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

CIVIL ACTION NO. HBC 28 OF 2020

BETWEEN: **NAULU BALEILEVUKA** of Namaka, Nadi

PLAINTIFF

AND: **HASRAT BEGG T/A HRF INVSTMENT CO** of Nadi Back Road

DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Vakacakau – For the Plaintiff
Ms. Tunikula – For the Defendant.

DATE OF HEARING : 19th August, 2022.

DATE OF JUDGMENT : 31st October, 2022

JUDGMENT

A. **INTRODUCTION**:

1. This is an Application (Summons) for leave to appeal and stay of the decision of the learned Master (the Master) dated and delivered on 17th June, 2022 at the High Court of Lautoka in the above styled action.

2. By the said Summons dated and filed on 01st July, 2022, the Defendant- Intended Appellant (the Defendant) seeks the following orders:

    1. *That the Appellant (Original Defendant) be granted leave to appeal to a judge of the High court from the Orders of the Ruling of Master of the High Court U. L. Mohamed Azhar, delivered on or about 17th June ,2022 at the High Court of Lautoka; and*

    2. *That the appellant (Original Defendant) be granted stay of Ruling of Master of High Court U. L. Mohamed Azhar delivered on or about 17th June, 2022 at the High court of Lautoka, until the final determination of this Appeal; and*

    3. *Such further or other orders as this Honorable Court shall deem just.*

3. The Application is supported by the Affidavit of HASRAT BEGG, the Defendant, sworn on 30th of June, 2022 and filed along with annexure marked as "HB-1", being the copy of the draft Notice of Appeal and Grounds of Appeal. Further, the Application states that it is

made pursuant to Order 59 Rule 8, Rule 11, 12, 16 the Rule 17 of the High Court rule 1988 and the inherent jurisdiction of the Court.

4. The Application, reportedly, being served on the Solicitors for the Plaintiff-Respondent (the Plaintiff) on 1st of July, 2022 and when mentioned before me on 28th of July,2022 , though the Plaintiff's Solicitors were granted 28 days' time to file Affidavit in response, they opted not to file the same, but to oppose the Application at the hearing relying on the relevant law. Accordingly, the matter was fixed for hearing to be taken up on 19th August, 2022 leaving the parties at liberty to file written submissions at the hearing.

5. At the hearing held on 19th August, 2022, learned Counsel for both the parties made oral submissions. Additionally, the Counsel for the Defendant tendered her written submissions at the Registry on the same day, while the Counsel for the plaintiff was granted 14 days to file his reply written submissions, which was filed on 5th of September,2022.

B. <u>THE BACKGROUND BEFORE THE MASTER:</u>

6. The Plaintiff commenced the substantial action on 07th February,2020 by filing the Writ of Summons and the Statement of claim against the Defendant seeking, inter-alia,

   a. A declaration that by his action and/ or non- action, the Defendant is in gross breach of the Agreement,
   b. General damages for breach of Agreement as per paragraph 17 of the Statement of Claim,
   c. Special damages in the amount of $1,800.00 (One Thousand eight hundred dollars) as per paragraphs 18(a), 18 (c), 18 (d) and 18 (e) of the Statement of Claim,
   d. Refund of $75,000.00 (Seventy five thousand dollars) being the deposit paid in accordance with the Agreement.

7. The above claim emanates from and out of an Agreement, admittedly, entered between the Plaintiff and the Defendant on or about 26th October, 2016 for the Defendant to sell and the plaintiff to buy the Land owned by the Defendant on Lease No- 20050 LD 4/10/1891, which was to be developed, sub- divided into 5 lots and separate Leases to be obtained. The total agreed price was $1, 50,000.00 out of which $75,000.00.00 had been, admittedly, paid initially on or about 27th October, 2016.

8. The Plaintiff alleges that the Defendant, by his actions and/or non-actions, has willingly breached the Agreement by not carrying out his duties and despite numerous reminders and requests; the Defendant has failed and/ or refused to carry out the obligations on his part of the Agreement.

