

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

CIVIL ACTION NO. HBC 39 OF 2012

In the matter of an Application for Leave to Appeal against, and stay of , the Ruling of the Hon. Master of the High Court of Lautoka – Fiji, pronounced on 15th June 2023 in the Civil Action No. HBC 39 of 2012L)

BETWEEN : MOHAMMED ALEEM KHAN of 11 Kennedy Avenue, Nadi, Businessman
**APPLICANT
(ORIGINAL 1ST DEFENDANT)**

AND : KRISHNA SAMI NAIDU of Vulovi, Labasa, Business
**1ST RESPONDENT
(ORIGINAL PLAINTIFF)**

AND : GULF INVESTMENT (FIJI) PTY LTD a limited liability company having its registered office in Nadi, Fiji
**2ND RESPONDENT
(ORIGINAL 2ND DEFENDANT)**

AND : ALEEM INVESTMENT LTD a limited liability company having its registered office in Nadi, Fiji
**3RD RESPONDENT
(ORIGINAL 3RD DEFENDANT)**

AND : KENNEDY LAUNDRY & DRY CLEANING LTD a limited liability company having its registered office in Nadi Fiji
**4TH RESPONDENT
(ORIGINAL 4TH DEFENDANT)**

BEFORE : Hon. Mr. Justice A. M. Mohamed Mackie

**APPEARANCES : Mr. Singh R. with Ms. Swamy A. for the Applicants
: Ms. Fatima G. for the Respondent.**

DATE OF HEARING : 15th March, 2024

DATE OF RULING : 16th October 2024.

RULING.

A. INTRODUCTION:

1. The Applicant hereof was the 1st Defendant, while the 1st Respondent was the Plaintiff and the 2nd, 3rd and 4th Respondents were 2nd, 3rd and 4th Defendants respectively in the substantial action filed on 1st March 2012 by way of Writ of Summons and the Statement of claim
2. Before me is an Application (Summons) filed by the above-named 1st Defendant- Applicant (“the Applicant”) on 29th June 2023 and supported before me inter-parte on 25th July 2023 seeking the following reliefs;
 1. *An ORDER that leave be granted to appeal to the High Court from the Order of the Master Mr. U.L. Mohamed Azhar in this matter delivered on the 15th day of June, 2023.*
 2. *An ORDER that there be a stay of execution against the Appellant/original 1st Defendant pending the determination of this application and in the event, that such leave is granted until the delivery of the judgment of the High Court on any appeal brought in terms of such leave.*
 3. *An ORDER that costs of this application be costs in the cause.*
 4. *Any further relief or orders that this Honorable Court deems just and appropriate.*
3. The Summons is supported by the Affidavit of Mohamed Aleem Khan, the Applicant, sworn on 28th June 2023 and filed along with annexures marked as “A” to “J”, out of which the annexure marked as “J” contains Notice of Appeal and proposed 08 Grounds of Appeal.
4. The Summons states that it is filed pursuant to Order 59 Rule 11 and Rule 16 of the High Court rule 1988 and the inherent jurisdiction of the Court.
5. The Summons, reportedly, being served on the City Agents of the Solicitors for the Plaintiff-Respondent (“the Respondent”) on 29th June 2023, the Respondent filed his Affidavit in opposition on 22nd August 2023, along with an annexure marked as “A”, being an Indemnity Bond dated 22nd October 2015 signed by and between the Applicant and the Respondent. The Applicant Mohamed Aleem Khan filed his Affidavit in reply on 01st September 2023.
6. Accordingly, this matter was taken up for hearing before me on 15th March 2024, along with the connected matters **HBC 123 of 2012 Leave to Appeal & HBC 184 of 2019 Appeal**, and was fixed for Ruling on 23rd July 2024. However, the same could not be delivered on time due to my absence from Fiji for 3 months on account of an urgent medical condition. I tender apologies to the parties and their counsel.
7. At the hearing, Counsel for both the parties made oral submissions. Additionally, they have filed their respective written submissions as well as aforesaid.

