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

HBC NO. 69 OF 2012

BETWEEN	:	**EDWARD NAGIYA**
		APPLICANT [Original 1st Defendant]
AND	:	**KIRAN DEVI AUTAR**
		RESPONDENT [Original Plaintiff]
AND	:	**SWADESH WATI**
		Original 2nd Defendant

Counsel	:	Applicant in Person
	:	Mr. N. Kumar for the Respondent

Hearing disposed by way of written submissions.

Written Submissions by Plaintiff- Respondent filed	:	14th August, 2017.
Written Submissions by 1st Defendant – Applicant on	:	24th August, 2017.
Written submissions by 2nd Defendant on	:	24th August, 2017.
Supplementary written submissions by 1st Def–App	:	08th September, 2017.
Date of Ruling	:	07th December, 2017.
Ruling by	:	Justice Mr. Mohamed Mackie

R U L I N G

INTRODUCTION:

1. The 1st named Defendant – Applicant, namely, Edward Nagaiya (Applicant) by his Notice of Motion dated 6th November2013 seeks , *inter-alia*, following orders ;

a. That leave be granted to the Defendant to appeal out of time,

b. That a stay be granted on any execution of judgment.

2. The said notice of motion is supported by an Affidavit of the Applicant sworn on 6th November 2013 filed with the documents annexed marked as "A" the Ruling dated 27th May 2013 made by the learned then Master (Master) of this Court, "B" a Radiological Report, "C" few Medical Certificates, and "D" the purported Grounds of appeal.

3. The Plaintiff- Respondent, namely, Kiran Devi Autar (Respondent) filed her Affidavit in reply sworn on 16th December 2013 together with the exhibit marked "KDA-1" namely, the Judgment Debtor Summons (JDS) filed at the Magistrate's Court of NADI for the execution proceedings against the Applicant.

BACKGROUND & CHORONOLOGY OF EVENTS:

4. The Respondent on 10th of April2012 filed her writ of summons together with the statement of claim dated 29th March 2012 against the Defendants (the 1st named Defendant -Applicant and his wife the 2nd named Defendant) moving for a judgment claiming , inter-alia, following reliefs;

a. A sum of $ 201,195 ,being the total principal sum owed by the Defendants under the acknowledgment of Debt dated 4th October 2010 and the money lent and advanced from on or about 10th March 2011 to on or about 16th September 2011.

b. A sum of $ 155,520, being the interest on the principal sum of $ 72,000 paid under the said acknowledgment of Debt dated 4th October 2010, calculated from 31st October 2010 till 31st March 2012 at the rate of 12% per month.

c. Interest on the sum of $ 72,000 at the rate of 12% per month from 31st March 2012.

5. The writ of summons, admittedly, being served on the Applicant on 18th June 2012, no statement of defence was filed and as a result a default judgment dated 6th August 2012 was entered against him as prayed for which was, reportedly, served on him on 18th October 2012, together with the notice of assessment of damages.

6. In the meantime, the writ of summons & the statement of claim against the 2nd named Defendant being served on her on 21st November 2102, and though service was duly acknowledged by her, she too had not filed her statement of defence.

7. However, it has to be put on record that the default judgement mentioned above has not covered the 2nd named defendant and no such judgment has so far been sought or entered against her.

8. Subsequently, on 21st January 2013 the Applicant filed Summons under Order 19 rule 9 supported by his affidavit to have the above default judgment against him set aside and for the stay of execution.

9. This summons being opposed by the Respondent, after a due hearing, the Master by his ruling dated **27th May 2013,** having entirely set aside the default judgment, entered judgment in favour of the Respondent only for a portion of the entire claim and granted the Applicant leave to defend and to file his statement of defence for the rest of the claim. The last paragraph of the impugned ruling reads as follows;

> *"I set aside the default judgment entered against the defendant and in its place; enter judgment for the plaintiff against the defendant in a sum of $112,000 (one hundred and twelve thousand dollars only). I grant leave to the defendant to file and serve a statement of defence with regard to the balance of the moneys which the plaintiff alleges still owing. Case adjourned to 17th June, 2013 for mention. Cost in, the cause"* (underlining by me).

10. Thereafter, the Applicant filed his statement of defence for the balance claim on 14th June 2013 together with a counter claim, and the Respondent on 20th June 203 filed her reply to the statement of defence and counter claim.

11. It is in relation to part of the impugned ruling dated 27th May 2013 the Applicant has filed the Notice of Motion on 6th November 2013 moving for leave to appeal out of time and stay as stated in paragraphs 1 and 2 above.

