

**IN THE HIGH COURT OF FIJI
AT LAUTOKA [WESTERN DIVISION]
CIVIL JURISDICTION**

Civil Appeal No. HBA 04 of 2021

BETWEEN : **GEORGE AKHIL ANAND** of Sydney, Australia
APPELLANT
(Original Defendant)

A N D : **DORSAMI NAIDU**, trading as Pillai Naidu & Associates, Solicitor,
Nadi.
RESPONDENT
(Original Plaintiff)

BEFORE : A.M. Mohamed Mackie- J.

COUNSEL : Mr. Koroi. U. - for the Defendant-Appellant.
Mr. Dass. E. –For the Plaintiff- Respondent.

HEARING : On 25th August, 2022.

WRITTEN SUBMISSIONS: Filed on 14th June, 2022 by the Appellant.
Filed on 3rd August, 2022 by the Respondent.

JUDGMENT : Pronounced on 14th February, 2023.

JUDGMENT

A. INTRODUCTION:

1. This is an Appeal preferred by the Defendant- Appellant (“the Appellant”) against the decision dated 12th May, 2018, pronounced by the Learned Resident Magistrate of Nadi, ordering the Appellant to pay a sum of \$7,385.05 unto the Plaintiff-Respondent (“the Respondent”), as prayed for in paragraph 1 of the prayer to the claim, being the amount depicted in the bill of costs dated 24th May, 2012.

B. BACKGROUND:

2. The Respondent, who is a senior practitioner of Law in Fiji, under the name and style of “Pillai Naidu & Associates”, was retained by the Appellant way back in the year 2008 as his Counsel to represent him in Suva Family Court Action No- 08/SUV/0324 that proceeded between the Appellant and his estranged wife, namely, Maya Wati.
3. When the said family action was in progress, the Respondent had sent the Appellant a progressive bill of Cost marked as “PEX-2b” dated 24th May, 2012 for a sum of \$7,385.05,

together with the even dated letter marked as “PEX-2a” requiring further instructions and the payment of the amount shown in the bill of costs.

4. As there was no response from the Appellant to the aforesaid letter, sent together with the bill of Costs, and to the subsequent Telephone call made on 23rd June, 2012, the Respondent sent another letter dated 4th July, 2012 marked as “PEX-3”, explaining the current position of the case and to uplift the file after the payment of the fees, in order to instruct another counsel, stating that he finds it extremely difficult to continue to represent him.
5. In response , the Appellant sent his letter dated 4th August,2012 marked as “ PEX-4” to the Respondent, making various allegations against the Respondent , *inter-alia*, that “ **Your Bill of Cost is incorrect and excessive and failed to provide the exact hrs you have spent**”
6. Subsequently, the Respondent after around 3 years and 4 months, sent his letter dated 7th December, 2015 marked as “PEX-5” addressed to the Appellant demanding the said sum in the bill of Costs and informing that, if not paid, to face the litigation to recover the same without any further notice or warning.
7. Thereafter, as there was no response from the Appellant, the Respondent, having filed his Statement of Claim dated 7th June, 2016 in the Magistrate’s Court on Nadi on 10th June, 2016, filed a Notice of Motion dated 13th September, 2016, supported by an Affidavit, seeking permission to serve the summons by way of substituted service, whereby the learned then Magistrate made the Order granting permission to have it published in a local Newspaper in Fiji and same was, evidently , published on 11th January,2017 as per the annexure marked as “A” to the Affidavit of service.
8. In response to the said publication, the Appellant, having filed his Notice of Intention to defend on 27th January, 2017, along with a memorandum dated 23rd January, 2017, filed his Statement of Defence on 30th March, 2017, together with a counter claim in a sum of AUS \$ 7,650.00, which was equivalent to Fijian \$ 12,163.50. It is to be noted that Respondent did not file his reply to Defence or Defence to Counter Claim made by the Appellant.
9. The matter proceeded for trial before the then learned Magistrate, with one (1) agreed fact and (9) issues being recorded , wherein the Respondent and the Appellant testified on their behalf marking documents “PEX-1” to “ PEX-6” and “DEX-1” to “DEX-4” respectively.
10. However, as the learned Magistrate, who heard matter, had left the bench before the judgment was pronounced, the subsequent Magistrate, seemingly, with the consent of the Counsel for both the parties, delivered the impugned judgment on 12th January, 2021 by relying on the notes taken by the predecessor Magistrate during the trial.

11. By the impugned judgment, the learned subsequent Magistrate allowed the Respondent's claim as prayed for and dismissed the counter claim made by the Appellant. Being aggrieved by this judgment, the Appellant by initially filing his Notice of Intention to Appeal on 19th January, 2021, subsequently on 17th February, 2021 filed his Notice of Appeal and Grounds of Appeal dated 11th February, 2021. The Appellant relies on 7 grounds which are reproduced below.

