

IN THE HIGH COURT OF FIJI
IN THE CENTRAL DIVISION
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 364 OF 2022

BETWEEN: **MAJOR JOSEFA SAVUA**

FIRST PLAINTIFF/APELLANT

WARRANT OFFICER (WO1) INOKE LIVANISIGA

SECOND PLAINTIFF/APELLANT

SERGEANT LIVAI BALEICOLO

THIRD PLAINTIFF/APELLANT

WARRANT OFFICER (WO2) JONE BUADROMO

FOURTH PLAINTIFF/APELLANT

CORPORAL (CPL) MARIKA SALUSERE

FIFTH PLAINTIFF/APELLANT

PRIVATE (PVT) SIMIONE DAU

SIXTH PLAINTIFF/APPELLANT

CORPORAL (CPL) LORIMA TINADRA

SEVENTH PLAINTIFF/APPELLANT

AND:

MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

REPUBLIC OF FIJI MILITARY FORCES

SECOND RESPONDENT

ATTORNEY GENERAL OFFICE

THIRD RESPONDENT

Date of Hearing : 8 July 2024
For the Appellant : Mr. Fa I.
For the 1st and 3rd Respondents : Ms. Raman J.
For the 2nd Respondent : Mr. Tawake P.
Date of Decision : 11 October 2024
Before : Waqainabete - Levaci, S.L.T.T, Puisne Judge

J U D G E M E N T

(APPLICATION FOR LEAVE TO APPEAL DECISION)

PART A - BACKGROUND

1. The Appellant/Plaintiff commenced proceedings in their personal capacity and as representative for and on behalf of approximately 5000 soldiers seeking to claim for allowances and pay alleged to be owing to them by the United Nations Interim Force (UNFIL) between 1978 to 2002 whilst serving on peace keeping duties.
2. Similar causes of action were litigated and dealt with in Civil Action No. 101 of 2014 and HBC 096 of 2016. The Appellant/Plaintiff in those actions are different from the Appellant/Plaintiff in this matter.
3. During the course of proceedings, the Appellant/Plaintiff filed a Summons to Strike Out the 2nd Defendants Summons which was later dismissed in an Interlocutory Ruling by the Acting Master Wickramasekara.
4. The Appellant/Plaintiff is now seeking Leave to Appeal the decision of the Acting Master Wickramsekera delivered on 25 March 2024 with the following Orders:
 - a) *The Summons to Strike Out the 2nd Defendant Summons dated 3 May 2023 as filed by the Plaintiff on 7th July 2023 is hereby refused and struck out subject to the following orders of the Court.*
 - b) *Plaintiff shall pay the 2nd Defendant a cost of \$500.00 as summarily assessed by the Court, as costs of the application.*
 - c) *Summons filed by the Plaintiff on 7 July 2023 is accordingly struck out and dismissed.*
5. The Orders of the Acting Master of the High Court stems from an application by way of Summons to Strike Out the Appellant/Plaintiffs amended Writ of Summons which was served on the 5th April 2023 and acknowledged by the 2nd Defendant on 1 May 2023.
6. Where the 2nd Defendant/Respondent filed a Summons to Strike Out the Appellant/Plaintiffs amended Writ on 3rd May 2023 and served on 17 May 2023.

7. On 7 July 2023 the Appellant/Plaintiffs filed another Summons to Strike Out with written submissions later filed on 14 July 2023.
8. The 2nd Defendant/Respondent filed an Affidavit in Opposition to the Summons to Strike Out on 21 July 2023 together with a written submissions on 24 July 2023.

PART B: AFFIDAVIT

9. The Appellant/Plaintiff deposes that the 2nd Defendant had filed their acknowledgement of Service 26 days after the Amended Writ of Summons was filed and served on them although not served on Appellants.
10. There being no Notice of Intention to Defend, the 2nd Defendant thereafter filed their Acknowledge of Service without seeking leave of the Court.
11. The Appellant deposes that Order 12 (5) of High Court Rules (hereinafter referred to as 'HCR') requires that leave of the Court to be obtained if the Defendant gives notice to defend.
12. Therefore, according to the Appellant/Plaintiff's affidavit, the Respondent/2nd Defendant Acknowledged Service without leave of the Court.
13. Hence the Appellant/Plaintiff deposes there were no grounds for the Respondent/2nd Defendant to be heard on their Summons to Strike Out if leave was not obtained from Court to file Notice to Defend.

PART C: LAW AND ANALYSIS

14. The right to appeal an interlocutory order or judgment of the Master is provided for in Order 59 Rule 8 (2) and Order 59 Rule 11 of the High Court Rules which states:

Appeal from Master's decision

"8 (2). No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.

