IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBA NO. 6 OF 2016

M. C. LAUTOKA CIVIL ACTION NO. 12 of 2013

BETWEEN	:	**FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji. **Applicant**
AND	:	**PENIJAMINI RURU NASALO** and **TULIA TINAIANNESLEY KOROI** both of 54 Musuniwai Street, Lautoka, Church Worker and Domestic Duties respectively. **Respondents**
COUNSEL	:	Mr. Lajendra for the Appellant o/i of Lajendra Lawyers.
	:	Respondents absent and No Appearance.
DATE OF HEARING	:	15th September, 2017
DATE OF JUDGMENT	:	2nd November, 2017
JUDGMENT BY	:	Justice Mr. Mohamed Mackie

J U D G M E N T

(On an Appeal from the Magistrate's Court of Lautoka)

A. INTRODUCTION

1. This is an Appeal preferred by the Plaintiff- Appellant(Appellant) namely, Fiji Development Bank (FDB), being dissatisfied with the ruling dated 5th February, 2014, pronounced by the learned Resident Magistrate of Lautoka, dismissing the action on a, purported, preliminary objection raised by the Defendant – Respondents (Respondents) in the writ action bearing No.12/ 2013.

2. Though, the impugned ruling had been made on 5th February,2014, the Grounds of Appeal came before this Court only on 14th July,2016 , having obtained **Leave to Appeal Out of Time,** as per the Ruling dated 1st July,2016, made by Justice. A. Tuilevuka, in the Application bearing No HBM- 20/2014 filed in this Court.

B. BACKGROUND & CHRONOLOGY OF EVENTS

3. For the purpose of lucidity and easy comprehension of the issue that begged adjudication by this Court, in this protracted litigation between the parties, I shall briefly explain the history of the matter from what I have grasped out of the case records.

Writ of Summons bearing No. 455 of 2010;

4. Messrs. Lajendra Law had filed a writ of Summons on behalf of the Appellant (FDB) on 27th September, 2010, against the Respondents before the Magistrate's Court of Lautoka for the recovery of $ 22,538.63, being the arrears of the Term Loan and $ 16,533.84, both being the arrears of SCARF Loan, allegedly, due from the Respondents. The case number assigned was 455/2010.

5. The said writ action No. 455/10, being mentioned before the then learned Magistrate on 08th December, 2010, the Respondents were given 21 days to file their Statement of Defence (S.D) and the matter was adjourned to 19th January, 2011.

6. The Respondents finally filed their S. D on 27th January, 2011, being the fourth date given for same and the matter was, subsequently, adjourned for mention on 3rd February, 2011, on which day same was struck out due to non- appearance of the Appellant's Solicitors.

7. On 7th March, 2011, the Appellant's Solicitors filed a Reinstatement Application, for which the Respondents filed the affidavit in opposition on 6th September, 2011, and the ruling on same was delivered on 21st November, 2011, dismissing the application, allegedly, in the absence of the Appellant's Solicitors and even without any formal hearing being given.

Appeal against the Ruling in Action No. 455 of 2010;

8. On 28th November, 2011, the Appellant Bank's Solicitors filed the timely Notice of Intention to Appeal and Grounds of Appeal and, strangely, for reason not yet known, **NO** an Appeal number was allocated though, nearly One Year and Nine Months had lapsed from the date of filing the Notice of Intention to Appeal and Grounds of Appeal.

New Writ – Civil action No. 12 of 2013;

9. Then the Solicitors for the Plaintiff Bank filed a new writ on 1st March, 2013, under writ action bearing No. 12 of 2013, as there was no any feedback from the High Court Registry informing an Appeal number and a mention date in respect of the Appeal so filed in relation to writ action No.455 of 2010.

10. The new writ was to be mentioned on 20th May, 2013. However, as the learned Magistrate was not available, the matter was adjourned for 1st July, 2013.

