

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

Civil Action No. HBC 93 of 2017

**BETWEEN:** **MOHAMMED ASHRAF KHAN** trading as Khans Constructions  
formerly of Lot 10 Natuvukica Road, Nasinu but now of Lot 20,  
Wainibokasi, Nausori, Company Director/Businessman

**PLAINTIFF/APPLICANT**

**AND:** **RABIA SHABNAM** of Lot 11 Natuvukica Road, Nasinu, Domestic  
Duties.

**DEFENDANT/RESPONDENT**

**Counsel** : **Plaintiff: In Person**  
: **Defendant: Mr K. Chang**  
**Date of Hearing** : **27.8.2020 (9.30am)**  
**Date of Judgment** : **27.8.2020 (3.00pm)**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff had filed this action for defamation. Defendant had not filed a statement of defence. Master in terms of Order 25 rule 9 of High Court Rules 1988(HCR) had issued summons to strike out the writ of summons and both parties had appeared in person and Master had given directions to parties to file necessary applications within fourteen days . Plaintiff's reason for delay was that he was relying on an alternate dispute resolution method through religious leader. Defendant had stated it was due to her impecunious nature and seeking representation from Legal Aid and then seeking advice of private practitioner that had delayed to file a statement of defence. Plaintiff had filed a Notice of Motion seeking interlocutory judgment on 31.8.2018. Defendant had also filed Notice of Motion seeking enlargement of Time to file statement of Defence on 3.9.2019. These two applications were heard together and on decision dated 27.4.2020 Defendant was granted extension of time to file statement of defence and also for payment of a cost of \$500 within 14 days. By virtue of this decision there was no need to consider Plaintiff's application seeking interlocutory judgment. Defendant had filed a statement of defence, but sought leave to appeal against the order of the cost awarded by Master. Leave was granted on default of Plaintiff. At the hearing of the appeal Plaintiff appeared in person

and made submissions. According to Plaintiff's affidavit filed to purge the default of taking steps to prosecute this action, he had sought intervention of 'Religious Elder' to resolve this dispute, without success. If so same reason is applied to Defendant for her delay in filing a statement of defence. Defendant is a widow and a recipient of social welfare grant. It is not always reasonable to award a cost of \$500 to a person who had not complied with the requirements under HCR. Defendant was represented by Legal Aid and was also recipient of social welfare grant. The reason for delay for Plaintiff to take any action in this matter was unsuccessful attempt to resolve dispute through intervention of common elderly religious personality.

## ANALYSIS

2. Plaintiff filed this action for defamation and Defendant admit the receipt of writ of summons and statement of claim.
3. Defendant did not file acknowledgment of service within fourteen days in terms of O 12 r 4(a) hence needed extension of time under the same provision which allows the court to grant an extension of time. It had not stated that court can grant a cost for such an extension of time. This provision had not been considered by Master though O 12 r 5(2) was mentioned in the ruling.
4. In my judgment if the court grants extension of time to file an acknowledgement of service there was no need to grant a cost for that extension, unless there was a special reason to do so.
5. Next issue is allowing extension of time to file statement of defence. The relevant provision is O 18 r 2 (1) HCR which again gives the court discretion to extend time when sought leave. It should be noted there again there is no mention of granting cost.
6. In The Supreme Court Practice (UK) 1988 at p 264 18/2/2/ Extension of time to serve defence stated

‘The proper course for defendant who needs more time to serve his defence is first to apply to the plaintiff for an extension of time by consent, so as to avoid the costs of a summons (O.62,r6(6) and if the plaintiff consents to an extension, no order need be drawn up 9see I42, r 4(2)(a) but the time will be extended (see O.3,r5(3)). **It is normal practice for the plaintiff to consent once to reasonable extension**’ (emphasis is mine)

7. Defendant had not filed statement of defence within time stipulated time in term of O 18 r 2(1) of HCR, but had sought extension of time on directions given by Master in terms of O. 25 r.9 of HCR.

