

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No: 275 of 2009.**

**BETWEEN:**    **ESAVA NAKULAIATA KUNATUBA** of Caubati Road, Nasinu in the Republic of the Fiji Islands, Unemployed.

**PLAINTIFF**

**AND:**            **TOPLINE ELECTRICAL SERVICES LIMITED** a limited liability company having its registered office at Lot 18, Matua Street, Walu Bay, Suva in the Republic of Fiji Islands.

**DEFENDANT**

**BEFORE        :**    **Justice Deepthi Amaratunga**

**COUNSEL     :**    **Mr. S. Valenitabua** for the Plaintiff  
                      **Mr. Ronal J. Singh** for the Defendant

**Date of Hearing    :**    **7<sup>th</sup> December, 2011**

**Date of Decision  :**    **4<sup>th</sup> July, 2013**

**DECISION**

**A.    INTRODUCTION**

1.    There are two applications before the court. In the order of filing, first the Plaintiff filed a summons seeking interim payment and subsequently the Defendant filed a summons seeking strike out of the writ of summons on the basis that the cause of action was statute barred. The statement of Defence at paragraph 7 Defendant pleaded the said defence. For efficiency and proper case management, I have listed both applications together for hearing simultaneously, as the issues involved also have an impact on both

applications. It is futile to deal with application for interim payment if the action is statute barred, and I have to be certain that judgment will be in favour of the Plaintiff in order to grant an interim payment, and for this decision first I deal with the issue of strike out.

## **B. ANALYSIS**

2. The basis of the Defendant's application for the strike out is that at the time of the institution of this action the time period for a cause of action based on the negligence, has expired. The stamping on the writ of summons and all documents filed indicate that the writ of summons was filed on the 25<sup>th</sup> August, 2009, there is no evidence to support the Plaintiff's contention that writ of summons was filed prior to this date. The alleged negligent act in the writ of summons happened on the 23<sup>rd</sup> August, 2006. The time period for the institution of action in terms of the Section 4(1) of the Limitation Act is three years and the Plaintiff needed leave of the court to file any action outside the said limitation period. The extension of the time period can be obtained from the court according the said provision under certain circumstances and the Plaintiff can ex-parte obtain leave of the court to file any action outside the limitation period. If the leave was obtained ex-parte the said leave can be set aside by a subsequent application by the Defendant if the Plaintiff had not fulfilled the requirements for extension of the time period. This is a trite law and had survived test of time and cannot be circumvented on mere allegation of Plaintiff which is not substantiated.
3. The affidavit in opposition was sworn by the Plaintiff and states that the previous solicitors had filed the action within the limitation period, but was unable to provide exact date of filing the documents in court. He was unable to provide a date of engaging the said solicitors and if the lawyers were negligent the Plaintiff has a different recourse against the said solicitors.
4. The Plaintiff state that the previous solicitors had filed the writ of summons prior to 23<sup>rd</sup> August, 2009 but the registry had kept the documents without

issuance from the registry till 25<sup>th</sup> August, 2009. This contention is untenable. First, this affidavit is not sworn by any person from the said solicitors and even the Plaintiff had not given a name of a person who had provided such information. Even if such informant was revealed in the affidavit in opposition that amounts to hearsay and the court cannot rely on such hearsay statement. The primary requirement of an affidavit is that the deponent should have perceived the facts stated in the affidavit. This affidavit in opposition sworn by the Plaintiff has not complied with the primary requirement and should be struck off from the record for non-compliance. Though I am inclined to do so considering the circumstances of the action I will not do so, but would not attach any evidential value to the said averment in the analysis for obvious reasons.

5. There are two distinct stampings of the documents and one is worded as 'filed' and clearly indicate that the documents were filed on 25<sup>th</sup> August, 2009. This is clearly outside the time stipulated in the Section 4 of the Limitation Act for action based on negligence. The other stamping is when the filing fees were being paid to the registry and this also denotes the same date as the filing of the writ of summons.
6. Without prejudice to what I have stated above the contention of the Plaintiff cannot be accepted specially considering that when a solicitor files an action close to limitation period extra care would have taken to see that it was filed within the stipulated time period contained in the Limitation Act. If the registry kept the documents more than one day without filing and or issuance of the same the solicitors would have raised their concern with the authority at that time. According to the affidavit in opposition the documents were submitted some time prior to 23<sup>rd</sup> August, 2009 indicating at least 2 days period to the stamping of the writ of summons. This cannot be accepted as any reasonable person with reasonable knowledge of the law would have immediately raised the issue since the consequences of such delay is fatal. If the delay was due to lapse on the part of the registry there was no need of waiting till the issue was raised at this hearing and this is an afterthought to circumvent the mandatory

provisions of the law where the leave of the court was needed and certain conditions needed to be fulfilled for extension of time.

**C. FINAL ORDERS.**

- a. The statement of claim and the writ of summons struck off.
- b. No costs.

Dated at **Suva** this **4<sup>th</sup> day** of **July, 2013**.

.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**