

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 54 of 2019

BETWEEN: SURESH PRASAD of Laucala Beach, Suva, unemployed

PLAINTIFF

**AND: ASALEO CARE (FIJI) PTE LIMITED a limited liability company
having its registered office at Nakasi, Fiji**

DEFENDANT

For the Plaintiff: Ms. K Saumaki

For the Defendant: Mr. S. N. Koya

Date of Hearing: 7th May 2025

Date of Ruling: 16th July 2025

**RULING ON APPLICATION TO STRIKE OUT THE
APPLICATION FOR LEAVE TO APPEAL**

1. This is the Ruling on the Defendant's Summons dated 31st March 2025, seeking the following orders from the Court: -

- (i) The Plaintiff's Inter Partes Summons and Affidavit in Support of Mnisha Kumar filed on 4th March 2025 be struck out;
- (ii) Costs be awarded against the Plaintiff in favour of the Defendant.

Upon the grounds that: -

[A] That the Plaintiff did not file and serve its application for leave to appeal under Order 59 Rule 11 within 14 days from the Learned Master's ruling dated 18 February 2025.

[B] The delay in prosecution of this matter and the further delays that will be occasioned by giving leave to extending the time to enable the appeal to be filed will further prejudice the Defendant's interest in and desire to have the matter dealt with expeditiously.

2. The application is made under Order 2 Rule 2 (1) and (2), Order 41 Rule 6 and Order 59 Rule 11 of the High Court Rules 1988, and the inherent jurisdiction of the High Court.

The history of these Proceedings

3. On the 18th February 2025 – the learned Master ruled on the Defendant's Summons to Strike out the Plaintiff's Amended Statement of Claim, determining inter alia:

a) The Plaintiff's Claim for special and general damages for alleged breach of contract is a matter for trial.

b) The Plaintiff's Claim for damages for breaches of section 11 (1) and 20 of the Constitution pursuant to section 44 of the Constitution does not comply with section 3 of the Constitutional Redress Rules and is therefore struck out.

c) The Plaintiff is to file a Second Amended Statement reflecting the above.

4. 4th March 2025 – the Plaintiff filed its Inter Partes Summons and Affidavit in support of Manisha Kumar for leave to appeal the Ruling.

5. 31st of March 2025, the Defendant served this Summons and affidavit on the Plaintiff's counsel to strike out the Plaintiff's application for leave to appeal the Master's Ruling.

6. The application was called in Court and directions were given for affidavits to be filed and the matter was fixed for hearing on the 7th of May 2025.
7. On the date of the hearing, parties made oral arguments and these were later supplemented by written submissions filed both parties.

Defendant's Submission in support of Striking Out.

8. The Defendant submits that the ruling of the Master was an interlocutory ruling therefore the Plaintiff requires leave to appeal it. (Gounder vs Minister of Health (unreported) Fiji Court Of Appeal, Civil Appeal No ABU 75 of 2006 (9th July 2008), Byrne, Powell, Khan Justices of Appeal).
9. Order 59 Rule 11 of the High Court Rules 1988 requires that an application for leave to appeal against a Ruling of the Master is to be filed and served on all other parties within 14 days from the date of the ruling.
10. The Defendant submits that the Plaintiff breached Order 59 Rule 11 in that:
 - a) The Plaintiff filed its application for leave to appeal the ruling on the 14th day.
 - b) The Plaintiff served its application for leave to appeal 10 days after the period stipulated under Order 59 Rule 11 had expired.
11. It is clear that the Plaintiff was well aware of his non-compliance with service as he prays for this Court to extend the time of service.
12. The Defendant therefore submits that the issues to be determined are:
 - a) Whether the Plaintiff's non-compliance with service is fatal?
 - b) Whether the Honourable Court has jurisdiction to extend the time of service for this application?

Is the failure to serve the application for leave in time fatal?

13. The Defendant cites the case of Phillip vs Permanent Secretary for Health [2016] FJHC 526; HBC 85 of 2014 (9 June 2016). In this case Justice Sapuvida of the High Court in Lautoka found that the construction of Order 59 Rule 11 makes it clear that service must be done within 14 days of a Master's interlocutory ruling and that failing to do so is fatal to the application.

14. In Devi vs Shah [2024] FJHC 316; HBC 220 of 2020 (1 May 2024), Justice Mackie stated as follows: -

“17 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.

18. The affidavit in support filed on behalf of the Defendant does not give any reason for not having the application for leave to appeal served on the Plaintiff within the prescribed time period.

19. As was held in **Hawkes's case** (3. above) the doctrine of substantial compliance cannot apply to the fixed time limit. The Master made the impugned ruling on 18th October 2023. The Defendant should have served his application for leave to appeal on or before 1st November 2023. The application was filed on 1st November 2023 and served on 07th November 2023. The Defendant 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.

20. In view of the provisions under Order 59 rule 11, there is no proper application for leave to appeal the Master's ruling dated 18th October 2023. The application for leave to appeal filed by the Defendant 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.”

