

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

CIVIL JURISDICTION

CIVIL CASE NO: HBC 247 OF 2017

BETWEEN: **ANIL JATINDER SINGH** of Suite 10, Nadi Town Council Arcade,
Nadi.

PLAINTIFF

A N D: **CHANDRA MANI** aka SAMI MANI trading as Paradise Realtors
(Fiji) Limited.

FIRST DEFENDANT

A N D: **PARADISE REALTORS (FIJI) LIMITED** a limited liability
company having its registered office at Suite 4 Ganesh Building, New
Queens Road, Nadi Town Road, Nadi.

SECOND DEFENDANT

Appearances : Mr. Mosese Naivalu for the Plaintiff
Mr. Rajiv R Prakash for the Defendant

Hearing : Monday, 13th July 2020

Decision: Friday, 21st August 2020

DECISION

(01) This summons came up for hearing before me on 13th July 2020. By it, the defendants applied for the following orders;

(a) *That Mr. Chandra Mani, the first defendant be permitted to be made available to be both examined and cross-examined by Audio Visual Link during the trial of this action set for 09th and 10th September 2020;*

AND

(b) *The costs of this application be in the cause; and*

(c) *Such further orders as this Honourable court deems just and fair.*

(02) The application was made pursuant to order 33, rule 4, order 38, rule 3 (1) of the High Court Rules, 1988 and the inherent jurisdiction of the court.

- (03) The application was supported by the affidavit of Mr. Neel Shivam, the principal at Neel Shivam Lawyers who are solicitors on record for the defendants.
- (04) The application was opposed by the plaintiff. This is certainly a contentious matter. At the hearing of the application, Counsel for the plaintiff raised two preliminary objections to the supporting affidavit of the defendants. While the plaintiff perfunctorily objects to the affidavit of Mr. Neel Shivam sworn on behalf of the first defendant, it is plain to me that the real and invidious reason for his objection is his desire to get the first defendant to be present in Fiji to answer the plaintiff's case.
- (05) Counsel for the plaintiff submitted in *limine*,
- (A) The affidavit is irregular and produces no authority to swear the affidavit.
(B) There is nothing in the affidavit to say why the first defendant could not depose the affidavit.
- (06) Counsel for the plaintiff relied on the decision of the Fiji Supreme Court in Patrick Paul v Director of Lands and Others, Civil Appeal No:- CBV 0018/2019, date of decision, 09.06.2020.
- (07) Counsel for the defendants did not respond to the preliminary objections raised by Counsel for the plaintiff.
- (08) Let me now move to consider the preliminary objection raised by counsel for the plaintiff. I turn to the supporting affidavit sworn by Mr. Neel Shivam.
- (09) The first defendant is the Director of the second defendant company.
- (10) The deponent, Mr Neel Shivam states as follows in the affidavit;
1. *That I am the Principal at Neel Shivam Lawyers who are solicitors on record for the Defendants in the within proceedings.*
 2. *That I make this Affidavit from the knowledge of the facts and their truth ascertained from the upkeep of the files and by reference to the personnel of, and the files kept by Neel Shivam Lawyers and/or from sources specified. Where the contents are not within my personal knowledge, they are true to the best of my information, knowledge and belief. In identifying the sources of my information, I am not to be taken to be waiving any of the Defendant's legal privilege.*
 3. *That I am making this affidavit in support of the Defendant's application for the leave to adduce the First Defendant's evidence by Audio Visual Link during the trial of this action set for 9th and 10th of September 2020.*
 4. *That our client who is the First Defendant and the Director of the Second Defendant Company is in Australia.*