8. Parties are not at variance on the procedure adopted and the time frame followed in filing this Summons seeking leave to Appeal and stay.

B. BACKGROUND & CHRONOLOGY OF EVENTS:

9. The Respondent on 1st March 2012 filed his writ of summons and the Statement of Claim against the Applicants seeking, *inter alia*;

- i. *Judgment in the sum of \$2,000,000.00.*
- ii. *Special Damages in a sum of \$3,000.00 as mentioned at paragraph 15.*
- iii. *General Damages,*
- iv. *Exemplary damages,*
- v. ***An order that all the 1st Defendant's shares in the Defendant Companies be transferred to the Plaintiff in the alternative if the Defendants cannot pay the sums claimed***
- vi. *An Order restricting and forbidding the Registrar of Title.....*
- vii. *An Order restricting and forbidding Registrar of Title.....*
- viii. *An Order restricting and forbidding Registrar of Title.....*
- ix. ***An Order that all the 1st Defendant's shares in the Defendant Companies be transferred to the Plaintiff in the alternative, if the Defendants cannot satisfy the Plaintiff's claim. (Emphasis mine)***
- x. *An Order restraining and forbidding the Registrar of Companies.....*
- xi. *An Order restraining and forbidding the Registrar of Companies.....*
- xii. *An Order restraining and forbidding the Registrar of Companies.....*
- xiii. *Solicitors Costs on indemnity basis,*
- xiv. *Court costs.*

10. Simultaneously, on 1st March 2012, the Respondent also filed a **Notice of Motion** pursuant to Order 8 Rule 2 of the High Court Rules of 1998, supported by his Affidavit sworn on 29th February 2012 seeking for ;

1. *An Order restricting and forbidding the Registrar of Title.....*
2. *An Order restricting and forbidding Registrar of Title.....*
3. *An Order restricting and forbidding Registrar of Title.....*
4. ***An Order that all the 1st Defendant's shares in the Defendant Companies be transferred to the Plaintiff in the alternative, if the Defendants cannot satisfy the Plaintiff's claim.***
(emphasis mine)
5. *An Order restraining and forbidding the Registrar of Companies.....*
6. *An Order restraining and forbidding the Registrar of Companies.....*
7. *An Order restraining and forbidding the Registrar of Companies.....*
8. *Any such further order or orders that this honorable court may deem just and necessary.*

11. The basis for the above claim is found in paragraphs 6,7 & 8 of the Affidavit in support of the said Notice of Motion filed on 2nd March 2012, wherein the deponent Respondent (Krishna Sami Naidu) had averred that the parties had entered into a Deed of Agreement on 1st June 2012, by which the Applicant, together with 2nd, 3rd and 4th Respondent Companies, had acknowledged owing him the sum of \$2,000,000.00 for the works done, consultation services provided and loan given, and though the Applicant had agreed to pay back it on or before 30th October 2011, he has failed pay as agreed.

12. The Respondent on **2nd March 2012** filed a ,purported, Affidavit of Service sworn on **2nd March 2012** by one **Jackson Yawala** , averring that he on **2nd March 2012** at **184 Queen's**

Road, Kennedy Avenue , Nadi, Fiji Island , served the 1st, 2nd, 3rd and 4th Defendants (the Applicant and 2nd, 3rd & 4th Respondents) with the true copies of the **Writ of Summons** issued by this Court on 1st March 2012.

13. The said Notice of Motion being supported on 9th March 2012, before the then **Judge Hon. Sosefo Inoke**, the Orders 1 to 7 thereto had been granted, notably, in the absence of the Applicant and 2nd to 4th Respondents. As none of the Defendants (the present Applicant and 2nd to 4th Respondents) had filed the acknowledgment of service and/or Statement of Defence, the Plaintiff – 1st Respondent on 18th April 2012 moved for a Default Judgment to be entered and it was accordingly entered by the Deputy Registrar on 31st May 2012.

