

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Civil Appeal No. CBV0018/2019

[Court of Appeal No. ABU 85 of 2018]
[High Court Action No. HBC 315 of 2014]

BETWEEN: **PATRICK PAUL**

Petitioner

AND: **DIRECTOR OF LANDS**

1st Respondent

AND: **REGISTRAR OF TITLES**

2nd Respondent

AND: **THE ATTORNEY-GENERAL**

3rd Respondent

Coram: The Hon. Acting Chief Justice Kamal Kumar
President of the Supreme Court

Counsel: **Ms N. Choo for Applicant**
Mr A. Prakash and Mr A. Chand for Respondents

Date of Ruling: **9 June 2020**

R U L I N G
(Filing of Affidavit by Law Clerk)

Introduction

- [1] On 6 August 2019, Patrick Paul (hereinafter referred to as “**the Applicant**”) filed Application for Enlargement of Time to file Petition for Leave to Appeal. (“**the Application**”)
- [2] On 27 August 2019, being the returnable date of the Application, Counsel for the Respondents objected to filing of Affidavit of Lemeki Sevutia the Litigation Clerk in the firm of R. Patel & Co., Solicitors for the Applicant (“**Preliminary Issue**”).
- [3] Court directed parties to file Submission in respect of the preliminary issue and listed it for hearing on 19 September 2019.
- [4] Parties filed Submissions.

Preliminary Issue

- [5] Counsel for the parties relied on Order 41 of High Court Rules (**HCR**) and various case authorities in support of their Submission.
- [6] Order 41 Rule 5 of HCR provide:-

“5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.”

[7] This rule clearly permits deponents of Affidavit in Interlocutor matters to swear Affidavits “containing statements of information or belief with the sources and grounds thereof”.

[8] Counsel for the Respondent relied on various case authorities in support of Respondent’s submissions. This Court feels that those case authorities be analysed to see the position of Court in those cases.

[9] Respondent’s Bundle of Authorities:

(i) **Angco v. Mudaliar & Others**, [2000] HBC 26 of 1997L (1 September 2000)

In this case First and Second Respondents applied to set aside Judgment by Default and the Application was supported by Affidavit of Senior Litigation Clerk employed in their Solicitors office.

The Court in respect to Affidavit filed by Senior Litigation Clerk stated as follows:-

“The court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of their clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. it trespasses the demarcation between client and solicitor roles.”

(ii) **Deo v. Singh** [2005] FJHC 23; HBC0423.2004 (10 February 2005)

In this case Plaintiff filed Application for Specific Performance pursuant to Order 86 of High Court Rules.

Law Clerk employed by Solicitors for the Defendant filed Affidavit in Opposition.

Court stated as follows:-

“The swearing of affidavits by solicitor’s clerks in contested proceedings appears with alarming regularity before the courts. Arun Kumar says he was duly authorized by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in “first person”. The affidavit put before the court is more like a statement of defence in its working rather than being expressed in first person. Swearing of affidavits by solicitor’s clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained.”

In this proceeding the Application was not an interlocutory application and even though Court criticized filing of Affidavit by Solicitors Clerk it appears that Court took contents of Clerk’s Affidavit into consideration.

(iii) **Mishra Prakash & Associates v. Nagan Engineering (Fiji) Ltd** [2018] FJHC 198; HBA 001.2010 (9 March 2018)

In this case Applicants filed Application to Extend Time to Appeal, Leave to Appeal Master’s Decision and Leave to Amend Appeal which Application was supported by Applicant’s Solicitors Chief Clerks Affidavit.

Court stated as follows:-

“It is trite law that a lawyer’s clerk may not affirm an affidavit intended to be used in a contentious matter in Court. This is indeed a contentious matter where the Respondents are strongly resisting the application for extension of time. The Affidavit should have been affirmed by the Solicitor having personal knowledge of the pertinent matters. More precisely, the deponent should have been the Solicitor who had the conduct and the management of the cause.

What is more, the law clerk deposes “*I am duly authorized to swear this Affidavit on behalf of the Appellant*”.

I note that the law clerk has no written authorization to affirm the Affidavit. I cannot comprehend the basis on which he was deposing.”

Even though Court made such comment it did not strike out the Affidavit but considered the contents of Clerk's Affidavit in determining the Application.

(iv) **Tavo & Anor. v. Enasio** [2019] FJHC 40; HBC 369.2017 (28 February 2019)

In this case Applicant filed Application to Extend Time and Leave to Appeal Master's Decision which Application was supported by Affidavit of Applicant's Solicitors clerk.

