

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 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**

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

**FIRST DEFENDANT**

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

**SECOND DEFENDANT**

**AND:**                **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.

**THIRD DEFENDANT**

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

**FOURTH DEFENDANT**

**BEFORE:**            **Hon. Acting Chief Justice Kamal Kumar**

**COUNSEL:**           Ms S. Devan for the Plaintiff/Respondent  
Mr S. D. Sahu Khan for First and Third Named Defendants/Applicants

**DATE OF RULING:** 26 May 2020

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**RULING**  
**(Application for Leave to Appeal Interlocutory Decision)**

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## **1.0 Introduction**

- 1.1 On 14 March 2019, 1<sup>st</sup> and 3<sup>rd</sup> Defendants (hereinafter referred to as “**the Applicants**”) filed Summons for Leave to Appeal the Court’s decision delivered on 21 February 2019 (“**the Application**”).
- 1.2 Application was called on 22 March 2019, when it was adjourned to 26 March 2019 due to non-appearance of Applicants Counsel.
- 1.3 On 26 March 2019, parties were directed to file Affidavits and Submissions when the Application was adjourned to 25 May 2019, for hearing.
- 1.4 On 18 April 2019, Applicants filed Application to vacate hearing which was called on 25 April 2019, when hearing date was vacated and fresh hearing date was re-fixed for 18 June 2019, and parties were directed to file Submissions.
- 1.5 Application was not called on 2 July 2019, and then adjourned to 23 July 2019, for hearing.
- 1.6 Application was heard on 23 July 2019, and adjourned for ruling on notice.
- 1.7 Following Affidavits were filed on behalf of the Applicants and the Plaintiff (hereinafter referred to as “**Respondent**”):-

### **For Applicants:**

Affidavit of Hemant Kumar in Support sworn on 13 March 2019, and filed on 14 March 2019 (“**Hemant’s Affidavit**”).

### **For Respondent:**

Affidavit in Reply of Waisele Tokalau sworn on 2 April 2019, and filed on 5 April 2019 (“**Tokalau’s Affidavit**”).

## 2.0 **Hemant's Affidavit**

- 2.1 Respondent at paragraph 5 of Tokalau's Affidavit takes objection to Hemant's Affidavit on the ground that deponent has not annexed any Authority from the Applicants to swear the Affidavit on their behalf.
- 2.2 Whilst this Court accepts what is stated at paragraph 5 of Tokalau's Affidavit, there is more to it than the Authority issue.
- 2.3 Courts have time and again condemned filing of Affidavits by Law Clerks and Legal Executives employed by Solicitors but it seems that some Legal Practitioners have no regard to what is being said by the Court.
- 2.4 This Court has time and again expressed its concern regarding filing of Affidavits by Solicitor's clerk.
- 2.5 Some of the cases that dealt with this issue are:-

- (i) **Dr Ramon Fermin Angco v. Dr Sachida Mudaliar & Others**, HBC 26 of 1997

In this case First and Second Respondents appeared to set aside Judgment of Defendants and the Application was in support of Senior Litigation Clerk employed in their Solicitors office.

The Court in respect to file filed by Senior Litigation Clerk stated as follows:-

“The court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of their clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. it trespasses the demarcation between client and solicitor roles.”

- (ii) **Deo v. Singh** [2005] FJHC 23; HBC0423.2004 (10 February 2005)

In this case Plaintiff filed Application for Specific Performance pursuant to Order 86 of High Court Rules.

Law Clerk employed by Solicitors for the Defendant filed Affidavit in Opposition.

Court stated as follows:-

“The swearing of affidavits by solicitor’s clerk in contested proceedings appears with alarming regularity before the courts. Arun Kumar says he was duly authorized by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in “first person”. The affidavit put before the court is more like a statement defence in its working rather than being expressed in first person. Swearing of affidavits by solicitor’s clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained.”

In this the Application was not an interlocutory application and even though Court criticized filing of Affidavit by Solicitors Clerk it appears that Court took contents of Clerk’s Affidavit into consideration.

(iii) **Mishra Prakash & Associates v. Nagan Engineering (Fiji) Ltd** [2018] FJHC 198; HBA 001.2010 (9 March 2018)

In this case Applicants filed Application to Extend Time to Appeal, Leave to Appeal Master’s Decision and Leave to Amend Appeal which Application was supported by Applicant’s Solicitors clerk.

Court stated as follows:-

“It is trite law that a lawyer’s clerk may not affirm an affidavit intended to be used in a contentious matter in Court. This is indeed a contentious matter where the Respondents are strongly resisting the application for extension of time. The Affidavit should have been affirmed by the Solicitor having personal knowledge of the pertinent matters. More precisely, the deponent should have been the Solicitor who had the conduct and the management of the cause.

What is more, the law clerk deposes “*I am duly authorized to swear this Affidavit on behalf of the Appellant*”.

I note that the law clerk has no written authorization to affirm the Affidavit. I cannot comprehend the basis on which he was deposing.”