8. There was no reason to grant costs considering the circumstances of the case, unless special reason to do so in the exercise of discretion of the Master. There was no reason given for award of costs.
9. Plaintiff did not take action for more than six months and Master issued notices to both parties in terms of Order 25 rule 9 of HCR to strike out the action.
10. Plaintiff filed 'summons' supported by an affidavit, explaining the reasons for delay. The purported summons did not seek any relief but sought 'Plaintiff to show cause for delaying in filing necessary documents' which is superfluous when Master had already issued notice in terms of Order 25 rule 9. Be that as it may in the said affidavit in support as well as in the summons the reason given by Plaintiff for the delay was resolution of the dispute between the parties through 'Religious Elder'.
11. Whatever the process Plaintiff had adopted, it was an informal alternate dispute resolution method by a common religious personality that was acceptable to parties. Such methods can be considered as methods of mediation without intervention of court and may have the benefit of more cost effective. This fact was not denied by Defendant.
12. Master had granted extension of time to file statement of defence along with acknowledgement subject to payment of cost of \$500. Master had not stated the reason for the said award of cost. A cost can be awarded for compensation for the delay. Such a cost cannot be punitive in nature or excessive considering the circumstances of case. When Plaintiff had failed to prosecute action, there was no loss to Plaintiff from Defendant's default.
13. A cost award of \$500 in normal circumstances cannot be held excessive, but must be justifiable in the exercise of discretion of Master.
14. Defendant seeks to set aside the order of cost \$500 or due to impecunious nature, reduction of the cost granted by Master.
15. First issue is whether the award of cost is justified in the circumstances of the case, as stated earlier neither O 12 r 5 of HCR nor O. 18 r .2(1) state the court can grant costs for such extensions.
16. In terms of O 3 r 4 court 'may' extend time period on a term 'as it thinks just' which is a general discretion. But considering that O 12 r 5 or O 18 r 2(1), had not mentioned any cost, if the court is granting such cost there should be a good reason. This needs to be stated in the decision. General discretion, needs to be reasonable.

17. Master's decision of 27.4.2020 had not given any such reason for award of cost. Plaintiff who had filed this action in person and abandoned it , is not justified in the award of \$500
18. Plaintiff is estopped from denying alternate dispute resolution, and considering the status of Defendant it would be hard to imagine she would take any step in the action while parallel dispute resolution methods are explored.
19. Defendant in the affidavit in support filed on 4.5.2020 at paragraph 19, 20 and 21 stated her impecunious nature. She states that she is a recipient of social welfare from the Ministry of Women, Children and Poverty Alleviation.
20. In *Povey v Povey*, [1970] 3 All ER 612 p 618-19referring to discretion of the court referred to RSC Ord62 ,r3(2) which is identical to Order 62 rule 3(3) and held,

"Nevertheless, the demands of consistent justice have caused various practices to emerge. For example, it would obviously be unjust that a person who was obliged to go to court in order to vindicate or defend his rights should have the fruits of successful litigation attenuated by his having to pay the costs of the litigation. Thus a practice developed that costs should follow the event of the litigation. This is now embodied in RSC Ord 62, r 3(2), which provides:

'If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.'

But the residual discretion is sufficient for this still to be a rule of practice and not a rule of law. **There will be types of litigation where it would not be appropriate, because it would not be just, that costs should follow the event.**(emphasis is mine)

21. Though grant of cost against the party delayed is generally allowed this should not be an inflexible rule.
22. Master can exercise discretion in the award of costs in terms of O. 3. R.4 of HCR and or O 62 r.3(3) but this discretion should be exercised, considering the circumstances of the case.
23. Plaintiff in his submissions said that he in good faith is willing to reduce the costs to \$400. He also said that he had incurred cost for some previous litigation which had taken some time and he had appeared in court below for a criminal charge and he was acquitted. He said that this action for defamation was a result of that false complaint.

24. So, Plaintiff is seeking costs for previous litigation, which cannot be allowed, in this appeal.

**CONCLUSION**

25. Defendant who is appealing against the order of the cost, stated that she is a widow and having children to maintain and also relying on social welfare benefit. I could not find these facts being stated in the affidavits filed before Master. In any event considering the circumstances of this case there was no justification in awarding cost to Defendant. Plaintiff had stated that the delay was due to resolution of matter by mutually accepted religious elder. So the Master’s decision awarding a cost of \$500 is set aside. No cost for this appeal considering the circumstances of this case.

**FINAL ORDERS**

- a. Master’s order awarding cost of \$500 against Defendant is set aside.
- b. Appeal is allowed
- c. No order as to cost of this appeal.

**Dated at Suva this 27<sup>th</sup> day of August, 2020.**

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