11. On 1st July, 2013, the Respondents were given 14 days to file their Statement of Defence (S.D) and the matter was adjourned to 31st July, 2013. The Respondents, who should have filed their SD by 15th July,2013,ie before the expiry of 14 days, failed to do so and filed same only on 31st July, 2013, and the Court thereafter fixed the matter for 7th August, 2013, allowing the Respondents to serve the SD on the Appellant's Solicitors. However, same was served on 31st July, 2013, itself.

Preliminary Objection by the Respondents;

12. When the new writ came up on 7th August, 2013, the Respondents raised a preliminary objection to the effect that the new action was an abuse of process, as there was an Appeal pending on account of dismissal of the Reinstatement Application filed against the striking out of the writ action No. 455 of 2010, involving the same parties and claim, on which the Court adjourned the matter for 14th August, 2013.

13. In the meantime, on 13th August, 2013, the Solicitors for the Appellant filed the Notice of Discontinuance of Appeal dated 9th August, 2013, in respect of the said ill-fated Appeal and accordingly, informed the learned Magistrate on 14th August, 2013, that the Appeal was discontinued as the High Court Registry had failed to allocate an Appeal number or a date of calling for the Appeal filed on 28th November, 2011.

14. On 28th August, 2013, both parties filed their respective written submissions on the preliminary objection as directed by the Court and the matter was fixed for hearing in to the preliminary objection to be held on 2nd October, 2013,on the question of alleged abuse of process,

15. Upon conclusion of the said hearing on 2nd October, 2013, the Court, having allowed the Respondents to file a supplementary submission and the Appellant to reply thereafter, adjourned the matter for ruling on 13th November, 2013.

16. When the matter was called for ruling on 13th November, 2013, the learned Magistrate instead of delivering the ruling, on a request being made, gave further time for the Respondents to file their supplementary submissions, with liberty for the Appellant's Solicitors to file reply and fixed the ruling to be delivered on 15th January, 2014.

17. On 15th January,2014, the learned Magistrate, on the request of the Respondent's Solicitors, gave the Respondents further time until 4.30 on the same day to file their Supplementary submissions and for the Appellant's Solicitors to file reply on 22nd January,2014 and finally fixed the matter **for ruling on 5th February,2014.**

18. However, the Respondents had not filed and served their Supplementary submissions by 4.30 pm on 15th January, 2014, as per the directions and this being notified to the Registry by the Appellant's Solicitors, the Respondents eventually filed same on 24th January, 2014. A copy of same being served on the agents for Appellant's Solicitors only on 27th January, 2014, the Appellant claimed that it reached the Principal Solicitors in Suva only on 31st January, 2014.

19. As a result the Appellant's Solicitors claimed that they were deprived of filing their reply submissions, since the ruling had already been fixed for 5th of February, 2014.

20. According to paragraph 69 of the affidavit of Appellant Bank's Assets Manager, filed before Justice A. Tuilevuka, in the Leave to Appeal Out of Time Application, it has been averred that when the matter was called at 9:30 on 05th February, 2014, for the delivery of ruling, it was stood down for 2:30, as the ruling had not been typed and when it was called again at 2:30, Court having informed that the ruling was still being typed, had directed the parties to liaise with the Registry regarding the next call date of the matter for ruling.

21. However, the journal entry dated 05th February, 2014, shows a note to the effect ***"Ruling is delivered".***

22. The Appellant's Solicitors had maintained the position that their Agent Solicitors were present in Court on 05th February, 2014, at 9:30 Am and 2:30 Pm, to obtain the ruling and had left the Court relying on the direction given by the Court. However, they claimed that they later became aware that the ruling had been delivered at 3:30 Pm and admitted the receipt of the copy of the ruling only after the Appealable time period had lapsed.

23. As a result the Appellant Bank belatedly filed its Application for the Enlargement of Time to Appeal and after successful agitation of the events unfolded in the Magistrate's Court to its detriment, obtained the Enlargement of Time to Appeal as per the well-

considered ruling dated 1st July,2016, made by Justice A. Tuilevuka in the Application bearing No. HBM-20/14.