15. Order 2 Rule 2 of the High Court Rules allows the Defendant to make an application to set aside for irregularity any proceedings or any document, judgment or order if:

a) The application is made within a reasonable time; and

- b) Before the party applying has taken any fresh step after becoming aware of the irregularity.

16. The Defendant submits that both conditions are satisfied as this application was made before the first call of the Plaintiff's application, and no fresh steps have been taken.

17. The Defendant submits that due to the defective and irregular service, Order 2 Rule 2 can be invoked to strike out and set aside the Plaintiff's application for leave to appeal.

18. The Plaintiff has also filed an application for extension of time for service.

Leave for Extension of Time for Service

19. The Plaintiff has also sought extension of time for service under the same application for leave to appeal.

20. The Defendant submits that since the Plaintiff is out of time for service, then the Plaintiff ought to have sought to regularise its irregular and defective service under Order 2 Rule (2) instead of incorrectly relying on Order 3 Rule 4.

21. The Plaintiff's application does not satisfy Order 3 Rule 4 of the High Court Rules either.

22. The Defendant cites the case of Veilave vs Naicker [2017] FJHC 131; HBC 159 of 2013 (17 February 2017), where the High Court set out the following factors for the Court to consider in exercising its discretion to enlarge time as follows: -

“44. Though not exhaustive in the exercise of discretion under Order 3 rule 4 of High Court Rules 1988 the following may be considered, their cumulative effect is taken and they are:

- a) the interests of the of justice and specially the failure to exercise extension and consequences. e.g., If the failure to enlarge time would result denial of access to a party.
- b) whether the application for extension has been made promptly.

- c) whether the failure to comply was intentional, for e.g. non-compliance of unless order or after an extension of time delaying taking further steps.
- d) whether there is a good explanation for the failure.
- e) The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.
- f) whether the failure was caused by the party or his legal representatives. e.g. mistake of law or fact
- g) Effect of extension have on the trial, if the action is still pending before the court.
- h) the effect which the failure as opposed to granting extension, on all the parties including interest of public if any.
- i) If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.
- j) The effect of extension on case management and right of a party for determination of a civil action without delay.
- k) Whether the defect is curable, and if so the prejudice to other party.”

23. The Defendant submits that if the application is granted, then this matter will be further delayed as this case is now going on to its 6th year and any appeal may prolong the proceedings another 2 to 3 years. These further delays will be prejudicial to the Defendant.

24. The Defendant submits that the Plaintiff’s insistence on constitutional redress, while there is an alternative remedy in damages, will only prolong these proceedings and this outweighs any possible and (highly dubious) benefits.

25. The Plaintiff has also not provided any reasons for not complying with the requirements for service. This absence of a reason is fatal to the Plaintiff’s application.

26. The Defendant submits that the interest of justice weighs heavily against the Plaintiff and the proposed grounds of appeal have no merit.

27. The Defendant submits that the Plaintiff clearly abused the court process by instituting a cause of action through an amended writ of summons which claims for breach of contract and simultaneously seeks constitutional redress.
28. The Defendant therefore submits that the application for leave should be set aside for irregular service and its prayer for extension of time for service ought to be dismissed for lack of merit.

The submission for the Plaintiff

29. The Plaintiff agrees that the Master's ruling was interlocutory, and leave is required to appeal. It is also agreed that the appeal should have been filed and served within 14 days of the ruling.
30. The Plaintiff acknowledges that the application was not served on time therefore relies on Order 3 Rule 4 of the High Court Rules.
31. The Plaintiff submits that he did file the application for leave to appeal within time and he had sought extension of time for service in the same application.
32. He submits that the Defendant has accepted service and cites the case of Orix Holding Limited -v- Luping Zou [2017] HBC 201 (20 March 2020) where the High Court held as follows: -

“Defendant had failed to do both requirements contained in Order 59 Rule 11 of the High Court Rules 1988 but only filed the Summons within time. When an application seeking leave to appeal is failed, Court can validate service done outside fourteen day time non pro tunc. This doctrine is not applied every time there was a non-compliance but it can be applied depending on the merits of the application seeking leave. In my judgment non service of summons within fourteen days cannot be the sole reason to strike out application seeking leave to appeal, when in every other manner it is proper to grant leave to appeal.”

Extension of Time

33. The Plaintiff submits that the Court has the powers set out at Order 3 Rule 4 of the High Court Rules 1988.

34. The Plaintiff cites the case of Taralailai vs Taralailai [2020] FJHC 912; HBC 89 of 2017 (30 October 2020) where the High Court stated as follows: -

“17 Order 3 rule 4 (1) and rule 4(2) of HCR grants a general discretion to court to extend any time period authorized by HCR or by any ‘*judgment, order or directions to do any act in any proceedings*’

18. This is an action filed by way of originating summons. Master made orders in this action on 23.11.2017 in terms of power granted in Order 59 rule 2(e) of HCR. Accordingly, Master is empowered to make any order or judgment with consent of the parties.