14. Subsequently, on 28th May 2012, the Plaintiff- 1st Respondent caused to file an **Ex-parte Summons** supported by his Affidavit sworn on 22nd May 2012 and moved to have the Orders 1,2,3,5,6 and 7 made on 9th March 2012 discharged and/ or revoked, and the same being supported before the then **Master A. Tuilevuka** on 12th June 2012 , the Orders were granted accordingly, leaving the Order No-4 above intact. (Vide sealed Order filed on 9th July 2012 and dated 10th July 2012).

15. Thereafter, Messrs. PATEL & SHARMA LAWYERS, having filed their Notice of Appointment for the Applicant on 10th September 2020 , on 16th October 2020 filed a Summons supported by an Affidavit sworn by Ms. Ayesha Khan (wife of the Applicant) with annexures marked as “A” to “K” moving for reliefs , *inter alia*;

1. ***THAT*** the Order No-4 as pleaded in the Order of this Honorable Court granted on 9th March 2012 by Honorable Justice Sosefo Inoke, against the 1st Defendant be set aside unconditionally as the same is irregularly entered and obtained against the Defendants and is a nullity as the Plaintiff;

i. *Did not serve the Defendants with the pleadings in the action herein.*

ii. *The Notice of Motion dated 29th February 2012 filed on 1st of March 2012 by the Plaintiff was not served on the 1st Defendant , and*

iii. *The Orders obtained on 9th March 2012 were final Orders obtained on an interlocutory application and Order No-4 at all times was prayed for in the alternative to the payment of a debt.*

2. ***THAT*** the interlocutory Judgment dated and entered on 31st May 2012 against the 1st Defendant be set aside unconditionally as the same is irregularly entered against the Defendant and is a nullity as the Plaintiff;

i. *Did not serve the Defendant with any pleadings in the action herein.*

3. ***THAT*** leave be granted to the 1st Defendant to defend the application filed by the Plaintiff by way of Notice of Motion on 1st of March 2012 and leave be granted to the Defendants to defend and file a Statement of Defence to the Writ of Summons filed in the action herein.

4. ***THAT*** an Order, the 1st Defendant's shares, which has been transferred in favor of the Plaintiff from 2nd, 3rd and 4th Defendants be revoked and cancelled and reverted to the 1st Defendant.

5. ***THAT*** the costs of this Application on an indemnity basis.

16. Subsequently, the 1st Respondent (Plaintiff) on 19th November 2020 filed Summons to Strike out, supported by his Affidavit sworn on 17th November 2020, which served as an Affidavit in opposition as well to the Applicants' aforesaid Summons filed on 16th October 2020, for which Ms. Ayesha Khan, filed her Reply Affidavit on 22nd January 2021 together with a copy of the Power of Attorney from Mr. Mohamed Aleem Khan, and a copies of relevant pages of his Passport marked as exhibits "A" and "B" respectively.
17. The Applicant on 24th February 2022 caused to file an Ex-parte Summons (which was made inter-parte) supported by an Affidavit (together with annexures A,B &C) of Mohamed Aleem Khan, sworn on 16th February 2022 in Australia, seeking reliefs inter alia,
1. *For the Stay of the Order granted on 9th March 2012 by then Judge Mr. Sosefo Inoke, and the Default Judgment entered on 31st May 2012 by the Deputy Registrar.*
18. The 1st Respondent filed his Affidavit in opposition on 14th March 2022, along with A, B, C& D, for which the Applicant, Mohamed Aleem Khan, filed his Affidavit in reply on 23rd May 2022, along with annexures marked as "A" to "G".
19. The learned Master, having heard the counsel for both parties on 11th October 2022 and entertained written submissions, pronounced the impugned Ruling on 15th June 2023 dismissing the Summons for setting aside of the Order dated 09th March 2012 and the interlocutory judgment dated 31st March 2012 (more correctly **31st May 2012**) The Master also imposed summarily assessed Costs of \$7,500.00 payable by the Applicant within one month time. Understandably, no ruling on the Application for Stay was granted as the main relief of setting aside was dismissed.
20. It is against the above Ruling, the Applicant came before this Court by his timely SUMMONS filed on 29th June 2023 as stated in paragraph 1 above, seeking for leave to Appeal and Stay of the execution .