Application for Leave to Appeal

11. An 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 delivery of the order or judgment."

15. In Kelton Investment Limited -v- Civil Aviation Authority of Fiji [1995] FJCA 15; Abu 0034d.95s(18 July 1995) where Sir Tikaram P JA (Court of Appeal) explained the importance of leave for applications on appeal as follows:

“I am mindful that Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubball v Everitt and Sons (Limited) [1900] UKLawRpKQB 17; [1900] 16 TLR 168).

Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:

'.....

5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd [1978] VicRp 44; (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries 104 ALR 621 at 623 lines 29-31).

5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:

"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."

16. In Rajendra Prasad Brothers Ltd -v- FAI Insurances (Fiji) Ltd [2002] FJHC 220; HBC 0205r.2001s (9 August 2002) where the Appellant/Defendant appealed against the decision of Pathik J to convert and continue an Originating Summons into a Writ of Summons in accordance with Order 29 r.8 of the High Court Rules. His Lordship stated:

“This application as I see it is not only on interlocutory order but also one of A practice and procedure. Here there was an exercise of discretion by the Court on a point of practice and procedure. I find that the following passage from the judgment of the High Court of Australia in Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc. & Anor, [1981] HCA 39; [1918] 148 CLR 170 at 177 wherein is repeated with approval the oft-cited statement of Sir Frederick Jordan in Re Will of F.B. Gilbert (decd) [1946] NSW Rpt 24; [1946] 46 SR (NSW) 318 at 323 pertinent:

A...I am of the opinion that.....there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon inference with the order of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal.” (emphasis mine)

Even in *Salmond on Jurisprudence* 10th Ed. (1947) p.476, difference between substantive law and procedural law have been described thus:

“A Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.”

It was stated in Adam Brown (supra) at 177 that:

A.... that appellate courts exercise particular caution in reviewing decisions pertaining to practice and procedure. Not only must there be error of principle, but the decision appealed from must work a substantial injustice to one of the parties,..... For ourselves, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria. The circumstances of different cases are infinitely various. (emphasis mine)”

As can be seen from the wording of the said s12(2)(f) leave will not generally be given from an interlocutory order unless the Court sees that some injustice will be done. The Courts have therefore laid down certain principles upon which this leave will be granted. In *Hawkins v Great Western Railway* [1895]

14 R.360 Rigby, L.J at 362 said: A.....It is only where a potent mistake is pointed out, or where it is made clear that there is some injustice which ought to be remedied, that leave should be granted.

On the authorities, Mr. Haniff for the defendant has to satisfy the Court that a substantial injustice will be done by leaving that erroneous decision unreversed@ (William J in Perry v Smith 27 V.L.R 66 at 68; followed by Full Court (Winneke C J) in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd [1969] VR at 401). On the affidavit evidence before me I am not satisfied that any substantial injustice would be done”

17. From these cases it is very clear that an appeal against a decision on the exercise the Masters discretion on a practice or procedure must be granted cautiously. In order to do so the Court must consider whether:
 - (1) Error of principle by the Master;
 - (2) Substantial Injustice to the parties as a result of the decision

Error of principle or decision

18. The issue before this Court is whether an extension is required where the Acknowledgement of Service has been filed out of time and whether the failure of an extension renders the Acknowledgement invalid.
19. In my opinion, an acknowledgement of service enables the Respondent/2nd Defendant to acknowledge being served with the Claim and allows the Respondent/2nd Defendant to dispute the jurisdiction of Court on grounds stipulated in the High Court Rules or to accept the jurisdiction of the High Court.
20. Where the Acknowledgment of Service and the Writ of Summons together with the Statement of Claim is defective or is not served, the Court has held that irregularity of service renders default judgment entered irregularly.
21. A failure to file an acknowledgement of Service renders the Respondent/2nd Defendant to accept the jurisdiction of the High Court Rules and powers. Furthermore, where the Respondent/2nd Defendant has not filed an Intention to Defend on time, the Plaintiff is entitled to seek for default or summary judgment.
22. Order 12 Rule 5 (6) of the High Court Rules provides that an Acknowledgment of Service can be filed late and does not preclude an applicant from filing other documents.

23. However the High Court Rules in Order 12 Rule 5 (6) also requires that where the Acknowledgement of Service is filed late, that an extension of time be obtained by the Court.
24. Order 3 of the High Court Rules provides rules in the manner in which extension of time for filing may be done.
25. The Appellant/Plaintiff therefore contends that not only is the extension of time required in order to regularize the filing of pleadings, it also is required where parties seek to make other interlocutory applications including Striking Out under Order 18 rule 18 of the High Court Rules.
26. In their submissions the Respondent/2nd Defendant argues otherwise. They argue that the application for Leave to Appeal is unmeritous and wrong and fail to submit case authority to substantiate their application.
27. In Ali -v- Radruita [2011] FJHC 302; HBC 403.2009 (26 May 2011) where Callanchini J (as he was then) held that:

“The exceptional circumstances that the Defendant is required to establish in the present application are that the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded is so much out of all reasonable proportion to the facts proved in evidence. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed.”