C. GROUND OF APPEAL:

1. *The learned Magistrate erred in law and in fact in holding at paragraph 8 of the said Judgment that "it is clear that Mr Naidu has acted upon the instructions of Mr Anand" when no written and signed instructions/client care agreement/instructions to act was produced or given in Court by the Respondent to support this statement and was in breach of the Legal Practitioners Act 2009.*
2. *The learned Magistrate erred in law and in fact by holding that the Appellant had not adduced any evidence to dispute the amounts as stated in the bill of costs when the onus was on the Respondent to prove his claim and provide a clear detailed bill of costs to the Appellant when he requested for the same as per his letter dated 4th August 2012.*
3. *The learned Magistrate erred in law and in fact in not taking into consideration that the Respondent did not respond to allegations regarding the disputed Bill of Costs but issued a demand letter dated 7 December 2015, which was never received by the Appellant.*
4. *The learned Magistrate erred in law and in fact in failing to consider that the Bill of Costs that was tendered in Court is contrary to the Legal Practitioners Act 2099, hence the Respondent cannot claim from the Appellant as he is barred from claiming the same.*
5. *The learned Magistrate erred in law and in fact in not taking into consideration that the Respondent tried to deprive the Appellant of his right to representation by deliberately advertising the statement of claim in the Fiji Times despite knowing well that the Appellant was an Australian citizen and resided always in Sydney, Australia and all previous correspondence with the Appellant had been through his Australian address only.*
6. *The learned Magistrate erred in law and in fact by failing to consider the evidence of the Appellant and took into consideration irrelevant matters when dismissing the Appellant's counterclaim and allowing the claim, without any proper evidence being tendered in support of the Claim.*
7. *The learned Magistrate erred in law by proceeding to rule on the matter when the hearing was conducted before another Magistrate, without asking Counsels if they have written or confirmed instructions from their clients, particularly in this case the*

Appellant, before proceeding to rule on the matter. At all material times the Appellant was unaware and not consulted as to what his instructions were regarding the Ruling of the matter.

D. ANALYSIS:

12. The pivotal issue that should have begged adjudication before the learned Magistrate was whether there was an Agreement or a quote through a retainer Agreement on the fees to be paid by the Appellant for the services he obtained. An affirmative answer to this would have immensely assisted the Magistrate in arriving at the correct decision in respect of the issue No-1 raised at the commencement of the trial.
13. Admittedly, there was no such an Agreement between the Appellant and Respondent. Vide page 53 of the copy record, where the Respondent has categorically admitted it and stated further that the Agreement was through Mr. Anil J. Singh. But, Mr. Singh was not called as a witness to substantiate it.
14. Despite the Appellant had asked for a quotation for the fees, the Respondent did not provide such a quotation. The Appellant's averment in this regard in paragraph [v] of his Statement of Defence has not been refuted by the Respondent by filing a reply to defence or during the cross examination of the Appellant.
15. It appears that the Respondent has sent the disputed Bill of Cost dated 12th May, 2012 marked "PEX-2b" only after the Solicitor-Client relationship between them had ceased or when the Appellant was no longer represented by the Respondent. This is clearly brought out by the paragraph [xi] and [xiii] of the Statement of Defence, where the Appellant has stated, among other things, that in February, 2012 he had engaged another lawyer to complete the matter before Suva Family Court. These averments were not disputed by the Respondent by filing a reply to defence.
16. Moreover, the Respondent had not based his claim under section 79 of the "Legal Practitioners Decree of 2009". In the absence of any Agreement as provided under section 79 (1) of the Decree or without making it in accordance with the schedules of fees established by regulation pursuant to this part, the Respondent could not have filed and proceeded with this action in order to obtain a judgment in his favor against the Appellant.
17. Learned Counsel for the Appellant in his oral submissions has raised and heavily relied on the defence of the absence of any Agreement for fees/ cost, which was not aptly countered by the learned Counsel for the Respondent
18. Further, when the Appellant in paragraph [xi] of his statement of Defence, has taken up a position that from February, 2012 he had engaged another lawyer to complete the matter, a pertinent question arises as to how the Respondent could have represented and appeared for the Appellant for him to be billed for the alleged services on 13/2/2012,

19/4/2012, 16/5/2012, as shown in item 1 of the purported bill of costs and particularly for the Court appearances on 22/3/2012, 19/4/2012 and 23/5/2012 as stated in the said bill of Costs, which is disputed.

