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

HBC NO. 253 OF 2012

BETWEEN	:	**MOHAMMED SHAHEEM KHAIRATI**, formerly of Yalalevu, Ba, Fiji but presently residing at 88 Stirling Drive, Morrinsville, Waikato, 3300, New Zealand, Businessman. Plaintiff
AND	:	**MOHAMMED FAREED KHAIRATI**, of 14582-85A Avenue Surrey B. C, Postal Code: V3F5T6 Canada, Businessman. First Defendant
AND	:	**MOHAMMED HASSAN aka MAHMUD HASSAN**, of 13545-66A Avenue Surrey B. C, Postal Code: V3W2B6 Canada, Businessman. Second Defendant
Counsel	:	Mr. V. Mishra for the Plaintiff Ms. Arthi Bandhana Swamy for the Defendants
Written Submissions by	:	Both parties on 18th May 2018
Date of Hearing	:	18th May 2018
Date of Ruling	:	1st June 2018
Ruling by	:	Justice Mr. Mohamed Mackie

RULING

INTRODUCTION

1. This is an application of the Plaintiff by way of summons filed on 12th of December 2017 , supported by the Affidavit of **Mohammed Shaheem Khairati** (plaintiff) sworn on 9th December 2017, seeking the following reliefs.

   a. *The Plaintiff do be given leave to appeal the decision of the Honorable Justice Mr. Mohammed Mackie delivered herein on the 6th day of November 2017.* (factually ruling was dated 6th November and delivered on 7th November)

b. *The **Defendant** do have 21 days from the date of making the order granting leave to file his appeal to the Fiji Court of Appeal.* (The emphasis should be Plaintiff)

2. The 1st and 2nd Defendants, namely, **Mohammed Fareed Khairati** and **Mohammed Hassan,** have on 12th February 2018 filed their joint affidavit sworn on 31 January 2018 opposing the application.

A. BRIEF BACKGROUND HISTORY:

3. The Plaintiff and Defendants are blood relations and currently living in New Zealand and Canada respectively.

4. The Plaintiff filed writ action against the Defendants on 5th December 2012 based on the alleged defamation , wherein the Plaintiff alleges that the Defendants have falsely made statements about him to the family members at a family function in the year 2010 to the effect that the "Plaintiff together with his late father Mr. Mohammed Ibrahim had bought a Land and a Tractor from the Money of the Estate of Khairati and the plaintiff has put those properties under his Wife's and Mother's name to avoid any liability on any order made against the plaintiff, to deprive the Defendants from their lawful entitlement under the Estate."

5. The Defendants filed their Statement of defence and on 5th November 2015 the matter was fixed for two days trial by my predecessor to be taken up on 8th and 9th of June 2016.

6. In the meantime on **2nd May 2016**, the Defendant's Solicitors, **M/S. Patel & Sharma Lawyers,** filed summons for withdrawal as Solicitors on the ground that the Defendants are not contactable and no instructions could be obtained from them. This summons being supported on **18th May 2016** before my predecessor, orders in terms of summons were granted instantly on the same day allowing the Defendant's solicitors to withdraw, **without making any orders to serve the summons for withdrawal and the Order made thereon on the Defendants as required by the O-67 rules 6(1) (a) (b) (c) and (2) of the High Court rules. .**

7. However, learned Judge made order to issue an ordinary NOAH on the Defendants returnable on 1st June 2016, as if the Defendants were living in Fiji. The fact that the Defendants were living in Canada,during the time material, had escaped the attention of the learned Judge. The Registry did not issue NOAH on the Defendants as there were no local addresses of the Defendants available in the record and it was not practical to issue the NOAH in Canada which is out of jurisdiction.

8. Accordingly, when the matter was mentioned on 1st June 2016, being the notice returnable day, as the Defendants were absent and unrepresented , the learned judge on the application

of the Plaintiff's Counsel fixed the matter for formal proof to be taken up on 8th June 2016, which was the first date originally fixed for inter- parte trial.

9. On 8th June 2016 my learned predecessor, having accepted the affidavit evidence of two witnesses for plaintiff together with that of the Plaintiff, who was absent, and after hearing the short oral evidence of the said two witnesses to confirm the contents of their affidavits, delivered the written judgment on 13th October 2016 in favour of the Plaintiff granting $ 20,000.00 and $ 5000.00 being the damages and the costs respectively.

