

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 236 of 2008

BETWEEN : **NICOLE EARNSHAW** of 15 Rutherglen Drive, St. Andrews, New South Wales, Australia.

PLAINTIFF

A N D : **CORAL SURF RESORT LIMITED** a limited liability company having its registered office at Pricewaterhouse Coopers, 52 Narara Parade and **SILVER BEACH PROPERTIES LIMITED** a limited liability company having its registered office at Pricewaterhouse Coopers, 52 Narara Parade, Lautoka trading as "The Naviti Resort".

DEFENDANTS

Counsel : **Mr. Dorsami Naidu for the plaintiff.**
(Ms.) Nilema Samantha for the defendants.

Date of ruling : **Friday, 18th October, 2019.**

RULING

[A] INTRODUCTION

(1) This is an application filed by the plaintiff seeking the following orders;

(i) *That leave be granted to the plaintiff to call the evidence of its medical expert Associate Professor Arun Agrawal of Sydney Australia using Skype Video conferencing.*

(ii) *The costs of this application be costs in cause.*

(2) The application was made by summons dated 01st November 2018 and supported by an affidavit sworn on 31st October 2018 made by Mr. Jadhav Prakashan, an associate solicitor in the firm of Messers Pillai Naidu and Associates, the solicitors for the plaintiff.

(3) The application was opposed. An affidavit in opposition sworn on 16th November 2018 by 'Ranjani Narayan', an Insurance Officer in the employment of 'New India Assurance Company Limited', the insurer for the defendants, was filed on behalf of the defendants. The plaintiff did not respond to the defendants' affidavit in opposition.

(4) Objections were taken by the defendants to the affidavit sworn by Mr. Jadhav Prakashan in support of the plaintiff's summons. Counsel for the defendants' submitted that the affidavit was defective.

(5) The first and the major argument of the defendants is;

"Jadhav's affidavit should not be admitted in evidence by the Court as it does not contain a valid authority from the plaintiff for him to swear the affidavit on her behalf. Mr Jadhav is a solicitor employed by the firm who act for the plaintiff in this matter."

(6) Secondly, counsel for the defendants' says that the affidavit is in a third person's narration.

(7) The paragraph (4) of the affidavit is in these terms:

4. *THAT the plaintiff intends to tender and rely on the served expert medical report of Associate Professor Arun Aggarwal, Neurology and Rehabilitation/Pain Specialist, dated 19 March 2015. Associate Prof. Aggarwal is a specialist doctor practicing in Sydney, Australia. The plaintiff is unaware whether the defendant wishes to cross-examine Ass Prof Aggarwal on his report, and asks that this be made clear. If the defendant does do require unnecessary expense and inconvenience would be avoided if such cross-examination were undertaken by means of Skype or similar means, with the doctor remaining in Sydney.*

(Emphasis added)

(8) Thirdly, counsel for the defendants says that the affidavit does not disclose the professional address of the deponent.

(9) Finally, counsel for the defendants says that the deponent does not state the sources and grounds of his information.

- (10) On 10th December, 2018 the parties were heard on the Plaintiff's application to call the evidence of its Medical Expert, Associate Professor Arun Aggarwal of Sydney, Australia using Skype Video. A ruling was subsequently delivered by this Court on 15th March, 2019 on the Defendants' preliminary objection wherein the Court ordered the following:-
1. *Preliminary objections are upheld.*
 2. *The paragraph four (04) of the supporting affidavit of the solicitor sworn on 31st October, 2018 is expunged.*
 3. *In the interest of justice, the Court grants leave to the plaintiff to cure the defects in the supporting affidavit filed on 31st October, 2018 by supplement affidavit.*
 4. *There will be no order as to costs.*
- (11) A second application was filed by the plaintiff on 18th April, 2019 wherein she sought the same orders sought in her earlier application which was filed on 31st August, 2018. On the returnable date of the application, the Summons filed on 18th April, was struck out while the supporting affidavit was accepted as Supplementary Affidavit. An Affidavit in Reply was filed on behalf of the Defendants on 21st June, 2019.
- (12) Counsel for the plaintiff and the defendants agreed to dispose the second application by way of further written submissions. Counsel for the plaintiff did file supplementary written submissions on 21/05/2019. Counsel for the defendants filed further written submissions on 19-07-2019.

