

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. HBC 273 of 2009

Between: K Naidu Investment Proprietary Limited

Plaintiff

And: Azam Khan

Defendant

Appearances: Mr F. Vosarago for the plaintiff

Mr Vinit Singh for the defendant

Date of hearing: 6th November, 2014

Judgment

1. By inter partes summons filed on 22 September, 2014, the plaintiff moves that the time period for appeal of a decision of the Master of 8th July 2014, be enlarged under Or 59, r 10, and for a stay of all proceedings, in relation to the execution of that decision.
2. *The background*
 - a) On 31st March, 2014, I delivered judgment setting aside the default judgment entered against the defendant and made order that the plaintiff show cause why this case should not be struck out for want of prosecution.
 - b) On 29 May, 2014, the plaintiff moved by notice of motion to issue writ of summons against the defendant, out of jurisdiction. On 8th July 2014, the Master struck out the action for want of prosecution on the ground that the plaintiff had failed to show cause under Or 25, r 9.
3. At the hearing, Mr Vosarago, counsel for the plaintiff submitted that the steps taken by the plaintiff to serve writ out of jurisdiction resolved the issue of want of prosecution ordered by Court.

4. Mr Singh, counsel for the defendant submitted that the application is misconceived, as leave to appeal has to be sought. The Order of the Master was an interlocutory order, not a final order. He further contended that the plaintiff had not complied with Or25,r 9 and shown cause for want of prosecution, in terms of my judgment. Finally, Mr Singh submitted that the writ of summons was filed on 25th August,2009. The writ has expired.
5. Mr Vosarogo, in reply, submitted that the Order of the Master was a final order and leave was not required.

6. *The grounds of appeal*

The affidavit in support of the application for enlargement of time to appeal sets out the following proposed grounds of appeal :

- (a) That the Learned Master erred in law when he failed to consider that judgment was not proper as the Plaintiff had already begun proceedings to overcome the requirement of serving the Defendant out of jurisdiction.*
- (b) That the Learned Master erred in law and fact when he failed to properly evaluate procedural requirement of the process and the history of the matter so as to arrive at a considered ruling in law.*
- (c) That the Learned Master failed to properly and fully consider the history of the writ process and the failure of the Defendant to defend the writ of action after filing of acknowledgment of service.*
- (d) That the Learned Magistrate erred in law and in fact by not considering the Plaintiff's process by striking out the same without proper analysis of the same and of the surrounding circumstances of the case.*

7. *The determination*

- a.** The preliminary question that I have to determine is whether the Order of the Master is an interlocutory or final order.

- b. That issue has been settled by the FCA in ***Goundar vs Ministry of Health***, (Civil Appeal No. ABU 0075 of 2006 S. the Court stated:

Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:

1. *an application to stay proceedings;*
2. ***an application to strike out a pleading;***
3. *an application for an extension of time in which to commence proceedings;*
4. *an application for leave to appeal;*
5. *the refusal of an application to set aside a default judgment;*
6. *an application for leave to apply for judicial review.*(emphasis added)

- c. It follows that the Order of the Master striking out the action is an interlocutory order and requires leave. The plaintiff's summons is misconceived.
- d. I have considered the proposed grounds of appeal.
- e. The plaintiff was required to show cause in the first instance, before he took steps to file summons to serve writ out of jurisdiction. This, the plaintiff failed to do so. There is no merit in the first ground of appeal.
- f. The second and third grounds urge that the Master failed to evaluate the procedural requirements and the history of this matter. I had delivered judgment on that matter on 31st March, 2014,. The plaintiff was required to comply with my orders and show cause. In my view, the Master quite correctly struck out the action.
- g. In my judgment, there are no merits in the proposed grounds of appeal.
- h. The plaintiff's summons fails.

8. Orders

- (a) The plaintiff's summons is declined.
- (b) The plaintiff shall pay the defendant costs in a sum of \$ 750 summarily assessed.

19th November, 2015



A.L.B. Brito-Mutunayagam

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Judge