5. *That the First Defendant has dual citizenship of both Fiji and Australia. True copies of the both Passports are annexed herein marked as "NS-1" and "NS-2" respectively.*
6. *The First Defendant has been residing in Australia for past 33 years.*
7. *That the First Defendant's children and wife are Australian citizens and are staying in Australia.*
8. *That on or about 20 October, 2014 the First Defendant registered a company under the name of Paradise Realtors (Fiji) Ltd, the Second defendant in Fiji.*
9. *That in 2015 the First Defendant started the said business in Fiji.*
10. *That the First Defendant was staying in Fiji to operate and manage his business.*
11. *That the within action initiated on or about 28 November 2017 against the First Defendant and his company, Second Defendant.*
12. *That the First Defendant on or about 15 August 2017 went Australia to visit his children.*
13. *That during his visit he suffered stroke and was hospitalised for 2 years. A true copy of the report from the Care Manager dated 6 February, 2020 of Integra Support Services is annexed herein marked as "NS-3".*
14. *That since then the First Defendant has been unable to walk and has been bound to wheel chair.*
15. *That the First Defendant is also suffering from multiple medical disorders for which his is undergoing treatment. A true copy of the health summary sheet prepared by Dr Shafiqur Rahman dated 6 February 2020 of Jans Family Health Practice is annexed herein marked as "NS-4".*
16. *That the First Defendant is unable to care for his daily and personal activities.*
17. *That the First Defendant is been cared for by the caretakers and is attending medical clinic relative to his conditions.*
18. *That the First Defendant is staying with his wife at his residence in Australia.*
19. *The within action was set for hearing on 17th and 18th of October 2019 however due to First Defendant's health condition the said hearing was vacated.*
20. *The within action now is listed for Hearing on 6th , 9th and 10th of September 2020 before the Lautoka High Court.*

21. *That we are further advised by the First Defendant that since he is currently wheel chair bound and is under 24 hour care, he may not be able to travel on the given hearing dates.*
22. *That the First Defendant's health condition is deteriorating and there is a serious risk to his health if he travels.*
23. *That there is no certain time or date as to when the First Defendant would be able to travel as there has been no substantial improvements in his health.*
24. *That the First Defendant is the only witness in the within action for the Defence side.*
25. *To avoid the hearing being vacated again and any further delays the Defendant is willing to give evidence through Audio Visual Link.*
26. *That the Defendant may not be able to defend his case properly if he is not allowed to give evidence through Audio Visual Link and this will seriously prejudice his case.*
27. *That we believe there will not be any prejudice caused to the Plaintiff if the application to adduce the Defendant's evidence by audio Visual Link is granted.*
28. *For the above reasons, I respectfully seek orders in terms of the Summons.*

- (11) The deponent needs sanction to swear on behalf of the first defendant. But the deponent does not annex authority given to him by the first defendant.
- (12) The court also noted that there is nothing in the affidavit to say why the first defendant could not depose the affidavit.
- (13) In the Fiji Supreme Court decision in '**Patrick Paul v Director of Lands and Others**' (supra), the Supreme Court said, inter alia;

[16] When Third Party (including Law Clerks/ Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-

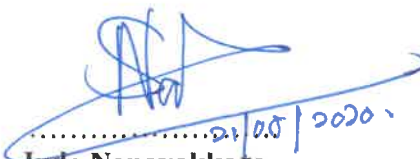
- (i) *must be authorised in writing by that party to depose such Affidavits;*
- (ii) *must depose as to why that party and if a Company then why its director or authorised office cannot depose the Affidavit;*
- (iii) *must not depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:*
 - (a) *Affidavit is in support of or in opposition to Application for Summary Judgement;*

- (b) *Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;*
- (c) *Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.*
- iv) *may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.*
- (14) I find that the argument of Counsel for the plaintiff holds water. I uphold the preliminary objections raised by Counsel for the plaintiff.
- (15) The supporting affidavit of Mr. Neel Shivam is expunged. Consequently, in the absence of an affidavit in support, the application seeking leave to lead evidence of the first defendant via video link must necessarily fail.

ORDERS

- (01) The preliminary objection is upheld.
- (02) The supporting affidavit of Mr Neel Shivam sworn on 07.02.2020 and filed on 10.02.2020 is expunged from the court record.
- (03) The plaintiff is entitled to costs on this application which I summarily assessed at \$500.00 which is to be paid within seven (07) days from the date of this decision.




Jude Nanayakkara
[Judge]

At Lautoka
Friday, 21st August 2020