

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 53 of 2005

BETWEEN:

HABIB BANK LIMITED, a limited liability company incorporated under the laws of Fiji and having its registered office in Suva, Fiji

PLAINTIFF/ RESPONDENT

AND:

MEHBOOB RAZA, f/n Tazim Raza of 17 Howell Road, Suva, Barrister and Solicitor/Businessman.

1ST DEFENDANT/ APPLICANT

MOHAMMED SAHID ALI f/n Mohammed Ali of 31 Sawani Street, Suva (last known address), Businessman

2ND DEFENDANT

MEHBOOB RAZA & ASSOCIATES, Barristers and Solicitors, Commissioners for Oath and Notary Public, and having its registered office at 176/184 Renwick Road, Suva, Fiji Islands.

3RD DEFENDANT / APPLICANT

HORIZON TRAVELS LIMITED, a limited liability company incorporated under the laws of Fiji and having its registered office in Suva.

4TH DEFENDANT

BEFORE:

Hon. Justice Kamal Kumar

COUNSEL: **Ms. S. Devan for the Plaintiff/ Respondent**
Mr. S.D. Sahu Khan for 1st & 3rd Defendants/ Applicants

DATE OF HEARING: **12 September 2017**

DATE OF RULING: **21 February 2019**

RULING

(Application to Set-Aside Notice of Discontinuance and to Strike out Action)

1.0 Introduction

- 1.1 On 19 April 2017, 1st and 3rd Defendant filed Application to set aside Notice of Discontinuance filed against 2nd and 4th Defendants (**“Setting Aside Application”**).
- 1.2 On 18 May 2017, Mr A. K. Singh appeared for the 1st and 3rd Defendants (hereinafter referred as **“the Applicants”**) when the Application was adjourned to 2 June 2017, for A. K. Singh Lawyers to file Notice of Change of Solicitors for and on behalf of the Applicants.
- 1.3 On 1 June 2017, A. K. Singh Lawyers filed Notice of Change of Solicitors on behalf of the Applicants.
- 1.4 On 2 June 2017, Counsel for the Plaintiff (hereinafter referred to as **“the Respondent”**) informed Court that Respondent will engage another firm of Solicitors and the Application was adjourned to 13 June 2017.

- 1.5 On 12 June 2017, Neel Shivam Lawyers filed Notice of Change of Solicitors on behalf of the Respondent.
- 1.6 On 13 June 2017, the Setting Aside Application was adjourned to 27 June 2017, on the Application of Respondent's Counsel and then adjourned to 7 July 2017, to enable Respondent's Counsel to conduct file search at the Registry.
- 1.7 On 7 July 2017, parties were directed to file Affidavits and Submissions and the Setting Aside Application was adjourned to 11 August 2017.
- 1.8 On 22 June 2017, Applicants filed Application to Strike Out the Writ of Summons ("**Striking Out Application**") which was returnable on 11 August 2017.
- 1.9 On 11 August 2017, parties were directed to file Submissions and both Applications were adjourned to 12 September 2017, at 2.30pm for hearing.
- 1.10 Applicants and Respondent filed their Submissions and made Oral Submissions on 12 September 2017.
- 1.11 Following Affidavits were filed by the parties:-

For Applicants:

- (i) Affidavit of Mehboob Raza sworn on 24 March 2017, and filed on 19 April 2017 ("**Raza's Affidavit**");
- (ii) Affidavit of Hemant Kumar in Response sworn and filed on 27 July 2017 ("**Kumar's Affidavit**").

For Respondent

Affidavit of Rosarine Amato-Ali sworn on 13 July 2017, and filed on 14 July 2017 ("**Ali's Affidavit**").