HEARING IN TO THE SUMMONS BEFORE THIS COURT:

12. It is to be observed that from the inception the Applicant has appeared in person stating that he cannot afford lawyer's fees and has not even sought Legal Aid for the reason best known to him.

13. However, according to records it is noted that during the period commencing from 2nd December 2013 till 30th March 2017, when the matter had been mentioned before my predecessors to fix a hearing date, the Applicant had managed to obtain 15 adjournments on his purported health condition, by submitting Medical Certificates, Reports and letters. It means that for over 3 years and 3 months the Applicant has avoided the hearing being fixed into this application for leave to appeal out of time and stay, filed by him on 6th November 2013.

14. Eventually, when the matter was mentioned before me for the 1st time on 4th May 2017 to fix a hearing date, once again the Applicant moved an adjournment for a long date on the ground of a pending Eye Surgery and considering this application too in his favour the hearing was of consent fixed for 14th August 2017.

15. Accordingly, when the matter came up for hearing on 14th August2017, though the Respondent' s counsel was ready to proceed with the hearing , the Applicant once again moved for an adjournment citing his purported Medical condition (Poor Eye sight) This was vehemently objected by the Respondent's Counsel who moved for cost if an adjournment was to be granted. The Applicant was neither willing to agree for a reasonable cost nor was in possession of an acceptable Medical Certificate to prove that he cannot take part in the hearing.

16. Then, the Court with no alternative decided to dispose the hearing by way of written submissions and parties filed their respective submissions on the dates as shown in the caption above. The 2nd named Defendant against whom so far no judgment has been entered and who is not a party to the present application has also filed a written submission on her own.

RELEVANT LAW & DISCUSSION

Is the Order in question an interlocutory or final?

17. Before proceeding to determine the question in hand, i.e. whether leave to appeal out of time should be granted or not, it is pertinent for this Court to decide whether the Order in question is a final or an interlocutory Order.

18. It is unfortunate that the Applicant has made this application under Order 55 Rule 3 of the High Court Rules 1988 and the inherent jurisdiction of this Court. It is to be noted that the Order 55 Rule 3 provides only for appeals from the Magistrate's Court or Tribunal and not for an appeal from the Master to a Judge. Hence this Order 55 Rule 3 relied upon by the Applicant will not assist him in his move.

19. However, without penalising the Applicant for resorting to a wrong Order & Rule, this Court decides to consider the application as if it had been made under the relevant Rules and sub Rules of Order 59 provided for this purpose in the High Court Rules of 1988, in order to meet the ends of justice.

20. It is observed that the Applicant appears to have considered the part of the impugned ruling of the Master, where the Master having vacated the default Judgment entered a judgment for $ 112,000.00, being a portion of the claim, as a final judgment. If it was a final judgment, undoubtedly, he would have been at liberty to move for an appeal under O.59.r8 (1) and if needed, could also have made an application under O.59 R.10 (1) for the enlargement of time to file and serve his notice of appeal.

21. In relation to an appeal from the final Order or Judgment of the Master, Order 59 Rule 8(1) & (2)of the High Court Rules 1988 provides as follows:

> *(1) "An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court"*

(2) *"No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of the single judge of the High Court which may be granted or refused upon the papers filed"*

22. The time period within which such an appeal should be made is stipulated in Order 59 Rule 9 of the High Court Rules of 1988 is as follows:

> *"An appeal from an order or judgment of the Master shall be filed and served within the following period-*
>
> *(a) 21 days from the date of the delivery of an order or judgment; or*
>
> *(b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal".*

23. With regard to the extension of time for filing and serving a notice of appeal or cross-appeal Order 59 rule 10 (1) provides as follows;

> *"An application to enlarge the time period for filing and serving a notice of appeal or cross- appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period"*

24. Conversely, the Counsel for the Respondent in his written submissions states that the impugned ruling, against which the Applicant seeks leave to appeal out of time, is an order refusing an application to set aside a default judgment, therefore the order in question is an interlocutory in nature and the leave of the Court should have been obtained in the first instance before deciding on the extension of time.

25. Counsel for the Respondent advanced the above argument relying on the decision in ***Goundar v Minister for Health [2008] FJCA 40; ABU0075.2006S (9 July 2008).*** This is relevant to the current application. In that case Fiji Court of Appeal under paras 37 & 38 in its decision said:

> *"This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory".*
> *"Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration'. The following are examples of interlocutory applications*:
>
> i. *An application to stay proceedings;*
>
> ii. *An application to strike out a pleading;*

iii. *An application for an extension of time in which to commence proceedings;*

iv. *An application for leave to appeal;*

v. ***The refusal of an application to set aside a default judgment;***

vi. *An application for leave to apply for judicial review." (Emphasis mine).*

26. When the Master is called upon to decide on an application for vacation of a default judgment, obtained regularly or irregularly, the decision that the Master can arrive at is to vacate such judgment or refuse to vacate it.

