

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION AT SUVA

CIVIL ACTION NO. HBC 611 of 2005

BETWEEN : Kelera Ledua Lesivakarua

PLAINTIFF

AND : Western Marine Limited

1ST DEFENDANT

AND : South Sea Engineering Limited

2ND DEFENDANT

Before : The Honorable Mr Justice David Alfred

Counsel : Mr K Vuataki for the Plaintiff
Mr S Nandan for the Applicant/ 1st Defendant
Ms M Fong for the 2nd Defendant

Date of Hearing: 3 July 2015

Date of Interlocutory Judgment: 10 July 2015

INTERLOCUTORY JUDGMENT

[1] This is the First Defendant's Application for leave to appeal against the Ruling of the learned Master given on 13 March 2015 (the Decision) and for a stay of proceedings until the determination of this Application, pursuant to Order 59 of the Rules of the High Court and the inherent jurisdiction of this Court.

- [2] (i) The grounds for this Application are set out in the affidavit of Minghua Liu sworn on 25 March 2015. Hereinafter the First Defendant will be referred to as the Applicant.
- (ii) The said Minghua Liu (the deponent) affirms that he is the Managing Director of the Applicant and seeks leave to appeal against the Decision whereby the Master made, inter alia, the Final Order that the Applicant is at liberty to file and serve an Amended Statement of Defence within 14 days.
- (iii) The deponent seeks leave to appeal against the Decision for the reason that the Applicant has never been served with the Writ of Summons of the Plaintiff and the Decision waives the service of the said Writ on it.
- (iv) The deponent also avers he is advised by Applicant's Solicitors that its proposed appeal has every chance of succeeding.
- (v) Finally the Applicant seeks a stay of proceedings as otherwise it will be put to unnecessary expense in having to defend the action and thus, the Appeal, if it did succeed, would be partially nugatory.
- [3] The matter came up for hearing before me on 3 July 2015. Counsel for the Applicant and Counsel for the Plaintiff provided written submissions and also made oral submissions. Counsel for the 2nd Defendant had informed me that her client was not involved in the outcome of the Appeal and confined herself to providing some useful information about the earlier proceedings herein.
- [4] At the conclusion of the hearing I reserved judgment to a date to be announced.
- [5] In the course of reaching my decision, I have perused the written submissions of both Counsels and the authorities submitted. However I must state the factual situation presented to me to decide here is quite novel, and thus will have to be decided on its own particular facts.

Factual Outline

- [6] This Application stems from the following factual situation:

- (a) On or about 7 April 2004, one Taniela Vuli was electrocuted while at work as an employee of the Second Defendant on a welding machine owned by it which had been hired out to the Applicant and returned to the Second Defendant shortly before the aforesaid fatal incident. The Plaintiff is the sister and Administratrix of the estate of the aforesaid deceased.
- (b) The Civil Action brought by the Plaintiff against both the First and the Second Defendants was heard by Coventry J on 15 and 16 January 2008 and Judgment delivered on 23 January 2008. The Applicant was adjudged 75% liable and the Second Defendant 25% liable for the said incident.
- (c) At that hearing, the Applicant and the Second Defendant were represented by one and the same Counsel, Mr G O'Driscoll.
- [7] The Applicant being dissatisfied with the judgment entered against it appealed to the Court of Appeal. The Appeal was heard on 14 May 2014 and Judgment delivered on 29 May 2014 by Malalgoda JA, with whom Chandra and Kumar JJA agreed. I will refer to this as the Judgment and the Order.
- [8] It is clear from page 24 of the Judgment that the Order is the Appeal is allowed on ground 9 of the Amended Grounds of Appeal and a New Trial is ordered.
- [9] Ground 9 is reproduced in page 3 of the Judgment and reads as follows:

“Subject to leave being granted to adduce further evidence, that there has been a substantial wrong or miscarriage of justice to the Appellant in all the circumstances pertaining to trial of the proceedings in the High Court and accordingly the Judgment dated 23rd January 2008 be set aside and/or new trial be ordered.”