2.0 Chronology of Events

- 2.1 On 7 February 2005, Respondent caused Writ of Summons to be issued against the Applicants and 2nd and 4th Defendants with Statement of Claim.
- 2.2 On 10 February 2005, Applicants filed Acknowledgement of Service and Statement of Defence and Counter-claim respectively.
- 2.3 On 29 March 2005, Applicants entered Judgment by Default on their Counter-claim.
- 2.4 On 5 April 2005, Respondent filed Application to Set-Aside Default Judgment which was returnable on 13 April 2005, when parties were directed to file Affidavits and Application was adjourned to 9 June 2005, for argument.
- 2.5 On 9 June 2005, by consent Default Judgment was set aside and Respondent was directed to file and serve Reply to Applicants Defence and Defence to Applicants Counter-claim with matter to take its normal course.
- 2.6 On 7 June 2005, Respondent filed Reply to Applicants Statement of Defence and Defence to Applicants Counter-claim.
- 2.7 On 17 June 2005, Respondent filed Summons for Directions and on 6 July 2005 Order in Terms of Summons for Direction was made.
- 2.8 On 4 August 2005, Respondent filed Affidavit Verifying List of Documents (**“AVLD”**).
- 2.9 On 20 December 2005, Respondent filed Application to strike out Applicants Statement of Defence and Counter-claim for failure to comply with Order on Summons for Direction which was returnable on 17 January 2006.
- 2.10 On 18 January 2006, Applicant filed AVLD.
- 2.11 On 19 January 2006, this matter was adjourned to 10 February 2006, and then adjourned to 20 February 2006.

- 2.12 On 20 February 2006, upon enquiry from the then Master, Counsel for Respondent by its Counsel informed Court that they are seeking instructions from Respondent in respect to 2nd and 4th Defendants and as such this matter was adjourned to 3 March 2006.
- 2.13 On 3 March 2006, this matter was adjourned to 30 March 2006, for Pre-Trial Conference (**“PTC”**).
- 2.14 On 30 March 2006, Respondent by its Counsel informed Court that Respondent is not proceeding against 2nd Defendant and that a Winding-Up Order has been made against 4th Defendant when Respondent and Applicants were directed to convene PTC and file Minutes of PTC by 15 May 2006. This matter was adjourned to 16 May 2006.
- 2.15 On 16 May 2006, Respondent and Applicants were granted time until 5 June 2006 to convene PTC and file Minutes of PTC and this matter was adjourned to 27 June 2006 and then adjourned to 17 July 2006.
- 2.16 On 17 July 2006, this matter was adjourned to 7 August 2006, for PTC.
- 2.17 On 7 August 2006, this matter was taken off the list with cost awarded against Respondent for non-appearance.
- 2.18 On 13 September 2006, Respondent filed Notice of Intention to Proceed with Notice of Motion to Re-instate this Action.
- 2.19 On 2 October 2006, this Action was re-instated when parties were directed to file Minutes of Pre-Trial Conference, Agreed Bundle of Documents and Copy Pleadings and this matter was adjourned to 2 November 2006.
- 2.20 On 2 November 2006, time for compliance of Court’s direction of 2 October 2006 was extended to 24 November 2006, and then to 1 February 2007, and further extended to 24 March 2007.
- 2.21 On 21 February 2007, Respondent filed Minutes of Pre-Trial Conference.

- 2.22 On 20 March 2007, parties were directed to file Copy Pleadings, Order 34 Summons and Agreed Bundle of Documents and this matter was adjourned to 23 April 2007.
- 2.23 On 20 March 2007, Respondent filed Order 34 Summons and on 23 April 2007, parties were directed to file Copy Pleadings with Agreed Bundle of Documents and this matter was adjourned to 22 May 2007, to refer file to a Judge.
- 2.24 On 18 April 2007, Respondent filed Copy Pleadings.
- 2.25 On 22 May 2007, parties were directed to file Agreed Bundle of Documents when this matter was adjourned to 21 June 2007, to transfer file to a Judge which time was extended to 13 July 2007 then to 2 August 2007 and 7 November 2007.
- 2.26 On 2 August 2007, Respondent filed Agreed Bundle of Documents.
- 2.27 On 7 November 2007, this matter was adjourned to 16 January 2008, when it was fixed for trial on 21, 22 and 23 May 2008.
- 2.28 On 14 March 2008, Applicants filed Application to Vacate the trial dates and on 14 March 2008, trial dates were vacated and re-fixed for 7, 8 and 9 May 2008.
- 2.29 On 20 March 2008, Applicants filed another Application to Vacate the trial dates and on 11 April 2008, trial dates were vacated and re-fixed for 14, 17 and 18 July 2008.
- 2.30 On 2 July 2008, trial dates were vacated and this matter was adjourned to 9 December 2008.
- 2.31 On 29 October 2008, Applicants filed Application to Amend Statement of Defence.
- 2.32 On 18 November 2008, parties were directed to file Affidavits and the Amendment Application was adjourned to 27 February 2009, for hearing.