24. It is after obtaining leave as aforesaid, the present Appeal against the ruling dated 05th February,2014, made by the learned Magistrate in the said new writ action bearing No.12/2013, has been preferred by the Appellant's Bank under Appeal No: - **6/2016.**

25. Therefore, the task before this Court is to decide whether the impugned ruling dated 05th February, 2014, made by the learned Resident Magistrate of Lautoka in the new writ action No; 12 / 2013, can stand as a valid ruling, on the following Grounds of Appeal adduced before me, and in the light of the relevant laws applicable.

C. GROUNDS OF APPEAL:

26. Grounds of Appeal filed before this Court on 14th July, 2016, are as follows.

(1) THAT the learned Magistrate erred in law and fact in striking out the action.

(2) THAT the learned Magistrate erred in law and fact in failing to accord the Appellant time to respond to the supplementary submissions of the Respondents and thereby denied the Appellant natural justice and due process.

(3) THAT the learned Magistrate erred in law and fact in failing to take into consideration that the Appeal was discontinued prior to the hearing and determination of the Defendants' preliminary objection.

(4) THAT the learned Magistrate erred in law and fact in failing to properly exercise her discretion by drawing her attention to the following factors;

(a) that the Appeal had not progressed as the Registry had not allocated even an action number to the Appeal almost two years post judgment;
(b) the Appeal being discontinued even before the hearing of the preliminary objection thereby leaving only one action pending in respect of the matter;
(c) the initial delay by the Respondents in failing to file their defence on time;
(d) the delay by the Respondents in failing to file their Supplementary Submissions on time:;
(e) considering the nature of the defence of the Respondents; and
(f) considering the meritorious nature of the claim of the Applicant;

so as to balance all the relevant considerations in the exercise of the discretionary power to meet the overall justice of the case.

D. ANALYSIS AND RELEVANT LAW:

The 1st Ground of Appeal – The learned Magistrate erred in law and fact in striking out the action.

27. The Respondents, by their supplementary written submissions dated 24th January,2014, had supported their stance on their preliminary objection to the 2nd action bearing No. 12 of 2013, to the effect that it was an abuse of process of Court on the following questions;

i. Where the Magistrate Court Act gives the Appellant the right to audience to bring the same action on the same pleadings when the Court has already struck out the 1st action?
ii. Where the Magistrate Court Act gives the Appellant the right to file fresh writ on the same pleadings while there is an appeal on foot?
iii. Does the fact the Appellant have filed fresh writ on the same pleadings amount to a second bite of the Cherry and as such an abuse of process?

28. In order to substantiate their position on the above questions , the arguments advanced by Respondents before the learned Magistrate were ;

a. While the Appeal on the 1st action No. 455/2010 was pending before the High Court, the Appellant could not have filed the 2nd action No. 12/2013 on the same pleadings.

b. The Appellant withdrew the Appeal only after the preliminary objection was taken up by the Respondents;

c. The Appellant, when filed the fresh writ on the same pleadings , had not disclosed the fact that the 1st writ had been struck out and there was an Appeal pending;

d. The Appellant should have waited for the outcome of the Appeal and should the Appeal be decided in its favour , then the recourse would have been that the original matter would be back before the same Court;

29. The learned Magistrate in her impugned ruling dated 05th February, 2014, finally decided as follows.

> ***"Thus it is evident that the process by the Applicant by filing this case before this Court until determination of the original case base on the same transaction is amount to abuse of process. And has been attempted using this Court as an instrument to abuse by filing this case while the appeal in the original case is rest in the High Court by the Plaintiff and***

secondly withdrawing the appeal after the preliminary objection by the defendant dated 07.08.2013 is process outside the lawful cause" (emphasis mine)

30. Therefore, the issues that this Court needs to determine are-

(i) Whether the Appellant's 2nd writ bearing No. 12/2013, filed on 1st March, 2013 was an abuse of the process of the Court?