“Particulars:

- i. The Appellant was never served with the Writ of Summons (with Statement of Claim attached) in the High Court;**
- ii. That the Appellant had no knowledge of the existence of the proceedings and of it being in the High Court from its institution on the 28th December 2005 until after the judgment herein was delivered on 23rd January 2008;**
- iii. The Appellant had never given any instructions or retained legal counsel Mr Gavin O’Driscoll in respect of this or any other matter including in particular to make any legal representations on its behalf or agree to 75% apportionment of liability;**
- iv. The Appellant was denied natural justice and opportunity to defend the claims made against it in these proceedings or be heard;**
- v. The Appellant also refers to and relies on the grounds set out in the Affidavit of Mr Minghua Liu sworn and filed herein.”**

[10] Ground 9 asserts essentially:

- i. That the Appellant was never served with the Writ of Summons in the High Court;*
- ii It had no knowledge of the existence of the proceedings until after the judgment therein was delivered on 23 January 2008;*
- iii That it never retained Mr O’Driscoll in respect of this matter nor for him to agree to the apportionment of liability;*
- iv. It was denied an opportunity to defend the claims made against it.*

[11] Paragraph [70] of the Judgment shows quite clearly that the Court of Appeal considered it unsafe to conclude that the Writ of Summons or Statement of Claim “were properly served on” the Appellant (the present Applicant).


- [12] Put in other words, this must mean that the Court of Appeal considered the Writ and Statement of Claim had not been served on the Applicant.
- [13] Further paragraph (74) of the Judgment states that the findings of the Trial Judge are tainted with distorted facts and that it can be concluded “that a substantial loss and a miscarriage of Justice will be caused to the appellant if these findings are not reversed.”
- [14] Finally in paragraph [77] of the Judgment it is stated (the Court of Appeal) is satisfied that there has been a substantial wrong and a miscarriage of Justice to the Appellant. The appeal is therefore allowed on the aforesaid ground 9 and a new trial ordered before the High Court.
- [15] Perusing these clear words of the Judge delivering the Judgment, I am satisfied of the following propositions:
- (i) ***The Court of Appeal considered the Writ had not been served on the Applicant.***
 - (ii) ***The findings of the trial judge including the apportionment of liability are reversed.***
- [16] It therefore follows as the night the day, that the Court of Appeal by allowing the Appeal and ordering a new trial is ordering the trial court to hear the claim from the beginning not just on liability and quantum but equally importantly the question of what the Plaintiff is to do viz a viz the present Applicant whom the Court of Appeal has patently concluded was not served with the Writ.
- [17] In my view the Master was not entitled to go behind the clear judgment of the Court of Appeal and to decide that the service of the Writ on the Applicant is to be waived. ‘Waive’ according to the Oxford Advanced Dictionary of Current English means ‘(one will) not insist on a right’. It is therefore clear that the Master here considers that the Applicant has a right to be served with the Writ. Therefore only the Applicant and not the Master is entitled to say it is

abandoning its right to be served with the Writ, which plainly the Applicant most certainly is not.

- [18] Thus, the first issue that the Master should have decided was how the Writ is to be served on the Applicant. No rule of Court nor authority has been relied upon by the Master to waive service of the Writ on the Applicant; Counsel for the Plaintiff has not cited any authority to me to support the Decision.
- [19] On this ground alone I will allow the Application for leave to appeal the Decision which in effect deprives the Applicant of the fruits of its successful appeal to the Court of Appeal.
- [20] As the Decision is clearly not in consonance with the Judgment, I shall also allow a stay of proceedings until the determination of the Appeal which the Applicant will no doubt be filing expeditiously.
- [21] I finally order the Plaintiff to pay the First Defendant, only, costs of this Application which I summarily assess at \$750.00.

Delivered at Suva this 10th day of July 2015.




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David Alfred
JUDGE
High Court of Fiji