Affidavits relied on

- (13) The following affidavits have been filed;
- (A) The supplementary affidavit in support sworn by (Ms) Bulou Vialele Azariah Kinivua (on behalf of the plaintiff) filed on 17/04/2019.
 - (B) The affidavit in reply sworn by (Ms) Ranjani Narayan (on behalf of the defendants) filed on 21/06/2019.

(B) DISCUSSION

- (01) This is an application in which the plaintiff seeks the following reliefs;

“That leave be granted to the plaintiff to call the evidence of its medical expert Associate Professor, Arun Agrawal of Sydney Australia, using Skype video conferencing.”

- (02) The application is supported by an affidavit sworn by (Ms) Bulou Vialele Azariah Kinivua [an associate solicitor in the firm of Messers Pillai Naidu and Associates] sworn on 17th April 2019.

In opposition, the defendants raised preliminary points in *limine* to the founding affidavit of (Ms) Bulou Vialele Azariah Kinivua [Ms Kinivua’s affidavit].

Objection as to affidavit in support of (Ms) Bulou Vialele Azariah Kinivua sworn on 17th April 2019

- (03) The defendants object to the above affidavit being received into evidence to support the application to allow evidence to be taken by Skype. The defendants’ general objection is; [As set out at paras 5.2, 5.3 and 5.5 in the defendants’ supplementary submissions filed on 19.07.2019]

5.2 *In view of the above, we submit that the Supplementary Affidavit in Support of Bulou Vialele Azariah Kinivua filed on 18th April, 2019 (hereinafter “Ms. Kinivua’s Affidavit”) should not be admitted in evidence by the Court as it does not contain a valid authority from the Plaintiff for her to swear the affidavit on her behalf. Ms. Kinivua is a solicitor employed by the firm who act for the Plaintiff in the matter. Furthermore Ms Kinivua’s Affidavit does not state that she has been duly authorized by the Plaintiff to swear the Affidavit on behalf of the Plaintiff. This Honorable Court noted in its ruling on the preliminary objection that a person making an affidavit must show that he has been authorized.*

5.3 *A similar situation arose in the case of **Bulileka Hire Services Ltd v Housing Authority** wherein a party was relying on an affidavit of a Solicitor in support of an application to seek leave to appeal and a stay of proceedings. The court in that case had held that the affidavit of the solicitor was not a proper affidavit and had struck it out. Justice Seneviratne in the case at paragraph 13 of the ruling had provided his reasoning being that:*

“... A solicitor cannot while representing his client before the court at the same time be his witness. The solicitor of a particular litigant can also be construed

as his agent but the relationship between the solicitor and the client is different to that of an agent and the principle... They cannot assume the status of the clients and do everything what is expected of them...a solicitor cannot be a substitute for his client."

5.5 Notwithstanding the above, Ms Kinivua's Affidavit also shows various breaches under Order 41 of the High Court Rules which we have identified and specify below:-

- i. Breach of Order 41 r.5 – The affidavit does not state the sources and grounds of the deponent's information. Paragraph 5 of Ms. Kinivua's Affidavit states "I am informed...." Without providing the source of her information. Additionally, Ms. Kinivua's Affidavit does not enclose a copy of the purported medical report of 19th March, 2015 which the Plaintiff intends to rely on. Furthermore paragraph 6 of Ms. Kinivua's Affidavit does not provide the source of her information and belief for deposing accepting Associate Prof Aggarwal's qualification. She has not disclosed copies of any qualifications and/or resume.

Regrettably, Counsel for the plaintiff did not respond to the objections to the above affidavit being received into evidence.

Valid Authority

- (04) **I accept that in the body of the affidavit (Ms) Kinivua 'does not say that the plaintiff has authorized her to depose an affidavit on behalf of her. Nor does she say on whose behalf she has sworn this affidavit'. She simply says at paragraph (01) "I am an associate solicitor in the firm of Messers Pillai Naidu and Associates and I am duly authorized to make this affidavit as solicitors of the plaintiff in this action".**
- (05) The back sheet is, however, endorsed in accordance with Order 41, r.9 (2) of the High Court Rules which states;

"Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court".