- 2.33 On 27 February 2009, Amended Application was adjourned to 19 April 2009, for Applicants to provide particulars of proposed amendments.
- 2.34 This matter was next called on 6 May 2010, when parties were directed to file Affidavits and Amendment Application was adjourned to 17 June 2010.
- 2.35 This matter was next called on 2 July 2010, and adjourned to 12 August 2010, and then to 10 September 2010.
- 2.36 On 10 September 2010, this matter was adjourned to 4 November 2010.
- 2.37 On 4 November 2010, parties were directed to file Affidavits and Amended Application was adjourned to 2 February 2011, and then to 13 May 2011, for hearing.
- 2.38 On 12 May 2011, Applicants Application to Amend Statement of Defence was adjourned to 23 June 2011, for hearing.
- 2.39 Ruling in respect to Amendment Application was delivered on 6 September 2011, when the Application was partially allowed.
- 2.40 On 14 September 2011, Applicants filed Application for Leave to Appeal Master's decision and for Stay of proceedings until determination of Appeal ("**Leave Application**").
- 2.41 On 5 October 2011, Leave Application was referred to a Judge.
- 2.42 On 21 October 2011, parties were directed to file Affidavits and Leave Application was adjourned to 1 December 2011, for mention and then adjourned to 23 February 2012.
- 2.43 On 23 February 2012, the Leave Application was adjourned to 21 May 2012, for hearing.
- 2.44 On 18 May 2012, Applicants filed Application to vacate hearing date and on 21 May 2012, hearing date was vacated and re-fixed for 27 July 2012.

- 2.45 Leave Application was heard on 27 July 2012, and adjourned for Ruling on Notice.
- 2.46 Ruling on Leave Application was delivered on 27 September 2013, when Leave was refused.
- 2.47 On 8 January 2014, Messrs. R. Patel Lawyers filed Notice of Appointment of Solicitors on behalf of Respondent.
- 2.48 On 3 September 2014, Applicants filed Amended Statement of Defence and Counter-claim.
- 2.49 On 19 September 2014, Respondent filed Reply to Amended Statement of Defence and Defence to Counter-claim.
- 2.50 This matter was next called on 21 July 2015, before the Master and adjourned to 8 September 2015 then to 6 October 2015.
- 2.51 On 6 October 2015, this matter was adjourned to 3 November 2015, for Respondent to file Copy Pleadings and since then this matter has been adjourned on various occasion (03/11/2015, 20/11/2015 30/11/2015, 26/1/2016, 24/2/2016, 7/3/2016, 5/4/2016, 19/4/2016, 10/5/2016 and 30/5/2016) for parties to formalize PTC Minutes and file Copy Pleadings.
- 2.52 On 26 and 30 May 2016, Respondent filed Order 34 Summons and Amended Minutes of Pre-Trial Conference respectively.
- 2.53 On 30 May 2016, this matter was adjourned to 9 June 2016, being returnable date of Order 34 Summons.
- 2.54 On 9 June 2016, Order in terms of Order 34 Summons was made and this matter was referred to a Judge.
- 2.55 This matter was called in this Court on 23 September 2016, when it was adjourned to 14 October 2016 for Respondent to take instruction in respect to 2nd and 4th Defendants when it was further adjourned to 11 November 2016, for same reason.

