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

CIVIL ACTION NO. HBC 244 of 2020

BETWEEN	:	**HAROON ALI SHAH**, of Vuda Point, Lautoka. Retired. **PLAINTIFF.**
AND	:	**IFTHIKAR IQBAL AHAMED KHAN**, of Lautoka, Barrister & Solicitor, operating as IQBAL KHAN AND ASSOCIATE a law firm, of 7 Yasawa Street, Lautoka. **FIRST DEFENDANT.**
AND	:	**SUMAN SHALINI DEVI**, formerly of Razak Road, Lautoka, but now of 130, Kerrs Road, Wiri, Auckland, New Zealand, Resource Manager. **SECOND DEFENDANT.**
AND	:	**REPEKA NASIKO**, the Reporter Western Division, Fiji Times Pte Limited, Vidilo Street to Tukani Street, Lautoka. **THIRD DEFENDANT.**
AND	:	**FRED WESLEY**, the Editor, Fiji Times Pte Limited, 177, Victoria Parade, Suva. **FOURTH DEFENDANT.**
AND	:	**FIJI TIMES PTE LIMITED**, a limited liability Company having its registered office at 177 Victoria Parade, Suva. **FIFTH DEFENDANT.**
BEFORE	:	Justice A.M. Mohamed Mackie.
COUNSEL	:	Mr. Anand. V. For the 1st Defendant – Applicant. Ms. Prasad. R. for the Plaintiff- Respondent. 2nd to 5th Defendant-Respondents are not parties to this Application.
HEARING	:	On 7th May 2025.
WRITTEN SUBMISSIONS:		Filed by the 1st Defendant- Applicant on 20th May 2025. Filed by the Plaintiff- Respondent on 2nd June 2025.
DATE OF RULING	:	Pronounced on 4th August 2025.

RULING

A. INTRODUCTION:

1. This ruling pertains to the hearing held before me on the "**Summons**" (the Application) preferred by the 1st Defendant- Applicant (the 1st Defendant) on 6th May 2024, seeking leave to appeal out of time against the Ruling of the learned Master (the Master) pronounced on 28th March 2024.

2. By the said Ruling, the Master had dismissed the Summons to Strike Out that had been preferred by the 1st Defendant on 3rd November 2020, pursuant to Order 18 Rule 18(1)(a) of the High Court Rules 1988 (HCR).

3. The Application hereof states that it is made pursuant to Order 3 Rule 4, Order 59 Rules 11 and 16 of the High Court rules of 1988 and the inherent jurisdiction of this Court. The Application is supported by an Affidavit sworn by the 1st Defendant, **Iftikar Iqbal Ahmed Khan** and filed on 6th May 2024 along with annexures marked as "IK-1" to "IK-5".

4. The Application is opposed by the Plaintiff by his Affidavit in opposition sworn and filed on 24th September 2024. The 1st Defendant swore and filed his Affidavit in Reply on 6th November 2024.

5. In addition to the oral submissions made at the hearing held on 7th May 2025, both counsel have filed their respective written submissions as well.

B. BACKGROUND:

6. The Plaintiff on 30th September 2020 instituted action against the 1st and 4 other Defendants on the ground of defamation, seeking reliefs, inter alia, injunction, damages (general, Punitive & exemplary), interest and costs as prayed for in terms of paragraphs (a) to (e) of the prayer to the Statement of claim.

7. The 1st Defendant, having filed his acknowledgement of service on 20th October 2020, filed this Application for Strike out on 3rd November 2020 pursuant to Order 18 Rule 18(1)(a) of the High Court Rules 1988.