- (06) (Ms) Kinivua has stated in the body of the affidavit her employment 'an associate in the firm of Messers Pillai Naidu and Associates'. As noted above, it is stated on the back sheet, in accordance with Order 41, r.9, that (Ms) Kinivua's affidavit was '*filed on behalf of; plaintiff*'. But, still the affidavit is deemed to be irregular. The authorization had to be not only stated on the back sheet but stated both in the body of the affidavit as well as with a letter setting out authorization annexed.
- (07) The founding affidavit is lacking in facts and evidence demonstrating that the deponent (Ms) Kinivua has the necessary authority to depose to the founding affidavit. The authority of the deponent (Ms) Kinivua is in issue. There is merit in the point raised in *limine*. **I uphold the objection as to affidavit of (Ms) Kinivua sworn on 17th April 2019 being allowed into evidence.**

One cannot be a witness and Counsel in the same matter

- (08) The basis of the application was that the facts stated in the affidavit of (Ms) Kinivua were, in reality, those of Mr. Naidu. As I understand (Ms) Samantha, she was suggesting that (Ms) Kinivua was just the 'mouthpiece' of Mr. Naidu so to speak.
- (09) I must confess, (Ms) Samantha has failed to convince me that (Ms) Kinivua is simply the 'mouthpiece' of Mr. Naidu. I note that this objection was never raised by the defendants' counsel as an oral application in her appearances at the call over of this matter on 07.05.2019, 22.05.2019, 27.05.2019, 04.07.2019 and 02.08.2019. The objection was raised in the defendants' supplementary written submissions. This is disingenuous to say the least. I say no more on this!

The professional address of the deponent

- (10) Counsel for the defendants says that the affidavit of (Ms) Kinivua does not disclose the professional address of the deponent. This objection had not been raised earlier than the hearing in this Court. **Had it been, then the minor error could have been remedied, and accordingly I do not uphold this technical point.**

Third person's narration

- (11) Counsel for the defendants says that the affidavit is in a third person's narration. The paragraph (5) of the affidavit says; "*It is the plaintiff's instructions...*"

This is not proper. The deponent (Ms) Kinivua does not express in first person. The deponent offends Order 41, r.4(1) of the High Court Rules. **I accept Counsel for the defendants' argument on this point.**

Sources and grounds of deponent's information

- (12) In relation to paragraph [5] of (Ms) Kinivua's affidavit the objection is that;
- ❖ (Ms) Kinivua has not stated the source of the information for "*Such expense, I am informed, would be a charge of the order of Australian \$1,000 per hour for court attendances plus, the doctor's cost of travel and accommodation.*"
 - ❖ (Ms) Kinivua has not stated the source of the information and the grounds or reasons for the belief for deposing accepting Associate Prof. Aggarwal's qualifications.
 - ❖ (Ms) Kinivua's affidavit does not enclose a copy of the purported medical report of 19.03.2015 which the plaintiff intends to rely on.
 - ❖ (Ms) Kinivua has not disclosed copies of any qualifications and/or resume of Associate Professor Aggarwal.
- (13) I note that paragraph (4) of (Ms) Kinivua's affidavit states "*That in these proceedings I have in my capacity as an Associate Solicitor in the firm acting for the Plaintiff, been so acting on the instructions of the Plaintiff, Ms. Earnshaw, a resident of Australia, conveyed to me by the Australian (Sydney, New South Wales) Solicitors who have advised her in the matter, they being formerly Mr. Karam C. Ramrakha and presently Mr. Kirath Ramrakha, and counsel whom she has, through them, briefed, being Mr. Michael Rollinson. I make this affidavit on information and belief, relying on my examination of the firm's file on the matter and instructions and information conveyed to me by the above mentioned legal practitioners in Australia*".

[Emphasis added]

Hence, I reject the objection that (Ms) Kinivua has not stated the source of the information and the grounds or reason for the facts deposed in paragraph (5) of her affidavit.

I take notice of the fact that expert report of Associate Professor Arun Aggrawal dated 19th March, 2015 had been served on the defendants' Solicitors on 31st March 2015 on the direction of Mr. Karam C. Ramrakha, the plaintiff's solicitor in Australia. Hence, I reject the contention that (Ms) Kinivua's affidavit should enclose a copy of the medical report dated 19th March 2015.

(C) CONCLUSION

As stated, the founding affidavit is lacking in facts and evidence demonstrating that the deponent (Ms) Kinivua has the necessary authority to depose to the affidavit. The authority of the deponent (Ms.) Kinivua is in issue. Consequently, absent an affidavit in support, absent any evidence to support this application.

In the result, the Summons filed on 01st November 2018 is dismissed. There will be no order as to costs.




Jude Nanayakkara
[Judge]

At Lautoka,
Friday, 18th October 2019