order, the Court decided to hear leave to Appeal Application and the Appeal simultaneously.
12. On 16th June 2023, it transpired that the Affidavits in opposition by the Respondent, which should have been filed on or before 30th June 2023, had been filed belatedly only on 6th June 2023. However, the Affidavits in reply thereto by the Appellant had been filed on 29th June 2023 well within the first 14 days' time granted. Accordingly, both the matters got fixed for hearing on 7th August 2023, on which Counsel for the Appellant moved for a stay once again. The Court responded that the Judgment will be delivered well in advance of the hearing date before the Master on 30th October 2023, and fixed the matter for ruling on 3rd October 2023.

E. The Law:

13. The substantial Applications before the Master were filed in terms of Order 113 of the High Court Rules. The relevant Order that governs the filing of Affidavits Evidence in relation to Originating Summons procedure is found under Order 28 rule 2 (1) to (9).
14. Order 28 rule 2 (6) of HCR, states that Court is precluded from receiving evidence, other than by way of three Affidavits stated in preceding provisions of HCR, except where leave

of the court is granted to adduce additional Affidavit evidence. The Court has discretion to allow a supplementary Affidavit. The burden is on the party seeking the admission of such Affidavits to satisfy that discretion should be exercised in its favour.

15. His Lordship Amarathunga- J in **Ramesh Chand & Another v Rajesh Rishi Ram HBC 61 of 2019** discussed the following factors, which needs consideration by the Court in determining an Applications made under this rule. They are;
 - a. Nature of the action,
 - b. Contents of the proposed supplementary Affidavit,
 - c. Relevance of the evidence to the action,
 - d. Reason for seeking supplementary affidavit,
 - e. Delay,
 - f. Prejudice to the other party,
 - g. Effect of filing the supplementary affidavit.
16. The cumulative effect of such factors can be considered in the exercise of general discretion in terms of Order 28 rule 2(6) HCR. Higher Courts rarely interferes with such exercise of discretion of the Master, unless it is shown that the discretion was wrongly exercised and there is immediate prejudice, which require intervention through leave to appeal from the interlocutory orders.
17. It is a settled law in the Court of Appeal that ‘Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Ex parte **Bucknell [1936] HCA 67; (1936) 56 CLR 221’ [1]**. It should also be noted that requirement for leave to Appeal from Master’s interlocutory decision is to discourage such Applications.[2](See **Murphy J in Niemann v. Electronic Industries Ltd [1978] VicRp 44; (1978) VR 431 at 441-2**).
18. I am mindful of those factors enunciated in plethora of case law authorities in this jurisdiction, that are taken into consideration, when the leave is sought to Appeal against an interlocutory decision.

F. Analysis:

19. The Appellant is seeking leave to Appeal against Master’s interlocutory decision made on 8th February 2023 rejecting the Supplementary Affidavits filed by the Appellant ABBAS ALI on 20th January 2023. It is true that prior to the filing of the said Supplementary Affidavit, both the parties had exercised their rights to file Affidavits as prescribed under Order 28 Rule 2 rr (1) to (5).
20. The Reply Affidavits by the Plaintiff- Respondent in these matters before the Master being filed on 9th September 2022, when the matters came up on 13th October 2022, the Appellant’s Counsel had raised an issue that there are new matters averred in the Affidavits in reply. But, this allegation was refuted by the Respondent’s Counsel, and the Master too on his part, having stated to the effect “***I don’t see any new matters, No need for the Affidavit***” directed the matters to be mentioned on 1st December 2022 to fix a hearing date in the substantial Applications.

