

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

CIVIL ACTION NO. HBC 3 OF 2019

BETWEEN : **LALÉ'S HARDWARE SOLUTIONS LIMITED** a limited liability company having its registered office in Martintar, Nadi
PLAINTIFF/ RESPONDENT

AND : **ABSOLUTE BEST BUILDERS LTD** a limited liability company having its registered office at Nasau, Nadi
DEFENDANT/ APPLICANT

BEFORE : A. M. Mohamed Mackie- J

COUNSEL : Ms. Naidu A O/I, for the Defendant- Applicant.
Ms. Ravai S. for the Plaintiff-Respondent.

HEARING : Agreed to dispose by way of written submissions.

WRITTEN SUBMISSION: By the Plaintiff- Respondent filed on 1st July, 2025.
Not filed by the Defendant-Applicant.

DATE OF RULING : 29th August 2025

RULING

A. INTRODUCTION:

1. Before me is an application titled "NOTICE OF MOTION TO APPEAL OUT OF TIME" preferred on behalf of the Defendant-Applicant ("the Applicant") on 7th February 2025 seeking leave to file an appeal out of time against the decision of the learned Master ("the Master") Ms. Preetika Prasad, made on the 16th day of May 2024.
2. Prior to the said application, on 20th November 2024, an Ex-PARTE NOTICE OF MOTION was also filed on behalf of the Applicant seeking that the order made by this court fixing the matter for formal Proof hearing on 17th September 2024 be set aside and the matter be allowed to take its normal cause.
3. Both the above purported applications are supported by two separate affidavits sworn by Mr. William Rosa, the Defendant's Counsel, on 7th February 2025 and 20th November 2024 respectively.

B. LAW:

4. It is to be observed that none of the above applications state under which order and rule of the High court Rules 1988, those are made against the Master's Order made on 5th July 2024, and the subsequent Order made by this Court on 17th September 2024.
5. Apparently, the Master's Order dated 5th July 2024, made to strike out the defence and for the matter to proceed for formal proof was only an interlocutory order. Thus, the Defendant should have sought leave to appeal pursuant to Order 59 Rule (8) sub-rule (2).
6. The time period within which the appeal to be filed in case of an interlocutory Order or judgment, is 7 days from the date of granting leave to appeal as prescribed by Order 59 Rule 9 sub-rule (b) of the High Court Rules 1988.
7. The Application for the enlargement of time period for filing and serving a notice of appeal or cross appeal should be made to the Master before the expiration of that period and to a single judge after the expiration of that period.
8. For the sake of easy reference and lucidity, I shall reproduce the Order 59 and Rules 8,9,10 and 11, of the High Court Rules 1988 as follows.

Appeal from Master's decision (O. 59, r. 8)

8. (1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.

(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.

Time for appealing (O. 59, r. 9)

9. An appeal from an order or judgment of the Master shall be filed and served within the following period –

(a) 21 days from the date of the delivery of an order or judgment; or

(b) in case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

Extension of time (O. 59, r. 10)

10. (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.

Application for Leave to Appeal (O. 59, r. 11)

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. Notice of appeal

C. BRIEF HISTORY:

9. The Plaintiff – Respondent (“the Respondent”) on 30th January 2019 filed the above styled action against the defendant seeking the following reliefs;
 - a. *Judgment in a sum of \$89,087.98*
 - b. *Damages for breach of agreement.*
 - c. *Interest as per agreement,*
 - d. *Costs on indemnity basis.*
10. The Defendant in its statement of defence filed on 31st January 2019, having admitted the majority of the averments in the SOC, moved for the dismissal of the Plaintiff’s action with costs on indemnity basis.
11. Pursuant to the closure of pleadings, a Summons dated 4th March 2024 was filed before the Master by the Plaintiff on 28th February 2024 under order 25 rule 09 seeking orders, *inter alia*,
 1. *The Defendant show cause as to why its Statement of Defence should not be struck out for want of prosecution due to their failure to comply with the directions of the Master on finalizing PTC minutes expeditiously without any real interest in bringing the matter to trial;*
 2. *Should orders be granted by the court for 1 above, that this matter be transferred before a judge to set a formal proof date for the Plaintiff;*
12. The summons being served and supported inter-parte on 2nd May 2024 before the learned predecessor Master, direction was given for the defendant to file affidavit in opposition before 16th May 2024, with an unless order that if no affidavit is filed, Orders will be granted as sought in the summons. The matter was then fixed to be mentioned on 28th May 2024.
13. However, when the matter was called before the present Master on 5th July 2024, as the Defendant had not filed the Affidavit in opposition for a long time, the Master granted orders in terms of the said summons dated 4th March 2024, struck out the defence and directed the matter to be referred to a judge for formal proof hearing.
14. Subsequently, as the matter was allocated to me pursuant to the Master’s Order and the same being mentioned before me on 17th September 2024, the matter was fixed for formal proof hearing before me. Then, the Defendant’s Solicitors filed the Ex-parte Summons on 20th November 2024, as stated above, seeking to set aside my order made on 17th September 2024 fixing the matter for formal proof hearing.

