

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 214 OF 2015

BETWEEN : **WESTERN LAND DEVELOPMENT AND INVESTMENT LIMITED** a limited liability company having its registered office in Ba, Fiji.

PLAINTIFF

AND : **ANIL KUMAR** of Bulabula, Ba, unemployed sued for and on behalf of Lila Wati also known as Niloati in her personal capacity and as executor and trustee of the **ESTATE OF HARI PRASAD** deceased, Testate.

1ST DEFENDANT

AND : **ANIL KUMAR & ORS** of Bulabula, Ba, Fiji, Farmer and **VIVENDRA KUMAR** also known as **VIREND KUMAR** of Bulabula, Fiji, Farmer and **ANJILLA DEVI** of Varadoli, Ba, Fiji, engaged in domestic duties in their personal capacity and as Executors and Trustees of the **ESTATE OF HARI PRASAD**, Laborer.

2ND DEFENDANTS

COUNSEL : Mr. N. Padarath – for the Plaintiff

: Mr. Ravneet Charan – for the Defendants

DATE OF HEARING: 12th September, 2018

DATE OF RULING : 26th October 2018

RULING

A. Introduction:

1. This brief ruling pertains to the hearing held before me on 12th September 2018 in relation to the Summons filed on 26th April 2018 on behalf of the defendants, supported by an affidavit dated 17th April 2018 and sworn by one ANIL KUMAR, who now stands as the 1st defendant and the 1st named second defendant.

2. By the above summons , the defendants have moved that ;
 - a. *The Master's order of 8th September, 2017 striking out the Amended Statement of Defence of the First and Second Defendants be set aside and vacated;*
 - b. *That the First and Second Defendant's Amended Statement of Defence be reinstated*
 - c. *That the Cost of this application be costs in the cause*
3. The plaintiff company on 17th August 2018 filed its affidavit in reply sworn by one CHANDRESH ARUN, the director of the plaintiff company.

B. Background:

4. The plaintiff on 26th November 2015 filed the Inter-Parte Summons, supported by the affidavit together with the even dated statement of claim and moved for certain injunctive reliefs , declarations and orders against the then 1st defendant LILA WATI and the 2nd defendants.
5. All four injunctive orders, as prayed for in the inter-parte summons, being granted by my predecessor on 2nd day of December 2015, the defendants filed their original statement of defence on 22nd July 2016 by appearing in person.
6. In the meantime, due to the death of the then 1st defendant LILA WATI aka NILOATI, though, the Public Trustee was appointed to represent the deceased, the 1st named 2nd defendant, who obtained the probate as a son of the deceased, has now been substituted as the 1st defendant as well in addition to his position as the 1st named 2nd defendant.
7. The statement of claim being amended, the 1st and 2nd defendants filed their amended statement of defence through M/s. AC Law on 7th March 2017 and following further pleadings, parties filed respective affidavits verifying list of documents as per the direction made in terms of the summons for same.
8. Thereafter, the learned Master (the Master) on 13th July 2017 ordered for the PTC to be finalized on or before 27th July 2017 and directed the matter to be mentioned on 31st July 2017.

9. Since the Master did not sit on 31st July 2017, as per the record, the matter being mentioned on 24th August 2017, with the representation for both the parties, the Master, having given further 7 days' time for the defendants to complete the PTC, made the following order (**unless order**) and directed the matter to be mentioned on 8 September 2017.

"The defendant to comment on the PTC minutes draft & should be furnished on or before 4th September 18.

If the defendant fails to comply with this order, the defence / the c/claim if any will be struck out"

10. Accordingly, the matter being mentioned on 8th September 2017, having heard the learned counsel for both the parties, the Master made the impugned order to the following effect.

Counsel's submissions:

The counsel for the plaintiff informs that no comments received from the defendant's solicitors and seeks to activate the 'Unless Order' made on the last occasion.

The counsel for the defendant informs that he didn't get instructions from the defendants though he tried to contact them and also informs that he wants to withdraw the appearance.

Orders:

- i. *Considering all , I activate the 'unless Order'*
- ii. *The defence & c/claim (if any) struck out.*

11. It is against the above order (activation of unless order), the defendants have filed the above summons to have the above order set aside and to have their amended statement of defence reinstated.

12. The stern position taken up by the learned counsel for the plaintiff was that, since the application before the Court is for the setting aside of Master's order and reinstatement of the statement of defence, same has to be initially made to the Master and not to a judge.

13. Learned counsel for the defendants submitted that the summons was in fact filed to be called before the Judge / Master and it is the Registry that directed it to the Judge, and made further submissions that the Judge too has the jurisdiction to hear the summons.
14. Both the counsel have addressed the court further on their respective position with regard to this summons. Plaintiff's counsel states that since the order of the Master is nothing but activating an unless order made by him, without going into the merits, it is always prudent to have the summons heard before the Master and to do the needful thereafter depending on the outcome from the Master's court.
15. Before the consideration of the propriety of the arguments placed by both the learned counsel, I foresee a danger of depriving and prejudicing the party, who will, probably, be dissatisfied with the ruling of this court, by making them to lose a tier of an appeal to a judge in Lautoka, in the event this court makes the ruling on the application in hand by circumventing the Master of this Court.
16. Having said that, I am of the firm view that it is judicious to have this matter referred to the Master, without making any ruling or comments on the merits or demerits of the application, for the parties to have the same initially adjudicated by the Master, who made the impugned unless order and activated it.
17. I am also of the view, that this matter should have been, at the outset, referred to the Master, either by the Registry or this Court, as opted by the solicitor/counsel for the defendant in the summons. Therefore, in the interest of justice and acting now for then (*Nunc Pro tunc*), I decide to refer this application to the Master to do the needful, what the justice demands, of course, after hearing the parties.
18. Apart from the above observations, which in my view reasonably warrants the referral, I am also guided by the order 59 rule 4 of the High Rules of 1988 to do so.
19. However, this referral is made without compromising on the jurisdiction of a judge of this court, including this bench, to deal with this application.

C. ORDERS:

- a. This court decides not to make any ruling on the merits or demerits of the summons in hand.
- b. Matter is referred to the Master to hear the parties and make appropriate ruling.
- c. Parties may seek directions, if needed, from the Master.
- d. Registrar is directed to place the matter before the Master, for the parties to be noticed on a date convenient to the Master.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie", is written over a horizontal dotted line.

A.M.Mohammed Mackie
Judge

At Lautoka
26th October, 2018