- 2.56 On 11 November 2016, this matter was set down for trial on 19, 20 and 21 September 2017.
- 2.57 On 29 November 2016, Respondent filed Notice of Discontinuance against 2nd and 4th Defendants.
- 2.58 Thereafter Applicant filed Applications stated in paragraph 1.1 and 1.8 of this Ruling.

3.0 Setting Aside Application

- 3.1 Order 21 Rule 2(1) and (4) and Rule 3(1) of High Court Rules (“HCR”) provide as follows:-

“Discontinuance of Action etc., without leave

2.-(1) Subject to paragraph (3), the plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him, or, if there are two or more defendants, of the defence last served, by serving a notice to that effect on the defendant concerned, and filing in the registry a copy hereof.

(2)

(3)

(4) Where there are two or more defendants to an action begun by writ not all of whom serve a defence on the plaintiff, and the period fixed by or under these Rules for service by any of those defendants of his defence expires after the latest date on which any other defendant serves his defence, paragraph (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period.

This paragraph shall apply in relation to a counterclaim as it applies in relation to an action with the substitution for references to a defence, to the

plaintiff and to paragraph (1), of references to a defence to counter-claim, to the defendant and to paragraph (2) respectively.

Discontinuance of action, etc., with leave (O.21, r.3)

3.-(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.”

3.2 Applicants by their Counsel submit that Respondent (Plaintiff) was required to obtain Leave of the Court when it filed Notice of Discontinuance against 2nd and 4th Defendants pursuant to Order 21 Rule 2(1) and (4) of HCR.

3.3 Applicants relied on **Fiji Medical Council v. Mudaliar** [2009] FJHC 366; HBC 84 of 2009 (9 November 2009) which case dealt with Application by Plaintiff to discontinue proceeding commenced by Originating Summons pursuant to Order 21 Rule 3 of HCR (“**Mudaliar Case**”).

3.4 In **Mudaliar Case** his Lordship Justice Calanchini (current President of Court of Appeal) stated reason for need to obtain Court’s Leave to discontinue a proceeding as follows:-

“The requirement to obtain leave is based on the principle that a Plaintiff who has engaged the Defendant in litigation should not, after the proceedings have reached a certain stage, be allowed to withdraw because of a realization that the chances of success had diminished. It is for the Court to determine whether the proceedings should be discontinued and on what terms.”

3.5 Respondent by its Counsel submit that Respondent has unqualified discretion and relied on following statement from:- **Nai & Ors v Cava** FJHC; HBC 18 of 2008 (6 February 2008):-

“The plaintiffs have an unqualified right under Order 21 rule 2 (5) of the High Court Rules to discontinue the action without the leave of the court and have exercised that right. If it is shown that the plaintiffs have abused such right, the court has the power to set aside the notice of discontinuance. That would require a formal application which has not been filed.”

3.6 Order 21 Rule 2(5) of HCR provides as follows:-

“(5) The plaintiff in an action begun by originating summons may, without the leave of the Court, discontinue the action or withdraw any particular question or claim in the originating summons, as against any or all of the defendants at any time not later than 14 days after service on him of the defendant's affidavit evidence filed pursuant to Order 28, rule 2 or, if there are two or more defendants, of such evidence last served, by serving a notice to that effect on the defendant concerned.”

3.7 This Court is of the view that Plaintiff in an action does not have unqualified right to discontinue or withdraw claim at any time without leave of the Court.

3.8 Plaintiff can only discontinue or withdraw a claim without Leave of the Court under Order 21 Rule 2(5) prior to expiry of fourteen (14) days of filing of Affidavit by the Defendant pursuant to Order 28 Rule 2 of HCR and once that time expires, Plaintiff will need to obtain Court's leave.

3.9 On the same token, Plaintiff can only discontinue or withdraw any action or claim prior to expiry of fourteen (14) days after service of the Defence or prior to expiry of fourteen (14) days from time prescribed for filing of Defence or the filing of latest Defence as provided for in Order 21 Rule 2(1)(4) of HCR and upon expiry of that period Plaintiff is to obtain Court's Leave.

