

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

**CIVIL APPEAL NO: HBM 09 of 2024.  
MAGISTRATE'S COURT OF SIGATOKA  
CIVIL ACTION NO- 01 of 2017.**

**IN THE MATTER** of Civil Action N0-01 of 2017 on Appeal of the Ruling made by the Resident Magistrate Mr. J. N.L. Savou on 29<sup>th</sup> of July 2020.

**BETWEEN** : **KESHO KANT** trading as **KANT'S ELECTRICAL SIGATOKA**, having its principal place of business at Olosara Subdivision, Sigatoka, Fiji.  
**APPLICANT  
(ORIGINAL DEFENDANT)**

**AND** : **KOOL TECH REFRIGERATION PTE LTD**, a Limited Liability Company duly incorporated in Fiji and having its registered office at suite 51, Lees Complex, Lucala Beach, Suva, Fiji.  
**RESPONDENT  
(ORIGINAL PLAINTIFF)**

**BEFORE** : Mr. A.M. Mohamed Mackie- J.

**HEARING** : By way of written submissions.

**W. SUBMISSIONS** : Filed by the Defendant- Applicant on 24<sup>th</sup> January 2025.  
Filed by the Plaintiff- Respondent on 15<sup>th</sup> January 2025.

**RULING** : Pronounced on 11<sup>th</sup> August 2025.

**RULING**

**A. INTRODUCTION:**

1. Before me is a Summons by the Defendant- Applicant ("the Applicant") filed on 03<sup>rd</sup> April 2024 seeking, *inter alia*, leave to Appeal **out of time** against the Ruling pronounced by the Hon Resident Magistrate on 29<sup>th</sup> July 2020 at the Magistrate's Court of Sigatoka in Civil Action No-01 of 2017.
2. The Applicant also seeks for the stay of all/ any of the proceedings and execution pursuant to the Ruling of the Resident Magistrate dated 29<sup>th</sup> July 2020.
3. The Summons ("the Application") states that it is made pursuant to Order **59 Rule 8 (1) , 8 (2) Rule 10 (1) (2) of the High Court Rules** and the Inherent Jurisdiction of the High Court .

4. The Summons is supported by an Affidavit sworn on 21<sup>st</sup> March 2024 by the Applicant, KESHO KANT, and filed along with annexures marked from "KK01"– "KK04". The impugned Ruling pronounced by the Hon. Resident Magistrate on 29<sup>th</sup> July 2020 is also found annexed to the Affidavit in support, though not pleaded.
5. However, it is to be noted that the original case record is not before this Court being forwarded by the Court below. Further, either a copy of the original record or any part of it is also not before this Court being filed by the Applicant along with his Application, except for the copy of the impugned Ruling dated 29<sup>th</sup> July 2020 annexed to the Affidavit in support, without being pleaded as alluded to above.
6. The Plaintiff-Respondent ("the Respondent") on 16<sup>th</sup> May 2024 filed its Affidavit in opposition, sworn on 15<sup>th</sup> May 2024 by the Director ADRIAN QUAI HOI, together with annexures marked as "AQ-1" to "AQ-3", which are;
  - a. A copy of the Notice of Motion dated 21<sup>st</sup> May 2020 filed by the Applicant's then Solicitors before the Magistrate's Court of Sigatoka seeking to set aside the judgment dated 09<sup>th</sup> August 2017 marked as "AQ-1".
  - b. Ruling dated 3<sup>rd</sup> May 2024 made by Resident Magistrate Hon. J. Daurewa on examination of Judgment Debtor Summons (JDS) (means test hearing) marked as "AQ-2".
  - c. Ruling made by Hon Resident Magistrate on 29<sup>th</sup> July 2020 refusing to set aside the Judgment dated 9<sup>th</sup> August 2017 marked as "AQ-3".
7. The Applicant swore and filed his Affidavit in reply on 3<sup>rd</sup> March 2024. Accordingly, on 26<sup>th</sup> September 2024 the matter was fixed for hearing to be taken up on 29<sup>th</sup> January 2025 by leaving the parties at liberty to file written submissions 2 weeks prior to the hearing date.
8. However, when the matter came up for hearing on 29<sup>th</sup> January 2025, a suggestion being made by the Court to have the hearing disposed by way of written submissions, on 27<sup>th</sup> February 2025 both parties agreed to my suggestion and accordingly have filed their respective written submissions as stated in the caption above. The solicitors for the Respondent have also tendered the copies of the cited authorities in support of their contention.

