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

CIVIL ACTION NO. HBM 50 OF 2020
(M.C. Lautoka -Misc. Action No- 6 of 2020
SCT Lautoka - Claim No- 1559 of 2019)

BETWEEN	:	**VINAKA BUILDERS** of Vitogo, Lautoka **APPLICANT** **ORIGINAL RESPONDENT**
AND	:	**SHANTI DEVI** of Vomo Street, Lautoka **RESPONDENT** **ORIGINAL RESPONDENT**
AND	:	**MIKALE SOGOGOGO/WAINIKITI V LEWACEI** of Vomo Street, Lautoka **RESPONDENT** **ORIGINAL APPLICANT**
BEFORE	:	Hon. A. M. Mohamed Mackie - J
COUNSEL	:	Mr. J. Reuben for the Applicant-Original Respondent. (Vinaka Builders) Mr. Rupesh Singh- for the first Respondent- Original Respondent (Shanti Devi) Original Claimants 2nd Respondents absent & no representation.
WRITTEN SUBMISSIONS:		By the First Respondent filed on 10th August 2021. No written submissions by the Applicant & 2nd Respondents.
HEARING	:	Disposed by way of written submissions.
RULING	:	On 17th April, 2023.

RULING

A. INTRODUCTION:

1. The Applicant /Original Respondent , namely," Vinaka Builders" (hereinafter referred to as 'the Applicant') filed its Notice of Motion before this Court on 19th October2020 against the Respondent /Original First named Respondent , namely, SHANTI DEVI (hereinafter referred to as the 'first Respondent') seeking the following reliefs;

    1. *The Applicant / Original Respondent be given an enlargement of time to file Notice of Appeal and Grounds of Appeal within (7) days from the date on which leave is granted to appeal the decision of the SCT Referee Mrs. M. Vatucicila , delivered herein on the 19th day of November ,2019.*

2. *The determination of the Small Claim Order dated 19th November, 2019 be stayed.*

3. *Alternatively, an interim Order for Stay until the determination of this application.*

2. The said Notice of Motion was supported by an Affidavit sworn and filed on 19th October, 2020 by NIYAAZ ASHAD ALI, being the Director of the Applicant Company, together with the annexures "NAA-1" to "NAA-3".

3. The first Respondent, having filed her Notice of Appointment of Solicitors on 3rd November, 2020, swore her Affidavit in opposition and filed it on 18th November 2020, for which the Applicant Company on 9th March 2009 filed its Affidavit in reply sworn by the said Director NIYAAZ ASHAD ALI on 5th March 2021.

4. Accordingly, when the matter came up for hearing before me for the 11th April 2022, this Court having observed that the Original claimants were not before the Court , necessary direction was given to issue notice to them .

5. Subsequently, when the matter came up on 18th May 2022, this Court having observed further that the relief sought by the Applicant in the Notice of Motion was against the Orders made by the Referee of SCT and not against the Orders made by the learned Magistrate, the Applicant was granted leave to amend the Notice of Motion. However, instead of amending the Notice of Motion already filed, the Applicant on 27th June 2022 filed an "Amended Summons for Enlargement of Time" seeking the following reliefs;

    1. The Applicant / Original Respondent be given an enlargement of time to file Notice and Grounds of Appeal within (7) days from the date on which leave is granted to appeal the decision of the **Learned Magistrate Mr. Bandula Gunaratne delivered herein on the 19th day of August 2020.**

    2. The determination of the **Magistrate Court Order dated 19th August,2020 upholding the Small Claims Tribunal Order dated 19th November,2019 be stayed.**

    3. Alternatively, an interim Order for Stay until the determination of this application.

6. As the Second named Respondent's (Original claimant's) name had been omitted in the said Amended Summons for Enlargement of Time, the Court on 12th July, 2022 directed the Counsel for the Applicant to amend the same to include them and the Amended Summons was filed on 22nd August, 2022, which was evidently served on the 2nd named Respondent/ Original Claimants on 2nd December, 2022 by way of substituted service (by newspaper publication) as per the leave granted by the Court.

7. However, since the Second named Respondent / Original claimants had not responded to the service of the Amended Summons for Enlargement of Time, this Court on 22nd February, 2023, with the consent of the remaining parties, decided to dispose the matter by way of written submissions and this Ruling is pronounced today accordingly.

B. HISTORY IN BRIEF:

8. The First named Respondent/ Respondent SHANTI DEVI contracted the Second named Respondent, the present Applicant Company, Vinaka Builders to do the fencing of her compound in or around September, 2019.

9. The Director of the Applicant Company , namely Niyaaz Ashad Ali , prior to the commencement of the fencing work, having inspected the compound of the first Respondent, requested the first named Respondent Shanti Devi to have 3 Coconut trees in her compound cut and removed as the fencing was impossible with the presence of Coconut Trees.

10. According to Mr. Niyaaz Ashad Ali, on the request of the First Respondent, Shanti Devi, assisted her by giving the contact number of one, Mukthar Ali, a Chainsaw man to have the trees cut by him and they agreed for a sum of $400.00 as his charges for the cutting of trees.

11. During the process of cutting the trees on 22nd September, 2019, one of the Tree fell on the back porch of the Original Claimant Respondents causing damages to the roof, post and railing thereof.

12. The original claimants asked the First Respondent Shanti devi to pay damages as she is the landlord and had employed the employees of the Applicant/ second Respondent Company, which she refused by pinning the blame on the Applicant Company stating that the tree cutter was employed by the Applicant.