3.10 For sake of convenience, this Court will set examples as to how Order 21 Rule 2(1) and Rule 2 (4) works.

Example: Rule 2(1)

A sues X, Y and Z on 1/1/18

X serves Defence on 7/1/18

Y serves Defence on 10/1/18

Z serves Defence on 14/1/18

A can discontinue action against X, Y or Z by serving Notice of Discontinuance by 28/1/18 (14 days from 14/1/18). If A fails to Discontinue or Withdraw Action by 28/1/18 then A will need to seek Leave of the Court.

Example: Rule 2(4)

A files action against X, Y and Z on 1/1/2018. A serves Writ of Summons with Statement of Claim on X, Y and Z on 5/1/18.

X, Y and Z file Acknowledgement of Service on 6/1/18. X serves Statement of Defence on 10/1/18.

Y and Z does not serve Statement of Defence.

Under Order 18 Rule 2 of HCR X, Y and Z were to file Statement of Defence by 2/2/18 (20 days from service of Writ of Summons).

A can discontinue action without Leave prior to 16/2/2018 (14 days from 2/2/2018).

- 3.11 It must be noted that Statement of Defence under rules must be filed fourteen (14) days after time prescribed for filing of Acknowledgement of Service (Order 18 Rule 2(1) of HCR).
- 3.12 Acknowledgement of Service is to be filed within fourteen days from **service** of the Writ of Summons if served within jurisdiction or within forty-two (42) days if served out of jurisdiction: Order 12 Rule 4, Order 10 Rule 2(2) and Order 11 Rule 1(3) of HCR. The catchword in Order 12 Rule 4 is **“service”**.
- 3.13 In this instant it is not disputed that Writ of Summons and Statement of Claim was not served on 2nd and 4th Defendants.

3.14 Order 6 Rule 7(1)(2) of HCR provide as follows:-

“7.-(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

3.15 In this instance:-

- (i) There was no way 2nd and 4th Defendants could file Acknowledgement of Service and Statement of Defence;
- (ii) In short, 2nd and 4th Defendants were never “engaged” in the proceedings which fact was well known to 1st and 3rd Defendants as appears from Court record appearing at paragraphs 2.12 and 21.14 of this Ruling;
- (iii) The fact that Writ of Summons was not served on 2nd and 4th Defendants Order 21 Rule 2(1)(4) does not come into effect and fourteen (14) days does not come into play for the reason that:
 - (a) 2nd and 4th Defendants are not required to file Acknowledgement of Service due to not being served with the Writ;
 - (b) They are also not required to file any Statement of Defence as time prescribed for filing does not start running unless time prescribed for filing Acknowledgement of Service expires.

- (iv) Writ of Summons issued in this proceedings became invalid as against the 2nd and 4th Defendants for failure to serve it on them within twelve (12) months.
- (v) Writ of Summons against 2nd and 4th Defendants became invalid even though Applicants were served within the twelve (12) month period.

3.16 At paragraph 6/8/2 of the Supreme Court Practice 1993 Vol 1 it is provided as follows:-

The Service of the writ on one of two or more defendants within the appropriate period does not make it valid for service on any of the other defendants outside the appropriate period, and therefore even though the writ may have been duly served on one defendant, renewal of the writ must be obtained so as to make it available for service as against each defendant who has not been served within the appropriate period (Jones v. Jones [1970] 2 Q. B. 576; [1970] 3 All E. r. 47, C.A.).

3.17 Since 2nd and 4th Defendants were not served with the Writ of Summons it became invalid as against the these Defendants.

3.18 There was no need for Plaintiff to file Notice of Discontinuance against 2nd and 4th Defendants as they were never part of the proceedings due to them not being served with the Writ of Summons within twelve month period prescribed under Order 6 Rule 7(1) and that period has not been extended by Court.

3.19 As for 4th Defendant, even if it was served with the Writ of Summons within the prescribed time, this action against it would have been stayed pursuant to section 229 of the Companies Act Cap 247 which was the governing Act when Winding-Up Order was made and it provides as follows:-

“When a Winding-up Order has been made or an interim liquidator has been appointed under Section 236, no action or proceedings shall be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the court may impose.”