**B. HISTORY BEFORE THE MAGISTRATE'S COURT:**

9. The following are the sequence of events that took place before the Magistrate's Court of Sigatoka between the parties hereof.
  - a. On 14<sup>th</sup> February 2017, the Respondent's solicitors filed Writ of Summons and Statement of Claim against the Applicant seeking certain monetary reliefs.
  - b. Due to the alleged failure of the Applicant's then Solicitors Messrs. Robinson Prasad Lawyers (Mr. Robinson Prasad) to file the Statement of Defence, a judgment in favor of the Respondent was entered against the Applicant on 09<sup>th</sup> August 2017, whilst his said

Counsel was present in court. The Hon Magistrate had considered it as “disposal of undefended suit” pursuant to Order VI Rule 8 of the Magistrate’s Court rule 1945.

- c. An application for setting aside of the aforesaid judgment was filed on 21<sup>st</sup> May 2020 before the Magistrate by the Applicant’s subsequent Solicitors Messrs. Patel & Sharma Lawyers, who formally came on record on 29<sup>th</sup> May 2020 in place of the Applicant’s former Solicitors Messrs. Robinson Prasad Lawyers.
- d. Subsequent to the filing of Affidavit in opposition and reply thereto on 1<sup>st</sup> July 2020 and 16<sup>th</sup> July 2020 respectively, the hearing into it being taken up on 22<sup>nd</sup> July 2020, the Ruling on it was delivered by the then Hon. Resident Magistrate J.N.L. SAVOU on 29<sup>th</sup> July 2020, whereby the Applicant’s said Application for setting aside was dismissed, however, ordering no costs.
- e. Thereafter, the Respondent filed its JD Summons on 30<sup>th</sup> August 2023 to recover the judgment sum, after which the Applicant on 2<sup>nd</sup> February 2024 filed his second Application for setting aside the said judgment, which was subsequently withdrawn by the Applicant’s Solicitors on 1<sup>st</sup> March 2024 due to the protest made by the Respondent’s Solicitors through their letter dated 22<sup>nd</sup> February 2024 marked as “KK-5” by the Applicant in his Supporting Affidavit.
- f. Finally, the Means-Test hearing being held on 18<sup>th</sup> April 2024, ruling on it was delivered by the subsequent Resident Magistrate Hon. J. Daurewa on 3<sup>rd</sup> May 2024. The said Ruling is marked as “AQ-2” and annexed to the Affidavit in opposition by the Respondent.
- g. As per the Means-Test Ruling, the Applicant was ordered to pay a monthly installment of \$300.00 from 24<sup>th</sup> May 2024 till January 2025 and thereafter \$600.00 from 31<sup>st</sup> January 2025. This has been complied by the Applicant till November 2024.
- h. The Applicant has paid a total sum of \$2,100.00 from 23<sup>rd</sup> May 2024 till 28<sup>th</sup> November 2024 at the Sigatoka Magistrate’s Court registry. The Applicant’s Counsel in his written submissions has confirmed that the Applicant is currently paying \$500, 00 per month.

**C. DISCUSSION:**

10. Before proceeding to discuss, it is pertinent to recognise the impugned judgment dated 09th August 2017 not as a “Default Judgment”, but as a “judgment in undefended suit” entered pursuant to Order VI Rule 8 of the Magistrate Court Rules 1945) as the Hon. Magistrate had correctly referred to it in his Ruling dated 29<sup>th</sup> July 2020).
11. It is also pertinent to examine the correctness of the mode adopted by the Applicant in making his Application to this Court. When the purported Summons was initially referred to me by the Registry for issual, an important point that drew attention was the propriety of the mode that the Applicant had adopted in filing this Summons. Thus, I directed the same to be issued “subject to any objection” on it. (Vide the minutes sheet dated 27<sup>th</sup> March 2024),