10. The impugned judgment was posted to the Defendants by the Plaintiff's Solicitors on the 9th of November 2016 and the Defendants filed summons through the same Solicitors on 24th November 2016 seeking the stay and setting aside of the judgment, moving under Order 14 rule 11, Order 19 rule 7 of the High Court Rules and inherent jurisdiction of the Court.

11. Subsequent to the above Summons for setting aside by the Defendant, the Plaintiff too filed summons for security for costs and after hearing both the summons together, this Court by its interlocutory ruling delivered on 7th November 2017 set aside the impugned judgment dated 13th October 2017. The application for security for cost made by the Plaintiff was also dismissed.

12. It is against the above ruling dated 7th November 2017 , the Plaintiff has filed this leave to Appeal application dated 12th December 2017 in order to file the Notice of Appeal and to the ground of appeals at the Court of Appeal. The Defendants are vehemently objecting for the leave being granted.

13. At the hearing held before me on 18th May 2018 both the learned Counsel made the oral submissions and filed enlightening written submissions too, for which I am thankful to them.

B. GROUNDS OF APPEAL:

14. The Plaintiff has adduced five (5) grounds of appeal as follows.

1. *The Learned Judge erred in fact and/or in law in treating this matter as the setting aside of a default judgment (where evidence is not taken) rather that of a judgment delivered after a trial by Justice Sapuvida where the Respondents did not appear and failed to apply the principles and law which apply for setting aside a judgment after trial as set out in* ***Shocked and Another –v- Goldschmidt and Others [1998] 1 All ER 372) and Southern Transport Limited –v- Tebara Transport Limited, Suva HBC 229 of 1998S.***

2. *The Learned Judge erred failed to consider:*

a. *Whether the Respondents enjoyed any real prospects of success in a retrial as there was admission in the Defence of at least part of the Defamation and a plea of justification without necessary particulars required in defamation and when compelling evidence had been adduced of whether the tractor alleged to have been misappropriated had been acquired from by the Appellant which had not in any way been challenged or even denied by the Respondents.*

b. *The authenticity and probative value of the reason(s) why the Respondents did not attend at the trial in particular when:*

   i. *The Respondents had not informed their lawyers of any change of address (or e-mail) where they were to be contacted and when there was evidence adduced by the Appellant that the address of the Second Respondent had not changed as alleged.*

   ii. *The person whose email was alleged to be the means of communication between the Respondents and their lawyers had not given an affidavit in support or confirmed she had not accessed her e-mails for several months or why she had not or any evidence proving the same.*

   iii. *The person whose e-mail was alleged to be the means of communication between the Respondents and their Lawyers had not given an affidavit in support or confirmed she had not accessed her e-mail for several months or why she had not or any evidence proving the same.*

3. *The Learned Judge erred in fact and/or in law in setting aside the judgment of Justice Sapuvida entered on the 13th Day of October, 2016 unconditionally* ***when:-***

   a. *The matter had been set for trial on the 6th, 7th and 8th days of October, 2016 several months earlier and had been accepted as suitable by both Counsels.*
   b. *The responsibility of service of summons for withdrawal and service of order for withdrawal on the Respondents was a matter between the Respondents and their lawyers at which normally the Appellant is not even normally served so the Respondent's interest is not damaged.*
   c. *The application to set aside the judgment had not been made within seven days as required by Order 35 Rule 2.*
   d. *No application had been made for any extension of time beyond seven days mentioned in Order 35 Rule 2 had been prayed for.*

4. *The Learned Judge erred in fact and/or in law in holding that the judgment delivered by Justice Sapuvida was irregular because the summons for withdrawal as Solicitors and/or order made thereon had not been served on the Respondents and failed to take into account that the matter had been set down for hearing for several months and that the Respondents also had a duty to keep in touch with the Solicitors and instruct them.*

5. *In the alternative, if the Court holds that the judgment has been properly set aside the learned judge erred in fact or in law in not awarding thrown away cost of the trial*

held and in not awarding the security for costs.