(ii) Whether the Appeal **(claimed to be as still pending by the Respondents)** filed by the Appellant against the dismissal of the Reinstatement Application in action bearing
No: - 455/2010, was a bar for the Appellant to file the 2nd writ action bearing No. 12/2013?

(iii) Whether the Notice of Discontinuance/ withdrawal of the Appeal in relation to the 1st writ action bearing No. 455/10 , should, necessarily, have taken place prior to the filing of the of the 2nd writ action bearing No. 12/2013?

(iv) Whether the Appellant could have continued with the 2nd writ action bearing No. 12/2013, filed on 1st March, 2013, after discontinuing the Appeal filed in relation to the 1st writ action bearing No. 455/2010?

31. The learned Magistrate in order to arrive at the impugned ruling has mainly relied on the decision in ***Kumar V Habib Bank Ltd (2011) FJHC 22;HBC 248.2009 dated 01.04.2011***, where Justice Hettiarachchi held that;

> *"Litigants should be mindful that the Court system should not be used to take advantage. If the claim is not in good faith and is for an improper purpose then it is the duty of Court to prevent improper use of the machinery."*

32. Thus, the learned Magistrate has concluded that the filing of the 2nd writ bearing No. 12/2013, before her, whilst an Appeal was pending before the High Court, in relation to the former writ action No. 455/10, was quiet oppressive and misleading as they had been careful of supressing the fact that the original matter filed based on the same transaction (case number 455/2010) was still continuing to be determined in the High Court. The learned Magistrate also found fault with the Appellant for not disclosing about the pendency of the Appeal in relation to the 1st writ bearing no. 455/2010.

33. Since the learned Magistrate had, apparently, relied on provisions of the High Court rules- 1988, and decided cases in relation to the abuse of process & striking out, it is

pertinent to have a look at the principles of the "striking out" found in the - Order 18 Rule 18 (1) (d) of the High Court Rules, 1988, the following related quotes from text books and decided authorities on the subject..

(a) I bear in mind the following passage from Halsbury's 4th Ed. Vol. 3 at para 435: and the

> *"The power to strike out, stay or dismiss under the inherent jurisdiction is discretionary. It is a jurisdiction, which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed, it ought to be exercised sparingly and only in exceptional cases. However, for this purpose the court is entitled to inquire into all the circumstances of the case, and to this end affidavit evidence is admissible"*

(b) In the case of **Khan V Begum (2004) FJHC 430; HBC0153.2003L (30 June 2004) Justice Connors discussed 18 (1) (a) and (d)** where he held that;

> *"It is said that the fact the court has this inherent jurisdiction is one of the characteristic which distinguishes the court from other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the rules. It is not in issue that if a party relies solely upon Order 18 rule 18 there no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court."*

(c) It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.

> At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-
>
> *"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875)*

10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18)

(d) The following passage from the judgment of Court of Appeal in National ***MBf Finance (Fiji) Limited v Nemani Buli, (Civil Appeal No. ABU 0057 of 1998)*** very clearly enunciated and determined the principles of striking out. At page 2 of the judgment their Lordships said:-

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention..."

(e) In Halsbury's Laws of England at Vol 37 page 322 the term' Abuse of process "is described as follows-

"An abuse of process of the court arises where there its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression of for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleadings or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleadings or endorsements or any offending part of it. Even where a party strictly (motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a

maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

(f) The term "abuse of process" is summarized in ***Walton V Gardiner (1993) 177 CLR 378*** as follows.

"Abuse of process includes instituting or maintaining proceedings that will clearly fail. Proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness "

(g) ***In Stephenson V Garret [1898] Q.B. 677*** it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata"

(h) ***Domer V Gulg Oil (Great Britain) (1975) 119 S.J 392;***

"Where proceedings which were viable when instituted have by reason of subsequent events becomes inescapably doomed to failure, they may be dismissed as being an abuse of the process of Court."