Court stated as follows:-

"9. At the outset I shall refer to the Ruling of Sapuvida J delivered on 6 May 2016 in Panache Investment Ltd and/or its subsidiary company AND The New India Assurance Co Ltd: Lautoka High Court Civil Action No. HBC 56 of 2014. His Lordship said at para [27] of his Ruling that:

"I plainly disregarded the affidavit of Sanil Kumar, a law clerk filed in support of the application for seeking leave to appeal the interlocutory ruling of the Master with reasons emphasizing the case law on the issue of filing affidavits by law clerks in contentious matters in the High Court of Fiji."

10. I adopt and apply the above Ruling to the instant case as I note the affidavit in support is affirmed by the solicitor's clerk and not by the Defendant and contains facts in issues and issue of law which a Law Clerk cannot assert to, in the words of the Judge.

11. In the event this Court has no alternative but to reject the affidavit of Alelia in to. Consequently in the absence of an affidavit in support, the application for leave must necessarily fail."

(v) **Singh v. Tower Insurance (Fiji) Ltd** [016] FJHC 462; HBC 81.2015 (27 May 2016).

In this case Plaintiff filed Application to Strike Out Defendant's Summons seeking further and better particulars which Application was supported by Affidavit of Law Clerk employed by Plaintiff's Solicitors.

Court stated as follows:-

“In my view, Law Clerks of Solicitors are neither litigants nor competent legal persons to raise such objections. The litigants are entitled to take up such assertions only on advice of their Solicitors. The Law Clerk does not depose that he has been advised by the Plaintiff’s Solicitors on the contentious legal matters he deposed.”

Court also relied on statements made in **Dr Ramon’s** (Supra) case and **Deo’s** case (Supra).

Court held that Affidavit of Law Clerk was “defective and unacceptable”.

- (vi) **Media Metro Ltd, In re** [2016] FJHC 1073; Winding Up No. 33 of 2015 (25 November 2016)

In this case Debtor Company applied for extension of time to file Affidavit in Opposition pursuant to Rule 7(1) and 201 of Companies (Winding-Up) Rules which application was supported by Affidavit of Legal Executive employed by Debtor Company’s Solicitors.

Court stated as follows:_

“I acknowledge the force of the submission by Counsel for the Petitioning Creditor. The swearing of affidavits by solicitor’s clerks in contested proceedings should be a rare exception and the reason why the party is unable to depose ought to be explained.”

Petitioning Creditor opposed the Application for Extension of Time and Court held that it was a contested proceeding.

Court also noted that no explanation was given as to why Respondent Debtor was not able to depose the Affidavit in Support.

Court adopted the following statement from **Rupeni Silimuana Momoivalu v. Telecom Fiji Ltd.** Civil Action No. HBC 527 of 1992:-

“The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an

embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

“It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr Joji Boseiwaqa who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1077 about the propriety of law clerks deposing affidavits”.

(Emphasis added)

Court in respect to swearing of Affidavit by Legal Executives stated as follows:-

“Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Respondent Debtor’s Summons seeking extension of time to file an affidavit in opposition is unacceptable. Therefore, the whole of the affidavit is removed from the court record. The affidavit is worthless and ought not to be received in evidence in any shape whatever. This may leave the court with no option but to dismiss the Summons since there is no material on which the court can exercise its discretion.”

(vii) **Carpenters (Fiji) v. Jalam** [2016] FJHC 126; HBC 59.2011 (15 December 2016)

In this case, Plaintiff filed an application to re-instate the action to the cause list which application was supported by Affidavit of Law Clerk employed by Plaintiff’s Solicitor.

Court noted that there was nothing in Law Clerk’s Affidavit to say why Plaintiff could not depose the Affidavit.

Applying the principles stated in **Dr Ramon's** case, **Deo's** case and **Rupeni's** case Court upheld objection raised by Defendant's Solicitors on swearing of Affidavit by Law Clerk in a contested proceeding.

(viii) **Momoivalu v. Telecom Fiji Ltd** HBC 527.1997

In this case Defendant applied to have the action struck out for want of prosecution.

Defendant (Applicant) filed two Affidavits by its Senior Executive, whilst Plaintiff (Respondent) filed Affidavit sworn by his Solicitors Law Clerk.

Defendant (Applicant) raised objection about Affidavit being sworn by Law Clerk. Court stated as follows:-

“The respondent chose to reply not in person but through a litigation clerk from his solicitors firm.

