**<u>IN THE HIGH COURT OF FIJI</u>**
**<u>AT SUVA</u>**
**<u>CIVIL JURISDICTION</u>**

**Civil Action 248 of 2006**

**BETWEEN** : **KELTON INVESTMENTS LIMITED**, a limited liability company having its registered office in Suva.

***Plaintiff***

**AND** : **LAMI INVESTMENTS LIMITED**, a limited liability company having its registered office at Suva trading as **FOOD FOR LESS SUPERMARKET**.

***Defendant***

**Counsel** : **MS NARAYAN B.** of **Lateef & Lateef Lawyers**
**MR NAGIN H.** of **Sherani & Co.**

**Date of Judgment: 21st October, 2013.**

# JUDGMENT

1. Summons filed on 12th January 2012 supported by the Affidavit of Rulesh Prasad, General Manager of the Defendant Company dated 12th January 2012 and sought the following Order:

   *(a) that the Defendant be granted Leave to Appeal and to file Grounds of Appeal to the High Court of Fiji against the decision of the Honorable Master of the High Court Mr Deepthi Amaratunga delivered on 30th December 2012.*

2. The Defendant deposed in its Affidavit in Support dated 12th January 2012 inter-alia *(the relevant paragraphs are numbered as indicated in the Affidavit for the purpose of reference):*

*"2. The Plaintiff filed the proceedings against the Defendant on 14th June 2006 and sought orders described under paragraphs 2(i) to 2(iv).*

*3. The Defendant filed its Statement of Defence on 3rd July 2006 and made a Counter Claim and sought damages.*

*4. The Defendant filed two summons to amend the Statement of Defence dated 7th March 2008 and 28th May 2008.*

*5. The Defendant sought leave to amend paragraph 11 of the Statement of Defence.*

*6. When the matter was taken up on 29th August 2008 before the Master, no appearance being made by the Plaintiff and Order for the amendment was granted to the Defendant. The Defendant filed the amended Statement of Defence and Counter Claim on 1st September 2008 as per summons stated in paragraph 4.*

*7. The Plaintiff made an application on 1st September 2008 to set aside the Order of the Master dated 29th August 2008 and the application was granted by consent.*

*8. The matter was taken up for hearing by the Master on 15th October 2010.*

*9. The Master after the lapse of 14 months delivered his Ruling (Annexure marked "A" to the Affidavit) on 30th December 2011 and made the following Orders:*

*(a) The proposed paragraph 11 of the amended Statement of Defence was refused;*

*(b) The amendment through insertion of paragraph 23 to the Statement of Defence was allowed, subject to a cost of $1000. The Defendant is granted 14 days to file and serve the amended Statement of Defence with the insertion of paragraph 23 as proposed;*

*(c) The cost of the application was assessed summarily at $1,500.00;*

*(d) Costs in (b) and (c) above to be paid within 14 days.*

*10. The Defendant intended to appeal the decision of the Master dated 30th December 2011 and Ten Grounds of appeal was annexed marked as "B".*

*11. The Defendant deposed that the Master made serious errors of law and in fact and stated:*

*(a) The Master's finding that the Defendant had made admission to the construction of Mezzanine floors had to be decided considering the credibility of the witnesses and oral evidence subject to cross examination and as such the Master's finding was erroneous;*

*(b) The amendments to the Defence were necessary to put the Defendant's case properly before the court;*

*(c) Further stated that facts must be ventilated in court.*

*12. The previous affidavits filed by Rudra Prasad, Managing Director of the Defendant did not understand the meaning of "Mezzanine Floors" and explained how the said Rudra Prasad misunderstood the ceiling as Mezzanine floor and as such fair trial could not be held without the proposed amendment (paragraph 13 and 14 of the affidavit).*

*13. It was stated the Master made serious errors of law and this needs to be determined by the judge in appeal on the issue of the principles relating to amendment of pleadings.*

3. The Affidavit in Opposition was filed on 26th March 2012 by Anthony Ah Koy, Managing Director of the Plaintiff Company sworn on 26th March 2012 and deposed interalia *(the relevant paragraphs are numbered as indicated in the Affidavit for the purpose of reference).*

*"4. The Defendant was advised by his solicitors that Leave to Appeal an Interlocutory Order is not readily given unless exceptional circumstances are shown by the Applicant and some injustice to the applicant will result if leave was refused.*

