

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

**Civil Action No. HBC 27 of 2018**

**BETWEEN**

**KALABO INVESTMENT LIMITED** a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva and carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarket".

**PLAINTIFF**

**AND**

**ABHISHEK ABHIMANNU** of Lot 16, Koroba Street, Nakasi, Businessman.

**DEFENDANT**

**Counsel** : Mr. V. Seduadua for the Plaintiff.  
Mr. S. Fatiaki for the Defendant.

**Date of Hearing** : 19<sup>th</sup> September, 2019

**Date of Ruling** : 15<sup>th</sup> October, 2019

## **RULING**

*(On the application for leave to appeal)*

- [1] The plaintiff filed this writ of summons seeking to recover \$1,137,178.38 from the defendant.
- [2] On 27<sup>th</sup> November 2018 the defendant filed summons for the discovery of certain documents.
- [3] The said summons was first called on 12<sup>th</sup> December 2018 and the plaintiff was given 21 days to file its affidavit in opposition and the defendant was given 14 days thereafter to file his affidavit in reply. The hearing of the summons was fixed for 22<sup>nd</sup> May 2019. The plaintiff and the defendant failed and/or neglected to file their respective affidavits.
- [4] On 22<sup>nd</sup> May 2019 both counsel jointly sought an adjournment of the hearing which was refused by the learned Master and proceeded with the hearing.
- [5] On 30<sup>th</sup> May 2019 the plaintiff filed the present is application seeking the following orders:
  1. That leave be granted to the plaintiff to appeal against the interlocutory order of the Master made on May 2019 disallowing a joint application of the parties to adjourn the defendant's summons for specific discovery filed on 27 November 2018 upon the grounds appearing in the affidavit of Ratan Deo.
  2. That the Master not deliver her Ruling on the defendant's summons for specific discovery pending the determination of the appeal.
  3. That the costs of this application be costs in the cause.

4. Such further or other orders as may deem just to this Honourable Court.

[6] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

[7] In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.

Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;



The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

- [8] It is averred in paragraph 10 of the affidavit support that it is clear that the Master will now make orders in terms of the defendant's summons as there is no affidavit by the plaintiff and the Master is without the benefit of the correspondence between the solicitors indicating agreement of parties on the extent and manner of discovery. It is averred further that in these circumstances the Master's orders are likely to be highly prejudicial to the plaintiff as they would require the plaintiff to disclose its financial statements containing highly sensitive trading and commercial information instead of providing the required information via PwC's letter as agreed.
- [9] It is to be noted that the application for adjournment and the present application for leave to appeal are collusive acts of the plaintiff and the defendant. The defendant has not filed an affidavit in opposition in this matter and further when the matter was taken up for hearing the counsel for the plaintiff informed court that he has no objection to the application.
- [10] Leave to appeal cannot or in my view should not be granted of consent of the parties. Court must be satisfied that it has sufficient grounds grant leave to appeal. In an application for leave to appeal the court must consider whether substantial injustice would be caused if leave is refused.

- [11] In this matter the order sought to be appeal against is the refusal of the learned Master to vacate the hearing. The proceedings of the court are controlled by the Judge or the Master as the case may be. The parties before the court cannot take over that power and dictate terms on the bench. If the parties had any difficulty in proceeding with the hearing on 22<sup>nd</sup> May 2019 they should have informed the court in advance to have the hearing vacated and for that one party need not obtain the consent of the other party. The reason given by the plaintiff for not having informed the court his difficulty is that the plaintiff's solicitors took months to reply to their letter which is not a ground to grant leave to appeal. The parties may agree to vacate the hearing of a matter but whether the hearing should be vacated or not, is entirely within the discretionary powers of the court.
- [12] On the other hand if the plaintiff is not satisfied with the decision of the learned Master it can appeal against the decision and this issue also can be taken up in appeal. Therefore, the application for leave to appeal is liable to be refused.
- [13] For these reasons the court makes the following orders.

**ORDERS**

1. The application for leave to appeal is refused.
2. There will be no order for costs of this application.



  
Lyone Seneviratne

**JUDGE**

15<sup>th</sup> October 2019