

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Appeal No. HBA 16 of 2019

Nasinu Magistrate's Court Civil Action No. 07 of 2013

BETWEEN

MERCHANT FINANCE AND INVESTMENT COMPANY LIMITED a limited liability
company having its registered office at Level 1, Ra Marama House,
Gordon Street, Suva.

APPLICANT / SECOND DEFENDANT

AND

AUTO ONE IMPORTERS & EXPORTERS of 142 Ratu Mara Road,
Samabula, Suva.

RESPONDENT / PLAINTIFF

AND

RESHMI LATA LAL AND JOSEPH KUMAR trading as All-Ways investment of
Two Maharaj Street, Nakasi.

FIRST DEFENDANT

Counsel : Mr Liverpool A. for the Applicant / Second respondent
Mr Sing A.K. for the First Defendant
Mr Kumar V for the Respondent / Plaintiff

Date of Hearing : 05th August, 2019

Date of Ruling : 28th August, 2019

RULING

(On Application for Leave to Appeal out of time & Stay of Execution)

[1] The applicant filed this notice of motion on 30th May, 2019 seeking the following orders:

1. The appellant be given leave to appeal out of time as it relates to the judgment of the Nasinu Magistrate's Court delivered herein on 4th day of April, 2019 where the Magistrate dismissed 2nd defendant's application to set aside judgment against the 2nd defendant.
2. That time for filing the notice and grounds of appeal be extended if necessary.
3. That the execution of the judgment be stayed until the appeal is determined.
4. Any other order the court deems just and equitable.
5. A further order that the costs of this application be costs in the cause.

[2] The applicant filed a notice of motion in the Magistrate's Court of Nasinu seeking to set aside the order of the learned Magistrate dated 17th October, 2017 releasing the Hino 12 Wheeler Logging Truck Registration No. EQ 595 to the plaintiff (the respondent) allowing to remove all mechanical parts placed by the plaintiff (the respondent) in the said vehicle.

[3] On 04th April, 2019 the learned Magistrate struck out the motion of the applicant for want of appearance.

[4] The present application was originally made on 30th May, 2019 which was later amended. The amended notice of motion was filed on 02nd July, 2019. The only ground relied on by the applicant seeking extension of time to file notice and grounds of appeal is that the written ruling was not provided by the court. The applicant knew very well that no one attended the

court for hearing and it had not taken any interest in finding out what transpired in court on that day.

- [5] Since the application of the applicant was struck out for nonappearance of the applicant there could not have been a written ruling. The applicant and its solicitors should have known this.
- [6] The original notice of motion was filed on 30th May, 2019, almost two months after the order sought to be challenged in appeal. However, the affidavit in support has been filed on the 18th June, 2019. The delay has not been sufficiently explained by the applicant.
- [7] The learned counsel for the respondent raised an objection to the admissibility of the affidavit in support of Vani Tabudravu on the ground that in the jurat a different name appears as the affirmant. In the jurat the name of the affirmant appears as Vani Filipe. The learned counsel for the applicant submitted that the affirmant is married to one Filipe she uses both surnames. The submission made by a counsel from the bar table is not evidence. In my view the affidavit in support is defective and cannot be relied upon.
- [8] The applicant is seeking to challenge the decision of the learned Magistrate on four grounds of appeal. They are:

1. That the learned Magistrate erred in law and in fact in dismissing the appellant's Notice of Motion seeking to set aside the order granted on the 17 October 2017 where it was ordered;

That the application be granted in favour of the Plaintiff that Hino 12 Wheeler Logging Truck Registration No. EQ 595 be released to the Plaintiff or in the alternative Plaintiff be allowed to remove all mechanical parts placed by the plaintiff in Hino 12 Wheeler Logging Truck Registration No. EQ 595.

2. That the learned Magistrate failed to take into account that the inter parte motion filed by the Plaintiff was filed in the Form of a summons which cannot be filed in the Magistrate's court as part of the proceedings, therefore the Magistrate exceeded her jurisdiction by granting the orders sought therein.
3. That the learned Magistrate erred in law and in fact in not allowing the 2nd defendant defend the case on its merits.
4. The learned Magistrate failed to take into account that the 2nd named defendant has a legitimate interest in the Hino 12 Wheeler Logging Truck Registration No. EQ 595.


- [9] There must be material for the court to consider whether these grounds of appeal have merit. Since the applicant has failed to tender any document that is necessary for this court to consider before arriving at a finding whether these grounds have any merit, the court is not in a position to make a finding on that issue.
- [10] The grounds of appeal are related to the order made by the learned Magistrate on 17th October, 2017 but the order sought to be challenged by the applicant in appeal is the order made on 04th April, 2019.
- [11] It is also important to note that the applicant is seeking to challenge the ruling delivered on 04th April, 2019 by the learned Magistrate. From the material available on record the order sought to be challenged by the applicant is the striking out of its motion to set aside a default judgment with costs of \$750.00. In my view there is no right of appeal against the order of summary striking out the motion for want of appearance. The applicant must purge his default in the same court that struck out its motion to set aside the default judgment.
- [12] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The orders sought in the amended Notice of motion filed on 02nd July, 2019 are refused.
2. The applicant is ordered to pay the respondent (original plaintiff) and the 1st defendant \$1000.00 each as costs of this application.



09th August, 2019


Lyone Seneviratne

JUDGE