*5. The proposed grounds of appeal clearly lack merits, failed to give good valid and arguable reasons in the Affidavit filed by Prasad. The amendments sought by the Defendant are not Bonafide and the Learned Master correctly concluded the intention was to alter a clear admission previously made by the Defendant.*

*6. Replying to paragraph 12 of the Affidavit whilst denying same it was stated there was overwhelming evidence before the court the Defendant*

*through its Managing Director Rudra Prasad clearly understood the meaning of* "Mezzanine Floors" *which was the crux of the claim by the Plaintiff.*

*7. Whilst denying the paragraphs 13 to 14 of the Plaintiff's Affidavit, the Defendant had repeated the paragraph 6 above. The purpose of amendment was to drag determination of the proceedings and delay the trial.*

*8. The Defendant denied that a fair trial of this action is now not possible without the proposed amendment which will cause prejudice to the Defendant. Further stated as decided by the Learned Master the effect of the amendment shall alter the real matter in controversy. Further, it was stated the Defendant made the application for amendment after the Pre-Trial Conference Minutes were filed. As such if the application was allowed there will be injustice caused to the Plaintiff.*

*9. The Plaintiff deny the Master made any serious error in law and it does not warrant appellate court to interfere with the Master's exercise of discretion in refusing the proposed amendment and Defendant's application for Leave to Appeal should be struck out."*

4. In reply to Affidavit of Opposition, Affidavit in Reply was filed by Rudra Prasad, Managing Director of the Defendant on 17th April 2012 sworn on 12th April 2012 and disposed inter-alia:

*"4. In reply to para 4 of the Plaintiff's Affidavit, Defendant stated that the Defendant will suffer substantial injustice if the Defendant is deprived from putting forward its proper defence and there are exceptional circumstances to grant leave to appeal.*

*5. There are valid meritorious grounds to be heard by the Judge as the Master made serious errors of law whilst dealing with the application for amendment and further stated:*

(i) Defendant had no intention to deviate from the real issue of controversy but to correct genuine mistakes made by Rudra Prasad in referring to ceiling built by the Defendant as a Mezzanine floor;

(ii) Rudra Prasad misunderstood the meaning of Mezzanine floors and wrongly was under the impression that the ceiling constructed by the Defendant could also be referred to as a *"Mezzanine Floor"*;

(iii) Further Rudra Prasad had stated he referred in all his Affidavits inadvertently referred to as the *"Mezzanine Floor"* in fact it was a *"Ceiling"* and was used to store extremely light goods such as toilet papers; sanitary pads; etc.;

(iv) The evidence adduced before in this case was not disputed by the Defendant since Rudra Prasad believed the so called Mezzanine floor was a Mezzanine floor until Rudra Prasad was rightfully pointed out by the Defendant's solicitor that it was a ceiling in which light goods were kept;

(v) The Plaintiff did build a proper Mezzanine floor as per Suva City Council requirements where the Defendant stored the heavy products;

(vi) It was not practical to built another mezzanine floor on top of an existing one unless it is designed to take weight of both mezzanine floors and explained the Defendant only built a ceiling.

*6. The Defendant replying to paragraph 8 of the Plaintiff's Affidavit in Opposition stated the Defendant will not have fair trial without amending its Defence which is very crucial and a substantial defence to the Plaintiff's claim. Rudra Prasad admitted it was he who wrongly interpreted ceiling as a mezzanine floor and this matter should not jeopardize the Defendant's defence and the Defendant should be given fair treatment.*

*7.. It was stated that as advised by the Defendant's solicitor the Plaintiff will not suffer prejudice if Leave to Appeal is granted and if the Leave to Appeal is refused, the Defendant will suffer substantial loss.*

*8. As such the Defendant pleaded to grant Leave to Appeal against the decision of the Master."*

5. The counsel for the Defendant Mr Nagin and Ms B Narayan made oral submissions at the hearing and informed the court they rely on the submissions filed before the Master. The Defendant Appellant filed further submissions on 22nd June 2012.

6. The issue to be decided in this case is as to whether the Master made error in law and in fact when he arrived at the findings.