(i) *"once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process"* ***(as per Dixon J in Dey v.Victorian Railways Commissioners [1949] HCA 1; (1949) 78 CLR 62, 91.***

34. I, have carefully perused the reasons as to what actually led the Appellant's Solicitors to file the 2nd writ action bearing No. 12/2013, against the same Respondents for the recovery of the same amount of arears of loan arising out of the same transaction and the reasons adduced by the learned Magistrate for the dismissal thereof as well. .

35. It is an admission on the part of the Respondent's Solicitors (Vide **paragraph 3.0 of the Supplementary written Submission dated 24th January, 2014)** that the said action **455/10** was struck out on 3rd February, 2011, being a mention date, due to non- appearance of the Appellant's Solicitors. It is further admitted that although, reinstatement Application was made on 7th March, 2011, same was dismissed on 21st November, 2011 and it is against that dismissal a timely Appeal was made on 28th November, 2011, by way of Notice of Intention of Appeal & Grounds of Appeal.

36. It is also admitted by the Respondents that the said Appeal was never listed before a judge nor was it given an Appeal number and that is why the Appellant was made to file

the fresh writ bearing No. 12/2013, on 1st March, 2013, in which the impugned ruling dated 05th February, 2014, was made by the learned Magistrate. It is the ruling under scrutiny before me.

37. It is pertinent to note that the Respondents in paragraph 6.9 of their Supplementary written submissions, having admitted before the learned Magistrate that still there is a course of action that needs to be determined, have taken up the position that the procedure followed by the Appellant was an abuse of process.

38. Respondents have not changed their stance with regard to the existence of a valid course of action for the Appellant. It is also observed that the Respondents in paragraph 11 of their S D filed on 31st July, 2011, have, among other things, admitted that their account was in arrears and reminders were issued to them by the Appellant Bank.

39. The only defence taken in the SD and in the initial written submissions before the learned Magistrate, as far as the substantial matter is concerned, was that the action is Statutory barred.

40. Therefore, in view of the above, it is clear that the Respondents are admitting that the action of the Appellant bank has not so far been finally decided on its merits and it still awaits adjudication before the relevant Court.

41. Had an Appeal number been allocated by the High Court Registry for the Appeal made in respect of the writ action No.455/10, and culminated in favour of the Appellant, undoubtedly, the same action would have continued before the learned Magistrate to see an end result, provided due process were followed.

42. Unfortunately, for the reason not yet known and in the absence of any blame to be pinned on the Appellant's Solicitors, neither an Appeal number was assigned nor an Order was made by the High Court giving a mention date and / or issuing notice on the Respondents . Under this scenario the conclusion that can be arrived at is that the so called Appeal only had a stillbirth and got buried elsewhere without being subjected to the adjudication of the High Court.

43. The allegation that no an Appeal number was assigned, stands further substantiated in the Notice of Discontinuance dated 9th August , 2013, filed in the Magistrate's Court. Had there been a live Appeal before the High Court in respect of the writ action No.455/10, this Notice of Discontinuance would have been, rightly, filed in the High Court Registry.

44. Further, it is noted that the Notice of Discontinuance was originally filed stating the writ

action bearing No. 455/10, but, probably, due to non-availability of that record, the action No. 12 /2013 has been written by cutting the action No. 455/2010.(**it is wrong to have inserted the present action number 12/2103 in the Notice of Discountenance which should have been filed in the appropriate record**)) This clearly shows that the original record bearing action No. 455/10, too was not available in the Magistrate's Court.

45. Then the question arises whether the Respondents could have taken up a position that there was an Appeal against them, when the facts remain that there was no such an Appeal properly constituted by assigning an Appeal number and making required orders sanctioning the notice to be issued on the Respondents by giving a mention date.

46. In the light of the above, it is apparent that when the High Court had not exercised its Jurisdiction by assigning an Appeal number and making required orders against the Respondents and particularly, when the Respondents had not at all appeared in the High Court in respect of the ill-fated Appeal, they could not have claimed that there was an Appeal pending against them.