C. STATUTORY PROVISIONS & RULES ON LEAVE TO APPEAL:

15. Section 12 (2) (f) of the Court of Appeal Act provides:

> "(2) *No appeal shall lie –*
>
> .....
>
> *(f) Without the leave of the judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court except in the following cases."*

16. Rule 16 of the Court of Appeal Rules prescribes the time limits for bringing an appeal:

> *"(16) Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say –*
> *(a) in the case of an appeal from an interlocutory order, 21 days;*
> *(b) in any other case, 6 weeks."*

17. Rule 27 of the Court of Appeal Rules relates to the extension of time in which to appeal and is as follows:

> *"27 – Without prejudice to the power of the Court of Appeal, under the Supreme Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period."*

D. CASE LAW & PRINCIOPLES ON LEAVE TO APPEAL

18. *"In dealing with an application for leave to appeal, it is not necessary to delve into the merits of the appeal. All that is necessary is to see if the appeal is wholly unmeritorious or unlikely to succeed. The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious"* **(see Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3(3 February 2010); Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji [1991] FJCA 4; Abu0067d.90s).**

19. **In the Fiji Public Service Commission v Manunivavalagi Dalituicama Korovulavula FCA Civil Appeal No. 11 of 1989 at 5 the Court stated:**

"It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not.

However as the matter stands I am clearly of the opinion that the Appellant has raised a number of arguable legal issues of some importance which call for further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal."

20. It is an accepted principle and practice that *"interlocutory orders and decisions are seldom amenable to appeal...Leave is granted only in the most exceptional circumstances. It will not be granted if the court forms a clear opinion adverse to the success of the proposed appeal"*, as **Wati J stated in Giesbrecht v Cross, [2011] FJHC 443.**

21. Young CJ and Jenkinson J in **Dunstan v Simmie & Co Pty Ltd.(1978) VR 669 at page 670,** declared:

> *Again, although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the preliminary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in* ***Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd (1969) V. R. 401,*** *substantial injustice would result from allowing the order, which it is sought to impugn, to stand. (Emphasis added)*

22. In ***Hussein v National Bank of Fiji, [1995] FJHC 188*** it was held that there is a strong presumption against granting leave to appeal from interlocutory orders, which do not finally determine any substantive right of either party. Pathik J cited the following passages from the oft quoted judgment of Murphy J in Niemann v Electronic Industries Ltd, (1978) VR 431 at pg 441:

> *"If the order is seen to be clearly wrong, this is alone not sufficient. It must be shown, in addition to effect a substantial injustice by its operation....*
>
> *i.* ***Whether*** *the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;*
> *ii.* ***whether*** *there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been "sorely troubled";*
> *iii.* ***Whether*** *the order made has the effect of altering substantive rights of the parties or either of them; and..."*

23. His Lordship W. Calanchini J (as he then was) in **NBF Asset Management Bank V Taveuni Estates Ltd & Others, (Civil Action No. HBC 543 of 2004)** stated that:

"It is trite law to say that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused".

24. Sir Moti Tikaram, in ***Totis Inc Sport (Fiji) Limited v John Leonard Clark ,(Civil Appeal ABU0035 of 1996 S)*** said:

> "It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal....
>
> *Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed.*
>
> *The Fiji Court of Appeal has consistently observed the above principles by granting leave only in the most exceptional circumstances".*

25. ***In Shocked and Another v Goldschmidt and Others [1998] 1 All E.R. 372.*** The leading judgment of the court was given by Leggatt LJ who said at page 377: -

> *"The cases about setting aside judgments fall into two main categories: (a) those in which judgment is given in default of appearance or pleadings or discovery, and (b) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set aside. Different considerations apply to these two categories because in the second, unless deprived of the opportunity my mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and an adjudication on the merits has thereupon followed."*

26. Jenkins LJ in ***Grimshaw v Dunbar [1953] 1 All E.R 350 at 355*** said:

> *"...a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs..."*

27. Leggatt LJ in ***Shocked(supra) after considering the authorities then set out at p. 381*** a series of propositions or "general indications" which are: -

"(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

(2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.

(3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so.

(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short."

28. The Lord Justice then said that the predominant consideration is the reason why the party against whom judgment was given absented himself.