21. Thereafter, when the matters came up on 20th January 2023, Counsel for the Appellant once again moved to file Supplementary Affidavits. This being objected by Respondent's Counsel, the Master directed to issue the for the Respondent's Solicitors to peruse it and raise their concern on the next date. The Master also stated that the admissibility of them will be determined on the next date ie; 8th of February 2023. This mean the Master allowed the Affidavits to be filed, subject to the consent of the Respondent.
22. On 8th February, 2023, as the Counsel for the Respondent still objected to the admission of the impugned Supplementary Affidavits, the Master made the following extempore ruling and rejected the said Supplementary Affidavits in both matters.
 - *"The Defendant was given time to file Affidavit in opposition from September 2021. The Affidavit was filed on 2/05/22.*
 - *The Defendant had enough time to prepare the Defence.*
 - *Hence I reject the Supplementary Affidavit and expunge the Supplementary Affidavit filed on 20/01/23.*
 - *Hearing on 30/10/23.*
23. It is the above extempore ruling that has led the Appellant to this Court seeking leave to Appeal against it, in order to have it set aside and to have the said Affidavit admitted upon the leave being granted.
24. The extempore ruling of the Master is not devoid of any reason as alleged by the Counsel for the Appellant. He in fact has given a reason, with which this Court would disagree with all due respect. On the fateful day, when he was called upon to decide whether to accept the impugned Affidavit or not, the Learned Master appears to have been concerned only about the time taken or the alleged delay in filing the Affidavit in opposition by the Appellant. All the deciding factors, alluded to in paragraph 15 above, **(in Ramesh Chand Supra)** in deciding to grant leave or not, seem to have had escaped the attention of the Master.
25. The nature of the actions before the Master , as far as the Respondent is concerned, is for the recovery of the possession of two plots of land, which he claims to be in the possession of ABBAS ALI and unnamed occupants as per his Affidavit in support for the originating Summons.
26. But, as far as the Appellant is concerned, it transpires that he is opposing these Summons on the basis that an entity called JUXTA BEACH (FIJI) PTE LIMITED ("JUXTA"), wherein ABBAS ALI is said to be a Shareholder and the Director, is seeking for the specific performance of a SALE AND PURCHASE AGREEMENT ("SPA") entered into by and between the Respondent and JUXTA on 8th of October 2015. This SPA was disclosed for the first time by none other than the Appellant in his Affidavit in Opposition marked as "AA-2".
27. Admittedly, there is a pending action commenced by the JUXTA for the said purpose of specific performance, filed prior to the action in hand, being the action No: HBC 131 of

2021. The Respondent, for obvious reason, in his Affidavit in support of the Originating Summons did not utter a single word about the JUXTA or the SPA.
28. Thus, it became necessary for the history behind this litigation to be unfolded by the Appellant in his Affidavit in opposition, which he did as per paragraphs 6 (a), (b), (c), & (d) thereof demanding a plausible response or explanation from the Respondent.
 29. Accordingly, the Respondent in paragraphs 9 (i), (ii), (iii) & (iv) of his Reply Affidavit filed on 9th September 2022 has made certain responses in relation to the Appellant's revelations in paragraph 6 (a), (b), (c) and (d) of his Affidavit in opposition. These responses by the Respondent include, *inter alia*, several allegations as well, which called upon and warranted the Appellant to offer his reply. If no opportunity is granted to the Appellant to counter those responses, it can cause serious prejudice to the Appellant.
 30. The Appellant had in fact disclosed all his would be defences in these matters as per paragraph 6 of his Affidavit in opposition. The evidence that he sought to disclose in the Supplementary Affidavit was not something new or that he had suppressed or missed to adduce through his Affidavit in opposition. What the Appellant had attempted, through the supplementary Affidavit, was to reply to the Respondent's response in his Affidavit, which otherwise would have remained unanswered.
 31. No blame can be pinned on the Appellant that he had failed to adduce the evidence in his Affidavit in opposition, and now only he seeks to adduce new evidence by way of the Supplementary Affidavit. He had filed his Affidavit in opposition on the very first date he was directed to do so, which was 2nd May 2022. Then on 22nd February 2022 when the matter was first called before the Master, it was the Respondent's Counsel, who had intimated that they are to consider the Summons in hand as there is a writ action by the Appellant under the Sale and purchase Agreement, on which a mention date was given by the Master for 4th April 2022. (Vide Master's minutes dated 22nd February 2022). It was only on 4th April 2022, the Appellant was directed to file Affidavit in opposition, and accordingly filed it on 2nd May 2022, even without waiting till 23rd May 2023, which was the due date. The Appellant has had justifiable reasons for not to have filed his Affidavit in opposition immediately after the service of Summons.
 32. On quick perusal, I find that the contents of the averments in the Supplementary Affidavit and those of the annexures appear to be very much relevant to the question before the Master. However, the merits of them are yet to be visited by the Master. This Court, being an Appellate forum, cannot make any comments on it now. The contents of the Supplementary Affidavit and those of the annexures thereto need not have taken the Respondent by surprise or caused him any prejudice.
 33. Given the circumstances, the question of "delay" need not have arisen in determining whether the impugned Affidavits should have been admitted or not. Learned Counsel for the Respondent in her written submissions has alleged about 16 months of delay. If any delay has occurred, the reason for it has to be attributed to the Respondent, who had obtained 2-3 adjournments to file his Affidavit in reply. Further, it is observed that it was the Respondent's Counsel on the very first date ie on 22nd February 2022 had informed

