

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No.: HBA 14 of 2019**

**BETWEEN** : **DENARAU INVESTMENTS LIMITED** a company incorporated in Fiji and having its registered office at the Office of c/- Parshotam & Co, Barristers and Solicitors, Level 2 Mid City, Corner Cumming Street/Waimanu Road, Suva

**APPELLANT**

**AND** : **ROKEWOOD LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Office 08, Building A, Marina Centre, Port Denarau, Nadi in the Republic of Fiji.

**RESPONDENT**

**Counsel** : **Appellant: Mr V. Singh**  
: **Respondent: Mr. F. Vosarogo**  
**Date of Hearing** : **25.06.2019**  
**Date of Judgment** : **01.07.2019**

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal from order of Resident Magistrate granting a cost of \$1,000 made on 7.7.2017 to the Plaintiff –Respondent (Plaintiff). The civil action in Magistrate’s Court was filed by way of writ of summons and upon service of the writ of summons which was returnable on 11.4.2017, Defendant –Appellants (Defendant) did not appear in court 11.4.2017. The matter was listed for formal proof on 7.7.2017. Before 7.7.2017 Defendant had filed Notice of Motion on 3.7.2017 seeking leave to join a party and to serve Notice of that application overseas. This Motion was also listed for hearing on 7.7.2017, along with the formal proof. Since the party intended to be added was residing overseas, there was a need to allow 42 days after service to enter appearance in court. This Motion was filed in pursuant to Order 27 rule 3 and Order 28 rule 1 of Magistrates’ Court Rules. Defendant had served the Motion to the Plaintiff on 4.7.2017 and Plaintiff

had filed an affidavit in opposition on 6.7.2017. On 7.7.2017 Plaintiff informed the court that they would not be in a position to proceed to formal proof on 7.7.2017 since the Defendant had file an application seeking joinder of a new party. This was logical considering circumstance, where a party needed to minimize cost and waste. Resident Magistrate had granted leave to file defense, subject to 'reasonable cost' and had ordered a cost of \$1,000 to be paid in 14 days. I cannot see any unreasonableness or wrong application of discretion by Resident Magistrate, as Defendant had not only failed to appear in court on 11.4.2017 and had waited till 3.7.2017 to file Motion seeking addition when the matter was already fixed for formal proof on 7.7.2017. Defendant was served with the writ of summons on 10.3.2017 and had waited for approximately 4 months to make the application seeking joinder of a party, thus incurring additional costs for Plaintiff.

## ANALYSIS

2. Defendant had appealed against the order of cost amounting to \$1,000. Their contention is that cost was ordered on 7.7.2017 and formal proof of Plaintiff's claim was postponed on the application of the Plaintiff.
3. From the minutes of 7.7.2017 , the reason for not prepared to proceed with formal proof was the application of the Defendant seeking joinder of a party residing overseas which was served on to the Plaintiff on 4.7.2017 for which they had filed an affidavit in opposition on 6.7.2017.
4. Plaintiff logically could not proceed with formal proof of the claim when there was an application pending for addition of a party. It would be futile and waste of time to do so and correctly had stated that it desired not proceed with the formal proof on 7.7.2019 as Motion of Defendant was served on 5.7.2019.
5. Every legal practitioner have an obligation not to waste time and money when making applications to court. So, the application not to proceed with formal proof in the light of the Motion filed by Defendant who failed to file a notice to intention was correct considering the circumstances and merits of the said Motion. Even if the Plaintiff was ready to proceed with formal proof and proceeded with that, court below needed to determine issue of granting leave to file intention to defend which is prerequisite which was needed to be filed three days prior to hearing.
6. Defendant had not appeared on the service of writ of summons and had waited till 4.7.2017 to file Motion to add a party who was residing overseas, without seeking leave to file intention to defend.

7. In the circumstances Defendant had made following defaults and or delay in court below.
  - a. Defendant failed to appear in court on the day stated in writ of summons open court.(i.e.11.4.2017)
  - b. Motion seeking joinder of parties was served to the Plaintiff on 4.7.2017 when the matter was already fixed for formal proof, on 7.7.2017.
  - c. Failure to file Notice of Intention to Defend in terms of Order 6 rule 6 of Magistrates' Court Rules.
8. When a party defaults to file intention to defend, in terms of Order 6 rule 6 of Magistrates Court Rules, Order 6 rule 7 of Magistrates' Court Rules allows the court below to exercise its discretion, any time before judgment allowing Defendant to defend upon terms of the court that may seem just.
9. Learned Resident Magistrate had correctly exercised the said discretion by ordering a cost to the Defendant and granting leave to file a defence.
10. So, the issue whether Plaintiff was ready to proceed with the formal proof or not is not relevant as Defendant needed leave of the court to file intention to defend, and they were allowed to do so subject to a cost.
11. So ordering a cost of \$1,000 and allowing the Defendant to file notice of intention to defend is within discretion of the resident magistrate and there is no merit in this appeal.
12. Defendants who had waited till 4.7.2017 to file a Motion seeking joinder of a new party when the writ of summons was served on 10.3.2017, knew that other party would incur cost due to their non appearance on 11.4.2017 and failure to file any notice of intention to defend. Defendant made an application to add a party, approximately four months after they were served with writ of summons and statement of claim.
13. Even if I am wrong on the above awarding cost is a discretionary remedy. Though the Plaintiff was not ready for hearing, it was due to the application of the Defendant who had served an application seeking joinder of a party on 4.7.2017 to Plaintiff. This was three days before the day fixed for formal proof.
14. Defendant states, that Registry upon inquiry from tele-conversation had informed that 7.7.2017 was for mention only. This again is irrelevant, as Defendant had failed to file notice of intention before 11.4.2017 and they knew that they needed leave to file notice of intention to defend. Having defaulted to appear in court on date specified in the writ of summons and also failed to file notice of intention to defend as required, it cannot now

rely on alleged tele conversation with the Registry. So this was no merit in that ground of appeal.

15. The Supreme Court Practice(1988) at p 925 states(62/2/12)

*'.....In many class of cases the Courts award costs on settled principles, but is always in the discretion of the Court to depart from the rule where the circumstances of the particular case require it. The distinction between costs awarded according to a general rule and costs awarded in the exercise of a discretion on particular facts is important, because the appeal lies from an order awarding costs on wrong principle; ...'*

16. Learned Resident Magistrate had correctly considered the reason for the Plaintiff's application not to proceed with formal proof, and that was the actions of the Defendant who had on the last minute file a Motion seeking addition of a party three days before formal proof.

#### **CONCLUSION**

17. Defendant had not filed a notice of intention before 11.4.2017 and had also not appeared on the date appeared on the writ of summons. It had delayed the application for addition of a party .In such a situation cost can be granted against the party who had caused Plaintiff additional costs. Learned Resident Magistrate had correctly exercised the discretion in awarding cost to the Plaintiff who had arranged the witnesses to attend court from overseas. There is no dispute as to these facts. Appeal is dismissed and order of the learned Magistrate made on 7.7.2017 granting a cost of \$1000 to the Plaintiff is affirmed. The cost of this appeal is summarily assessed at \$500.

#### **FINAL ORDERS**

- a. Appeal is dismissed decision of Resident Magistrate made on 7.7.2017 regarding award of cost to the Plaintiff, is affirmed.
- b. Cost of this appeal is summarily assessed at \$500 to be paid within 21 days.
- c. Case record to be forwarded to court below forthwith.

**Dated at Suva this 1<sup>st</sup> day of July, 2019.**



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**Justice Deepthi Amaratunga**  
**High Court, Suva**