> *"It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case" – **Rich J in Cameron v Cole [1944] HCA 5; 68 C.L.R. 571 at 589.***

29. Most recently, the issue has been considered by the Supreme Court of New South Wales Court of Appeal in Murphy v Doman (as representative of the estate of Simpson (dec'd)) – unreported [2003] NSWCA 249 – 11 September 2003 where at paragraph 48 Handley JA said: -

> *"Taylor v Taylor [1979] 143 CLR 1 and Allesch v Maunz [2000] HCA 40; [2000] 203 CLR 172 are decisions to the same effect. They establish that where judgment had been given in the absence of a litigant who has been denied a hearing through no fault of his own and where his absence has been adequately explained, that litigant has a prima facie right to have that judgment set aside to permit a re-hearing on the merits."*

F. <u>DISCUSSION</u>:

30. Before proceeding to consider the question of leave to appeal, let me delve into the issue of delay alleged by the learned Counsel for the Defendants in her submissions.

a. It could not have escaped the attention of learned Counsel for the Plaintiff that this summons in hand was filed only on **12th December 2017** praying for leave to appeal, against the ruling made by this Court on **7th of November 2017,** and for the Plaintiff to have 21 days from the date of making the order granting leave (this order) to file his notice of appeal and grounds of appeal at the Court of Appeal.

b. There is no dispute that my ruling dated delivered on 7th November 2017, which is intended to be appealed against, is an interlocutory one. Thus, the time period allowed to file notice of appeal is 21 days from the date the impugned ruling was signed, entered or otherwise perfected, as per the Court of Appeal rules stated above. The written ruling was signed and made available on the same day.

c. Rule 27 of the Court of Appeal Rules shown above says that the period for filing and serving notice of appeal under rule 16 may be extended by the Court below **upon application made before the expiration of that period**. It means that the Plaintiff should, before the expiry of said 21 days, have applied to this Court for the extension of time for the notice of appeal. What the Plaintiff has moved for, in his Summons as the 2nd relief, is 21 days from the date of making this order granting leave to appeal to the Court of Appeal.

d. The Plaintiff filed his summons on 12th December 2017 exactly after 35 days. It is clear that since the Plaintiff failed to obtain leave within 21 days from the date of the ruling (my ruling) sought to be appealed against; he is not in a position to comply with the provisions of Rule 16 of the Court of Appeal Rules. The 21 days' time period, within which the Plaintiff should have applied, expired on **27th of November 2017**.

e. In the absence of such an application, to enlarge the time, made before the expiry of 21 days period, hearing the leave to appeal application will be a futile exercise because even if the court decides to grant leave to appeal, the Plaintiff will not be able to file notice and grounds of appeal out of time since he has not obtained the leave of the court to extend the time period.

f. In the case of ***Habib Bank Limited v Mehboob Raza & Others, Civil Action No. 53 of 2005*** Hon. Justice Kamal Kumar in his ruling dated 01st November 2013, while refusing the leave to appeal, has plainly made the law and rules that govern the subject as follows.

"Rule 16 requires notice of appeal from an interlocutory order to be filed within 21 days of the Order which obviously means that the intended appellant has to obtain leave and file notice of appeal within 21 days from the date of the order.
In this instance even though the leave to appeal was filed within 21 day period and leave not having been granted the time for filing Notice of Appeal expired on or about 18th October 2013.

.....

It is the submission of the learned counsel for the 2nd defendant submitted that Rule 16 of the Court of Appeal Rules requires the notice of appeal from an interlocutory order to be filed within 21 days from the date of the order obviously means that the intended appellant has to obtain leave and file the notice of appeal within 21 days from the date of the order.

From this submission what I understand is that, according to the learned counsel, the period of 21 days prescribed in Rule 16 of the Court of Appeal Rules should begin to run from the date of the order granting leave to appeal. Rule 16 of the Court of Appeal Rules does not refer to applications for leave to appeal. On the plain reading of the said Rule it becomes clear that 21 days period commences from the date of the sealing of the order sought to be appealed against.

Rule 27 of the Court of Appeal Rules conferred upon the High Court to grant an extension of time on an application made ***before the expiration of the period prescribed by Rule 16.*** *There is no application from the 2nd defendant for the extension of time and the Court has no power to grant an extension ex mero motu without an application from the party concerned".*

g. Unfortunately, the Plaintiff in this action has failed to make the application to this Court before the expiry of 21 days period prescribed by the Rule 27 of C.A. As per the Summons what he asks is 21 days from the date of this order. Accordingly, there will be an un-accounted time period from 27th November2017 (expiry date of 21 days from the order intended to appeal against) till the date this order is made. See also ***FNPF Investment Ltd v Venture Capital Partners (Fiji) Ltd [2016] FJHC 205; HBC99.2011 (29 March 2016)*** for Justice Lyon.Senevirate's decision on this.

h. The above observation drives me to an inescapable conclusion that the Plaintiff's, purported, application for leave to appeal cannot proceed further. However, considering the lengthy and appealing oral and well researched written submissions made by the learned Counsel for the Plaintiff, I shall take a deep dive into the merits advanced by him, without prejudice to the above findings.