28. In their oral submissions, the Appellant/Plaintiff argued that there were exceptional circumstances to entitle Leave to Appeal be granted on the basis that the Master exercised its discretion wrongly by refusing to strikeout the Respondent/2nd Defendant’s application for Striking Out when they failed to file the Acknowledgement of Service within time.
29. Their argument refers to the interpretation of Order 12 Rule (5) of the HCR which precludes the Defendant from doing any other act without leave of the Court and reads:

Late Acknowledgment of Service (o. 12, r.5)

5-(1). Except with the leave of the Court, a defendant may not give notice of intention to defend in an action after judgment has been obtained therein

(2). Except as provided in paragraph (1), nothing in these Rules or in writ or order thereunder shall be construed as precluding a defendant from acknowledging service in an action after the time limited for doing so, but if a defendant acknowledges service after time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other act later than if he had acknowledged service within that time”

30. In the Supreme Court Practice 1988 (Sweet and Maxwell Ltd , London, 1988) p 106-107 in para 12/6/1 reads:

“Effect of Rule: - The rule has been substituted for the former –O. 12, r.6 which was taken from R.S.C (Rev.) 1962 which was based in part on the former O.12; r.22 and in part on the former Chancery practice; see *Stein –v- Friendman* [1953] 1. W.L.R 969; [1953] 2 All E.R 565. The former Q.B practice, which permitted an appearance (now an Acknowledgement of Service) after judgment without leave, is no longer operative.

Although a notice of intention to defend may be given after the time limited for acknowledging service and before judgment, this does not of itself extend the time for the defendant to serve his defence or do any other act; if he desires such extension of time, he must apply an order in the usual way.”

31. From the Supreme Court Practice, it is quite clear that the Court has inherent jurisdiction to extend time.
32. Furthermore by virtue of Order 3 rule 5 of the High Court Rules, empowers the Court on an application, after expiration of the period prescribed, to extend time.
33. Thus where an applicant fails to apply for extension of time, does not preclude the court for granting extension of time on its own motion.
34. Thus does this extension of time required to apply to applications to strike out? According to Order 18 rule 18 of the High Court Rules it reads:

“The Court may at any stage of proceedings order to be struck out or amended any pleadings or the endorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) It discloses no reasonable cause of action or defence, as the case may be; or
- (b) It is scandalous, frivolous or vexatious;
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed on judgment to be entered accordingly, as the case may be.”

35. The meaning of the rule is clear. The application for striking out as a summary process can be made at any time or at any stage of the proceedings. The Order 18 Rule 18 does not limit its application to certain types of proceedings.
36. Furthermore, I find that the term ‘any other act’ is restrictive only to procedures for filing of pleadings. It does not limit the application for striking out, more particularly where Order 18 Rule 18 of HCR specifically provides that the application can be made at any stage of the proceedings. There is no proviso limiting or restricting its application.
37. Therefore I find that the decision was not wrong in principle and thus there is no proper grounds for which the Appellant/Plaintiff can seek leave to appeal.

Whether the decision has created a substantial injustice to the parties

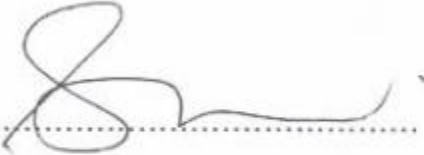
38. The leave to appeal challenges the procedure adopted by the Respondent/2nd Defendants to file their application for strike out without leave.
39. The decision delivered by the Master does entitle the parties to continue with the proceedings but does not alter their substantive rights.
40. The issue in question deals with procedural rights. These do not affect the substantive rights of the parties provided the parties apply the necessary applications appropriately.
41. The court finds the decision in the Appeal does not alter the substantive rights of parties or directly bring the proceedings to an end.
42. There is a pending application to Strike Out the Statement of Claim by the 2nd Defendants for which the Plaintiff/Appellant has the right to respond and if need be, seek leave to appeal.
43. The Court finds no prospect of success in the application before it to grant Leave to Appeal at this stage.

PART D: ORDERS

44. The Court orders as follows:

- (a) **Application for Leave to Appeal is dismissed;**
- (b) **Costs against the Appellant/Plaintiff for the sum of \$1000.**





Justice Senileba Waqainabete-Levaci

Puisne Judge

11 October 2024