Even though Court made such comment it did not strike out the Affidavit but considered the contents of Clerk’s Affidavit in determining the Application.

(iv) **Tavo v. Enasio** [2019] FJHC 40; HBC 369.2017 (28 February 2019)

In this case Applicant filed Application to Extend Time and Leave to Appeal Master’s Decision which Application was supported by Applicant’s Solicitor’s clerk.

Court stated as follows:-

“9. At the outset I shall refer to the Ruling of Sapuvida J delivered on 6 May 206 in Panache Investment Ltd and/or its subsidiary company AND The New India Assurance Co Ltd: Lautoka High Court Civil Action No. HBC 56 of 2014. His Lordship said at para [27] of his Ruling that:

*“I plainly disregarded the affidavit of Sanil Kumar, a law clerk filed in support of the application for seeking leave to appeal the interlocutory ruling of the Master with reasons emphasizing the case law on the issue of filing affidavits by law clerks in contentious matters in the High Court of Fiji.”*

10. I adopt and apply the above Ruling to the instant case as I note the affidavit in support is affirmed by the solicitor’s clerk and not by the Defendant and contains facts in issues and issue of law which a Law Clerk cannot assert to, in the words of the Judge.

11. In the event the court has no alternative but to reject the affidavit of Alelia in to. Consequently in the absence of an affidavit in support, the application for leave must necessarily fail.”

(v) **Singh v. Tower Insurance (Fiji) Ltd** [016] FJHC 462; HBC 81.2015 (27 May 2016).

In this case Plaintiff filed Application to Strike Out Defendants Summons seeking further and better particulars which Application was supported by Affidavit of Law Clerk employed by Plaintiff’s Solicitor.

Court stated as follows:-

“In my view, Law Clerks of Solicitors are neither litigants nor competent legal persons to raise such objections. The litigants are entitled to take up such assertions only on advice of their Solicitors. The Law Clerk does not depose that he has been advised by the Plaintiff’s Solicitors on the contentious legal matters he deposed.”

Court also relied on statements made in Dr Ramon’s (Supra) case and **Deo’s** case (Supra).

Court held that Affidavit of Law Clerk was “Defective and unacceptable”.

(vi) **Media Metro Ltd, In re** [2016] FJHC 1073; Winding Up 33.2015 (25 November 2016)

In this case Debtor Company applied for extension of time to file Affidavit in Opposition pursuant to Rule 7(1) and 201 of Companies (Winding-Up) Rules which application was supported by Affidavit sworn by Legal Executive employed by Debtor Company’s Solicitors.

Court stated as follows:—

“I acknowledge the force of the submission by Counsel for the Petitioning Creditor. The wearing of affidavits by solicitor’s clerks in contested proceedings should be a rare exception and the reason why the party is unable to depose ought to be explained.”

Petitioner Creditor opposed the Application for Extension of Time and Court held that it was a contested proceeding.

Court also noted that there was no explanation as to why Respondent Debtor was not able to depose the Affidavit in Support.

Court adopted the following statement from **Rupeni Silimuana Momoivalu v. Telecom Fiji Ltd.** Civil Action No. HBC 527 of 1992:-

“The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

“It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non contentious matters such as service of documents

where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr Joji Boseiwaqa who appeared on instructions from the

Court in respect to Legal Executives Affidavit stated as follows:-

“Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Respondent Debtor’s Summons seeking extension of time to file an affidavit in opposition is unacceptable. Therefore, the whole of the affidavit is removed from the court record. The affidavit is worthless and ought not to be received in

(v) **Carpenters (Fiji) v. Jalam** [2016] FJHC 126; HBC 59.2011 (15 December 2016)

In this case, Plaintiff filed an application to re-instate the action to the cause list which application was supported by Affidavit sworn by Law Clerk employed by Plaintiff’s Solicitor.

Court noted that there was nothing in Law Clerk’s Affidavit to say why Plaintiff could not depose the Affidavit.

Applying the principles stated in **Dr Ramon’s** case, **Deo’s** case and **Rupeni’s** case Court upheld objection raised by Defendant’s Solicitors on swearing of Affidavit by Law Clerk in a contested proceeding.

(vi) **Momoivalu v. Telecom Fiji Ltd** HBC 527.1997

In this case Defendant applied to have the action struck out for want of prosecution.

Defendant (Applicant) filed two Affidavits by its Senior Executive whilst Plaintiff (Respondent) filed Affidavit by his Solicitors Law Clerk.

Defendant (Applicant) raised objection about Affidavit being sworn by Law Clerk. Court stated as follows:-

“The respondent chose to reply not in person but through a litigation clerk from his solicitors firm.

The applicant takes objection to that affidavit and quite rightly so. First, the application to strike out the claim is a contested hearing, it is not appropriate

for a clerk to depose in support of it. Secondly, the affidavit contains material which is irrelevant and pure hearsay.

