

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

**Civil Action No. HBC 2 of 2016**

**BETWEEN** : **ABDUL YAMEN HAROON** of Martintar, Nadi, Businessman.

**PLAINTIFF**

**AND** : **MALAKAI DRIU SAUKURU** of Sabeto, Nadi, Farmer.

**1<sup>st</sup> DEFENDANT**

**AND** : **iTAUKEI LAND TRUST BOARD** a statutory body established under the iTaukei Land Trust Act Cap 134 having its registered office at 431 Victoria Parade, Suva.

**2<sup>nd</sup> DEFENDANT**

**Counsel** : Mr. A. J. Singh for the Plaintiff  
Mr. P. K. Chauhan for the 1<sup>st</sup> Defendant  
Mr. J. Cati for the 2<sup>nd</sup> Defendant

**Date of Hearing** : 25<sup>th</sup> June 2018

**Date of Ruling** : 25<sup>th</sup> June 2018

**Ruling by** : Hon. Mr. Justice Mohamed Mackie

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**RULING**

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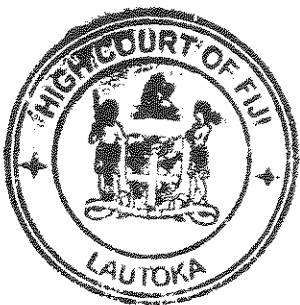
1. This is an appeal preferred by the Plaintiff- appellant (Plaintiff) against the Order made by the learned Master (Master) on 8<sup>th</sup> March 2018 striking out the statement of claim, by activating the unless Order that had been made on 22<sup>nd</sup> of February 2018.
2. Having file the Notice and Grounds of Appeal before this Court on 29<sup>th</sup> March 2018, (on the expiry date of 21 days to appeal), the plaintiff filed Summons on 24<sup>th</sup> May 2018 to enlarge the time for directions for the hearing an Appeal, supported by an affidavit of the Plaintiff,

namely, **Abdul Yamen Haroon**, sworn on 24<sup>th</sup> may 2018 and moved for the following reliefs.

- a. THAT the matter be listed before a judge of the High Court of Lautoka for directions and a date for the hearing of the appeal.
  - b. SUCH other orders the court deems fit.
  - c. THAT the costs be in the cause.
3. The Plaintiff relies on two grounds of appeal, which are reproduced bellow.
- 1) That the Learned Master erred in law and in fact in allowing the Appellant's Statement of Claim to be struck out for non-compliance of an unless order because the said Statement of Claim was served on the Second Respondent on the 27<sup>th</sup> day of February, 2018 within the time prescribed by the said unless order.
  - 2) The Learned Master erred in law and in fact in allowing the Appellant's Statement of Claim to be struck out because it was not the Appellant's fault that the Appellant's counsel was not able to enter an appearance on the said day for the reason that the said counsel's Practicing Certificate was not renewed until the 26<sup>th</sup> day of March, 2018.
4. When the matter was mentioned before me today for directions, with the presence of the learned Counsel for all the parties, on perusal of the record, I found that the impugned order made by the Master on 8<sup>th</sup> March 2018 cannot stand as a valid order for the reasons set out bellow, with which the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants agreed and consented to vacate the order made by Master on 8<sup>th</sup> march 2018.
- a. Pleading being closed before the Master, when, the summons for directions was mentioned before the Master on 22<sup>nd</sup> February 2018, with the presence of Solicitors for all the parties, Master made an order as follows.  
  
***"Plaintiff to serve the Statement of claim on the 2<sup>nd</sup> defendant on or before 1/3/2018. If not served, the Statement of Claim shall be struck out- Mention 8/03/18"***
  - b. Subsequently, when the matter was mentioned before the Master on 8<sup>th</sup> March 2018, due to the absence of the Plaintiff, his Solicitors and the Solicitors for the 2<sup>nd</sup> defendant, on the application of the learned Counsel for the 1<sup>st</sup> Defendant, Master made the following order striking out the Plaintiff's action.  
  