19. Once an order is made by the court irrespective of whether it was by consent or otherwise Order 3 rule 4 of HCR applies and court can exercise the general discretion regarding extension of time.

20. Supreme Court Practice (UK) (White Book)1988(Vol 1) p18 states,

‘The making of a consent order requiring a party to comply with the terms of the order within a specified time, failing which his claim would be struck out , does not preclude the parties returning to the court to ask for an extension of time (*Greater London Council v Rush and Tomkins* (1984)81 L.S. Gaz. 2624(CA))’.

21. The purpose of Order 3 rule 4 of HCR is to extend time in order to prevent injustice to a party by strictly adhering to time period. This is general discretionary power of court.

22. Supreme Court Practice (UK) (White Book) Vol 2 at p1270 states,

‘Although an order is headed “by consent” , it is in every case a question whether there was a true binding contract between the parties or whether it is an order of the Court to which the parties agreed or to which they did not object or to which one side submitted, and if such be the case, the jurisdiction of the Court to grant an extension of time to do a specified act under O.3 r.5 not ousted(*Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 W.L.R 185;[1982] 4 All E.R. 377 C.A)’.

23. Lord Denning in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER377 at p 380p 380 Held,

“I would add this. As Eveleigh LJ said early on in this appeal, when people do not object to an order of this kind, it is always on the terms that is subject to the rules of a of court which enable an extension of time to be made. Under RSC Ord 3, r 5(1)—

“The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.”

Extension of Time for Leave to Appeal

35. The Plaintiff submits that the law for determining leave to appeal was set out by the High Court in *Bank of Hawaii vs Reynolds* [1998] FJHC 226, where Justice Pathik stated as follows: -

*“This is an application for leave to Appeal out of time from the interlocutory order that this Court made on 2 Feb2 February 1998. In this regard I refer to the following passages from the judgment in **Ex parte BUCKNELL** [1936] HCA 67; 1936 56 C.L.R. 221 at 225 and 226 which are pertinent.*

"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 sec.35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification 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."

36. The Plaintiff presents the following proposed grounds of appeal: -

- (i) The Learned Master erred in law in finding that that Plaintiff did not comply with section of the Constitutional Redress Rules in filing a Writ and Statement of Claim when the provision does not preclude the making of an application seeking constitutional redress by other means.
- (ii) The Learned Master erred in law and in fact in finding that the Plaintiff did not comply with section 3 of the Constitutional redress rules in filing the necessary application in the required time when the Plaintiff was in compliance of the Rule in filing the Writ of Summons and Statement of

Claim on 18 February 2019, some 39 days after the date of the alleged matters of the breaches of the Constitution by the Defendant.

- (iii) The Learned Master has erred in law and in fact striking out the Plaintiff's claim for Constitutional Redress and ordering paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and prayers C and D to be struck off from the Plaintiff's amended Statement of Claim when the Plaintiff was not precluded from making an application seeking Constitutional Redress by way of Writ of Summons.
- (iv) The Learned Master has erred in law and in fact in ruling on the Defendant's second strike out application when the application was a duplication from the earlier Strikeout Application filed by the Defendant on 25th March 2019 and therefore was an abuse of process under the res judicata principles.
- (v) Such further and/or other grounds as well as shall become apparent from the Court Records.

37. The Plaintiff submits that the application before the Court is meritorious and must be considered in totality. The Plaintiff therefore submits that the application by the Defendant has no basis and should be struck out with costs and the Plaintiff's application for leave to appeal should be heard and determined.

Analysis

38. This is the proposed appeal from the Master's Ruling dated 18 February 2025 where he had struck down paragraphs 10 to 19 and prayers C & D in the Statement of Claim.

39. This was an interlocutory ruling and the Plaintiff required leave to appeal the said Ruling. The relevant Rule that applies to such applications is Order 59 Rule 11.

40. Order 59 Rule 11 requires that any such application for leave to appeal must be filed and served within 14 days.

41. The Plaintiff had filed an Inter Partes Summons supported by the affidavit of Manisha Kumar, seeking leave to appeal the decision of the Master to strike out portions of the claim as well as 2 reliefs sought in the Statement of Claim.

42. In her affidavit in support, Manisha Kumar has failed to set out the reasons for not complying with Order 59 Rule 11 and serving the Defendants within the 14 day time limit.

43. That failure is fatal to the application for leave therefore the Defendant's application must succeed.


44. The Defendant having succeeded, is entitled to costs which are summarily assessed at \$700.

This is the Ruling of the Court: -

- 1. The Plaintiff's Inter Partes Summons and affidavit in support of Manisha Kumar filed on 4 March 2025 is hereby struck out.**
- 2. The substantive matter will proceed and take its own course.**
- 3. The Plaintiff will pay the Defendant costs summarily assessed at \$700 – one month to pay**

There is a right of appeal





Mr. Justice U. Ratuveli
Puisne Judge

cc: **-Shelvin Singh Lawyers**
-Howards Lawyers-