15. Accordingly, when the matter came up for formal proof hearing on 25th November 2024, the Notice of Motion filed by the Defendant to set aside the order fixing the matter for formal proof was supported inter-parte. However, since there is no provisions to vacate the Order fixing the matter for formal proof hearing, the Court disregarded the Defendant's application and fixed the F/P hearing for 22nd May 2025.
16. It was when the matter stood fixed for F/P hearing on 22nd May 2025, the solicitors for the Defendant on 7th November 2024 filed the Notice of Motion in hand seeking leave to appeal out of time the present Master's Order made on 5th May 2024.
17. The Plaintiff filed its affidavit in response with annexures marked as "SRP-1" to "SRP -2". No affidavit in reply was filed by the Defendant.

D. HEARING:

18. Both the parties agreed to have the hearing disposed by way of written submissions. However, only the Plaintiff- Respondent's Solicitors filed their written submissions and no written submissions was filed on behalf of the Defendant – Applicant.


E. DETERMINATION:

19. In the light of what I have discussed above and for the following reasons , the Defendants Application by way of Notice of Motion filed on 7th February 2025 should fail and be dismissed.
 - a. The Defendant, by way of the said application, has not moved for leave of this Court to appeal the Master's interlocutory order made on 5th May 2024.
 - b. What the Defendant has prayed for, as his relief in the impugned Notice of Motion, is only the extension of time to appeal. Even if the extension of time is granted, the Defendant will be left with no leave of the Court to appeal. Accordingly, in the absence of a prayer for leave to appeal, which is a pre-condition to appeal against an interlocutory order/ judgment made by the Master, the Defendant's application has to fail necessarily.
 - c. Even if the Notice of Motion contains a prayer for leave to appeal, same cannot be favorably considered as the Defendant is guilty of undue delay in making this application after around 9 months from the date of the impugned order made by the Master on 5th May 2024. This Notice of Motion was filed before this Court only on 7th February 2025.
 - d. The reason adduced by the Defendant's Counsel, in his affidavit in support, for the apparent delay occurred in making this application cannot be accepted, as the existence of dispute between him and his client (the Defendant) with regard to his professional charges, is not a valid reason.

- e. The dismissal of the Defendant's application in hand, will not fully shut the doors for the Defendant to challenge the Plaintiff's claim, as he can apply to this court to set aside the formal proof judgment as and when it is entered and served on it., however if it has merits to do so.
20. The Ex-parte Notice of Motion filed on 20th November 2024, and supported inter parte, seeking to set aside the order made by this Court fixing the matter for formal proof hearing, also should be dismissed.
21. However, no prejudice is caused to the Defendant, as it is at liberty to file an application to have the formal proof judgment set aside, if it is entitled to, as and when such a judgment is entered and served on it.

ORDERS:

22. For the reasons adumbrated above, this court makes the following orders;
- a. The Defendant's Notice of Motion to Appeal Out of Time fails.
- b. The said Notice of Motion Filed on 07th February 2025 seeking **leave to Appeal out of time** against the Master's Order dated 5th July 2024 is hereby dismissed.
- c. The Defendant's Ex-Parte Notice of Motion filed on 20th November 2024, seeking to set aside the Order made by this Court on 17th September 2024 fixing the matter for formal proof hearing, is also hereby dismissed.
- d. The plaintiff may proceed for formal proof hearing
- e. There shall be no Order for costs and the parties are to bear their costs.


A.M. Mohamed Mackie
Judge.



At the High Court of Lautoka on this 29th day of August, 2025.

SOLICITORS:

For the Plaintiff- Respondent:
For the Defendant:

Messrs. Vijay Naidu & Associates, Barristers & Solicitors
Messrs. Zodiac Law, Barristers & Solicitors.