4.0 Application to Strike Out Action

4.1 Applicants by their Counsel submit that this action be struck out on the ground that Plaintiff has failed to obtain Leave of Court to issue proceeding against 2nd Defendant who at the time of instituting this proceedings was and still is residing out of jurisdiction.

4.2 Order 6 Rule 6(1) of HCR provides as follows:-

“6.-(1) No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court:

Provided that if every claim made by a writ is one which by virtue of an enactment the High Court has power to hear and determine, notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ.”

4.3 It is not disputed that:-

- (i) At time of issue of Writ of Summons 2nd Defendant was and still is residing out of jurisdiction;
- (ii) No Leave has been granted by Court to issue the Writ against the 2nd Defendant as required under Order 6 Rule 6 (1) of HCR.

4.4 Respondent submits that the proviso in Order 6 Rule 6(1) applies to this proceeding in that this Court is empowered to hear the claim.

4.5 With all due respect this Court considers Respondent’s submission to be misconceived and is made without proper understanding of what is provided in the proviso in Order 6 Rule 6(1).

4.6 To put it simply the proviso deals with any “**enactment**” that provides that proceedings can be issued against person to be served of jurisdiction without leave of the Court.

4.7 Respondent has failed to refer to any **enactment** pursuant to which this claim arises.

4.8 **In Singh v. Victory Mission Church** [2015] FJHC 349; HBC 127 of 2009 [14 May 2015], the Court held that requirement to obtain leave to issue Writ that is to be served out of jurisdiction is mandatory and placed emphasis on the word “**shall**” in Order 6 Rule 6(1).

4.9 **In Lowing v Howell** [2016] FJHC 578; HBC 154 of 2015 (28 June 2016), the Court set aside Writ of Summons for failure to obtain Leave of Court to issue Writ of Summons that was to be served out of jurisdiction, even though Court granted leave to serve the Writ out of jurisdiction.

4.10 Brief fact of **Lowing** case is as follows:-

- (i) On 24 July 2015, Plaintiff issued Writ of Summons against Defendant who was residing out of Court’s jurisdiction;
- (ii) On 10 December 2015, Defendant filed Acknowledgement of Service;
- (iii) On 22 December 2015, Defendant filed Application to set aside Writ of Summons on the ground no leave was granted by Court to **issue** Writ of Summons.

4.11 In **Lowing**, his Lordship Justice Ajmeer stated as follows:-

*“The word “**shall**” used in O.6 suggests that the provisions are mandatory and must be complied with. Therefore, I am of the view that failure to comply with the mandatory requirements of O.6 is fatal and could be cured by seeking assistance of O.2, r.1. I accordingly find that the writ of summons should be set aside on the ground that the services on the defendant is irregular.*”

- 4.12 In **Tokomaru Ltd v Fittler** [2009] FJHC 148; HBC 118 of 2009L (17 July 2009) the Court held that Plaintiff's claim for Defendant to enter into a Covenant, pay levies due and interim injunction did not fall within the exception in the proviso to Order 6 Rule 6(1) of HCR and as such leave to issue Writ that was to be served out of jurisdiction was required.
- 4.13 In **Tokomaru case** Court dealt with Application for leave to issue Writ under Order 6 Rule 6(1).
- 4.14 In **Rabuka v. Wellington Newspapers Ltd** [1992] FJHC 58; HBC 238 of 1990S (25 November 1992), the Court held that since the Court had jurisdiction to hear defamation cases at Common Law no leave to issue Writ was required and relied on Section 18 and 22 of Supreme Court Act which provides as follows:-

Section 18

“The Supreme Court shall within Fiji, and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or capable of the being exercised by Her Majesty’s High Court of Justice in England.”

Section 22

- (1) *“The Common Law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875, shall be in force within Fiji subject to the provisions of section 24 of this Act.*
- (2) *For the removal of doubt, it is hereby declared that the provisions of section 24 and 25 of the Supreme Court of Judicature Act, 1873, are in force in Fiji notwithstanding that the commencement of that Act was postponed in England until after the said second day of January 1875.”*

4.15 This Court accepts Applicants Submission that the Court in **Rabuka** case “**considered the issue at hand very casually**”.