LEAVE TO APPEAL

31. Learned Counsel for the Plaintiff mainly found fault with the propriety of my ruling pronounced on 7th November 2017, on the ground that I having recognized the judgment that had been entered by my predecessor on 13th October 2016 as a judgment obtained after a formal proof trial in the absence of the Defendants and also having conceded that it demands an application under Order 35 Rule 2 of the High Court Rules, coupled with sufficient merits for setting aside , erred by setting aside same by my impugned ruling treating it as an irregular judgment . Learned Counsel heavily relied on the often cited case of ***Shocked and another V Goldschmidt and others in pages 372- n382 [1998] 1`All ER*** (supra)and the principles formulated in it by LEGGART –J with the concurrence of ROCH and MORRITT - LJJ

32. It was also an argument of the learned Counsel for the Plaintiff that the failure on the part of the Defendant's Solicitors to comply with the rules under Order 67 (1) of the High Court Rules and the resultant consequences of the Defendant's absence for the trial cannot be laid on the Plaintiff's Door.

33. Learned Counsel for the Plaintiff also made submissions that there was a Principal –Agent relationship between the Defendants and their Solicitors and the Defendants being principals are bound by the acts and omissions on the part of their Solicitors. In this regard he drew the attention of the Court to the decision in ***Southern Transport Limited V Tebara Transport Limited HBC-229 of 1998.***

34. Other arguments advanced by the learned Counsel in support of his leave to appeal application included that the Defendants have not shown any merits of Defence, they have not followed the correct rules for setting aside, the Defendants did not make their setting aside application within 7 days of the judgment entered on 13th October 2016 and, particularly, they have not explained the reason for their absence on the trial date.

35. With the all due respect to the learned Counsel for the Plaintiff, I beg to disagree with him on all the above arguments advanced by him in support of his stance. My views, to be expressed bellow, on the above arguments are profusely fortified by, none other than, the decisions in **Rosedale Ltd v Kelly [2004] FJHC 429; HBC0323.1997L (11 June 2004)** and ***Rosedale Ltd v Kelly [2005] FJHC 659; HBC0323.1997L (13 May 2005)*** both decided by His Lordship John Connors – J, (as he then was), the first one being on setting aside of a judgment entered against the 2nd Plaintiff in his absence on the counter claim of the Defendant and the second one on the refusal of the leave to appeal against the setting aside order.

36. The core issue in the above action was the absence of the 2nd Plaintiff at the trial, which resulted owing to non-compliance of the Order 67 (1) of the High Court rules, on which alone the Hon. J. Connors –J. 11th June 2004 chose to set aside the judgment that had been entered against the 2nd Plaintiff on 6th March 2003 in his absence. Subsequently, leave to appeal being applied by the Defendant before the same judge, his Lordship by his ruling dated 13th May 2005, dismissed the summons for leave to appeal.

37. In arriving at respective decisions in the above matter, His Lordship had extensively discussed the prepositions or general indications found in ***Shocked and another V Goldschmidt and others in pages 372- n382 [1998] 1`All ER (supra),*** which were heavily relied on by learned Counsel for the Plaintiff in this matter. Interestingly, the Counsel who represented the Defendant in the above matter on both the instances happens to be the counsel for the Plaintiff in this matter. Learned Counsel, for the reason best known, did not refer the above decisions before me, in which present facts in issue and points of decision are almost identical.

What made the Defendants in this action to be absent at the Trial?

38. The decisions in ***Rosedale Ltd v Kelly [2004] FJHC 429; HBC0323.1997L (11 June 2004) and Rosedale Ltd v Kelly [2005] FJHC 659; HBC0323.1997L (13 May 2005)*** (supra) stand best suited to this case in hand as well, for the simple reason that no proceedings should commence and/or proceed in the absence of a party unless such party had been given due notice of it.