19. Accordingly, I am of the view that the objection taken by the Appellant in paragraph [xiii] of his Statement of Defence that the disputed bill of Costs is contrary to the section 80 of the Legal Practitioners Decree 2009 seem to be with full of merit. Hence, without giving the particulars required by the Appellant, the Respondent could not have filed or proceeded with the action against the Appellant as clearly set out under section 80 of the Legal practitioners Decree 2009.
20. The aforesaid provisions under Legal Practitioners Decree 2009 and failure on the part of the Respondent to adhere thereto seem to have escaped the attention of the learned Magistrate, when writing the impugned judgment.
21. Further, the learned Magistrate in paragraph 9 of his impugned judgment has found fault with the Appellant for not adducing any evidence to dispute the amount stated in the bill of Cost and arrived at a conclusion that the same remains unchallenged. When the Respondent was duty- bound to prove the contents of his main document, namely, the bill of Costs, and had failed to provide more particulars on it as demanded by the Appellant, the learned Magistrate should not have arrived at such a decision that the bill of Costs remained unchallenged.
22. The learned Magistrate has also failed to take into the consideration that the Respondent had failed not only to file the reply to defence, but also to respond to the request made by the Appellant for better particulars of the Bill of Costs, none-compliance of which stands as a bar to commence the action or to continue with it.
23. Accordingly, I find that the grounds of Appeal Nos.1, 2, 3, and 4 hereof are with merits warranting the intervention of this court.
24. Moving on to the ground of Appeal No. 5, I find that the propriety of the substituted service of summons on the Appellant was not an issue before the learned Magistrate. Thus, he was not called upon to adjudicate on it and no decision was arrived at by him on the mode of service. However, the Appellant chose to appear and submitted himself to the jurisdiction of the Magistrate Court of Nadi and contested the matter.
25. Though, some irregularity seems to have occurred in the process of service of summons on the Appellant, he did not move the Court under Order 12, Rule 6 and 7 of the High Court Rule 1988 for necessary remedy. Thus, the irregularity, if any, has remained cured by the appearance of the Appellant and subjecting him to the jurisdiction without any objection. Thus, I shall not delve into the ground of Appeal No 5 adduced on behalf of the Appellant as it has become redundant.

26. I find that the ground of Appeal No. (6) revolves around counter claim advanced by the Appellant, which was disallowed by the learned Magistrate, despite no defence to Counter Claim was filed by the Respondent. The failure to file defence to Counter Claim does not itself, necessarily, would have entitled the Appellant for a judgment in his favor. This will not absolve the Magistrate from going into the merits of the claim by the Plaintiff or the Defendant, as the case may be, and decide whether he/she is legally entitle to the relief claimed or not.
27. In fairness to the learned Magistrate, I must say that he has duly examined the counter claim made by the Appellant and arrived at the correct finding that the Appellant has failed to prove it on the balance of probability as there was no evidence to substantiate it. This finding cannot be interfered with by this Court. Accordingly, this 6th ground of Appeal has no merit and it should necessarily fail.
28. The ground 7 is in relation to the alleged absence of the consent on the part of the Appellant for the impugned decision to be written by the Magistrate, who had not heard the evidence. In this regard, I prefer to be guided by the sentiments expressed by the learned Magistrate in paragraph 1 of the impugned decision, where he has clearly stated that the Counsel for both the parties agreed and persisted in their request that he should write the decision, and accordingly he writes the decision based on Mr. Turaga's notes, who heard the evidence.
29. The journal entry dated 04.08.2020 does not show the name of the counsel appeared for the Appellant on that date, to express or not to express the consent for the learned Magistrate to write the decision by himself as aforesaid. However, I am of the view that the mere absence of a name of the counsel in the record need not necessarily be a conclusive proof for the non- appearance of the counsel. The content of the paragraph 1 of the Magistrate's judgment sufficiently convinces me that there has been some form of appearance on behalf of the Appellant, though it is not minuted. Unless there were appearances for both the parties, the learned Magistrate would not have expressed such a sentiment in paragraph 1 of his judgment.
30. However, if any prejudice was caused to the Appellant by the impugned judgment, I find that the same has been addressed by upholding the grounds of Appeal 1 to 4 hereof in favor of the Appellant. Hence, ground of Appeal No.7 warrants no serious consideration.

E. CONCLUSION:

31. For the reasons stated above, I find that the grounds of Appeal 1 to 4 adduced on behalf of the Appellant, in relation to the decision pronounced by the learned Magistrate in favor of the Respondent, are meritorious and this Court is justified in partly allowing the Appeal. However, the decision of the learned Magistrate made disallowing the counter claim advanced by the Appellant is not blame-worthy. Thus, I decide not to meddle with it and same should stand intact.

F. FINAL OUTCOME:

- a. The Appeal is partly allowed.
- b. The decision made by learned Magistrate on 12th January, 2021 allowing the Respondent's claim is hereby set aside.
- c. The decision made by the learned Magistrate on 12th January, 2021 dismissing the Appellant's counter claim is hereby affirmed.
- d. No costs ordered and the parties shall bear their own costs.
- e. The original record, along with a copy of this judgment, shall be dispatched to the Magistrate's Court of Nadi forthwith.


A.M. Mohammed Mackie
Judge

At High Court Lautoka this 14th day of February, 2023

SOLICITORS:

For the Appellant: Reddy Law

For the Respondent: Pillai Naidu Associates