7. **<u>Analysis and Conclusions</u>**

7.1 Ruling made by the Master in this case is an Interlocutory Order. The courts have repeatedly emphasized that appeals against interlocutory orders are granted on

exceptional circumstances. It was stated in the case of G.L. Baker Ltd v. Medway Buildings Supplies Ltd [1958] 1 WLR 1216:

> *"To grant or refuse leave to appeal is a discretionary matter in each case and" may be reviewed if it is clear that it had been* ***exercised on a wrong principle or a conclusion has been reached which would work a manifest injustice"***. (emphasis mine)

7.2 In the present case, the Defendant admitted he made a mistake (in the affidavit and page 13 paragraph 5.2 of the Defendant's submission) and submitted that appellate court should intervene and do justice to the parties. In such event it is important to refer to the Ruling by the Master as to whether he had considered the mistake and as to whether his findings are correct. I quote the following paragraphs of the Master's ruling where he addressed the issue of mezzanine floor:

> *"35. It is also clear from the Affidavit evidence in the said Civil Action No. 78 of 2005 that the Plaintiff had allowed the Defendant approximately 10 months to remove the Mezzanine floor and when the Defendant failed to do so the Plaintiff reported the construction of the Mezzanine floor to the Suva City Council as a result of which a Demolition Notice dated 21st December 2004 was issued by the Suva City Council requiring the said Mezzanine floor to be removed. Whilst not disputing the contents of the said Demolition Notice the Defendant's alleged defence to same is only to the effect that the said Demolition Notice was allegedly orchestrated by the Plaintiff.*
>
> *36. Without prejudice to what was already held in this ruling, I will now consider the findings of the High Court and Court of Appeal on the issue of mezzanine floors. In the Judgment of the High*

*Court Civil Action No. 78 of 2005, the Court observed the fact that the Defendant **"admits constructing the mezzanine floor"** (page 5 of the Judgment). On appeal by the Defendant against the High Court Judgment to the **Court of Appeal,** the Court of Appeal **held that two important facts were not in dispute,** that is, the **Defendant had constructed** one or more substantial Mezzanine floors and the **Defendant did not obtain the prior written consent of the Plaintiff or the approval of the Suva City Council** for its construction. In this respect the Plaintiff submitted the following observations of the Court of Appeal in Civil Appeal No. ABU 0059/2005 at paragraph [7] on page 3 of its Judgment:*

> "**It is not disputed** that shortly after the parties entered into the lease agreement one or more substantial **mezzanine floors were constructed by the Appellant** within the premises. It is not disputed that the Appellant did not, before undertaking the construction of the mezzanine floors obtain either the prior written consent of the Respondent or the approval of the Suva Civil Council."

37. *Further at paragraph [20] on page 8 of Judgment of the Court of Appeal said:*

> "……As will have been seen from the judge's summary of the Appellant's submissions, set out in paragraph 14 above, no mention was made by the judge in that summary of the possibility either that the Respondent had in fact agreed to the construction of the mezzanine floors or that it had either waived **the obvious breach clauses 4(j);**

> **4(k); and 7(g) of the lease** or alternatively had acquiesced in them."

38. *Furthermore, at paragraph [22] on page 9 of the Court of Appeal said:*

> "The Appellant did not deny that it has commissioned and completed major alterations to the leased premises. It could not do so since the substantial mezzanine floors were and are there for all to see. Neither could it point to any written request or authority to make those substantial alterations. It could not deny that the consent of the Suva City Council had never been obtained nor that the Suva Civil Council had demanded the demolition of the mezzanine floors. **Rather than attempt to do any of these things however, it advanced the proposition that the installation of the mezzanine floors was in fact well known to the Respondent and that no objection had been taken to their construction or installation in the five years that followed from October 1998 to November 2003."** [emphasis added]

39. *The Court of Appeal further at paragraph [23] referred to paragraphs 5(ii); 5(iii) and 9 of the Defendant's said Affidavit in respect of the Defendant's contention that the mezzanine floors were constructed by it with the full knowledge and consent of the Plaintiff's director, Mr Michael Ah Koy and other directors and its suggestion that the Plaintiff is therefore deemed to have acquiesced in the same and stopped from raising this issue and deemed to have waived any objection that it may have to the same. The Court of*