The applicant takes objection to that affidavit and quite rightly so. First, the application to strike out the claim is a contested hearing, it is not appropriate for a clerk to depose in support of it. Secondly, the affidavit contains material which is irrelevant and pure hearsay.

The proportion of offending material to anything that is even marginally admissible or relevant is so high that if this matter is to be disposed of with any regard to the law of evidence it would be right that the whole of the affidavit be removed from the file rather than expunging the irrelevant matters to put the affidavit in order. However, the applicant has offered some response to the document and so it shall remain on the file.”

(ix) **McCaig v. Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012)

Supreme Court considered the Affidavit filed by Litigation Clerk but noticed that he had failed to disclose the source of information as required by Order 41 Rule 5(2) of HCR.

[10] Counsel for the Applicant referred two cases in addition to **Deo's** case (Supra).

[11] Two additional cases submitted by Applicant's Counsel to Court are:-

- (i) **Vodafone Fiji Ltd v. Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008 (30 August 2010).

In this case Affidavit in Opposition filed by Debtor Company's Solicitor's Clerk was held to be defective on the ground that Winding-Up proceedings was not an Interlocutory matter and that the Clerk did not have personal knowledge of the facts deposed by her.

- (ii) **Chandra v. Tuisawau & Anor.** [2003] HBC No. 388 of 2002S (29 September 2003)

In case Plaintiff filed action against three Defendants seeking Order for Vacant Possession under section 169 of Land Transfer Act 1971.

Once again the matter before the Court was not an interlocutory matter and as such Order 41 Rule 5(1) was appropriate.

Affidavit in Opposition was signed by 3rd Defendant who was not in occupation of the subject premises and as such Plaintiff took objections to Affidavit sworn by 3rd Defendant. Court allowed the Affidavit to be taken into consideration and stated as follows:-

“Generally there is nothing to stop a person from swearing an affidavit in support of a cause notwithstanding that he or she is not a party to the case, as long as the contents are material and personally known to the deponent. In this case, D3 had been the link between the Plaintiff and D1 and D2, and while it would have been desirable to have their affidavit evidence, D3's affidavit in support of their cause, given the circumstances of this case, is acceptable.”

[12] From the case authorities cited in this Ruling one thing that becomes clear is that some Legal Practitioners fail to adhere to the sentiments expressed by Courts and principles stated by Courts in respect to Affidavits deposed by Law Clerks/Legal Executive/Litigation Clerks employed by them.

- [13] Courts have time and again expressed its concern in the manner in which Law Clerks/Legal Executives/Litigation Clerks depose Affidavits.
- [14] This Court is not saying that Law Clerks/Legal Executives/Litigation Clerks employed by law firms acting for a party should not sign the Affidavit altogether.
- [15] Based on what has been said by the Courts it is only appropriate that a guideline be set for signing of Affidavit by third parties including Law Clerks/Legal Executives/Litigation Clerks.
- [16] When Third Party (including Law Clerks/Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-
- (i) must be authorised in writing by that party to depose such Affidavits;
 - (ii) must depose as to why that party and if a Company than why its director or authorized officer cannot depose the Affidavit;
 - (iii) **must not** depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:
 - (a) Affidavit is in support of or in opposition to Application for Summary Judgment;
 - (b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;
 - (c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.
 - (iv) may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.

Affidavit of Lemeki Sevutia sworn on 6 August 2019 (“Sevutia’s Affidavit”)

[17] Lemeki Sevutia is a Senior Litigation Clerk in the firm of R.Patel Lawyers, Solicitors for the Applicant.

[18] Lemeki Sevutia had been authorized by the Applicant to depose Affidavit in Support of Application for Enlargement of Time. Counsel for the Respondent submitted that Authority (Annexure “A” to Sevutia’s Affidavit) as Appeal No. ABU085 of 2018 which is Court of Appeal number. This Court finds that this does not in any way make the Authority defective because ABU 078 of 2018 and ABU 0031 of 2018 were consolidated.

Also that fact that when Application for Enlargement of Time was filed no number was assigned by Supreme Court and as such Supreme Court number cannot be inserted in the Authority.

[19] It appears that what is stated at paragraph 1 to 18 of the Sevutia Affidavit is uncontested facts and mostly supported by the documentary evidence.

[20] It is with great interest this Court wishes to quote paragraphs 21 and 23 to 30 from Sevutia’s Affidavit:-

“21. That **I verily believe that there were serious anomalies in the findings of the Appellate Court on Section 57 of the Land Transfer Act** which warrants the review of the Supreme Court.