47. Therefore, it is my inescapable conclusion that though there was an institution of an Appeal in respect of the writ action No. 455/2010, due to the seeming failure on the part of the Civil Registry of the Magistrate's Court to remit the record to the High Court and/or that of the High Court Registry to take necessary steps to proceed with the Appeal by assigning an Appeal number and making required Orders for the continuation of the Appeal, there was no any properly constituted Appeal against the Respondents.

48. Since the cause of action against the Respondents still remains alive without being finally adjudicated on its merits, as observed above, there cannot be any bar for the Appellant to sue the Respondents by way of a fresh writ.

49. The Respondents, who obviously admit the claim and the existence of the cause of action without being finally adjudicated, should not have been allowed to take up the Defence of abuse of process, which is a procedure foreign to the Magistrate's Court Rules. Instead the learned Magistrate should have proceeded for substantial hearing.

50. In the aforesaid premises and in the light of the decided case discussed above, I am satisfied that the learned Magistrate grossly erred in her impugned ruling by concluding that the Appellant had attempted to use the Court as an instrument of abuse.

51. The Appellant, who had no any other alternatives, to come out of the mess, resulted due to non- constitution of the Appeal by assigning an Appeal number, in respect of its former writ action bearing No.455/2010, should not have been penalized when bringing the same claim under a fresh action No.12/2013.

52. Further, the events took place on the date of delivery of ruling , by readily not delivering the ruling at the first call at 9:30 am or on the subsequent calling at 2:30 and finally delivering at 3:30, as admitted by the Respondents (allegedly in the absence of any written ruling) clearly shows that the learned Magistrate was in a state of unpreparedness and had rushed to arrive at her decision.

The 2nd Ground of Appeal

53. The second ground of Appeal is the alleged failure on the part of the learned Magistrate to grant the Appellant an opportunity to file its response to the supplementary written submission of the Respondents.

54. Obviously, the Respondents had not filed their supplementary written submissions on the due dates given and same was filed only on 24th January, 2014. A copy of same was received by the Appellant's Solicitors only on 31st January, 2014, just 4 days prior to the ruling on 05th February, 2014.

55. Had the Appellant been given an opportunity to duly respond to the supplementary written submission of the Respondents, the learned Magistrate would have stood at a better position in arriving at the decision, though she had followed the wrong procedure by having a hearing on the, purported, preliminary objection, without proceeding to the substantial hearing as she is required by the rules.

56. I am also assisted by series of authorities on the principle of natural justice and in the light of the well-founded decisions therein, I am convinced that the Appellant in this case should have been afforded an opportunity by the learned Magistrate to file the reply submissions to the supplementary submissions of the Respondents, if she was determined to decide the matter on the so called preliminary objection.

57. The learned Magistrate who was, apparently, lenient toward the Respondents by granting several dates to file their S.D and the supplementary submissions, erred by not granting an opportunity for the Appellants to file their reply submissions. The Appellant was denied natural justice and due process.

The 3rd Ground of Appeal;

58. It is alleged that the learned Magistrate erred in law and fact in failing to take in to consideration that the said ill-fated Appeal had been discontinued prior to hearing and determination of the Respondent's preliminary objection.

59. It is not disputed that the Appellant filed the Notice of Discontinuation of the Appeal only after the so called preliminary objection was raised by the Respondents. However, it is evident that same has stood discontinued prior to the further proceedings and the impugned ruling.

60. In my analysis in the foregoing paragraphs, I have arrived at a conclusion that there had not been an Appeal properly constituted, although, the Appellant had, admittedly, instituted an Appeal. There is no any evidence to show that the, purported, Appeal papers filed in the Magistrate Court's Registry were in fact transmitted to the High Court Registry and/or the subsequent steps were taken by the High Court Registry, firstly, by assigning an Appeal number.