C. NOTICE AND GROUNDS OF APPEAL.

21. The Applicant propose to rely on the following grounds of Appeal ;
1. *THAT the Learned Master of the High Court erred in law and in fact in holding that the Order granted by the High Court on the 9th of March 2012 were regularly obtained.*
 2. *THAT the Learned Master of the High Court erred in law and in fact in considering that the Notice of motion on which the 1st Respondent obtained Orders on the 9th of March 2012 for transfer of shares owned by the Appellant in 2nd, 3rd and 4th Respondents was not served on the Appellant and no affidavit of service was ever filed to evidence and confirm the service of the said Notice of Motion.*
 3. *THAT the Learned Master of the High Court erred in law and in fact in finding that the Default Judgment entered on the 31st May 2012 was regular.*
 4. *THAT the Learned Master of the High Court erred in law and in fact in not considering that the wife of the Appellant, Ayesha Khan held a full power of attorney registered on 17th December 2019 from the Appellant giving Ayesha Khan authority to make an affidavit for and*

on behalf of the Appellant and make assertions in the manner made in her affidavits filed in the action herein.

5. *THAT the Learned Master of the High Court erred in law and in fact in not considering that the 1st Respondent obtained final orders by way of an interlocutory order dated the 9th of March 2012 for the transfer of shares of the 2nd, 3rd and 4th Respondents unto himself without serving the Notice of Motion seeking for those orders to be made.*
6. *THAT the Learned Master of the High Court erred in law and in fact in not considering that the Orders made on the 9th of March 2012 by Honourable Judge Sosefo Inoke were varied on an ex-parte application by the Master of the High Court on the 12th of June 2013 on an application by the 1st Respondent and in that the Master of the High Court on the 12th of June 2013 varied the orders of the Judge of the High Court.*
7. *THAT the Learned Master of the High Court erred in law and in fact in failing to hold that the default orders made on the 9th of March 2012 and later varied on the 12th of June 2013 were void abinitio and no action could be taken upon the orders, or any action taken on the said orders were null and void.*
8. *THAT the Learned Master of the High Court erred in law and in fact in finding that the indemnity executed by the Appellant on the 22nd of October 2015 estopped the Appellant from making an application to set aside the default judgment entered on the 9th of March 2012, varied on 12th of June 2013 and the Default Judgment entered on the 31st May 2012 when;*
 - 8.1 *The Default Orders were irregular and therefore void abinitio.*
 - 8.2 *The indemnity was in relation to and limited to the shares of the Appellant in 2nd Respondent.*
 - 8.3 *The indemnity lacked consideration as the Default Judgment was entered against the Appellant for failure to file a Statement of Defence of the Writ of Summons and the shares in the 2nd, 3rd and 4th Respondent was transferred unto the 1st Respondent on the basis of the Default Orders of the High Court made on the 9th of March 2012 and varied on the 12th of June 2013 in lieu for payment of the monies payable pursuant to the aforesaid Default Judgment.*

D. PRINCIPLES ON LEAVE TO APPEAL:

22. The law on leave to appeal an interlocutory order was set out in ***Bank of Hawaii v Reynolds [1998] FJHC 226 by Pathik, J*** (as he was then). Referring to the case of Ex Parte Bucknell [1936] his lordship stated in the judgment that:

“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 s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a jurisdiction 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”.

23. The Court in Bucknell went on to state at page 225:

“But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success to the proposed appeal”.

24. On the question of leave to Appeal, the following extract from the decision of the President, Fiji Court of Appeal in ***Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr. (Civ. App. 51/95)*** is also relevant and I adopt the same view to the facts and circumstances of this case:

“... 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”.