*Appeal then formed the view and* ***it was this aspect of the Defendant's contention of waiver, estoppels and acquiescence that raised an arguable issue of fact*** *with "important and decisive legal consequences' which could not be determined appropriately by way of the Section 169 proceedings.*

*40. The High Court and Court of Appeal have already made findings of facts that the Defendant did in fact construct the mezzanine floor alleged by the Plaintiff and the Defendant did not prior to undertaking the said substantial alterations to the premises either seek the Plaintiff's prior written consent or the required approval of the Suva City Council."*

7.3 The Learned Master had properly analyzed the matter and came to the conclusion as stated in paragraph 48 of the Ruling:

*"**48**. The Plaintiff has sought amendment after the pre trial conference, before the pretrial conference minutes were finalized. The Plaintiff is objecting to amendment to paragraph 11 of the statement of defence. The said paragraph is seeking to deny the fact of Defendant building a mezzanine floor in the Plaintiff's premises. These are admitted facts by the Defendant in this proceedings as well as in the concluded proceedings relating to eviction from the premises. Clearly, the proposed amendment to paragraph 11 of the statement of claim cannot sustain on materials before me and was sought in mala fide. If such amendment is allowed the real issue of the action will be not determined and the issue will not be narrowed down. So the said objection by the Plaintiff to the amendment sought to paragraph 11 of the statement of defence is sustained. The insertion of paragraph 23 to the statement of defence is allowed, and it was not objected by the Plaintiff."*

7.4 It is evidently clear that the amendment is not justifiable having considered the findings by the Master, specifically drawing the attention to the conclusions made by the Court of Appeal in the Civil Appeal No. ABU 0059/2005 at paragraph (7) on page 3 of its Judgment which was reproduced in preceding paragraph 7.2 of this Judgment (paragraph 36 of the Master's Ruling):

> *"………It is not disputed that shortly after the parties entered into the lease agreement one or more substantial mezzanine floors were constructed by the Appellant* (the Defendant in this case) *within the premises. It is not disputed that the Appellant did not before undertaking the construction of the mezzanine floors obtain either the prior written consent of the Respondent* (the Plaintiff in this case) *or the approval of the Suva City Council."*

7.5 It is further observed that the Defendant by the letter dated 20th February 2005 addressed to the Town Clerk, Suva City Council on the direction of its Engineers stated (paragraph 24 of the Master's Ruling):

> ***"Re: Temporary Mezzanine at Food for Less Supermarket***
>
> *We refer to the Suva City Council letter of 4th February, 2005 regarding construction of a mezzanine at the rear of the structure.*
>
> *We advise that Chand Engineering Consultants Ltd, have carried out an inspection of the mezzanine that has been constructed and we are in the process of preparing "**As-Built**" drawings for lodgment onto Suva City Council for your records.*

*It is noted that the mezzanine is utilized for light storage only. The mezzanine that has been constructed is a temporary structure and is structurally in safe and sound condition. We further advice that the construction of the mezzanine has not caused any instability to the existing main building and can be removed at any time without causing any damages to the existing main building.*

*We trust that the discussions stipulate above is acceptable to you. Please noted that the* ***"As-Built"*** *drawings would be submitted to "Suva City Council as soon as they are complete. Please contact the undersigned should you wish to discuss any matters pertaining to the above."*

7.6 It is abruptly clear the Defendant had not made a genuine mistake of misunderstanding ceiling to a Mezzanine floor. The Defendant himself engaged Engineers to draw the structural drawings. Whether it is for light storage or not the Defendant had admitted it's a mezzanine floor. There is no error of law or in fact by the Learned Master that Defendant made a genuine mistake. The question to be decided at a trial is as to whether defendant acted in contravention to the agreement and as such the Plaintiff has the right to evict the Defendant, not only on this issue but several other defaults by the Defendant. I conclude and agree the Master had made no error in law by concluding the Defendant's application for amendment cannot sustain.

7.7 The Defendant also had tendered written submission on the (10) Grounds of Appeal which are analyzed by me to arrive at a conclusion:

**1st Ground of Appeal**

7.7.1 The reasons submitted by the Defendant for the amendment does not warrant such amendment as the mistake or the misunderstanding was not bonafide and

the Defendant did not submit any material in that regard. The Master had used his discretion correctly without making any error in law or in fact.