39. As pointed out in the preceding paragraphs, the summons for withdrawal was filed by the Defendant's Solicitors on 2nd May 2016 and supported on 18th May 2016. Learned Judge for reason not known, without ordering the Summons be served on the Defendants, who were admittedly in Canada, made the instant order allowing the withdrawal. Moreover, the Learned Judge did not even make an order to serve the Order made on the summons.

40. Moving further, the learned Judge, may be due to inadvertence, made direction to issue NOAH on the Defendants returnable on 1st June 2016, as if the Defendants were residing within this jurisdiction and same was not issued as there was no local address for the Defendants and serving the NOAH out of the jurisdiction was, obviously, impracticable.

41. Subsequently, on 1st June 2016 the matter being mentioned and the learned judge, having found that the Defendants were absent and unrepresented , fixed the matter for formal proof on 8th of June 2016 which was the date already fixed for trial. Accordingly, the trial being taken up on 8th June 2016, after accepting the Plaintiff's affidavit, who was absent and the affidavits of two other witnesses, who were present in Court to confirm the contents them, the learned judge entered the impugned judgment dated 13th October 2016, which was set aside by my ruling dated 7th November 2017.

42. Accusations were made against the Defendants that they failed to communicate with their Solicitors to give instructions, had not provided a reachable postal address and failed to check the email through which previous communications were channeled. The Defendant's position was that the email account, which belonged to one of their Daughter, was not in operation during the time material for certain reason.

43. The postal address of the 1st Defendant, with whom all communications were maintained, appears to have had certain discrepancy and confusion. The Postal Code given by the plaintiff in the heading to the writ and the Statement of Claim reads as **V3F 5T6.** But the document filed by the Plaintiff depicting the Postal Codes of the relevant area does not have such a postal Code. The 1st Defendant in paragraph 4 of his affidavit dated 15th September 2017 States that his correct Postal Code is **V3S 5T6**, which is supported by the Plaintiff's document itself. It is matter of discrepancy between the alphabets **F** and **S**, which is sufficient enough, as I believe, to affect the due delivery of letters. Unless, it is carefully gone through letter by letter it cannot be easily ascertained.

44. The affidavit filed by the Plaintiff sworn by a private investigator in Canada regarding the 1st Defendant's address is containing of facts which are hearsay and same cannot be relied on and acted upon.

45. Totally relying on the e-mail communication is not always reliable on a matter of this nature. There was no order made by the Court allowing the service of processes via e-mail. The Defendants did not have their own e-mail addresses and they were, admittedly, relying on a daughter of one of them. Nevertheless, had the Court made necessary orders to serve the withdrawal summons or at least the order for withdrawal on the Defendants, naming a mode of service, this unfortunate situation could have been avoided. Who can say for sure that the Defendants would not have responded, if an order of this nature had in fact been issued by the Court for service and served?

46. The learned Counsel for the Plaintiff was heard to be pinning the blame on the Solicitors for the Defendants for this predicament. I agree with the Counsel since the Solicitors will remain as Solicitors for the Defendants until the Order is duly served on them. But, in the absence of an order from the Court to serve it on the Defendant, prescribing the Mode of service, whom to be blamed is the question before this Court. Since, there was no specific order by the Court to serve the order; the Solicitors were able to conveniently wash their hands. Can the Defendants be allowed to suffer on a failure, inadvertently, occurred on the part of the Court? My much deliberated answer will be "No".

47. When an important provision of the HCR pertaining to a party has been observed in breach, wittingly or unwittingly, by an act or omission on the part of the Court, the relevant party, in their endeavor of seeking redress, cannot be expected to or asked to follow the rules to the letter. No party should suffer or penalized owing to an error on the part of the Court. This is an instance where the inherent power of the Court is warranted.

48. In **Rosedale Ltd v Kelly [2004] FJHC 429; HBC0323.1997L (11 June 2004)** (supra) it was submitted by the defendants that the 2nd plaintiff having made his application outside the time prescribed in Order 35 Rule 2 is precluded from effectively applying to the court for the relief sought. In response to this His Lordship JOHN CONNORS stated as follows.