9. Having filed the Notice of intention to defend, the Defendant filed his Statement of Defence on 3rd March, 2020, with a counter claim of $7,500.00. The Plaintiff filed reply to defence and defence to Counter Claim. In his Statement of Defence, the Defendant, having admitted the entering into the Agreement, the receipt of advance of $75,000.00 and the two letters of demand, took up the position that the Plaintiff is not entitled for the refund

of the money as the Defendant still continues to perform all the obligations on his part under the Agreement. All the pre-trial formalities being complied with, except for PTC, further directions were made by the Master on 17th June 2020.

10. On 21st September further directions were made for the discoveries to be completed and PTC minuets to be filed before 12th October,2020 and the matter to be mentioned before him on 16th October,2020. However, the Defendant on 14th October, 2020 filed the Summons to Strike out the Plaintiff's claim pursuant to Order 18 Rule 18 1 (a) of the HCR.

11. Learned Master, after hearing the oral submissions and entertaining written submissions from both the parties, by his impugned Order dated 17th June, 2022 dismissed the Defendant's Summons for striking out, with an order for the payment of $1,500.00 by the Defendant unto the plaintiff, being the summarily assessed costs. It is against this Order, the Summons in hand is before me seeking for leave to Appeal and stay.

C. THE LAW:

12. The Defendant seeks to Appeal an interlocutory decision of the Master. Therefore, Order 59, rule 9 of the High Court Rules 1988, as amended (the HCR) is the relevant rule, which states:-

> *An appeal from an order or judgment of the Master shall be filed and served within the following period –*
>
> *(a) 21 days from the date of delivery of an order or judgment; or*
> *(b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.*

13. The Order, the Defendant seeks leave to Appeal against is an interlocutory order delivered by the Master of the High Court on 17th June,2022, dismissing the Defendant's Summons for Striking out the Plaintiff's action and imposing a costs of $1,500.00. There is no issue or dispute on this point.

14. An interlocutory order made by the Master may be appealed with the leave of a High Court Judge under O.59, r.11 of the HCR, which reads:-

> "*Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment".*

15. The order the Defendant seeks leave to Appeal was made on 17th June, 2022. The Defendant filed his Summons for leave to Appeal and Stay on 1st July, 2022 and had it, reportedly, served on the Plaintiff's Solicitors on the same day ie.1st July, 2022. Hence, parties are not at variance with regard to the compliance of the Rules on the time frame for the filing and service.

16. Order 59 Rule 12 states about the Notice of appeal as follows.

"An *appeal shall be brought by way of notice of appeal, which may be given in respect of the whole or any specified part of the order or judgment of the Master".*

17. Order 59 Rule 16 (1) (2) stipulates about the Stay of proceedings or execution as follows.

(1) The filing of a notice of appeal or an application for leave shall not operate as a stay of execution or proceedings, or any step therein unless the court so directs.
(2) An application under paragraph (1) shall be made by way of an inter-parte summons Supported by an affidavit.

18. Order 59 Rule 17 stipulates the procedure after filing the Appeal.

Test for granting Leave to Appeal & Case Law

19. In ***Prasad v Republic of Fiji & Attorney General (No 3) [2000] FJHC 265; [2000] 2FLR 81*** Justice A. Gates (as his Lordship then was) dealing with an application for leave to appeal to set aside interlocutory order stated:

"In an application for leave to appeal the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see Rogerson v. Law Society of the Northern Territory [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.

Fiji's legislative policy against appeals form interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given Niemann (supra) at 432. If is not sufficient for an appeal court to gauge, that when faced with the same material or situation. It would have decided the matter different. The court must be satisfied that the decision is clearly wrong (Niemann at 436).

Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties Bucknell (supra) at 225; Dunstan v Simmie & Co. Pty Ltd [1978] VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand," Dunstan (supra) at 670; Darrel lea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd [1969] VR 401 at 408."

20. The court may grant leave to appeal an interlocutory order if the order to be appealed from:

(i) Is clearly wrong or at least attended with sufficient doubt and causing some substantial injustice or
(ii) Has the effect of determining the rights of the parties.

