

BETWEEN : BULILEKA HIRE SERVICES LIMITED

Plaintiff/Respondent

A N D : THE HOUSING AUTHORITY

1st Defendant/Appellant

MIKAELE TUPUA

2nd Defendant/Appellant

COUNSEL : Mr. A. Pal for the Plaintiff/Respondent.
Mr. V. Maharaj for the Defendants/Appellants.

Date of Hearing : 30th March, 2015

Date of Ruling : 25th April, 2016

RULING

- [1] The first and second defendants/appellants (hereinafter referred to as the defendants) filed summons on 02nd February 2016 seeking leave to appeal against the ruling of this court dated 19th January 2016 and for stay of proceedings pending the appeal.
- [2] The plaintiff/respondent (hereinafter referred to as the plaintiff) made an application by way of summons on 15th February 2016 to have the affidavit of Josefa Serulagilagi filed in support of the application for leave to appeal struck out on the ground that the said affidavit cannot be relied upon for the reasons that it is in contravention of

the provisions of Order 41 Rule 9 of the High Court Rules and lack of authority from the person on whose behalf the affidavit has been deposed.

- [3] Order 41 Rule 9 of the High Court Rules provides as follows;
- (1) Except as otherwise provided by these Rules, every affidavit must be filed in the Registry.
 - (2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without leave of the Court.
- [4] In terms of section 6 of the Housing Act (Cap 267) which provides that the Authority shall be a body corporate under the name of the Housing Authority and by that name shall have perpetual succession and a common seal with power to hold land for purposes connected with the administration of this Act. The first defendant is therefore a juristic person which can sue and be sued in its own name and the 2nd defendant is a natural person. On behalf of both these defendants Mr. Josefa Serulagilagi sworn the affidavit filed along with the application for leave to appeal. Mr. Serulagilagi is an associate solicitor of MC Lawyers who represents the defendants in this case.
- [5] When this objection was taken by the learned counsel for the plaintiff, the submission of the learned counsel for the defendants was that the letter dated 01st February 2016 written by the acting Chief Executive Officer of the 1st defendant confers sufficient authority on the solicitors to swear the affidavit in question on its behalf.

The relevant paragraph of the said letter is to the following effect;

We hereby instruct you to appeal the decision to the Fiji Court of Appeal and further authorise you to file all necessary papers such as summons and affidavit etc. in support on behalf of the Authority.

- [6] This letter, in my view, does not have the effect of authorising the solicitors of the 1st defendant to depose an affidavit on their behalf. It only authorises the solicitors to file necessary papers and affidavits in court. In this letter what the solicitors were expected to do on behalf of the defendants are specifically stated and it only

authorises the solicitors to appeal against the order of this court and to file necessary papers.

- [7] In the case of **Denarau Corporation Limited v Deo HBC 32/2013** (24th February 2015) the High Court made the following observations;

A company being an artificial person cannot act by itself. It should act through an agent. That agent must have the proper authority to act on behalf of the company. Merely stating that the deponent is the Chief Executive Officer of the plaintiff and has the authority to swear affidavit on behalf of the plaintiff company is not sufficient. He must state the person who gave that authority, whether it is a director or secretary or other authorised officer of the company. In the absence of this the deponent will lack authority to swear affidavit.

- [8] The paragraphs 1 to 3 of the affidavit of the affidavit in question are as follows;

- (1) I am an associate solicitor in the employ of MC Lawyers.
- (2) MC Lawyers (my principle herein) have been retained by the defendants to defend within proceedings.
- (3) MC Lawyers have been authorized by the First Defendant to appeal the decision of the Honourable Court given on 19th January 2016.

- [9] In this affidavit there is nothing to say that the 1st defendant authorised its solicitors to depose an affidavit on its behalf.

- [10] The learned counsel for the defendants submitted that;

The 1st and 2nd defendants who are the employer and an employee respectively have been sued the plaintiff for alleged breach of contract. The defendants have engaged MC Lawyers, as their legal agents to defend the action which it is entitled to do pursuant to section 8(2) of the Housing Act. Section 8(2) does not put any qualification or any condition as to how and in what manner the authority can or may employ an agent and in this case, in the form of firm of solicitors to defend the action.