25. Court of Appeal in ***Shankar –v- FNPF Investments Ltd and Anr. [2017] FJCA 26; ABU 32 of 2016, 24 February 2017*** at paragraph 16:

“The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (Niemann –v- Electronic Industries Ltd [1978] VicRp 44; [1978] V.R. 431 and Hussein –v- National Bank of Fiji (1995) 41 Fiji L.R. 130).”

26. In ***Niemann v. Electronic Industries Ltd [1978] VicRp 44; [1978] V.R. 431 at page 441*** where the 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.”

27. Here the Applicant should demonstrate the imminent injustice would befall on him if the interlocutory order/ Default judgment remained intact. There should be some injustice that is continuing and could not be cured after the final decision is made in the Appeal. So it should be an immediate injustice or a loss that cannot be cured later.

E. THE PRINCIPLES ON STAY:

28. Master’s impugned Ruling dated 15th June 2023 was, undisputedly, an interlocutory decision. Hence granting of leave to Appeal and stay will temporarily affect the progress of the action towards the final result intended by the Respondent. The Court of Appeal in ***Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr [1995] FJCA 15; Abu0034d.95s (18 July 1995)*** held:

“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.”

29. The principles governing a stay has been stated thus in **Halsbury’s Laws of England (4th Ed Vol 37 para 699)**:

“Two principals have to be balanced against each other as to whether a stay of execution pending the appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation, and secondly, that an appellant should not be deprived of the fruits of a successful appeal.”

30. The principles relating to stay are fully set out in the Notes to Or. 59 r. 13/1 (The Supreme Court Practice 1979 p.909). It states, inter alia, that the Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled’ pending an appeal. (**The Annot Lyle (1886) 11 P.D. at p.116, C.A.; Monk v Bartram [1891] UKLawRpKQB 15; (1891) 1 Q.B. 346**).

31. The White Book states that;

“this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from ...” However, it also has to be considered that “when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory” (**Wilson v Church (No.2) (1879), 12 Ch. D at pp 458, 459 CA.**). Here there is a risk that the appeal will prove abortive if it is successful and a stay is not granted, in that case the Court will normally exercise its discretion in favor of granting a stay [**Scarborough v Lew’s Junction Stores Pty., Ltd [1963] VicRp 20; (1963) VR 129 at 130**]. Therefore, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay (**Wilson v Church (No. 2) (1879) 12 Ch.D.454**).

32. The grant or refusal of a stay is a discretionary matter for the Court [**AG v Emberson (1889), 24 Q. B.D., pp 58, 59**]. It will be granted where the special circumstances of the case so require. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it [**Emberson (supra)**]. Also where there is a risk that if a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion refuse the Application.

33. Furthermore, it was stated in **Atkins v G. W. Ry (1886), 2 T. L.R. 400** that:

“As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and the costs were paid there is no reasonable probability of getting them back if the appeal succeeds.

34. It was held in **Linotype-Hell Finance Ltd v Baker (1992), 4 All ER p.887**that:

“Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.”

35. In ***Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU0011.2004S*** (18 March 2005)(Unreported) Fiji Court of Appeal laid down the criteria for granting stay .

36. The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):

“On a stay application the Court’s task is to carefully weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful”: ***Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.***

37. The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from ***Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p 50*** and ***Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200***:

- a. *Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory. (This is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- b. *Whether the successful party will be injuriously affected by the stay.*
- c. *The bona fides of the applicants as to the prosecution of the appeal.*
- d. *The effect on third parties.*
- e. *The novelty and importance of questions involved.*
- e. *The public interest in the proceeding.*
- g. *The overall balance of convenience and the status quo.”(Emphasis added)*

38. The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the Appellant if the Appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process. I would deal with the main criteria, briefly in the analysis below, for the purpose of this Application.

F. ANALYSIS: (Leave to Appeal)

39. The Applicant is seeking to Appeal against the decision of the Master dated 15th June 2023, whereby the Master dismissed the Application of the Applicant seeking to set aside the Interlocutory Order made on 9th March 2012 pursuant to the Notice of Motion dated and filed on 2nd March 2012, and the Default Judgment entered on 31st May 2012 by the Deputy Registrar.

40. The parties are not in dispute as to the nature of the order against which the leave is sought to Appeal and as to the process followed for this purpose.

41. The Applicant in his Affidavit in Support has very succinctly and clearly identified the reasons as to why the Court should grant leave to Appeal the impugned decision of the Master. The proposed grounds of Appeal annexed to the Affidavit as exhibit "J", on the face of them, appear to be convincing and with merits.
42. Disregarding the lengthiness of this Ruling, I have taken trouble in reproducing the chronology of events that had unfolded initially before the then Judge **Hon. Sosofe Inoke** on 9th March 2012, and thereafter before the then Master **Hon. A. Tuilevuka**, close scrutiny of which clearly demonstrate some serious irregularities committed, possibly, with the ulterior motive of keeping the Applicant away from the court proceedings against him, which finally resulted the interlocutory Order dated 9th March 2012 and the Default judgment dated 31st May 2012 being entered against him and the 2nd to 4th Respondents in their absence.
43. The main contention of the Applicant was that the Default Judgment on 31st May 2012 was entered irregularly, in the absence of service of the Writ of Summons and the Statement of Claim on the Applicant and the 2nd to 4th Respondents, as such it has to be set aside as of right. The contents of the, purported, Affidavit of service sworn by **Jackson Yawala** and filed on 2nd March 2012 is highly questionable. In paragraph 2 thereof what he had stated was "*That the 1st Defendant is the Managing Director of the 2nd, 3rd and 4th Defendants and therefore he acknowledges service on their behalf*". How can this service and mere statement be accepted as fulfilling the requirement of proper service?
44. Further, the propriety of obtaining the Orders on 9th March 2012, by way of Notice of Motion, *inter alia*, to transfer the shares of the Applicant held in the 2nd, 3rd and 4th Respondent Companies also has to be gone into at the Appeal. This relief was in fact an alternative one to the substantial final relief, which was for the payment of \$2000, 000.00. It shows that the final relief sought in the Statement of claim has been obtained by way of the impugned Notice of Motion, which was, apparently, not at all served on the Applicant and the 2nd to 4th Respondents. No Affidavit of service is found in the record in this regard.
45. Another question that arises for consideration is whether the Orders made on 9th March 2012 by the then **Judge**, relying on the said (unserved) Notice of Motion, can subsequently be discharged by the **Master** as it was done on 12th June 2013? Here the question of jurisdiction has to be gone into. It is also observed that this Order for discharge has been made on an Ex-parte Summons, in the absence of the Applicant and 2nd to 4th Respondents, leaving only the impugned Order No-4 for the transfer of shares to remain intact. Further, once the 1st Respondent (the Plaintiff) had, on 9th March 2012, rightly or wrongly, obtained his final relief by way of the impugned Notice of Motion, no further judgment, default or otherwise, could have been entered subsequently on 31st May 2012. This appears to be a clear abuse of process and any sort of judgment obtained through it should be void ab initio.
46. Further, as per the prayer to the Statement of Claim, the transfer of shares was sought only as an alternative relief, in the event of the Applicant's failure to pay the substantial relief of \$2000, 000.00. There is no evidence to the effect that, prior to resorting to the so called alternative relief, the 1st Respondent Plaintiff had in fact demanded and/or moved

to recover the said sum of \$2000, 000.00 from the Applicant and he had failed to honor it. Also, there is no evidence to show that the Orders made against the Applicant and the 2nd to 4th Respondents were in fact sealed served on the Applicant and 2nd to 4th Respondents.

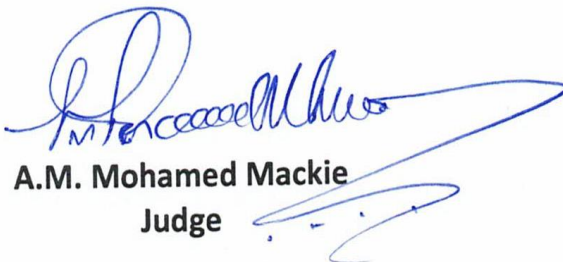
47. Another question that begs answer is that, when the Applicant was , admittedly, living out of Fiji in Australia, as transpired through the connected matter bearing No-HBC 123 of 2012, how could the Writ of Summons have been personally served on him as averred in the, purported, Affidavit of Service sworn and filed on 2nd March 2012 by Jackson Yawala?
48. Apart from the alleged irregularity of service, it is observed that there was no a judgment entered in favor of the 1st Respondent- Plaintiff prior to the Order for Transfer of shares was made. Thus, such transfer can be premature. Whatever the Orders made on the impugned Notice of Motion can only be temporary Orders pending the judgment that would follow the trial in the substantial action. He obtained the alternative relief of transfer of shares in the absence of a judgment over the main claim of \$2000, 000.00 as prayed for in the statement of claim.
49. The next pertinent issue that comes up for the consideration is the validity of the, purported, Indemnity Bond claimed to have been signed on 22nd October 2015. This warrants deeper scrutiny at the Appeal ,with leave being granted, as it could be argued by the 1st Respondent that by the time it was signed on 22nd October 2015, the Applicant should have been aware of this action No-HBC 39 of 2012 and he should have come to court prior to or at that stage.
50. The above surreptitious moves and failures, on the part of the 1st Respondent, appear to be demonstrating the serious violation of the Rules that requires the personal service of the Summons and other papers on the Applicant, and the prescribed procedures that ought to be followed when seeking to issue proceedings and affecting the services thereof on the Applicant, who was, undisputedly, resident out of the jurisdiction at the time material.
51. There appear to have been a calculated move on the part of the Respondent to obtain a judgment against the Applicant by disregarding the prescribed procedures for the commencement of the action and for the service of the processes therein. The propriety and/or the regularity of the, purported, service of the Summons and other papers, should be deeply delved into and decided at the Appeal, with leave being granted, as such irregularity could, probably, render the Default judgment and the other orders entered in this matter null and void.
52. On careful perusal of the grounds of Appeal, it appears that number of crucial issues in this matter , particularly, on the propriety of the service of Summons and other papers, seem to have had escaped the attention of the learned Master, when the impugned Ruling dated 15th June 2023 was pronounced. The grounds of Appeal are meritorious. Thus, it is a fit and proper matter that warrants leave of this Court to Appeal against the impugned Ruling dated 15th June 2023.

STAY:

53. The prejudice to the Applicant hereof, if stay is not granted, is substantial as per the averments of the Applicant's Affidavit in support. This Court stands sufficiently satisfied on it. Further, it is futile to grant only the leave to Appeal without a stay of decisions entered on 15th June 2023, which had allowed the execution of the Order dated 9th March 2012 entered on the Ex-parte Notice of Motion, which was not served, and the Default judgment entered thereafter on 31st May 2012.
54. If no stay is granted, the 1st Respondent will dispose the shares so transferred in his favor and the possibility for the Applicant to have those shares reverted back to him at the end would cause him serious prejudice, in the event his intended Appeal becomes victorious.
55. No prejudice would be caused to the 1st Respondent, if the stay is granted. The balance of convenience favors the grant of stay till the final determination of the intended Appeal by the Applicant.
56. In the circumstances, I grant leave to Appeal against Master's decision dated 15th June 2023 and also grant stay thereof until the intended Appeal is heard and finally disposed. Order on costs to be reserved.

FINAL ORDERS

- a. Leave to Appeal against the Master's ruling dated 15th June 2023 is granted.
- b. The Applicant shall act pursuant to Order 59 Rules 17 (1) and (2) of the High Court Rules.
- c. There will be a stay of proceedings pending the Appeal.
- d. The costs will be in the course of the Appeal.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 16th day of October 2024.

SOLICITORS:

For the Applicant : Messrs. Patel & Sharma, Barristers & Solicitors
For the Defendant : R. Patel Lawyers, Barristers & Solicitors