23. **It is the Applicant’s contention that despite there being more than sufficient evidence that the Registrar of Titles Notice dated 15th October, 2012 served on R Patel Lawyers, who at the material time were acting for Kilowen (Fiji) Limited, was done in breach of s57, the Court of Appeal deemed “sufficient service”.**

24. **The said Notice, was issued to R Patel Lawyers under s.57, incorrectly** referred R Patel Lawyers as the Mortgagee in the said letter. A copy of the said Notice is annexed hereto and marked as tab “G”.
25. That following the receipt of the letter by R Patel Lawyers, our office on 29th October, 2012 wrote to the Registrar of Titles. The contents of the letter of R. Patel Lawyers clearly stipulated that the payment of the arrears would be arranged by the Lessee to avoid cancellation of its Lease. **The letter which was written on behalf of the Lessee, Kilowen (Fiji) Limited was wrongly construed by the Court of Appeal was written on behalf of the Applicant/Petitioner.** A copy of the Letter from R. Patel Lawyers dated 29th October 2012 is annexed hereto and marked as tab “H”.
26. The Court of Appeal in its Judgment stated at paragraph 38:
- “It is admitted that consequence to the notice being sent, the law firm responded within one month period. The Letter said “Kindly note that we are arranging for the alleged arrears of rental to be paid by our client in order to ensure that there is no cancellation of our clients lease....” It is clear and unequivocal evidence that the Appellant infact had notice and that he acted in pursuance of such notice.
27. **That the Appellate Court failed to take into account the operative word in the said letter which was “our client’s lease”.** The said letter was not written in account of the mortgagee, Patrick Paul. The letter was written on behalf of the Lessee Kilowen.
28. In the said letter Kilowen Fiji Limited said it would pay the alleged arrears of rental to avoid the lease being cancelled. The Registrar of Titles should have caused a Notice to be issued to Applicant/Petitioner. **There was no evidence before the Court that any such Notice in terms of s.57 of the Land Transfer Act ever written to Applicant/Petitioner.**
29. **The Court of Appeal erred in holding that there was sufficient compliance with s.57 and disregarded the evidence of Registrar of Titles own witness, Ms**

Torika Goneva who admitted that no notice in terms of s.57 was served on the Applicant/Petitioner and that the Notice which was issued by her office to R Patel Lawyers was “completely defective”. **Against the strong evidence before the Appellate Court, it ruled that compliance was sufficiently met.**

30. That the **Applicant/Petitioner verily believes that:-**

- a) There is no substantial delay in making an application for enlargement of time;
- b) The reasons for the delay in not filing a timely Appeal has been explained by the Applicant/Petitioner;
- c) The merits in the Grounds of Appeal in the Proposed Petition and the basis stated therein justifies that the Honourable Court allow its discretion in granting orders for an extensions of time to file the Appeal; and
- d) The Court of Appeal by making such a finding on s.57 of the Land Transfer Act, has effectively set a wrong precedent and grounds for probable misapplication of s.57 for future cases.”

[21] This Court finds it quite outrageous that Lemeki Sevutia being Senior Litigation Clerk has blatantly criticized decision delivered by Court of Appeal and stated that Court of Appeal erred in many respects.

[22] Lemeki Sevutia also failed to state as how he can say what Applicant/Petitioner verily believes what is stated at paragraph 30 of his Affidavit.

[23] No doubt Lemeki Sevutia by making such comments has embarrassed himself and his employer to a great extent.

[24] This sort of behavior and comments from a person who is not a Legal Practitioner is totally unacceptable and tantamounts to greatest of disrespect to the Court of Appeal Judges.

[25] This Court would have considered Sevutia's Affidavit with certain paragraphs expunged but in view of comments made at paragraphs 21 to 24 of this Ruling the whole Affidavit would have to be struck out and expunged from the Court file.

Costs (Preliminary Issue)

[26] Court takes into consideration that both parties filed Submissions and made oral submissions on preliminary issues.

Orders

[27] This Court makes following Orders:-

- (i) Affidavit of Lemeki Sevutia sworn and filed on 6 August 2019, be struck out and expunged from Court file;
- (ii) Applicant do pay Respondent's cost on preliminary issue assessed in the sum of \$1,000.00 within thirty (30) days from date of this Ruling.



Mr. Justice Kamal Kumar

The Hon. President of Supreme Court

Solicitors:

R. Patel Lawyers for the Applicant

Office of the Solicitor-General for the Respondent