4.16 It is not doubted that where there is no legislation, rule or regulation dealing with matter before the Court, then the Court can apply the Law, Rules and Regulations applied in English Courts. However if there are Rules and Regulations in Fiji which deals with a matter before the Court then Courts will have to apply those Law, Rules and Regulations instead of English Law, Rules and Regulations.

For instance, Court in **Rabuka’s** case rightly stated that procedure for seeking leave to issue Writ for service out of jurisdiction is one that is applied in England whereby Plaintiff has to make ex-parte application supported by an Affidavit.

This is so because HCR (Fiji) does not state as to how application for leave to issue Writ for service out of jurisdiction is to be made.

4.17 Having analysed the cases cited herein before this Court is of the view that it is time to set the principles relating to issues of Writ for Service out of jurisdiction in Order which are as follows:-

- (i) Requirement to obtain Leave to issue writ for service out of jurisdiction is mandatory: Order 6 Rule 6(1) **Singh v. Victory Mission, Lowing v. Howell; Tokomaru Ltd v. Fittler.**
- (ii) Proviso in Order 6 Rule 6(1) does not apply to original jurisdiction of Court but an “enactment” which provides that Writ for service out of jurisdiction can be issued without leave of the Court.

For instance XYZ Act has a section which provides that “any Writ which is to be served out of jurisdiction to enforce any provision of this Act shall be issued without leave of the Court” then any Writ issued pursuant to XYZ Act will fall under the proviso;

- (iii) Failure to obtain leave under Order 6 Rule 6(1) cannot be cured by Order 2 Rule 1 of HCR as the failure is fundamental defect and not irregularity: **Lowing v. Howell** (ante);
- (iv) Failure to obtain Leave to issue Writ for service out of jurisdiction makes the proceedings voidable and will be struck out on an application by the Defendant as of right;
- (v) The Application to set aside Writ issued without leave of the Court as required under Order 6 Rule 6(1) should be made prior to Defendant taking any fresh step and soon after filing Acknowledgement of Service as was the case in **Lowing v. Howell** (ante);
- (vi) It would be unconscionable and not in the interest of justice to permit a Defendant to make Application to set aside Writ issued without leave of Court as required under Order 6 Rule 6(1) after Defendant takes fresh step like filing of Statement of Defence and other pleadings.

4.18 The next question that needs to be answered is what would be the position if there are more than one Defendant in a proceedings out of which one Defendant resides out of jurisdiction and others reside within the jurisdiction.

4.19 Order 6 Rule 5 of HCR provides as follows:-

- “(1) *One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid.*
- (2) *Without prejudice to the generality of paragraph (1), a writ for service within the jurisdiction may be issued as a concurrent writ with one which is to be served out of the jurisdiction, and a writ which is to be served out of the jurisdiction may be issued as a concurrent writ with one for service within the jurisdiction.”*

- 4.20 Irrespective over Order 6 Rule 5 of HCR, no writ which is to be served out of jurisdiction even if one of several Defendants is to be so served must not be issued without leave of the Court.
- 4.21 Once leave is granted by the Court to issue such Writ as required under Order 6 Rule 6(1) the Plaintiff can have concurrent Writs issued for service both within and outside jurisdiction.
- 4.22 The Defendant who was served with Writ outside jurisdiction without Plaintiff obtaining leave of the Court will have the right to have the Writ set-aside prior to taking any fresh steps in the proceedings.
- 4.23 Defendants who are within the jurisdiction does not have the right to have the Writ set-aside because of Plaintiff's failure to obtain leave to issue Writ concerning the Defendant who is not within the jurisdiction.
- 4.24 In the instant proceedings, the Applicants were and at the time proceedings was instituted and still are within Courts jurisdiction and as such have no legal right to have the Writ struck out for Plaintiff's failure to obtain leave to issue Writ against 2nd Defendant who was to be served out of jurisdiction.
- 4.25 Be that as it may, even if this Court held that Applicants have the right to have the Writ set aside or action struck out, it is unconscionable on their part to move the Court to do so on the ground that:-
- (i) They knew from the time writ of summons was served on them that 2nd Defendant was residing overseas and no leave was obtained to issue the Writ;
 - (ii) At paragraph 11 of Kumar's Affidavit it is stated as follows:-

"That despite having knowledge of the above the Plaintiff filed this action without seeking the leave of this Honourable Court to issue Writ of Summons against a defendant who was at the material time out of Jurisdiction."