***"There is a 'unless' order on the plaintiff. Neither the plaintiff, nor the 2<sup>nd</sup> defendant is present to confirm the service;***  
  
***In any event, since there is no appearance for the plaintiff I strike out the action".***

5. It is against the above striking out order; the Plaintiff filed his Notice and Grounds of appeal on 29<sup>th</sup> March 2018 on two grounds of appeal and thereafter the summons in hand on 24<sup>th</sup> May 2018., supported by the affidavit of the Plaintiff.
6. The unless order made by the Master on 22<sup>nd</sup> February 2018 was in fact for the Plaintiff to have the statement of claim served on the 2<sup>nd</sup> Defendant on or before 1<sup>st</sup> of March 2018. Having made the above order, the Master fixed the matter to be mentioned on 8<sup>th</sup> March 2018.
7. Unfortunately, the Plaintiff or his Solicitors did not appear in Court on 8<sup>th</sup> March 2018 to confirm the service of the statement of claim on the 2<sup>nd</sup> Defendant. Moreover, the Solicitors for the 2<sup>nd</sup> Defendant too did not appear to confirm the receipt of the statement of claim.
8. Then, the Master, on the application of the learned Counsel for the 1<sup>st</sup> Defendant, struck out the matter.
9. It transpires through the affidavit of the plaintiff, that the statement of claim had in fact been served on the 2<sup>nd</sup> Defendant on 27<sup>th</sup> February 2018 , five (5) days prior to the deadline given by the unless order. Learned Counsel for the 2<sup>nd</sup> Defendant before me acknowledges the said service on 28<sup>th</sup> of February 2018. This shows that by the time the master struck out the matter on 8<sup>th</sup> March 2018, the statement of claim had in fact been duly served on the 2<sup>nd</sup> Defendant in compliance with the unless order.
10. Had the Solicitors for the 2<sup>nd</sup> Defendant been present in Court on 8<sup>th</sup> March 2018, they would, undoubtedly, have informed the Court that the S.C. had been served.
11. The absence of the Plaintiff or his solicitors and that of the 2nd Defendant's Solicitors, to confirm the service of Statement of Claim, need not have necessarily warranted an order for striking out. It was merely a mention date and not a hearing date before the Master.
12. Learned Master could have ordered NOAH on the Solicitors for the Plaintiff and the 2<sup>nd</sup> Defendant and fixed another mention date for ascertainment of service on the 2<sup>nd</sup> Defendant before proceeding to strike out. The absence of the 2<sup>nd</sup> Defendant's solicitors, on which the Plaintiff's solicitors had no control, need not have been taken as a ground to strike out the Plaintiff's action. The absence of the 2<sup>nd</sup> Defendant's solicitors was something beyond the control of the plaintiff and his solicitors.
13. It is also not disputed that the practicing Certificate of the Plaintiff's Solicitors had expired and they were waiting for the renewal. Thus, they could not appear before the master on the day in question.

14. The learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants concedes the above position and agrees to vacate the impugned order made by the master on 8<sup>th</sup> march 2018.
15. The above Order was perfected and filed by the Solicitors for the 1<sup>st</sup> defendant on 15<sup>th</sup> March 2018 and remains sealed, but have not been served on the Plaintiff's or 2<sup>nd</sup> defendant's Solicitors. Thus, the plaintiff and his Solicitors were in dark as to what transpired in the Court on 8<sup>th</sup> March 2018.
16. The Master's Order being a final Order, the Plaintiff did not file and serve the Notice and Grounds of Appeal before the Master prior to the expiry of 21 days. However, the plaintiff filed the same before this Court on the 21<sup>st</sup> date from the date of the impugned Order for this court to consider the extension of time and the appeal. The delay is not serious and can be excused.
17. In the light of the foregoing reasons, I am of the view that the impugned order made by Master on 8<sup>th</sup> March 2018 striking out Plaintiff's action cannot stand as it is and should be vacated. The time for appeal and service should also be enlarged and the Plaintiff should be afforded an opportunity to prosecute his substantive action by allowing his appeal.
  - a. The Plaintiff's appeal succeeds with the enlargement of time being granted.
  - b. The impugned order made by the learned Master on 8<sup>th</sup> March 2018, striking the Plaintiff's action out, is hereby vacated.
  - c. The Statement of claim of the Plaintiff filed on 10<sup>th</sup> August 2018 stands reinstated.
  - d. No cost ordered and the parties shall bear their own cost.
  - e. Mention on 16<sup>th</sup> July 2018 for further directions.



At Lautoka  
25<sup>th</sup> June, 2018

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A.M.Mohammed Mackie

**Judge**