27. In the case in hand the Master, having entirely vacated the default Judgment, in the same breath has entered judgment in favour of respondent only for a sum of $112,000.00, as per the relevant paragraph of the impugned ruling reproduced in paragraph 9 above.

28. The reason for doing so by the Master appears to be the unequivocal admissions made by the Applicant in his affidavit filed to vacate the default judgment and in various writings, admittedly, given by the Applicant to the Respondent during the time material, which are marked as "KA-1", "KA-6" "KA-7", and particularly in "KA-2" a formal writing executed by the Applicant admitting the liability before a Solicitor. These documents were annexed to the reply affidavit of the Respondent before the Master.

29. It is the above part of the impugned ruling, the Applicant appears to have considered as a final judgment and moved this Court for the extension of time to file an appeal relying under the Order 55 Rule 3 of the High Court rule, which in any event is wrong Order to be followed as stated above.

30. On perusal of the impugned ruling, it appears that the Master being satisfied of the regularity of entering the default judgment, has entered judgment for $ 1,12,000.00 which, according to him, was well and truly owed by the Applicant to the Respondent and had no any valid defence in view of the admission he had made for that part of debt.

31. Entering a fresh judgment by the Master on his own after vacating the default judgment in its entirety, appears to have brought in a picture as if a final judgment has been entered by the Master, and the Applicant has, presumably, made this application for leave to appeal out of time, instead of making a leave to appeal application under relevant rule of the Order 59 on the basis that the ruling in question is an interlocutory order.

32. I am of the view that a simple interpretation on the above act of the Master will throw light to arrive at a finding whether the contentious part of the ruling of the Master is final or interlocutory.

33. It is not disputed that when the Master vacated the default judgment, the Applicant fell back to his original position. But, once the Master on the other hand entered a judgment for a portion of the claim in favour of the Respondent in the same breath, it has to be considered for all purposes that he has refused to vacate the default judgment in relation to such part of the claim.

34. In the light of the above the conclusion that can be safely arrived at, as the respondent's Counsel argued, is that the impugned ruling of the Master is an interlocutory in nature, which requires the prior leave of the Court to exercise his appellate right and he cannot directly appeal falling under Order 59 Rule 8(1)

35. Thus, it is my considered view that the portion of the ruling in question dated 27th May 2013 is not a final Order or Judgment. If it was so the Applicant could have exercised his appellate right directly falling under Order 59 Rule 8 sub rule (1) and, in the event of delay, could also have moved for the extension of time to file notice of appeal under Order 59 Rule 10 sub rule (1) of the High Court Rule 1988. The Applicant clearly cannot fall under the above Order and rules.

36. Accordingly, it is clear that since the part of the ruling in question is an interlocutory order, the Applicant should have necessarily obtained the leave of the Court to appeal in the first instance and then should have proceed to apply for the extension of time as aforesaid.

SHOULD LEAVE TO APPEAL AN INTERLOCUTORY ORDER BE GRANTED?

37. This Court has arrived at the finding that the impugned ruling of the Master dated 27th May, 2013, is an interlocutory Order for all the purposes as argued by the Respondent's Counsel. The next hurdle the Applicant has to face is the question of obtaining leave to appeal.

38. Though, an application for leave to appeal is not before the Court by the Applicant, in fairness to him and for the sake of completeness ,I shall discuss bellow whether he is entitle for such a relief in the light of the facts and the current law on the subject discussed as follows.

39. **Order 59 rule 11 of the High Court Rules states as follows:**

> *"Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment."*

40. In Rajendra ***Prasad Bothers Ltd v FAI Insurance (Fiji) Ltd 2002 FJHC 222; HBC 0295r. 2001s (9 August 2002)*** Court sets out the basis to be considered in relation to leave to appeal against interlocutory order or decision. It was held in:

"However, in the case before me it is my respectful view that the grounds for appeal are unmeritorious and there are no arguable legal issues of any importance which require some authoritative decision. I do not see how the applicant will be prejudiced if leave is refused. It will still have the opportunity to put its case fully before the court during the hearing of the substantive action. It will have the right of appeal if unsuccessful."

41. **In *Fiji Public Services Commission v Manunivavalagi Dalituicama Korovulavula FCA Civil Appeal No. 11 of 1989* Court held:**

"Whilst I am inclined to agree that Air Canada's case appears to be distinguishable. I must bear in mind that I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into consideration before deciding whether to grant leave or not."