61. It is also evident that the Notice of Discontinuance also has been filed in the current record bearing No. 12/2013, and not in the ill-fated Appeal file or in the original record bearing no. 455/2010. This, along with the other facts stated above substantiates my conclusion that there was no any properly constituted Appeal on foot for the same to be duly discontinued.

62. Therefore, the argument advanced by the Respondents with regard to the propriety of the time of filing the Notice of Discontinuance does not hold water.

63. It is to be noted that even in the absence of a properly constituted Appeal, the Appellant had demonstrated its intention of not proceeding with an Appeal, by filing a Notice of Discontinuance. Belated filing of it has not prejudiced the Respondents and it need not, necessarily, be a bar for the Appellant to file the new writ.

The 4th Ground of Appeal:

64. Since all the sub grounds herein from **A to F** have already been subjected to scrutiny under the foregoing main Grounds of Appeal, I need not delve in to these sub grounds adduced under the ground No-4. However, I am satisfied that all these sub grounds demand consideration in favour of the Appellant Bank.

Could the issue herein have been decided by Way of Preliminary Objection?

65. Without prejudice to the above findings, let me consider whether this allegation of abuse of process could have been decided by way of preliminary objection for the learned Magistrate to strike out.

66. Striking out of an action before the Magistrate's Court, under the Magistrate's Court Rule is found only under Order XXX Rule 1 and 2 on account of Non-appearance of

both the parties or of the Plaintiff respectively on the day of hearing.

67. It is to be observed that, other than the above provisions, there is no provision under the Magistrate Court Rules for striking out on the basis of abuse of process or on any other ground.

68. The learned Magistrate was bound to proceed with the substantial hearing under Rule XXXI. Learned Magistrate having entertained an oral application decided on the preliminary objection merely relying on the supplementary written submission filed by the Respondents for which the Appellant had no opportunity to response. The matter did not proceed for substantial hearing. Had it proceeded for hearing the Appellant would have been at a better position to substantiate its position with regard to the plight of the ill-fated Appeal, for the learned Magistrate to arrive at a most justifiable decision with regard to the allegation of abuse of process.

69. Learned Magistrate seems to have borrowed the relevant provisions from the High Court Rules and proceeded strike out the action, without proceeding for hearing as provided in Rule XXXI of the Magistrate's Court Rules.

E. CONCLUSION

70. I find there was no an abuse of process or duplication of cases by the Appellant before the learned Magistrate and the Appellant had all the right to institute the 2nd writ action bearing No.12/2013, since the first action had not been , admittedly, adjudicated on merits.

71. The ill-fated Appeal, which had not been even assigned with a number and did not have any records of commencement or continuance of proceeding, need not be a bar for the 2nd writ action of the Appellant.

72. The Notice of Discontinuance of the Appeal, in my view, need not, necessarily, have been filed in the absence of a live Appeal pending and filing or non-filing of same would not have had any effect on the new writ action.

73. The Appellant could have continued with the new writ action No.12/2013, before the learned Magistrate until its claim is finally determined by following the due process.

F. ORDERS:

A. Appeal allowed and the impugned ruling dated 05th February, 2014, made by the learned Resident Magistrate of Lautoka, in writ action No. 12/2013 is

hereby vacated.

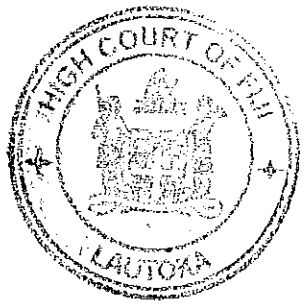
B. The Appellant's writ action bearing No. 12/2013 stands reinstated.

C. The parties shall be duly noticed by the learned Magistrate for further proceedings.

D. Considering the circumstances, the learned Resident Magistrate is directed to dispose this matter as expeditiously as possible.

E. I make no order for cost

F. The M.C. record shall forthwith be remitted to the Magistrate's Court of Lautoka, along with a copy of this judgment.



A.M.Mohammed Mackie
Judge

At Lautoka
2nd November, 2017