The proportion of offending material to anything that is even marginally admissible or relevant is so high that if this matter is to be disposed of with any regard to the law of evidence it would be right that the whole of the affidavit be removed from the file rather than expunging the irrelevant matters to put the affidavit in order. However, the applicant has offered some response to the document and so it shall remain on the file.

The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

“It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr. Joji Boseiwaqa who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in *Michael Harvey v Michael Kelly & Ray McGill*, Civil Action No. HBC 323 of 1977 about the propriety of law clerks deposing affidavits”.

The affidavit barely engages the applicant defendant in any meaningful way and is in any event quite illegitimate. Although the defendant has in part responded to this document by the clerk I intend to give it absolutely no weight whatsoever.”

(vii) **McCaig v. Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012)

Supreme Court considered the Affidavit filed by Litigation Clerk but noticed that he had failed to disclose the source of information as required by Order 41 Rule 5(2) of HCR.

2.6 In view of what is stated in cases cited above, this Court without hesitation strikes out Hemant’s Affidavit on the following grounds:-

(i) How did the deponent formulate the grounds of appeal when he is not legally qualified (paragraph 5 of Affidavit)?



(ii) What qualification does he have or how he is of the view that “law in respect to issue raised is unsettled Court of Appeal?”

2.7 Having struck out Hemant’s Affidavit and the grounds of appeal not being stated in the Summons, technically there is nothing before the Court.

2.8 However, to avoid unnecessary delay of this 2005 matter this Court will deal with the Application on basis of Submissions made during the hearing and Submissions filed by the parties.

### **3.0 Application for Leave to Appeal Interlocutory Decision**

3.1 The case authorities in respect to Appeals against interlocutory orders have been stated in **Gosai v. Nadi Town Council** [2008] FJCA 1.ABU116.2005 (22 February 2008) as follows:-

“28. *APPEAL ON INTERLOCUTORY DECISION*

*In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court’s decision in **Heffernan v. Byrne and Ors** HCF Civil Action No. HBM 105 of 2007 (19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15, ABU 0034d.95s; **Edmund March & Ors v. Puran Sundarjee & Ors** Civil Appeal ABU 0025 of 2000; and **KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. 12 of 1994 (Full Court).*

29. As His Lordship observed, in **Edmund March & Ors** this Court said:-  
*As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 33 of 1996 p. 15):*

*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 principle by granting leave only in the most exceptional circumstances.***

30. Further, as His Lordship also noted, in **KR Latchan Brothers Limited** a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:

*... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in **Ashmore v. Corp. of Lloyd's** [1992] 2 All ER 486-*

*Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court **unless his decision was plainly wrong** since he was in a far better position to determine the most appropriate method of conducting the proceedings.”*

3.2 Applicants will need to establish that this Court’s exercise of discretion in refusing Application for striking out the Action was plainly wrong and there are exceptional circumstances.

3.3 The only ground for appeal that Counsel for Applicants pursued was that this Court erred in law in not striking out this action for want of Leave to issue proceedings against 2<sup>nd</sup> Defendant who was residing overseas when Writ of Summons in this action was issued and still is residing overseas.

3.4 This Court after fully analyzing the case authorities and provisions of Order 6 Rule 6 of High Court Rules and what is stated at paragraphs 4.1 to 4.26 of Ruling delivered on 21 February 2019, reached following conclusion:-

“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.”
- 3.5 This Court accepted that it is mandatory for Plaintiff to obtain Leave of Court to issue Writ of Summons against persons residing overseas unless the provision and exception are applicable.
- 3.6 Failure to obtain such Leave will make Writ of Summons voidable in which case Defendant who is served Writ of Summons and engaged in the proceedings will need to move to the Court to strike out the Writ of Summons prior to taking any steps.
- 3.7 In this instance:-
- (i) Second Defendant who is resident overseas was **not served** with the Writ of Summons and **was never engaged** in this proceeding.
  - (ii) Applicants filed Statement of Defence and took part in the proceedings to the stage where **trial date had been assigned**.
- 3.8 In view of what is stated at the preceding paragraph this Court held that it was not justifiable to strike out the action.
- 3.9 This Court there holds that Applicants have failed to establish that this Court was plainly wrong when it refused to strike out the action or there are exceptional circumstances in this case to grant leave to appeal the decision.
- 3.10 Hence, Application should be dismissed and struck out with costs.

#### **4.0 Costs**

4.1 Parties filed Submissions and made oral submissions in addition to filing Affidavits.

#### **5.0 Order**

5.1 This Court makes following Orders:-

- (i) Applicants (First and Third Defendants) Application for Leave to Appeal decision of this Court delivered on 21 February 2019, is dismissed and struck out;
- (ii) Applicants (First and Third Defendants) pay cost for the Application for Leave to Appeal assessed in the sum of \$1,000.00 within twenty-one (21) days from date of this Ruling.



  
K. Kumar  
**ACTING CHIEF JUSTICE**

At Suva  
26 May 2020

**Neel Shivam Lawyers for the Plaintiff/Respondent**

**A. K. Singh Lawyers for the First and Third Defendants/Applicants**