21. In the decisions cited below, the law on leave to Appeal interlocutory orders have been discussed at length.

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"*

In the case of **Ex parte Bucknell [1936] HCA 67; (56 CLR 221 at page 224)** it was held:

> *"At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment".*

In Dunstan v Simmie & Co Pty Ltd 1978 VR 649 at 670 it was held:

> *"....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."*

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"….*

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".

D. GROUNDS OF APPEAL:

22. The proposed 6 grounds of Appeal are found in the annexure "HB-1" to the Affidavit in support, which are reproduced below.

1. *That the learned Master of the High Court erred in fact and in law by failing to consider that the sales and purchase Agreement dated 26th October 2016 had no end-date as stated in the Agreement , that the settlement date would be mutually agreed since the Agreement was conditional on the consent of the Director of Lands.*

2. *That the learned Master of the High court erred in fact and in law when failing to consider that there was no agreement as to the settlement date , therefore the Appellant (Original Defendant) has always continuously taken the necessary steps to attain consent of the Director of Lands.*

3. *That the learned Master of the High Court erred in fact and in Law when failing to consider that the Respondent (Original Defendant) prematurely served the Demand Notice dated 8th of November,2019 on the Appellant (Original Defendant) requiring the rescinding of the Agreement and the deposit sum to be refunded; and*

4. *That the learned Master of the High Court erred in fact and in Law when failing to consider that so far as to the right to cancel an agreement , it requires first a Notice to Complete therefore making time is of an essence; and*

5. *That the learned Master of the High Court erred in fact and in law by failing to consider that without the issuance of the Notice to Complete, the Sales and Purchase agreement dated 26th October,2016 had not been triggered , therefore the Applicant (Original Defendant) has always continuously performed his obligations under the said agreement; and*

6. *That the learned Master of the High Court erred in fact and in law by failing to consider that the Respondent (Original plaintiff) filed the Civil action No-28 of 2020 alleging a breach of the Sales and Purchase Agreement dated 26th October ,2016 , when it is evidenced that the Respondent's cause of action does not exist and is obviously unsustainable.*

E. ANALYSIS:

23. I do not wish to deeply delve into the ground stated above, as it amounts to an assessment of the merits of the Appeal. However, what is required in a Leave to Appeal and in a Stay Application for the consideration of the Court will be dealt with, in this ruling.

24. I shall also bear in mind that in the event the Application for Leave to Appeal becomes unsuccessful, the necessity to go into the Application for Stay will not arise.

25. However, careful scrutiny of the above 6, purported, grounds of Appeal, I find that all those grounds revolve mainly around two questions, namely, the "Consent of the Director

of Lands", and the so-called requirement of "Notice to Complete" about which not even a single word had been uttered by the Defendant in his Statement of Defence.

26. The Plaintiff before this Court opted not to file Affidavit in response to the Affidavit in support filed by the Defendant along with his Summons for Leave to Appeal and Stay. As the Application is to be argued and decided on question of Law alone, non-filing of an Affidavit in response need not necessarily inhibit the right of the Plaintiff to oppose the Application.

27. The only question, the Master was called upon to decide when the Application for Striking Out under Order 18 Rule 18 (1) (a) came up before him (in which no evidence is admissible) was whether there exist a reasonable cause of action against the Defendant?

28. Nowhere in his Statement of Defence, has the Defendant taken up any position that the Plaintiff has no cause of action. Instead, having admitted the entering into the Agreement, the receipt of the advance money of $75,000.00 and the two Letters of Demand, the position he seems to have taken up is that the Agreement had no ending date, he had fulfilled all the obligations on his part and the default was on the part of the Plaintiff.

29. One of the two arguments advanced on behalf of the Defendant in support of his position is the absence of consent from the Director of Lands, which is no more a mandatory requirement in commencing the proceedings. The absence of the consent need not necessarily nullify the legal proceedings. We have case law authorities which stipulate that it is only when the Court "deals" with the land, such consent becomes mandatory. See ***Dalmax Investment Limited V Vuki [2008] FJHC 45*** ,wherein it was held;

30. However, it has now transpired that the consent of the Director of Land had been obtained by the Plaintiff. In any event, if needed, an issue on this can be conveniently raised at the PTC and answered at the end of the trial. So the argument advanced on behalf of the Defendant that no cause of action had occurred in the absence of the Consent of the DOL will not hold water.