12. The reason being, that the Summons says, as alluded to in paragraph 3 above, that it is made pursuant to **Order 59 Rule 8 (1), 8 (2) Rule 10 (1) (2) of the High Court Rules** and the Inherent Jurisdiction of the High Court, which are inapplicable as far as the Summons in hand is concerned.
13. It is a well-known practice and procedure enshrined in the High Court Rules 1988 that the Order 59 and Rules thereunder are relied on only when the Appeals are taken against the Master's decisions to a Judge of the High Court.
14. The Order 59 and rules thereof under High court Rules 1988 could not have been relied on for the purpose of an Appeal, Leave to Appeal or the Extension of Time to appeal against a Judgment or Ruling pronounced by the Magistrate's Court. The provisions made under Order 37 Rule (1) to (5) of the Magistrate's Court Rules 1945 for the purpose of an Appeal against the Magistrate's Judgment seem to have had escaped the attention of the former and present Counsel for the Applicant.
15. As per the Order 37 rule (1), once the judgment was pronounced on 09<sup>th</sup> August 2017, even if the Applicant had failed to give the Notice of Intention of Appeal verbally then and there or in writing within 7 days from the date of the Judgment, the Applicant could have filed his grounds of appeal within 30 days from the date of the judgment provided he had justifiable reason for the delay, for the length of the delay and he has meritorious defence.
16. But the Applicant for reason/s best-known to him failed to do so and now blames his former solicitor/ Counsel. However, his Appeal has now become abandoned since the Applicant failed to resort to the provisions Order 37 of the Magistrates Court Rules 1945 in a timely manner. Instead, the Applicant pursued behind the Judgment dated 09<sup>th</sup> August 2017 treating it as a default judgment and preferred his Applications for setting aside before the Magistrate.
17. Having failed in his two setting aside attempts, the Applicant is now before this Court after the expiry of nearly 4 years and 8 months from the date of the impugned Ruling by the Magistrate made on 29<sup>th</sup> July 2020 and filed this Application on 3<sup>rd</sup> April 2024 by relying on a wrong Order and Rules under the High Court rules 1988.
18. The learned Magistrate in his impugned Ruling dated 29<sup>th</sup> July 2020 has clearly stated that the impugned Judgment entered on 09<sup>th</sup> August 2017 was made under Order VI Rule 8 of the Magistrate Court Rules of 1945 **as a judgment on undefended suit**. He has also stated that for the reasons discussed in paragraphs 6 to 10 of his Ruling that the Judgment entered on 09<sup>th</sup> August 2017 cannot be dealt with by order XXX Rule 6 of the Magistrate's Court rule 1945 and thereby has dismissed the Application for setting aside.
19. The reason for the Magistrate's above observation and decision, as I understand, is that the impugned judgment entered on 09<sup>th</sup> August 2017 was not a default judgment to warrant an application for setting aside as the Applicant hereof did, not only once, but twice. The Judgment entered on 09<sup>th</sup> August 2017 was a final judgment delivered on the basis of an undefended suit. Hence, there was no default judgment to warrant any Application for setting aside.

20. The only remedy that was available at that time for the Applicant was making a timely Appeal by following the Order 37 of the Magistrate's Court Rules 1945 and not making an Application for setting aside the said judgment dated 09<sup>th</sup> August 2017. The learned Magistrate, in his impugned Ruling dated 29<sup>th</sup> July 2020 has given valid reason for his refusal to set aside the final judgment dated 09<sup>th</sup> August 2017.
21. Even if this Court sets aside the Magistrate's Ruling dated 20<sup>th</sup> July 2020 as moved by the Applicant in his Summons to this Court, the Judgment dated 09<sup>th</sup> August 2017 will remain intact as it was a judgment entered on the basis of an undefended suit.
22. Further, even for the Applicant to come before this Court by way of an Appeal or seeking for the extension of time to Appeal, he should have filed his Application before the very same Magistrate's Court that made the impugned judgment / Ruling, which will in turn act in terms of order 37 Rule 2 for the Applicant to give security for costs and for the transmission of the original record together with the copy records to the High Court.
23. The Applicant conveniently by-passed the Appeal procedure prescribed in the Magistrate's Court Rule of 1945. Thereby, he evaded his obligation of giving security for costs, as a result of which the Respondent is before this Court with no any assurance on security for its costs of Appeal. The Applicant also avoided the would be expenditure on the full copy record or on necessary parts of it, as a result of which the Respondent and this Court are not provided with Magistrate Court's pleadings, transcripts, minutes, proceedings including the default judgment pronounced on 09<sup>th</sup> August 2017.
24. Hence, this Court should not have entertained the purported Summons for extension of time filed by the Applicant before this Court directly, by sidestepping the Magistrate Court. This procedure followed by the Applicant is repugnant to the Order 37 Rules 1 to 8 of the Magistrate's Court Rule. Thus, at this stage, by acting now for then ("*nunc pro tunc*") this court can dismiss this Summons by the Applicant. This Court should not have entertained the Applicant's Summons filed by keeping the Hon. Magistrate and the Respondent in dark, which has caused serious irregularities in the process.
25. The Applicant, who in his summons relied on the wrong order and rules of the High court Rules 1988, namely, Order 59 Rule 8 (1) & (2) and Rule 10 (1) & (2), in paragraph 4.1 of his written submission tendered to this Court on 24<sup>th</sup> January 2025, has relied on Order 55 Rule (1) of the High Court Rules 1988, which reads as follows;

*"ORDER 55  
APPEALS TO HIGH COURT FROM COURT, TRIBUNAL OR GENERAL PERSON*

Application (O.55, r.1)

1. (1) *subject to paragraphs (2) and (3), this Order shall apply to every appeal which by or under any enactment lies to the High Court from any court, tribunal or person.*

(2) *This Order shall not apply to-*

*(a) any appeal by case stated; or*

**(b) any appeal under any enactment for which rules governing appeals have been made thereunder, save to the extent that such rules do not provide for any matter dealt with by these rules. (Emphasis mine)**

(3) .....

(4) .....

26. The above Order 55 Rule 1-(1) 2 (b) clearly shows that **it shall not apply to, *inter alia*, any appeal under any enactment for which rules governing appeal have been made thereunder, save to the extent that such rules do not provide for any matter dealt with by these rules.** I have already observed that for the matter in hand, the Magistrate Court Rules of 1945 has made provisions as to how an Appeal should be initiated against a Magistrate Court judgment. Thus, there is no need for this court to rely on or to be directed by Order 55 of the High Court Rules. Therefore, the reliance of the Applicant’s Counsel under order 55 of the HCR cannot be accepted and the attempt by the Counsel to shift from Order 59 of the HCR (which was wrong) to Order 55 of the HCR should be disallowed.

**D. MERITS OF THE MATTEER:**

27. Although, what I have observed above are sufficient for this Court to dismiss the Summons in hand, for the sake of completeness, I shall briefly delve in to the merits of the Application as well.

28. By obtaining the extension of time to Appeal and Leave to Appeal from this Court, what the Applicant intends to Appeal against is the Ruling dated 29<sup>th</sup> July 2020, whereby the Hon. Magistrate dismissed the Application for setting aside preferred by the Applicant on 21<sup>st</sup> May 2020.

29. It is to be observed that the judgment on the undefended suit was entered against the Applicant by the then Hon. Magistrate Mr. J.N.L. Savou on 09<sup>th</sup> August 2017. The first purported Application for setting aside was made by Messrs. Patel & Sharma Lawyers for the Applicant only on 21<sup>st</sup> May 2021, exactly after 2 years, 9 months and 12 days. The reason why I refer to it as “purported application” is that, as I alluded to above, the nature of the judgment entered on 09<sup>th</sup> August 2017, did not warranted an application for setting aside. Because, it was not a default judgment, but only an undefended judgment as correctly pointed out by the learned Magistrate in his Ruling dated 29<sup>th</sup> July 2020. It was entered in the presence of the applicant’s then Counsel, who had failed to file the defence.

30. The task before this Court, if the extension is granted, is the examination of the propriety of the Ruling made by the Magistrate on 29<sup>th</sup> July 2020 refusing to set aside. In order to consider leave, this Court does not have any material before it in the form of Pleadings, Affidavits and other supporting evidence submitted to the Court below by the Applicant to purge his default. Had the Applicant filed this Summons at the Magistrate Court by following the Order 37 and Rules 1 to 5, or at least subsequently filed the copy record before this Court, this quandary could have been avoided.

31. However, the impugned Ruling dated 29<sup>th</sup> July 2020, refusing to set aside the default judgment, reveals that the Magistrate had granted the Applicant several adjournments to file

his Statement of defence and the applicant had failed to file the same, on which the Magistrate proceeded to enter the judgment on the basis of “Disposal of undefended suit” pursuant to Order 6 Rule 8 of the Magistrate’s Court rule of 1945. The Applicant was represented by his Counsel on this fateful day, but failed to act diligently. The Applicant who also slept over his right to Appeal, now cannot pin the blame on his former Solicitor.