- [11] The learned counsel also submitted that any papers filed in court by MC Lawyers on behalf of the defendants would be based on the authority and instructions of the

defendants and that MC Lawyers would be bound to follow not only what it has been expressly authorised to do but also to do all sub-ordinate acts which are necessary or ordinarily incidental to the exercise of the express authority.

- [12] In support of this contention the learned counsel cited the following paragraphs from Halsbury's Laws of England (4th Edition):

.....the authority of the agent may be derived expressly from an instrument, either under a seal or simply in writing, or may be conferred orally or even by signs. Authority may even be implied from the conduct of the parties or from the nature of the employment. In addition a person may appear to have given authority to another and acts within such apparent authority may efficiently bind him to third party.

The authority of an agent may be confined to a particular act or general to its character. It will extend not only to acts expressly authorised but also to subordinate acts which are necessary or ordinarily incidental to the exercise of the express authority. In no case, however, can the authority of the agent exceed the power of the principle to act on his own behalf. As between the agent and his principle, an agent's authority may be limited by an agreement or special instructions, but as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties.

- [13] The question is whether the above principles have the effect of conferring the right on a solicitor to depose an affidavit on behalf of his client. An affidavit is sworn evidence of facts before a court of law. A solicitor cannot, while representing his client before the court at the same time be his witness. The solicitor of a particular litigant can also be construed as his agent but the relationship between the solicitor and the client is different to that of an agent and the principle referred to in the above principles relied on by the defendants. Solicitors act on the instructions of their clients. They cannot assume the status of the clients and do everything what is expected of them. In other words a solicitor cannot be a substitute for his client. The requirements which should be met by a litigant himself are different to that of his solicitor.

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- [14] Order 41 rule 8 of the High Court Rules provides that no affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.
- [15] When the law provides that an affidavit sworn before a barrister or a solicitor of a particular party on whose behalf the affidavit is to be used is not valid before the law it cannot be said that an affidavit sworn by the solicitor on behalf of his client has any force or avail in the law.
- [16] It is the submission of the learned counsel for the defendants that the matters deposed to by Mr. Serulagilagi in his affidavit are kind of matters which rightly should be deposed to by a solicitor who has the carriage of the matter in hand.
- [17] The learned counsel for the defendants cited the decision of the Court of Appeal in the case of **Pacific Agencies (Fiji) Limited v Mark Spurling** Civil Appeal No. Misc. 10 of 2008S; High Court Civil Action No. HBC20 of 2007. The learned counsel has not indicated in his written submissions which of the findings contained in the said decision he is relying on. It appears from this judgment that the following issues relating to the validity of the affidavits had been raised. In the judgment under the sub-heading "**THE AFFIDAVITS FILED**" following paragraphs are reproduced.

Apart from the validity of the affidavit of Ms IRENE SANDHYA NARAYAN being brought into question (as it is missing details as to the place at which it was sworn), there are number of matters deposed to in the affidavit which should have been sworn to by the Solicitor with the conduct of the matter. For example, how can a non-lawyer, depose as to:

- (a) What the Solicitors on the Court record did or did not do on 16 July 2008(paragraph 4);
- (b) what "has been well settled law and common practice in Fiji" (paragraph 7) or the "usual rule and practice" (paragraph 7); or
- (c) "that the defendant has valid and arguable grounds of appeal which raise important questions of law and have reasonable prospects of success" (paragraph 8)?

the plaintiff" (paragraph 9), again, this is the matter for the Solicitor on the record to depose to in an affidavit together with providing details in support as to the basis upon which she makes such a claim. Further, how can a non-lawyer just boldly state as has the financial controller for the applicant company done (at paragraph 10) "That no prejudice if a stay is granted on the execution of the judgment"?

- [18] They were only the depositions contained in the affidavit which the learned judge has reproduced in his judgment and there is no finding in the judgment on these issues and there is nothing in said judgment which suggests that the solicitor who represents a party in Court has the right to depose an affidavit on his behalf.
- [19] For the reasons aforesaid it is the finding of this court that there is no proper affidavit before the court in support of the summons for leave to appeal and the stay of proceedings pending appeal. The court therefore, makes the following orders.

[20] ORDERS

1. The affidavit of Mr. Josefa Serulagilagi dated 02nd February 2016 filed in support of the summons for leave to appeal and for the stay of proceedings is struck out.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

25th April 2016