

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 87 OF 2019

BETWEEN: **PATRICK KUMAR** of 5 Dalito Place, Simla, Lautoka, General Manager
PLAINTIFF

AND: **RESHMA KUMARI RAM** of 12 Oriana Place, Field 40, Lautoka.
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. M. Tavakuru, for the Plaintiff
 Ms. V. Patel, for the Defendant

DATE OF HEARING : 1st July, 2022

DATE OF DECISION : 1st July, 2022

RULING

[Summons to vacate Trial date]

1. The Plaintiff by Summons filed on 29th June 2022 and served on 30th June 2022 seeks to vacate the trial date of this action, which stands is fixed for 04th of July 2022. The Summons is supported by the affidavit of PATRICK KUMAR, the Plaintiff sworn on 28th June 2022.
2. The Defendant opposes the application to vacate trial date, who has not filed her Affidavit in Opposition.
3. The Summons being supported before me inter-parte on 01st July 2022, learned Counsel for both parties made oral submissions; Counsel for the plaintiff filed helpful written submissions too.
4. The Plaintiff makes this application pursuant to Orders 35 Rule 3 of the High Court Rules, 1988 and the Inherent Jurisdiction of the High Court. Order 35 Rule 3 of the High Court Rules gives a judge the discretion to adjourn a trial in the interest of justice which states as follows.

“The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.”

5. The Plaintiff is relying on his aforesaid Affidavit , which states that;

- i. One of his key witnesses, namely, Police sergeant Maciu is currently overseas in the United States of America and as such he is unable to attend Court;
 - ii. That Police Sergeant Maciu had advised us that he will be available for hearing scheduled for 4th of July, 2022 however I am advised that he has left for the United States due to an emergency and will be available at the end of August;
 - iii. Police Sergeant Maciu's evidence is crucial to the merits of the Plaintiff's claim, in that Police Sergeant Maciu had spoken to the Defendant, where the Defendant admitted to the Police Sergeant Maciu of the allegations as set in my Statement of Claim. Police Sergeant advised me of the same.
 - iv. That the oral conversation is crucial evidence to the Plaintiff's case and only person that can adduce the evidence is Police Sergeant Maciu;
 - v. The absence of the plaintiff's key witness will greatly prejudice the Plaintiff's claim in its entirety and as such thus there will not be a fair trial.
6. The Plaintiff also avers that he does not intend to disrespect the Court and the learned Counsel for the Defendant and that he sincerely apologies for any inconvenience caused. The Defendant has not filed any affidavit in response, though the Affidavit in support had been served in time, which was not disputed by the learned Counsel for the Defendant.

SUBMISSIONS BY THE COUNSEL AT THE HEARING:

7. Learned Junior Counsel for the Plaintiff made her oral submissions relying on the contents of the written submissions filed. On the other hand, the Learned Counsel for the Defendant, while registering her objection for the vacation of the trial date, which falls on 04th July 2022, states that if the Court is inclined to allow the Summons for the vacation of the trial date, to order costs in the Defendant's favor against the Plaintiff.

DETERMINATION:

8. The power to adjourn or refuse to adjourn a trial is within the discretion of the Court hearing the matter. This discretion is to be exercised judicially and in the interest of justice.
9. The Plaintiff is seeking an adjournment since his key witness is away from the shores of Fiji Islands and presently in the United State due to certain urgent requirement, though he had advised the Plaintiff that he will be available for the scheduled hearing on 04th July 2022.
10. The Plaintiff on the other hand seems to have got ready for the upcoming trial, which is evidenced by the fact that his Solicitors have duly filed and caused the SUBPOENA

issued on another witness, namely, Vimal Vine Pillay, the Crime Officer Inspector attached to the Lautoka Police Station.

11. The Plaintiff is seems to be heavily relying on the evidence of the said Police Officer Maciu, being his key witness, to substantiate his claim against the Defendant .
12. This matter was assigned a hearing date before me for the first time on 21st March 2022, being the 2nd date fixed for the trial to be held on 4th July 2022. Though, this matter had initially, on 1st of April 2021, been fixed for trial by my predecessor judge for it to be taken up on 08th November 2021, it did not eventuate due to the retirement of my predecessor Judge and accordingly the matter was listed before me.
13. The stern position of the Plaintiff is that he requires his prime witness Police Officer Maciu to give evidence to substantiate his claim.

LAW

14. In coming to a decision I refer to the Court of Appeal decision in ***Goldenwest Enterprises Ltd vs Timoci Pautogo, Civil Appeal Number ABU 0038 of 2005*** in particular paragraph 37:

“Generally, this is the principle covering courts’ discretion to adjourn or not to adjourn. If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it, adjournment should be granted ...”