**2nd Ground of Appeal**

7.7.2 The Defendant failed to establish that he made a mistake or misunderstanding with regard to mezzanine floor. It is evidently clear by the conduct of the Defendant, documents, which were considered by the Master specifically referring to the Court of Appeal decision in Civil Appeal No. ABU 0059 of 2005.

**3rd Ground of Appeal**

7.7.3 The Learned Maser had not made error in law relying on the Court of Appeal decision whether it is summary procedure or not he is entitled to make his findings relying on the findings of the Court of Appeal.

**4th Ground of Appeal**

7.7.4 The Master had analysed the evidence and material before him to arrive at his conclusions and specifically the misunderstanding or mistake made by the Defendant is not an issue to be tried at a proper trial and I conclude the application for amendment was filed at the last stage is malafide and to prolong the trial causing prejudice to the Plaintiff.

**5th Ground of Appeal**

7.7.5 The Defendant's defence does not establish a meritorious defence to the Statement of Claim and there are no extra ordinary circumstances to consider by way of amendment to consider at a proper trial thus Defendant fails.

**6th Ground of Appeal**

7.7.6 The Master erred in law by not taking the land mark case of ***Peter Sujendra Sunder and Concave Investment Ltd v. Chandrika Prasad*** ABU 22 of 1993

(Unreported) decided on 10th November 1997. This case was decided on the issue of entitlement to unconditional leave to appeal out of time. The issue of amendment to the pleadings was not taken into consideration. I am at a loss to understand why the particular case being cited as *"Land Mark Case"* by the Defendant when the facts and principles applied in the said case cannot be applied in this matter. As such the Defendant's grounds of appeal fail and conclude that the Learned master had not made any error in law by not taking the said case in to consideration.

**7th Ground of Appeal**

7.7.7 The Defendant cited the case of ***Reddy's Construction Company Ltd v. Pacific Gas Company Ltd*** (1980) 26 FLR Page 127 and stated the said authority allows the parties to amend the pleadings at the trial stage with costs to the affected party and the Master had not taken the said Judgment into consideration. The issue raised and decided in the said authority was that there would be no prejudice caused to the affected party due to the amendment. However, in this case serious prejudice shall be caused to the Plaintiff by allowing the amendment and I conclude the Master had correctly used his discretion.

The Defendant had stated the parties are allowed to amend the pleadings at the Trial stage with costs to the affected party. There is no general rule to amend the pleadings and each case should be considered on the facts. In Reddy Construction Co. Ltd case it was stated *"The primary rule is that leave may be granted at any time to amend on terms, if it can be done* ***without injustice to the other side"***. With regard to use of discretion, I also quote the following statement made by Lord Griffith in the case of ***Ketteman and Others v. Hansel Properties and Others*** [1987] 1 A.C. 189 at page 220 to support my view:

*"Whether amendment should be granted is a matter for the discretion of the trial judge* ***and he should be guided in the exercise of discretion by his assessment of where justice lies.*** *Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But injustice cannot always be measured in terms of money and in my view judge is entitle to weigh in the balance the strain the litigation imposes on the litigants."* (emphasis mine)

In this case, the Learned Master had exercised the discretion and it is justified.

As concluded in preceding paragraphs if the proposed amendment is allowed prejudice shall be caused to the Plaintiff and discretion should be used in favour of the Plaintiff and the Master had not erred in law.

7.7.8 Having concluded as stated herein before there are no merits to consider in the 8th, 9th and 10th grounds of appeal and the Defendant fails.

In the above circumstance, it is my conclusion that the Defendant had failed to establish meritorious grounds for appeal. The Learned Master had analyzed all the factors before him correctly and found the Defendant's application was malafide and concluded that if the said amendment is allowed, the real issue of the action will not be determined. I agree with the Learned Master and conclude that he had not erred in law and in fact.

Accordingly, I make the following orders:

***(a) the summons filed for Leave to Appeal on 12th January 2012 against the Learned master's decision of 30th December 2010 is dismissed;***

*(b) the Defendant is ordered to pay summarily assessed costs of $2500.00 to the Plaintiff within 14 days of this Judgment.*

**Delivered at Suva this 21st Day of October, 2013.**

……………………

**C. Kotigalage**

**<u>JUDGE</u>**