the Master that the Appellant is to consider the Summons in hand as there is a writ action and got an adjournment.

34. During the proceedings before this Court as well, when the Counsel for the Appellant proposed to have the leave and the Appeal hearing together, considering the time factor it was the Counsel for the Respondent who objected to the proposal. However, the Court decided to take up both hearing together.
35. It was not at the hearing or when the hearing was around the corner, the Affidavit in question was sought to be filed. It was only after the Master's impugned decision to reject the Affidavit, the hearing was fixed for 30th October 2023 which is to occur in the near future. There was a time period of 8 long months before the hearing, for the Respondent to prepare for the hearing.
36. It is also to be observed, that no prejudice of any sort was to be caused to the Respondent on account of permitting the Supplementary Affidavit. If needed, he could have been allowed to offer his reply or compensated by making orders for costs, if circumstances demanded to do so.
37. In my view, entertaining the Supplementary Affidavit in this matter, would have facilitated the expeditious and effective determination of the substantive matters before the Master and it would not have caused any delay, or adverse effect on the case management.
38. In my judgment, Master's decision to disallow supplementary Affidavits, when there were nothing new averred therein, except for reply to the Respondent's Affidavits, was neither a justifiable decision nor it was warranted in terms of Order 28 rule 2(6) of HCR. So this Application seeking leave to Appeal needs to be considered favorably.
39. When an Application seeking leave to Appeal, is preferred from an interlocutory decision of this nature, the Applicant must not only show that the interlocutory order was wrong, but also it would cause prejudice. This Court stands convinced that the Appellant has demonstrated that the Master's Order is wrong, and if it is allowed to stand, serious prejudice would be caused to him. On overall analysis, I find that the grounds of Appeal adduced hereof are with merits and they warrant the granting of leave and allowing of the Appeal.
40. The parties need to disclose respective positions fully in their Affidavit evidence without holding on to any, for the Court to make its final determination. When the Appellant for the first time disclosed certain evidence in his Affidavit in opposition, and once the Respondent gives his responses it, if it warrants any reply by the Appellant, he should be at liberty for the same.

G. Costs:


41. Both the Applications have been heard together, and the parties filed common written Submissions as they had agreed to abide by one decision in respect of both matters. Accordingly, considering the circumstances, a sum of \$2,000.00 is ordered as summarily

assessed costs for both matters (\$1,000.00 each) to be paid by the Respondent in 14 days from today.

H. Final Orders:

- a. The Leave to Appeal Application by the Appellant, against the Master's decision dated 8th February 2023, is allowed and the leave is granted.
- b. The Appeal is allowed and the Master's decision dated 8th February 2023 to reject the Supplementary Affidavits of the Appellant is hereby set aside.
- c. The Supplementary Affidavits filed on 20th January 2023 by the Appellant are restored back into the case record.
- d. The Respondent is at liberty to file his reply Affidavits thereto, if needed, within 14 days from today.
- e. The matter will be mentioned before the Master on 23rd October, 2023 for compliance and any further directions, if needed, before the hearing on 30th October 2023.
- f. There shall be a summarily assessed costs in a sum of \$2,000.00 payable by the Respondent unto the Appellant within 14 days from today.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 3rd day of October, 2023.

SOLICITORS:

For the Plaintiff:

Messrs; A.K. Lawyers- Barristers & Solicitors.

For the Defendants:

Messrs. Lal Patel Bale Lawyers- Barristers & Solicitors.