15. It is to be noted that in the appeal of ***Goldenwest Enterprises Ltd (supra)*** the Court of Appeal also took into account the case of ***Dick vs Piller [1943] All ER 627*** at paragraph 41 the Court of Appeal made an important observation as follows:

“In Dick v. Piller in issue was whether the appeal was on point of law or fact. It was a question of law, said the Court, for by refusing the adjournment the judge ‘caused a serious miscarriage of justice, and ..., in doing so, rejected the first principle of law, for he deprived the defendant of his very right to be heard before he was condemned’: at 628”

16. In view of the principles enunciated in ***Goldenwest Enterprises Ltd (supra)*** the test for adjournment of trial dates can be listed as follows:
 - i. Will refusal to grant an adjournment amount to a denial of a fair hearing and hence denial of natural justice or procedural fairness; or
 - ii. Whether a refusal to adjourn would cause definite and irreparable harm to the party seeking it; and
 - iii. Is there any ‘fault’ on the part of the party seeking the adjournment?

WILL REFUSAL TO GRANT AN ADJOURNMENT AMOUNT TO A DENIAL OF A FAIR HEARING AND HENCE DENIAL OF NATURAL JUSTICE OR PROCEDURAL FAIRNESS

17. It is the submission of the Plaintiff's Counsel that if the hearing date is not vacated it will cause miscarriage of justice to the Plaintiff since he will be deprived of a fair hearing hence a denial of natural justice and procedural fairness because the key witness of the Plaintiff, who is a Police Officer and to whom the Defendant is alleged to have confessed about the defamatory remarks, the Defendant is alleged to have made against the Plaintiff.

WHETHER A REFUSAL TO ADJOURN WOULD CAUSE DEFINITE AND IRREPARABLE HARM TO THE PARTY SEEKING IT

18. If the adjournment is refused, the Plaintiff's key witness will not be able to give evidence and his claim against the Defendant will go unproved beyond his control as his key witness was away from Court. Plaintiff's Counsel relies on *Golden west Enterprises (supra).Ltd.*
19. From the evidence placed before the Court there is no doubt that Mr. Maciu, the Plaintiff's witness plays a very crucial and important role for the Plaintiff in prosecuting the claim filed against the Defendant by the Plaintiff.
20. The claim is also a substantial one, which requires proper evidence to be adduced before the Court for its determination. I am convinced that the refusal of an adjournment of trial can leave the claim of the Plaintiff unproved and as a result definite and irreparable harm would probably be caused to the Plaintiff.

IS THERE ANY 'FAULT' ON THE PART OF THE PARTY SEEKING THE ADJOURNMENT

21. In respect of this limb of the test, the Court of Appeal in *Goldenwest Enterprises Limited (supra)* at paragraph 42 stated:

"There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment: Piggott Construction v. United Brotherhood (1974) 39 DLR (3d) 311 (Sask. CA)..."

22. It is evident in the record that the plaintiff filed this application on 29th June 2022, about 3 working days prior to the trial date, which is on 4th July 2022, and the same was, undisputedly, served prior to the date on which the Summons was supported. However the Plaintiff's Solicitors had put the Defendant's Solicitor's on notice about the impending Summons to vacate the trial date by their email dated 28th June 2022. The plaintiff's Solicitors also had the Subpoena issued on the other police witness in preparation for the trial on 4th July 2022.
23. This demonstrates that the Plaintiff and his Solicitors had diligently acted towards the prosecution of the action against the Defendant and the Defendant's Solicitors had reasonable time keep their senior Counsel and the witnesses about this impending vacation of trial.

24. The witness for the plaintiff is going to be away from Court **not** due to the inability of the Plaintiff to call him or trace his whereabouts but due to beyond his control. The witness is said to have undertaken to make himself available in or after August 2022.
25. I don't find any serious fault on the part of the Plaintiff or his Solicitors for the blame to be pinned on them for the predicament resulted owing to the sudden absence of the Plaintiff's key witness.

CONCLUSION

26. I have carefully considered the evidence put before the Court and the submissions made by both the Counsel. I am satisfied that the Court should exercise its discretion in allowing the application of the Plaintiff. In the interest of justice I am also satisfied that the grant of an adjournment is warranted in the circumstances of this case. It is only fair that the Plaintiff be given an opportunity to put its case against the Defendant before the Court through its key witness and as a result be accorded with natural justice and procedural fairness.
27. I am also of the view that **no** serious prejudice and/ or damages would be caused to the Defendant on account of this adjournment being granted as prayed for by the Plaintiff. However, I bear the view that the Defendant ought to be compensated by the Plaintiff for the wasted hearing by way of Costs, which in any event should in the cause.

ORDERS

- i. The application for adjournment moved by the Plaintiff is hereby granted;
- ii. The trial that stood fixed for 04th July 2022 is hereby vacated.
- iii. Of consent the trial is re-fixed for 24th October 2022 at 10.30 am.
- iv. Costs will be in the cause.
- v. The Plaintiff shall take all steps (including the payment of hearing fees) in preparation for the trial.




A.M. Mohammed Mackie
Judge

At High Court Lautoka this 1st day of July, 2022

SOLICITORS:

For the Applicant: Messrs Krishna & Co.

For the Defendants: Messrs Vasantika Patel