

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 132 of 2019

IN THE MATTER of the Land transfer Act 1971, Section 109.

AND

IN THE MATTER of an application to remove Caveat No. 873707 lodged by

HOTEL & RESPT INVESTMENT HOLDINGS PTE LTD against

Certificate of Title No. 38013, the property of

HOTEL EQUIPMENT LIMITED.

BETWEEN

HOTEL & RESORT INVESTMENT HOLDINGS PTE LTD a limited

liability company having its registered office at

Concave Drive, Namaka, Nadi in the

Republic of Fiji.

DEFENDANT – APPELLANT

AND

BANK OF SOUTH PACIFIC LIMITED (BSP) a banking company duly

incorporated in Papua New Guinea and registered in

Fiji as a foreign company with its principle office at

Suva in Fiji.

PLAINTIFF – RESPONDENT

Counsel : Ms Prasad L. for the Plaintiff-Respondent
Mr Siga S. (as a representative) for the Defendant-Respondent.

Date of Hearing : 25th May 2020

Date of Ruling : 17th July 2020

RULING

(On the preliminary objection)

- [1] The plaintiff-respondent filed this originating summons seeking to have the caveat No. 873707 lodged by the plaintiff against Certificate of Title No. 38013 removed.
- [2] The learned Master of the High Court, on 27th June 2019, ordered that the caveat be removed forthwith. The defendant-appellant being dissatisfied with the said decision of the learned Master filed notice and grounds of appeal on 16th July 2019. On 5th August 2019 the defendant filed summons for directions. The plaintiff-respondent raised a preliminary objection to the summons for direction that it was not in conformity with Order 59 rule 17(2) of the High Court Rules 1988. This court, on 01st November 2019 held that the appeal defendant-appellant be deemed abandoned.
- [3] The defendant-appellant filed summons for reinstatement, enlargement of time and leave to appeal on 21st November 2019 and since the plaintiff-respondent informed court that it would not file an affidavit in response the court fixed the matter for hearing on 21st February 2020. On 21st February 2020 the defendant-appellant was absent and unrepresented and the court struck out the summons.
- [3] On 28th February 2020 the defendant-appellant filed summons seeking to set aside the default judgment and to have the matter re-listed for hearing. The affidavit in support of this summons of sworn by Mr. Simione Valenitabua, the Solicitor for the defendant-

appellant. At the hearing of the summons the objected to the application on the following grounds:

1. Since the affidavit in support of the summons has been deposed by the solicitor it is not inadmissible.
2. The summons to set aside the ruling and to re-list the matter for hearing has not been made pursuant to the correct provisions of the High Court Rules 1988.

[4] In this matter the affidavit filed in support of the summons to set aside the default judgment was deposed to by the solicitor in carriage of the file. The question here is whether the solicitor of a party to an action before the court is legally entitled to affirm an affidavit on behalf of his client.

[5] There are several authorities that a law clerk of a law firm cannot affirm an affidavit on behalf of a client. In this matter the facts are different. On the careful reading of the affidavit deposed to by Mr. Valenitabua it appears that the facts contained in his affidavit are within his personal knowledge and the client could not have had any knowledge of such facts. Explaining his failure to appear in court on 5th February 2020 he states that he had taken down the next date incorrectly. Affidavits are statements of fact and also sworn evidence before courts of law and can be deposed to by persons who have personal knowledge of such facts.

[6] The defendant-appellant in this regard relied on the decision of Justice Kamal Kumar (as he then was) in the case of **Mishra Prakash & Associates v Nagan Engineering (Fiji) Ltd** [2018] FJHC 198; HBA001.2010 (19 March 2018). In that matter the court held:

It is trite law that a lawyer's clerk may not affirm an affidavit intended to be used in a contentious matter in Court. This is indeed a contentious matter where the Respondents are strongly resisting the application for extension of time. The Affidavit should have been affirmed by the Solicitor having personal knowledge of the pertinent matters. More precisely, the deponent should have been the Solicitor who had the conduct and the management of the cause.

[7] For the reasons set out above I see no defect in the affidavit in support and therefore the objection taken to the validity of the affidavit in support by the plaintiff-respondent is overruled.

[8] The application to set aside the ruling of this court and to have the matter re-listed for hearing should have been filed pursuant to Order 32 rule 5(4) of the High Court Rules 1988 but the summons says that it is made pursuant to Order 35 rule 2(1) (2) of the High Court Rules 1988.

[9] The question is whether this error in the summons vitiates the entire application of the defendant-appellant.

[10] In **Chul v Doo Won Industrial (Fiji) Ltd** [2004] FJHC 24; HBC0011R.2004S (4 October 2004) the court held:

Secondly, the application is made pursuant to Order 14 r.11 of the High Court Rules, dealing with summary judgment. However, as Counsel for the Plaintiff correctly points out, the judgment sought to be set aside, is a default judgment and setting aside should have been pursued under Order 13. There is a world of difference between an application to set aside a summary from a default judgment. The former is reached only after the formal sanction of the Court pursuant to the Plaintiff's application, while the latter can be obtained as a matter of course following the Defendant's failure to acknowledge service. This Court had in Rejieli Dioge v. Munian Chetty & Or. CA 0053.2002, decided that such an error is fundamental which the Court cannot, in its discretion, rectify as mere non-compliance under Order 2 of the Rules.

[11] High Court Rules 1988 provide the procedures to be followed in civil litigation. Procedural laws are enacted to facilitate the proper administration of justice and the litigants must follow the rules. The question here is whether the failure to follow certain rules Of the High Court Rules 1988 has the effect of vitiating the entire proceedings.

[12] In the instant matter the defendant-appellant should have filed the summons to set aside ruling made on 21st February 2020 and to have the matter reinstated pursuant to Order 32 rule 5(4) of the high Court Rules but it was filed pursuant to Order 35 rule 2(1)(2) of the High Court Rules 1988. In my view stating the incorrect Rule of the High Court Rules 1988 pursuant to which the summons was filed does not cause any prejudice to the plaintiff-respondent. This is a mere technicality and technicalities should not be allowed to stand in the way of justice. It is also important to note that

this mistake can be corrected by amending the pleadings to which the defendant-appellant is entitled in law.

[13] The decision in *Chul v Doo Won Industrial (Fiji) Ltd (supra)* is a decision of the High Court which is of parallel jurisdiction and therefore this court is not bound to follow the principles enunciated in the said decision.


[14] For the above reasons the court makes the following orders.

ORDERS

1. Preliminary objections raised by the plaintiff-respondent are overruled.
2. There will be no order for costs.



17th July 2020


Lyone Seneviratne

JUDGE