31. The Plaintiff must plead 4 basic principles when he alleges breach of contract. The first one, being the existence of a valid contract, is clearly admitted in the pleadings. Secondly, there is no allegation by the Defendant that the plaintiff failed to fulfill any specific obligation on his part. Nevertheless, the Plaintiff said to have obtained the consent of the DOL. The next question whether the Defendant performed his obligations or not could not have been decided by the Master summarily in the absence of evidence. Finally, the question of damages, if any, to the Plaintiff, also has to be adjudicated trough the trial and not in a summary manner.

32. What the Plaintiff was expected was to plead that there is a reasonable cause of action and not that the grounds pleaded are strong. In his impugned Ruling, Master has observed in paragraph 8 thereof "*the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot strike out an action for the reason that , it is weak or the Plaintiff or the Defendant is unlikely to succeed in his claim or defence"*

33. The allegations levelled in the Pleadings cannot be summarily addressed by the Master in an Application under Order 18 Rule 18 (1) (a), as correctly pointed out by the Master and these allegations on the cause of action have to be adjudicated at the trial proper, unless it was obvious and palpable on the face pleadings itself.

34. Another point raised and argued by the Counsel for the Defendant at the hearing before me and in her written submissions was the alleged non- issuance of a "Notice to Complete" by the plaintiff unto the Defendant. The Defendant had not pleaded that there was such a provision in the Agreement. The Defendant admits the receipt of two Letters of Demand from the Plaintiff and those letters and the Agreement were not part of the record. However, even if those documents were before the Master, when considering an Application pursuant to Order 18 Rule 18 (1) (a), he is not expected to rely on any evidence in deciding the existence of the cause of action. It is reserved to be addressed, along with the oral and other documentary evidence that would be adduced at the trial. Decisions of this nature cannot be arrived at summarily by the Master.

35. It appears from those decisions highlighted above, that the Appeals from interlocutory orders are discouraged by the court. In the instant matter no injustice whatsoever could be caused to the Defendants since the substantive matter is yet to be heard. The Defendant has the opportunity to challenge the judgment of the trial judge in a final Appeal, if it becomes detrimental to him.

36. It is obvious from the statement of claim that the plaintiffs' claim is based on the Agreement. The alleged violation of it cannot be decided on submissions alone. The court needs evidence to decide as to who was under obligation towards the fulfillment of the conditions of the Agreement, who, when and how the provisions of the Agreement were violated. It is convenient and desirable for the parties to have answers to those questions through the evidence at the substantial trial.

Whether the Master's order determines the rights of the parties.

37. The Master, by his order dated 17th June, 2022, struck out the Defendant's Summons under Order 18 Rule 18 1 (a) of the HCR , for striking out the Plaintiff's action. This order does not finally determine the rights of the parties. The plaintiff still needs to prove his claim at the trial. The Defendant may, if he so wishes cross examines the plaintiffs and their witnesses in order to prove his stance that he has not breached the Agreement and all the obligations on his part as per the Agreement have been duly complied with.

F. CONCLUSION;

38. For the foregoing reasons, I do not consider the proposed Appeal would have real prospect of success and I could not find any compelling reason why the leave should be granted and the Appeal be heard. I would therefore refuse leave to Appeal the interlocutory order of the Master dated 17th June, 2022. I, also find that the Defendant's Summons for leave to Appeal and stay is frivolous, vexatious and an abuse of process. Thus, the plaintiff should

be entitled to reasonable costs on account of these proceedings. I, accordingly, order the Defendant to pay summarily assessed costs of $1,500.00 to the plaintiff within 14 days from today.

G. FINAL OUTCOME:

1. The Defendant's Application for leave to Appeal and Stay of proceedings is refused.

2. The Defendant shall pay $1,500.00 to the plaintiff, being the summarily assessed cost on account of the proceedings before this Court, within 14 days from today.

3. The matter is to be mentioned before the Master for further direction at 8.30 am on 4th November, 2022.

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 31st day of October, 2022.

SOLICITORS:
For the Plaintiff:
For the Defendant: