

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 046 of 2019**  
**[In the High Court at Suva Case No. HBC 149 of 2015]**

**BETWEEN** : **PATRICK JOHN JAY**

***Appellant***

**AND** : **RAJENDRA PRASAD**

***Respondent***

**Coram** : **Jitoko, P**  
**Clark, JA**  
**Andrée Wiltens, JA**

**Counsel** : **Mr. S. Singh and Ms. K. Saumaki for the Appellant**  
**Mr. A K Singh for the Respondent**

**Date of Hearing** : **04 September 2024**

**Date of Judgment** : **27 September 2024**

**JUDGMENT**

**Jitoko, P**

[1] I have read the draft judgment of Andrée Wiltens JA and agree with his reasoning and conclusions.

**Clark, JA**

[2] I agree with the judgment of Andrée Wiltens JA, his reasoning and the orders proposed.

**Andrée Wiltens, JA**

**A. Introduction**

[3] This is an appeal against the dismissal of a Claim alleging fraud and seeking the return of \$58,000 allegedly paid. This Court was invited to overturn the High Court Judgment and find instead in favour of the appellant.

[4] The appellant, Mr Patrick Jay, met the Respondent, Mr Rajendra Prasad (also known as Jena Naren Autar) in late 2011/early 2012. At the time, Mr Prasad operated an earthworks business under the style of Yandra Viti Investment.

[5] Mr Jay alleges that in July 2012, he agreed to purchase Mr Prasad's excavator/digger FQ 51 ("the digger") for the sum of \$58,000. He further alleges that their agreement was reduced to writing in the form of a handwritten document signed by both and dated 16 July 2012 ("the agreement"). He maintains he paid for the digger by means of an initial \$11,700 deposit and subsequent instalments. He made and signed a note of his payments on a copy of the agreement and arranged for each payment to be counter-signed by Mr Prasad, save for the final entry.

[6] Once paid for in full, Mr Jay applied to transfer ownership of the digger into his name, only to learn that such transfer was not possible due to a Bill of Sale being registered against the title in favour of Credit Corporation of Fiji on 10 April 2013, securing an advance of \$20,000 to Mr Prasad.

[7] Mr Jay demanded reimbursement of the \$58,000 he had paid to Mr Prasad, but that was met with complete denials by Mr Prasad that he had: (i) agreed to sell the digger, (ii) signed any document to that effect, (iii) received any of the payments alleged, or (iv) counter-signed on a copy of the agreement to confirm receipt of payments.

[8] As a result, Mr Jay filed a Statement of Claim on 10 April 2015, alleging fraud on the part of Mr Prasad.

[9] Mr Prasad contested the Claim, and subsequently amended his Statement of Defence to include a Counter Claim, alleging fraud on the part of Mr Jay and seeking compensation for, among other things, the loss of earnings while the digger was subject to an injunction obtained by Mr Jay.

[10] The dispute was heard over a prolonged period in the High Court, as follows:

- (i) Evidence was led from Mr Jay on 14 February 2017, but a photocopy of the agreement was objected to on the grounds that (i) it was not the original and (ii) it had not been stamped as required pursuant to section 41 of the Stamp Duties Act 1985 (“SDA”). That led to an adjournment so the original agreement could be retrieved and stamped.
- (ii) An attempt to resume the evidence on 3 August 2017 failed, as the Court was advised the original agreement would not be released until after criminal proceedings against Mr Prasad in the Nausori Magistrate’s Court relating to this same alleged transaction had been completed.
- (iii) A further attempt at resumption on 29 January 2018 was thwarted by an application to adjourn by counsel for Mr Prasad, this time opposing production of a photocopy of the agreement on the basis of section 100(1) of SDA. As well, counsel forecast an application to amend the Statement of Defence by including an allegation of forgery, and to file a counter claim.
- (iv) On 28 February 2018, the matter was further adjourned, with time-tabling orders to ensure the amended Statement of Defence and Counter Claim were filed in a timely fashion; and at the same time providing for suitable responses to be filed by Mr Jay, so that the matter could progress.

- (v) On 27 February 2019, the evidence resumed. Again, production of a photocopy of the agreement was objected to, and a short adjournment was granted for Mr Jay's counsel to subpoena a police officer to attend Court and produce the original.
- (vi) On 15 March 2019, Superintendent Nand, the Deputy Director of CID testified to the effect that police records confirmed the originals of: (i) the agreement, (ii) a letter of 6 May 2013 on Yandra Viti Investment letterhead confirming Mr Prasad's agreement to sell the digger to Mr Jay, and (iii) Mr Jay's Application to Transfer Ownership had all been produced in the Nausori Magistrate's Court.
- (vii) On 25 March 2019, Mr Jay finally completed his evidence, without producing the original agreement, but tendering a photocopy. Three other witnesses were called in support of the Claim, all dealing with the whereabouts of the original agreement. Mr Prasad gave evidence and called three witnesses.
- Mr Prasad denied agreeing to sell his digger, alleged that he had not signed an agreement to that effect, and he gave alternative explanations relating to how the letter on Yandra Viti Development letterhead had come into being. He explained further how the application to transfer had been signed by him, an explanation totally at variance with the account from Mr Jay. He denied receiving any funds from Mr Jay, and alleged the signatures on the copy agreement said to evidence his receipt of payments had been forged.
- Mr Prasad's witnesses supported parts of his account.
- (viii) The evidence concluded on 26 March 2019.
- (ix) On 25 April 2019, His Honour Justice Alfred delivered his decision.

## **B. The Decision**

[11] The Alfred J summarized the history of the case and detailed the pleadings. He then set out, in paragraphs 7 to 32, a brief description of the evidence of the witnesses called by both Mr

Jay and by Mr Prasad. This part of the decision contains no findings of facts; and gave no assessments as to credibility or reliability.

[12] The decision next addressed the Claim and the Counter Claim.

[13] In relation to the Claim by Mr Jay, the Alfred J identified “the pivotal question” as being whether or not reliance could be placed on a photocopy of the agreement, it being neither the original nor stamped pursuant to the SDA. He considered the effect of section 41 of the SDA was that stamping was a prerequisite to admissibility, and accordingly he declined to accept a copy of the agreement into evidence. He determined that s10(1)(b) of the Civil Evidence Act 2002 did not apply as the agreement had not been stamped.

[14] The Learned Judge dismissed the claim on the stated basis that the original agreement was necessary to refute Mr Prasad’s denial of execution. Mr Jay was ordered to pay costs in the sum of \$3,000.

[15] The Counter Claim was then discussed and shortly dismissed. Mr Prasad was ordered to pay costs of \$3,000. However, this aspect of the decision is of no concern to this Court as Mr Prasad has abandoned his cross-appeal challenging the dismissal of his counter claim and the costs awarded.

### **C. Appeal**

[16] It is unfortunate that the transcript of the hearing is incomplete; and without any explanation. Counsel and this Court similarly are hampered. Apart from the small portion of transcript of the evidence that is available, what else transpired during the hearing of this dispute has had to be reconstructed from the High Court Judge’s notes, although counsel appearing had the advantage of their own notes and recollections.

[17] Although six grounds are detailed in written submissions, in oral argument it became apparent that Mr S. Singh, counsel for Mr Jay, was advancing the appeal solely on a rolled up basis, namely by asserting error on the part of Alfred J in not properly or adequately

considering the entire body of evidence before the Court, and inappropriately (and wrongly) deciding Mr Jay's Claim on the sole issue of the admissibility or otherwise of a photocopy of the agreement, which resulted in an unjust result.

(i) Inadequate consideration of the evidence

[18] This Court was taken to the following relevant evidence not referred to in the High Court decision and which it was submitted should have been analysed and considered as part of the process of determining the claim:

(i) Copies of several Westpac Bank statements in Mr Jay's name. Mr Jay had underlined several entries showing debits out of the account which he had marked as being payments made to Mr Prasad for the digger. Mr Prasad denied having received any such funds from Mr Jay.

(ii) A soft-covered notebook, used by Mr Prasad in relation to the digger, which was passed back and forth between them, with both of them making entries. Mr Prasad accepts it was his daughter's book in which he maintained records relating to the digger, but denied ever giving it to Mr Jay – he alleged Mr Jay had stolen it from his office. The following entries were said to be particularly relevant:

- "7/3/13 \$3,594.00 to be paid to Pat";
- "\$1205.00 PAY TO PAT";
- "no work as he arrived at 5pm because Binu and Pat drinking on Sunday";
- "net \$210.00 OK PJ +863"; and
- "\$1673 00 Pay to Pat".

(iii) A Search List, which had been produced in the Nausori Magistrate's Court in relation to the prosecution against Mr Prasad. The List refers to the original (i) agreement, (ii) application to transfer the digger, and (iii) letter from Yandra Viti Investment dated 6 May 2013 being seized by the Police in January 2015.

- (iv) A letter of 6 May 2013 on Yandra Viti Investment letterhead, confirming Mr Prasad's agreement to sell the digger to Mr Jay for \$58,000. Mr Prasad alleged the letter came about at Mr Jay's request in order for Mr Jay to obtain further funds from a partner, which Mr Prasad had acceded to and provided "...in good faith".
- (v) The Application to Transfer Ownership. If accepted on its face, it confirms Mr Jay's allegations of an agreement to sell the digger. Mr Prasad said that due to ill-health concerns he was advised to sign several such incomplete documents for subsequent use by his wife should he become incapacitated. He alleged that Mr Jay had stolen one of such signed but otherwise blank forms, and inserted the necessary identification details of the digger.

[19] Mr Jay's counsel submitted there was considerable evidence produced at trial which required analysis, with findings required as to credibility, reliability and what weight should attach to the evidence accepted. That was simply not done by the High Court Judge. The Court was urged to follow the decision of *Autoworld Trading (Fiji) Limited v Raidruta* [2019] FJCA 32, where due to "...scant or no attention to the merits of the case" by the High Court Judge, the Court of Appeal granted an extension of time to appeal despite inordinate delay. This was subsequently upheld by the Supreme Court in *Raidruta v Autoworld Trading (Fiji) Ltd* [2022] FJSC 33, on the basis of substantial justice resulting to both parties.

[20] Counsel for Mr Prasad did not substantively address this submission. He was concerned more with supporting the High Court Judge's decision to dismiss the Claim and maintained the inadmissibility of a copy of the agreement.

(ii) Admissibility of the photocopy agreement

[21] Given the approach taken by the High Court Judge the outcome of this appeal rests largely on the admissibility or otherwise of a photocopy of the agreement, which Mr Jay sought to produce. Objection was taken to the admissibility of a photocopy of the agreement pursuant to sections 41 and 100(1) of SDA.

[22] Section 41 of SDA states:

*“Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall, except in criminal proceedings be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time it was first executed.”*

[23] Section 100(1) of SDA states:

*“Any document which ought to bear a stamp under the provisions of this Part shall not be of any validity unless and until it is properly stamped nor shall any Judge, Magistrate or officer of any court allow such document to be used, although no exception be raised thereto, until such document has been first stamped.”*

[24] However, subsection (2) of section 100 states:

*“But if any such document is through mistake or inadvertence received, filed or used without being properly stamped, the court in which the same is so received, filed or used, may, if it thinks fit, order that the same be stamped, and thereupon such document shall be valid as if it had been properly stamped in the first instance.”*

[25] Accordingly, stamping is not the pre-requisite to admissibility contrary to His Honour’s conclusion. It appears that subsequent stamping can rectify the situation. This view is supported by sections 39 and 40 of SDA, which provide as follows:

*“39. (1) On the production of an instrument chargeable with stamp duty as evidence in any court of civil judicature, the officer whose duty it is to read the instrument shall call the attention of the judge or magistrate to any omission or insufficiency of the stamp thereon and, if the instrument is one which may legally be stamped after execution, it may, on payment to such officer of the amount of the unpaid duty and the fine payable by law, be received in evidence, saving all just exceptions on other grounds.*

*40. (1) If an instrument chargeable with duty and which may legally be stamped after execution is lost before the same is stamped, secondary evidence may be given of such instrument and of the contents thereof in any*



*court, but the person adducing such evidence shall first pay to the officer of the court whose duty it would be to read such instrument in court if the same had not been lost such unpaid duty and fine as the judge or magistrate assesses to be the duty and fine that would be payable on such instrument had such instrument itself been tendered in evidence.*

- (2) *If such duty and fine are not paid on assessment being made as aforesaid, the evidence shall be rejected.”*

[26] Counsel for Mr Jay also advocated that s10(1)(b) of the Civil Evidence Act 2002 was of relevance. I agree this further undermines the position adopted by the High Court Judge. That provision states:

*“If a statement contained in a document is admissible as evidence in civil proceedings, it may be proved –*

- (a) By the production of that document; or*  
*(b) Whether or not that document is still in existence, by the production of a copy of that document or the material part of it,*

*authenticated in a manner the court approves.”*

[27] This Court is aware that copies of documents are regularly produced in evidence, where originals are misplaced, lost, destroyed or otherwise unavailable under the “best evidence rule”. In Fiji, this common law rule was endorsed in *Sheik Mohammed v The State* [2015] FJSC 14. There it was stated: “The rule will also not prevent the production in evidence of the photocopy...if evidence is led, ...that the original has been lost or misplaced and could not be traced even after a diligent search.”

[28] Counsel for Mr Jay provided to the Court a series of *subpoena duces tecum*, requiring the recipient to attend Court with relevant documents, in particular the agreement, the Yandra Viti Investment letter and the application to transfer ownership. The Court-issued documents were addressed to (i) The Director of Public Prosecutions, (ii) the Manager of the Economic Crime Unit, CID Toorak, Suva, (iii) Susan Serukal at the Nausori DPP’s office, (iv) Inspector Dass, CID Headquarters, Toorak, Suva, (v) Seto Qalubau, SCO I, Magistrate’s Court,

Nausori, and (vi) DC 3588 Alvin Kumar, Nausori Police Station. Despite these apparent attempts, the original of the agreement remains unavailable.

[29] Counsel for Mr Prasad urged this Court to not accept the hearsay evidence of Superintendent Nand regarding what PC Kumar had told him regarding the whereabouts of the original documents. It transpired that PC Kumar had no personal knowledge of what had been tendered at Court; neither it seems did Mr Qalubau. However, the oral evidence of Mr Jay was that he was unable to obtain the original agreement, despite best efforts. The likelihood is, on the balance of probabilities, that they were produced at the Magistrate's Court, but either not retained or lost. The best evidence now available is the photocopy.

[30] In the circumstances, the dismissal of Mr Jay's case solely due to the lack of the original agreement was wrong.

[31] For completeness, I add that the version of the agreement with the added information (the alleged record of payments, signed by Mr Jay and allegedly counter-signed by Mr Prasad) was not a copy – it was an original document, and should have been treated as such. Depending on assessments as to credibility and reliability, this document is capable of establishing a significant part of Mr Jay's case.

[32] In all the circumstances the appeal is allowed.

[33] Counsel for Mr Jay urged this Court to reverse the decision on the basis of the evidence produced and to give judgment in favour of Mr Jay, given the length of time this litigation has run, with the attendant costs. I cannot accede to this request. Factual findings need to be made by the Court which has heard all the evidence. In the absence of any such findings by this Court cannot take the matter further than to order a re-trial.

**Orders of the Court:**

1. The appeal is allowed.
2. The decision to dismiss the Claim is reversed, and the order as to costs against Mr Jay rescinded.
3. Mr Jay's Claim is remitted for a re-trial.
4. Mr Prasad's Counter Claim cannot be considered at re-trial by virtue of the High Court Judge having dismissed the same and the appeal against that ruling having been abandoned. The costs order against Mr Prasad remains in effect.
5. The costs of the appeal are to lie in the cause.



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**The Hon. Mr. Justice Filimone Jitoko**  
PRESIDENT COURT OF APPEAL



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**The Hon. Madam Justice Karen Clark**  
JUSTICE OF APPEAL



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**The Hon. Mr. Justice Gus Andrée Wiltens**  
JUSTICE OF APPEAL

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