> *"The court has inherent jurisdiction to make the orders sought. Should confirmation of this be needed then it is supplied by Mason J. in Grimshaw v Dunbar where he said at page 16:*
>
> *"A jurisdiction to set aside its orders is inherent in every court unless displaced by statute. In my opinion the jurisdiction extends not only to the setting aside of judgments which have been obtained without service or notice to a party.... but to the setting aside of a default or ex- parte judgment obtained when the absence of the party is due to no fault on his part."* "I am of the opinion therefore that the court has jurisdiction to grant the relief that is sought".

49. Thus, the allegation that the Defendants in this case were delay in making the application, they chose the wrong Order and Rules to seek relief and their absence was not sufficiently explained, could not have stood as hurdles on their way to seek relief. This is what that justified the setting aside of the impugned judgment by my ruling dated 7th November 2017. In order to set aside a judgment obtained in this manner, one need not engage in the exercise of examining whether the impugned judgment was regular / irregular or default judgment or obtained after leading evidence.

Merits in Defence

50. The 1st Defendants in paragraph 12 of his affidavit in support of setting aside sworn on 10th November 2016 has averred that they have sufficient merits in their defence. The learned Counsel for the Plaintiff in his submissions heard to say that the Defendants have pleaded justification and thus partly admitted defamation. I don't find any explicit plea of justification in the Statement of defence. Instead, on perusal of the evidence adduced in the affidavits of the Plaintiff's witnesses, I find number of question which demand clear and convincing answer by the Plaintiff and his witnesses, which can be made possible only through cross examination and re-examination at a trial proper. For instance,

a. The witnesses in their respective affidavit only make a mere averments that the Defendants made the statement in the year 2010. They don't specify a Month or a particular date and time. This is very material since the Defendants were said to have come from Canada.
b. The particular words and sentences allegedly made had not been specifically pleaded, which is a must in an action for defamation.
c. Since there are two Defendants, the witnesses do not exactly say who, out of them, in fact made the alleged statement and to whom was it made and whether both of them made it individually or together.
d. There were no independent witnesses. Both witnesses were respectively the Mother and the Brother of the Plaintiff, whose credibility and interestedness need to be tested by way of due cross examination since this is a case of defamation.
e. The Plaintiff opted not to come to the Court. The demeanor of the witnesses in the witness box means a lot, when they are under cross examination and the trial judge should have the benefit of observing it.

51. In view of the above it cannot be said that the Defendants have no merits in their Defence and their move to set aside could not have been simply brushed away by allowing the impugned judgment to stand.

Prejudices to the Plaintiff

52. The substantial matter now awaits a trial date to be fixed in the near future. Parties can have their respective evidences unfolded before the Court in a trial proper. The Plaintiff will have the opportunity once a final judgment after trial is pronounced, if he then is aggrieved, to appeal to the Court of Appeal against such judgment. The cost whatever incurred and to be incurred can be recovered if the Plaintiff becomes victorious at the end of the day. It must therefore be said that there can be no injustice by refusing this leave to appeal application in hand.

Public Interest:

53. As far as the Public interest, which is another factor to be considered at this juncture, is concerned, it has to be borne in mind that the rule of natural justice and the fundamental right of an individual enshrined in the Constitution for a fair trial with his presence and/or representation cannot be compromised in the name of Public interest.

E. CONCLUSION:

54. I have considered the all five proposed grounds of appeal (see above) advanced by the Plaintiff and I cannot agree there is a serious question for adjudication by the Court of Appeal. I hold that there was no prejudice to the plaintiff (now applicant) before me. The applicant contends that whilst the law was correctly identified, it was incorrectly applied in many respects. However, I am indeed of the view that there cannot be any serious issues to be considered by the Fiji Court of Appeal. No such issues identified. The Defendants have merits that warrant the consideration of the trial Court.

55. In the light of the authorities cited above and without further delving into the merits of the case by examining the propriety of the order intended to be appealed against, I form the firm view that it would be inconsistent with the authorities and in particular, it would be inconsistent with the expressed attitudes of the Fiji Court of Appeal for leave to be granted in the circumstances of this matter.

F. ORDER

1. Summons filed on the 12th December 2017 moving for leave to appeal is dismissed.

2. The parties shall bear their own cost

3. Matter will be mentioned after 21 days to fix the inter-parte trial date in the substantive action.

HIGH COURT OF FIJI
LAUTOKA

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A.M.Mohammed Mackie
Judge

At Lautoka
1st June, 2018