- (iii) Applicants took steps in the proceedings by filing Statement of Defence and Counter Claim which was later amended, on Summons for Direction, attended Pre-Trial Conference and obtained trial dates as appear at part 2.0 of this Ruling.
- (iv) Issue regarding non-engagement of the 2nd and 4th Defendants were dealt by Court on 30 February 2006, and 30 March 2006, as appears at paragraph 2.12 and 2.14 of this Ruling;
- (v) This matter is ready for trial between Respondent and Applicants.

4.26 This Court states in no uncertain terms that 2nd Defendant and 4th Defendant were never served with the Writ or any other document in this proceeding and as such they were never **“engaged”** (**Tokomaru** case) in this proceeding by Respondent.

5.0 Conclusion

Notice of Discontinuance

- 5.1 Filing of Notice of Discontinuance had been sufficiently dealt at paragraph 3.1 to 3.18 of this Ruling.
- 5.2 In this instance, there was no need for Plaintiff to file Notice of Discontinuance against 2nd and 4th Defendant for the reason that these two Defendants were not served with the Writ of Summons and hence never engaged in the proceedings.
- 5.3 In any event, no leave was required for Plaintiff to file Notice of Discontinuance against 2nd and 4th Defendants for reasons stated at paragraph 3.15 of this Ruling.
- 5.4 However, parties and legal practitioners should familiarize themselves with HCR in particular Order 21 and what has been said at paragraphs 3.1 to 3.19 of this Ruling.

Strike Out Application

- 5.5 No writ which is to be served outside jurisdiction of Court is to be issued without leave of the Court unless an “**enactment**” provides otherwise. Order 6 Rule 6(1).
- 5.6 If a Writ is to be served out of jurisdiction and within jurisdiction, Plaintiff will need to obtain leave of the Court to issue such Writ together with concurrent Writ for service within and outside jurisdiction of Court.
- 5.7 Any Defendant who is served out of jurisdiction and such engaged by Plaintiff can move the Court to set-aside the Writ prior to taking any fresh steps in the proceeding. It is to be noted that filing of Acknowledgement of Service will not amount to taking fresh steps in the proceeding.
- 5.8 If there are two more Defendants, then only the Defendant who was served out of jurisdiction without Plaintiff obtaining leave to issue Writ will have the right to have the Writ set aside against him/her.

6.0 Costs

- 6.1 This Court takes into consideration that Applicants and Respondent filed Submissions and provided case authorities.

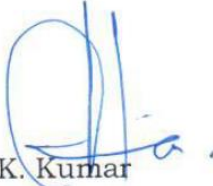
7.0 Orders

- 7.1 It is hereby ordered as follows:-

- (i) 1st and 3rd Defendants Application to set aside Notice of Discontinuance by Summons filed on 19 April 2017, is dismissed and struck out;
- (ii) 1st and 3rd Defendants Application to Strike Out the Action by Summons filed on 27 July 2017, is dismissed and struck out;
- (iii) Action against 2nd and 4th Defendants is invalid and struck out;

- (iv) Action against 1st and 3rd Defendants is to proceed;
- (v) 1st and 3rd Defendants do pay Plaintiff costs for Applications in paragraphs 7.1 (i) and (ii) assessed in the sum of \$1,000.00 within fourteen (14) days from date of this Ruling.




K. Kumar
JUDGE

At Suva
21 February 2019

NEEL SHIVAM for Plaintiff/Applicant
A.K. SINGH LAWYERS for Defendants/Applicant