32. In my view, if the Appellant was aggrieved by the judgment dated 09<sup>th</sup> August 2017, what the Applicant’s Solicitors should have done on the judgment being entered in such a manner, was promptly giving the verbal “Notice of Intention to Appeal” or giving the same in writing within 7 days of the judgment and proceeding to file the grounds of appeal within 30 days from the date of the impugned judgment dated 09<sup>th</sup> August 2017.
33. Instead, the Applicant, not only made his first belated Application for setting aside after 2 years, 9 months and 12 days, but also made his second Application for setting aside on 2<sup>nd</sup> February 2024 after around 6 years, 5 months and 23 days, which was later withdrawn. In my view, the filing of Applications for setting aside by the Applicant was an unwarranted and vexatious exercise.
34. The Judgment dated 09<sup>th</sup> August 2017 was not a default Judgment, but a final judgment. The Challenge to the final judgment dated 09<sup>th</sup> August 2017 should have commenced by giving Notice of Intention to Appeal as prescribed by Order 37 Rule 1 of the Magistrate’s Court Rules 1945, on failure of which by giving exceptional grounds to challenge the same on meritorious defence.

**E. GROUND OF APPEAL:**


35. The Applicant has adduced 7 purported grounds of appeal. All what the Applicant, by his summons in hand, has intended is to challenge the propriety of the Ruling dated 29<sup>th</sup> July 2020. But I find that all the purported grounds of appeal, except for the ground No- 2, revolve around the propriety of the final Judgment dated 09<sup>th</sup> August 2017. If the applicant was to challenge the said final judgment, it should have been done by following the appellate procedure pursuant to the Rules.
36. The purported ground No-2, appears to be dealing with the reinstatement of the applications, where the Applicant’s Counsel proposes to argue that the learned Magistrate applied incorrect test and principles. I don’t find any error on the part of the learned Magistrate warranting this Court to delve into it as there was no any striking out of a cause warranting the reinstatement.
37. If, the learned Magistrate had erred in disallowing the Applicant’s then Counsel to file the Statement of Defence and by entering the impugned judgment on a mention date, the Applicant could have exercised his right to Appeal by following the relevant rules and procedures, which the Applicant has failed.
38. It is after the laps of more than 6 years from the date of the final judgment, the Applicant has risen from his slumber and made this frivolous and vexatious Application by pinning the blame on his initial Solicitors/ Counsel, and particularly after the Respondent commence his JDS

process. The alleged lack of due diligence, inaction, laxity and failure to file the Statement of defence by Mr. Prasad, are issues between the Applicant and his Solicitors. The Respondent cannot be punished or allowed to suffer in that regard.

39. The Respondent filed his JDS on 30<sup>th</sup> August 2023. Thereafter, the Applicant filed his aborted Second Application for setting aside on 2<sup>nd</sup> February 2024. The Ruling on JDS was delivered on 3<sup>rd</sup> May 2024 and the Applicant, in terms of the said ruling, commenced payment from 23<sup>rd</sup> May 2024 by installment of \$300,00, on which he has so far paid \$1,200.00 till 28<sup>th</sup> November 2024. The Application in hand by the Applicant made on 3<sup>rd</sup> April 2024 appears to be another unsuccessful attempt to frustrate the Respondent.
40. The Judgment dated 09<sup>th</sup> August 2017 is not a default judgment. It cannot be dealt with by the extension of time as moved by the Applicant. The Applicant has abandoned the Appeal by not adhering to the relevant provisions of the Magistrates Court Rule 1945.
41. For the reasons discussed above, the Summons filed by the Applicant on 3<sup>rd</sup> April 2024 has to be dismissed, however with no cost.

**F. FINAL ORDERS:**

- a. The Applicant's Application for Leave to Appeal, file Notice of Appeal and Grounds of Appeal Out of Time fails.
- b. The Applicant's Application for stay of execution of the Ruling dated 29<sup>th</sup> July 2020 pronounced by the Magistrate of Sigatoka in Civil Action No- 01 of 2017 and the proceedings thereof, is hereby declined.
- c. The execution of the Ruling dated 3<sup>rd</sup> May 2024 pronounced pursuant to the Means Test hearing on the Judgment Debtor summons shall proceed uninterrupted.
- d. There shall be no costs and the parties to bear their own costs.

  
A.M. Mohamed Mackie  
Judge



At the High Court of Lautoka on this 11<sup>th</sup> day of August, 2025.

**SOLICITORS:**

For the Applicant:

Messrs Sunil Gosaip Law Firm, Barristers & Solicitors

For the Respondent:

Messrs. Sherani, Solicitors & Notaries Public