42. In ***Totis Inc Spor (Fiji) Limited & Anor. V John Leonard Clark & Anor (FCA No. 35 of 1996 at 15 (as cited in Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd (supra)*** Tikaram J said:

"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principles by principles by granting leave only in the most exceptional circumstances."

43. In **Kelton *Investment Limited and Tappoo Limited and 1. Civil Aviation Authority of Fiji Motibhai & Company Limited, Civil Appeal No. ABU 0034.1995,* court held:**

"The courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted."

44. Further, in the affidavit submitted by the Applicant along with his ill-fated application for grant of leave to appeal out of time, he does not utter a word that he has a valid grounds/s to appeal against Master's impugned ruling.

45. He has made explicit admissions that he obtained money from the Respondent on several occasions and agreed to repay it and the Master being satisfied of it, by his impugned ruling has refused to vacate the default judgment in respect of $1, 12,000.00.

46. It is observed that the amount of $1, 12,000.00, with regard to which the Master has refused to vacate the default judgment, is well and truly due to the Respondent in the light of Applicant's explicit admissions, and the purported reason adduced by him that monies were given to him by the Respondent on account of their illicit relationship and the Respondent did not expect to receive it back is not an acceptable defence.

47. When the facts of this case and the settled law on the leave to appeal application remain as stated above, I need not delve further into this question. I am also of the view that even if there had been a proper application on the basis that the order in question is an interlocutory, in the light of the applicable law, no order granting leave to appeal would have been possible in favour of the Applicant.

GRANTING LEAVE TO APPEAL OUT OF TIME:

48. The ruling in question, undoubtedly, **is not a final order or judgment** for the applicant to invoke the Order 59 Rule 8(1) to make an appeal or to make an application for leave to appeal out of time under O 59 R 10(1) of the High Court Rules of 1988.

49. The only remedy that was available to the Applicant was none other than making a leave to appeal application within the stipulated time period as provided in O 59 R 11, and if successful, then, if need arose should have moved for the extension of time to appeal. The Applicant t has grossly failed to file a leave to appeal application.

50. However, in fairness to the Applicant and for the completeness, I shall consider bellow the relevant case law authorities and the legislative provisions in relation to Leave to Appeal Out of Time applications.

51. The only specific statutory provision available for leave to appeal out of time (extension of time to appeal) is the Order 59 Rule 11, which should be sought after by the person/s who are entitled to make an appeal in relation to final orders or judgments as stated under Order 59 Rule 8 (1) in case they have not exercised this right within the stipulated period for valid reasons.

52. The sub rule 2 of Rule 8 under Order 59 explicitly prohibits an appeal from an interlocutory order or judgment which states as follows.

> *(3) "No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of the single judge of the High Court which may be granted or refused upon the papers filed"*

53. There is no any specific Rule or sub rule under Order 59 that has provisions to make an application for the extension of time in order to make leave to appeal application. It is provided only for the appeals qualified under Order 59 Rule 8 (1).

54. Since the Master's ruling delivered on 27th May 2013 in this case is an interlocutory order as observed above, leave is a prerequisite for the Applicant to appeal that order to a judge of the High Court as per HCR O.59, r.11, and once such leave is obtained only the application for the extension of time could be made, if there is a delay by that time. .

55. According to O.59, r.11, an application for leave to appeal the interlocutory order of the Master must be filed and served within 14 days of the delivery of the order.

56. The Applicant did not file a leave to appeal application as per the rules. Instead he chose to file the purported leave to appeal out of time application on 6th November 2013 under

a wrong Order and Rule. This is similar to putting the Cart before the Horse. Even to make the wrong application he has taken 5 months and 10 days.

57. Here I will refer to the decision of the Privy Council in: **Ratnam vs. Cumarasamy and Another [1964] 3 All E.R. at page 935;** in which Lord Guest in giving the opinion of the Board to the Head of Malaysia said, inter alia:

> *"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material which the court can exercise its discretion. The law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle."*

58. It is to be observed that under Order 59 rule 10, the Court can only enlarge the time for filing and serving of notice of appeal or cross-appeal and not in relation to an appeal for which the leave has to be obtained in the first hand. In ***Panache Investment Ltd v New India Assurance [2015] FJHC 523; HBC56.2014 (17 July 2015)*** it was held that the instant application cannot be considered as a valid application since it is filed without giving due regard to the law stipulated under Order 59 Rule 11 of the HCR.

59. It is clear that since the ruling in question is an interlocutory one, the Applicant should in the first instance have made a leave to appeal application and if he obtains the leave only, then he could have made an application for the extension of time as he will have the status of an appellant who falls under O 59 R8 (1).