13. The Applicant Company, on the other hand, took up the position that they were contracted only for the fencing works and not to cut the trees. The Applicant took up the position that it was the first Respondent who employed the Chainsaw man to cut the trees and it was not their job.

14. The first Respondent Shanti Devi and the Applicant Company were in dispute as to who is liable to the Original Claimants for the damages caused to their back porch by falling of the tree. Though, the second named Original claimant had met the first named Respondent Shanti Devi at her workplace and asked for damages, it was refused.

15. As a result, the Original Claimants filed their claim for a sum of $2,285.00 at the SCT on 4th October, 2019 against both the First Respondent Shanti Devi, and the Applicant Company.

16. When the matter came up for hearing before the SCT Referee on 19th November, 2019, after due notice to the Respondents, as the Applicant was absent, subsequent to the hearing of the original claimants and the First Respondent Shanti Devi, the SCT Referee made, *inter alia*, the following Orders.

    1. *THAT 2nd Respondent; Vinaka Builders to pay claimants; Mikaele Soqosoqo and Wainikiti V Lewacei the sum of $500.00 (five hundred dollars) per month with effect from 20/12/2019*

for repairs to part of the porch until total sum of $1985.00 (one thousand nine hundred and eighty five dollars) is fully paid.

2. *THAT Payment to be made in cash at the small claim tribunal Registry in Lautoka,*

3. *THAT In default of any payment , balance become due and payable immediately*

17. Being dissatisfied of the above Orders of the SCT, the Applicant moved the SCT for the rehearing of the matter and when the matter came up for rehearing on 13th December, 2019, as the Applicant was absent, the SCT Referee, having found fault with the Applicant for his absence and after hearing the parties who were present, made the following Order.

"THAT application for re-hearing struck out under Section 32 (5) of the Small Claim Decree 1991 and order dated 19/ 11/ 2019 is reinstated"

18. Subsequently, the Applicant, having obtained a certified copy of the above Order as per the letter by Niyaaz Ashad Ali, dated 21st January, 2020, filed the Notice of Motion on 16th June, 2020 before the Magistrate Court seeking the following reliefs.

a. *The applicant / Respondent be granted leave to file Notice of rehearing out of time, or*
b. *The applicant / Respondent be granted leave to file Notice of Appeal out of time.*

19. Accordingly, the learned Magistrate on 22nd July, 2020, after hearing the Applicant and the Respondent, granted the both parties to file written submissions which the Applicant complied with and the Respondent Shanti Devi opted to rely on the objection filed by her.

20. Thereafter on 19th August, 2020, the learned Magistrate, in the presence of both the parties, delivered the impugned ruling dismissing the Applicant's Application. It is against this Ruling of the learned Magistrate, the Applicant came before this Court on 19th October, 2020 by filing his Notice of Motion stated in paragraph 1 of this Ruling.

C. ANALYSIS:

21. Careful perusal of the impugned Ruling pronounced by the learned Magistrate on 19th August, 2020 clearly shows that the Magistrate has found fault with the Director of the Applicant Company for his delay in coming before the Magistrate and on the failure of the Applicant company to adduce any reason for the delay.

22. Neither an Affidavit by the Applicant was filed giving the reason for delay nor was such a reason given in his Notice of Motion or written submissions at least. The SCT ruling was given on 13th December, 2019 and the Applicant filed his ill-fated Notice of Motion before the Magistrate only on the 16th of June, 2020 after the expiry of 6 months' time from the date of Ruling by the Referee of the SCT on 13th December, 2019.

23. The delay has not been explained by the Applicant and all what he had discussed in his written submission filed before the Magistrate was on the merits of the matter. The unexplained delay on the part of the Applicant before the learned Magistrate, as observed by him, cannot be pardoned.

24. I find that the Ruling of the Magistrate pronounced on 19th August, 2020 dismissing the Notice of Motion filed by the Applicant is not blameworthy and it should not be interfered with by this Court.

25. Since this Court is affirming the impugned Ruling of the learned Magistrate, no necessity arises to consider the Application for stay.

26. As the SCT had not found the first Respondent – Shanti Devi liable to the original Claimant-Respondents and the learned Magistrate had only gone into the question of delay on the part of the Applicant company and not into the merits, she (Shanti Devi) need not have toiled herself in opposing the Applicant's Notice of Motion or the Amended Summons for Enlargement of Time before this Court. Hence, no order for costs in her favor is warranted.

27. The Original Claimants, though given Notice of this Summons, seems to have opted to stay away from the Court. Their absence before this court does not necessarily warrant any orders inimical to them.

28. For the reasons given above, the Applicant's Amended Summons for Enlargement of Time to file Notice of Appeal and Grounds of Appeal has to be dismissed, however with no costs being ordered.

D. <u>FINAL ORDERS:</u>

a. The Amended Summons for Enlargement of time, filed on 22nd August, 2022 by the Applicant Company is struck out.

b. The Application for the Enlargement of time to file the Notice of Appeal and the Grounds of Appeal against the learned Magistrate's Ruling dated 19th August, 2020 is hereby dismissed.

c. The Magistrate's Ruling dated 19th August, 2019 shall remain intact.

d. No orders for costs made and parties shall bear their own costs.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 17th day of April, 2023.

SOLICITORS:

For the Applicant Company:	**S. Nand Lawyers, Barristers & Solicitors**
For the 1st Respondent:	**Patel & Sharma Lawyers**
For the Original Claimant:	**Respondent was absent and no representation**