8. The Master, having heard the counsel for the Plaintiff and the 1st Defendant on 06th April 2022 in relation to the Application for strike out, entertained written submissions from both parties, and by his ruling dated and pronounced on 28th March 2024 dismissed the 1st Defendant's Application for Strike Out, with an order for costs in a sum of $1,500.00 payable by the 1st Defendant unto the Plaintiff. (Vide sealed Order filed on 17th July 2024)

9. It is against the said Ruling, the 1st Defendant on 6th May 2024 filed the **Summons** hereof, seeking Leave to Appeal Out of Time (the Application) on 6th May 2024 seeking, inter alia, the following Orders;

1. *That the Appellant be granted leave to file Appeal against the decision of the Master of the High Court, Mohammed Azhar delivered on 28th March 2024.*

2. *That all the execution here-under be stayed until the determination of this appeal application.*

3. *Costs in this application be cost in cause.*

C. THE LAW:

10. The 1st Defendant's Summons to this Court states that the Application is made pursuant to Order 59 Rule 11, Order 59 Rule 16, and Order 3 Rule 4 of the High Court Rules and under the inherent jurisdiction of the Court.

11. The 1st Defendant, as per the heading of his Summons, seeks leave to Appeal out of time the interlocutory Ruling dated 28th March 2024 delivered by the Master of this Court. An interlocutory order made by the Master may be appealed with the leave of a 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).*
>
> *O.59, r. 16 (1). The filing of a notice of appeal or an application for leave shall not operate as a stay ofexecution or proceedings, or any steps therein, unless the court so directs.*

12. Test for granting Leave to Appeal.

- 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.***
>
> *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] Argus Law Rp 51; (1901) 27 VLR***

***66 at 68**; and also with appeals to the High Court of Australia, see **Ex parte Becknell [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.***

- 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.*

D. DISCUSSION:

The Preliminary Issue:

13. The application is made out of time. It is observed that the 1st Defendant in his Summons has failed to include a prayer seeking to appeal out of time. Only the heading thereof states that it is a Summons for leave to Appeal out of time. However, as the purpose of the Summons could be easily ascertained from the heading and the contents of the Summons, I decide to disregard the failure.

14. The ruling of the Master dated 28th March 2024, which refused to strike out the Plaintiff's Action against the 1st Defendant, made together with an order for costs in a sum of $1,500.00 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 pronounced on 28th March 2024. The Summons was filed on 6th May 2024, which was not within the permitted time period of 14 days for same. However, the service of the Summons and the proprietary of the Supporting Affidavit appear to be not in dispute.

16. But, as far as the filing of the Summons is concerned, I find that it has been filed only on 6th May 2024. It should have been filed within 14 days from 28th March 2024. It means on or before 10th April 2024, but was filed only on 6th May 2024 after a delay of around 26 days.

Thus, it is clear that the Order 59 Rule 11 has been violated by the 1st Defendant, who himself is a Solicitor running a reputed firm of Solicitors with several juniors under him.

17. Counsel for the Plaintiff, raising the issue of delay, submits that the application filed by the 1st Defendant, is out of time, cannot be entertained and therefore should be dismissed.

18. **Hawkes Bay Hide Processors v CIR (1990) 3 NZLR 313** at 315 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.*

19. 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.

20. The Affidavit in support filed by the 1st Defendant does not give any justifiable reason for not having the application for leave to appeal out of time and leave to Appeal filed within the given timeframe. The Ruling by the Master was made on 28th March 2024. The date on which the 1st Defendant left for Australia was 29th March 2024. Perusal of the record shows that at the time the Ruling was pronounced by the Master on 28th March 2024, the 1st Defendant was well and truly represented in Master's Court by one of the first defendant's junior. She could and should have taken notice of the Ruling and done the needful prior to the departure of the 1st Defendant for Australia, at least having his Affidavit in support executed.

21. However, as per paragraph 12 of his Affidavit in support, he states that he returned from Australia on 4th April 2024 and, as per paragraph 14 thereof, he states about the death of his Mother in Law was on 09th April 2024.

22. His averment in paragraph 15 that his Associate Counsel Ms. Degei informed him about this ruling only after he resumed works subsequent to the bereavement period, cannot be accepted. It is also observed that prior to the death in the family on 9th April 2024, he had around 5 days after arriving at Fiji to file his Application, if he really was interested in filing such an application. This was not just another case handled by his firm of Solicitors. It was his own case where he was to defend himself. He also admits that he and his juniors appeared in various other matters in different Court during this period in question. The reason adduced by him for his failure to file his Application within time limit cannot be accepted at all.