60. It will be noted that Order 59 rule 10 empowers the Court to enlarge the time period for filing and serving a notice of appeal or cross-appeal and not the time period for filing and serving the application for leave to appeal an interlocutory order.

61. Even if one assumes that the Applicant has a right to make an Application for the **Extension of Time** prior to obtaining Leave to Appeal or on the other hand that he is before this Court after duly obtaining the pre-required Leave to Appeal , still the Applicant in this case would fail for the reasons to be stated bellow.

62. The governing principles for the granting of leave to appeal out of time are as follows:

(i) Length of delay;
(ii) Reason for the delay;
(iii) Chance of appeal succeeding if time for appeal is extended; and
(iv) Degree of Prejudice to the Respondent if application is granted.

63. See, ***Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 020.2009 (3 February 2010), Kumar v Commissioner of Police, Fiji Court of Appeal Civil Appeal NO.ABU 0059 OF 2004 (10 March, 2006), Nair v Prakash [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013) &Tora v Housing Authority [2002] FJCA 16; ABU0036.2002S (15 November 2002)).***

(1) & (ii) Length of delay and reasons for delay

64. The application in hand was made on 6th November 2013, against a ruling made on 27th May 2013. Thus the applicant is guilty of delay by 5 months and 10 days. This is a substantial period which has to be explained with cogent reasons.

65. The Applicant states in his affidavit the he was involved in a Motor accident. There is no specific date of the alleged accident or any document to prove an accident during the time material to the application.

66. The Radiological Report annexed as "B" to his affidavit dates back to 24th June, 2012, taken around one year prior to the date of default judgment and according to the contents therein it could not have contributed to the delay. Further, the four purported Medical Certificates annexed as "C" are not in respect of the period material to the impugned ruling, which only recommends a day off from work. Applicant's affidavit in support fails to explain the long delay.

(iii) Chance of appeal succeeding if time for appeal is extended;

67. The purported grounds of appeal are not compelling at all and do not divulge even an iota of hope that the Applicant has a chance of succeeding. His affidavit is completely silent on it. There is clear admission on his part about his indebtedness to the Respondent and the reasons adduced by him for not repaying the loan is ludicrous and unacceptable.

68. The Master, having observed the overwhelming admissions on the part of the Applicant, has rightly declined to vacate the default judgment in respect of $ 1, 12,000.00 and vacated the default judgment for the balance sum of the total claim and permitted the Applicant to file his statement of defence, which he has complied with. He can duly contest the balance claim at the trial to be held before this Court.

(iv) Degree of Prejudice to the Respondent if application is granted

69. The Respondent filed this action in the year 2012. The ruling refusing to set aside the default judgment in relation to part of the total claim (for $1,12,000.00) was made on 27th May 2013 and from that point of time the Respondent is waiting to enjoy the fruit of the judgment, which is in respect of the half of her total claim. Any further delay in the enjoyment of it will, undoubtedly, prejudice the Respondent.

70. In the absence of leave to appeal, obtained by making a timely application, it is infertile for this Court to engage in further scrutiny into a premature application made by the Applicant for the enlargement of time to make an appeal.

CONCLUSION:

71. The ruling made by the Master on 27th May 2013, is an interlocutory and not a final judgment or an order.

72. The Applicant, prior to making an application for the extension of time should ,necessarily, have obtained leave by making a leave to appeal application under Order 59 Rule 11, within the prescribed time period of 14 days.

73. Instead what the Applicant has filed before this Court is an application for the Extension of Time to Appeal, for which there is no any explicit provisions under Order 59 of the High Court Rules 1988, and that too after an unexplained delay of over 5 months, falling under a wrong Order and Rule, which is followed in case of appeals from the Magistrate's Court or the Tribunal.

74. Since the Court has arrived at the above conclusion in respect of the leave to appeal out of time application of the Applicant, no necessity arises to consider the relief of Stay.

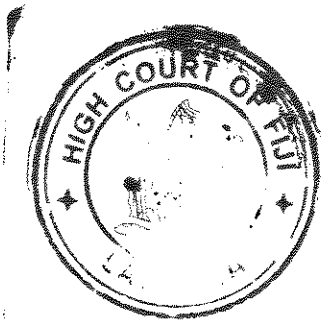
FINAL OUTCOME:

A. The application for the extension of time made by the Applicant on 6th November 2013 stands dismissed.

B. Application for stay dismissed.

C. The proceedings in relation to the balance claim of the Respondent will continue.

D. The Applicant shall pay summarily assessed cost of $500 on or before the next mention date.



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A.M.Mohammed Mackie

Judge

At Lautoka
7th December, 2017