23. The 1st Defendant should have filed and served his Application on or before the 10th of April 2024. The Application was filed on 06th May 2024. The 1st 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) Order 3 rule 4 or any other Orders/rules of the HCR.

24. The application for leave to appeal filed by the 1st Defendant is out of time and the reason adduced for the delay cannot be accepted and therefore it should 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, for the sake of completeness, I would consider the merits of the Application as well.

Merits of the Application:

25. Though, the 1st Defendant is guilty of laches in filing his Application seeking leave to appeal out of time as alluded to above, the court is not precluded from granting leave, provided that the 1st Defendant has adduced compelling and convincing grounds to show that the Ruling 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).**

26. 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 finally determining the rights of the parties.

E. GROUNDS OF APPEAL:

27. The 1st Defendant has adduced 7, purported, grounds of Appeal, which are filed annexed as *"IK-5"* to his Affidavit in support. I do not wish reproduce here as they do not warrant serious consideration, in view of the nature of the application made before the Master and the contents of his impugned ruling made on it.

28. I have carefully gone through the contents of the impugned ruling of the Master, which is sought to be appealed against before me, and the reasons adduced by the Master for not striking out the Plaintiff's action by the impugned Ruling dated 28th March 2024.

29. 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.*

30. The Court in Bucknell (supra) 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.

31. 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"*

32. 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] VicRp 44; [1978] V.R. 431 and Hussein –v- National Bank of Fiji (1995) 41 Fiji L.R. 130)."***

33. So, the 1st Defendant should demonstrate injustice, if the interlocutory order remains as it is. 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.

34. The Master has had a full-scale hearing before him, before he made the impugned ruling to dismiss the 1st Defendant's application for strike out the action and has made a well-considered ruling in not allowing the striking out application.

35. The burden is on the 1st Defendant to establish as to what is the alleged error in the impugned interlocutory Ruling, if it has caused him any substantial injustice. On careful perusal of the impugned Ruling, and the contents of the purported grounds of appeal adduced by the 1st Defendant, it would become apparent that there is no any sort of error in the Ruling of the Master.

36. The main, grounds adduced by the 1st Defendant were not matter to be considered before the Master or decided by him at that juncture. They need evidence at the trial. The pivotal question before the Master was whether the Plaintiff had a reasonable cause of action against the Defendant. The Defendant had called up on the Master to decide the matter only under Order 18 Rule 18(1)(a) of the HCR 1988.

37. The 1st Defendant's Solicitors, knowing very well about the outcome of the intended Appeal, belatedly, filed the Summons for Leave to Appeal out of time and leave to Appeal, in order to frustrate the Plaintiff.

38. When there is specific provision in the HCR (O.59) dealing with the appeal from the Master's Court, the 1st Defendant is not entitled 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 1st Defendant failed to demonstrate any exceptional circumstances that warrant the hearing of the appeal with leave being granted.

F. CONCLUSION:

39. The 1st Defendant failed to file the Application for leave to Appeal within the prescribed time period under Order 59 rule 11 of the HCR. The Application of the 1st Defendant 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 as to why the leave to appeal out of time should be granted and appeal be heard. I have no option other than to refuse leave to appeal out of time the interlocutory ruling of the Master dated 28th March 2024. I also find it is justifiable for this court to order the 1st Defendant to pay summarily assessed costs of $1,500.00 (One Thousand Five Hundred Fijian dollars) to the Plaintiff within 28 days from today.

G. FINAL OUTCOME:

1. The Application of the 1st Defendant dated and filed on 6th May 2025, seeking leave to Appeal out of time against the Master's ruling dated 28th March 2024, is hereby dismissed.

2. The 1st Defendant shall pay the Plaintiff $1,500.00 (One thousand Five Hundred Fijian Dollars), being the summarily assessed costs of this Application, within 28 days from today.

A.M. Mohamed Mackie
Judge

HIGH COURT OF FIJI
LAUTOKA

At the High Court of Lautoka on this 4th day of August, 2025.

SOLICITORS:
For the Plaintiff: **Messrs Fazilat Shah Legal, Barristers & Solicitors**
For the 1st Defendant: **Messrs. Iqbal Khan & Associates, Barristers & Solicitors**