

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 85 of 2017

BETWEEN : **PAULINE STEPHEN MORRIS**

1ST PLAINTIFF

AND : **PAULINE STEPHEN MORRIS**

2ND PLAINTIFF

AND : **SABIR QAUIYUM HUSSAIN *t/a* SABIR BUILDERS**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. R. A Singh for the first and second plaintiffs**

: **Mr. V. Kumar for the defendant**

Date of Hearing : **24 October 2023**

Date of Decision : **5 January 2024**

DECISION

PRACTICE & PROCEDURE

Leave to appeal – Failure to file affidavit

in opposition – Service of writ out of jurisdiction – Order 6 rule 6 of the High Court Rules 1988

1. The plaintiffs filed action claiming that the defendant did not perform its obligations under a building contract that the parties entered into. The plaintiffs sought damages and an order seeking completion of the contract. By its decision of 24 May 2023, court struck out the defendant's application to strike out the action. The strike out application was on the basis that the defendant was impersonated by his father. The defendant has sought leave to appeal the court's decision to disallow the strike out application.
2. At the hearing of the leave application, the defendant submitted at the outset that the plaintiffs failed to file an affidavit in opposition to its application. The defendant submitted that the plaintiffs are not entitled to oppose the leave application as their failure must be considered an admission of facts stated by the defendant. The defendant says that the plaintiffs failed to file an affidavit notwithstanding the court having given them further time for filing.
3. The plaintiffs say that they oppose the application for leave to appeal. They submit that the affidavit filed in the strike out application dealt with the matters urged by the defendant in this proceeding, and, therefore, it is not necessary to file another affidavit in opposition.
4. In determining this application, court will consider the plaintiffs' submissions on the law and those facts that are already before court.
5. The defendant proposed several grounds of appeal. The main ground urged by counsel for the defendant concerned Order 6 rule 6 of the High Court Rules 1988. The rule requires a writ of summons to be served outside the court's jurisdiction with the court's leave.

6. Mr. Kumar submitted that the defendant was not in Fiji at the time the writ was served, and that the court's leave should have been sought to effect service on his client. Counsel submitted that the defendant has another case before the Supreme Court on the same issue as this proceeding and says that his client could be prejudiced in the present case if the Supreme Court holds that writ should be served outside the court's jurisdiction after obtaining leave in terms of the rules.
7. The pleadings in the mentioned Supreme Court case is not before court. Apart from the brief reference made by the defendant's counsel, the parties did not make submissions on that case. Moreover, this application has to be decided in the context of the present proceeding. The real issues in the action must be decided after hearing the testimonies of the parties of this case.
8. The defendant says he has nothing to do with the building contract, and denies that he was served the writ in the present action. He claims to have been impersonated by his father, and says that his father gave instructions concerning the defence lodged in this action. The defendant resides in New Zealand, and denies instructing lawyers to prepare a defence on his behalf.
9. The plaintiffs submitted that the affidavit given in support of the leave application was not given by the defendant, and there is no explanation as to why the defendant could not give an affidavit setting out material particulars. The supporting affidavit is from Aitul Bi Hussein, the defendant's sister who resides in New South Wales in Australia. She holds a power of attorney on behalf of the defendant.
10. The importance of the defendant tendering an affidavit was discussed in the decision of 24 May 2023 and need not be restated in this decision. The defendant was in the best position to speak of matters within his personal knowledge, and convince court to hold with him and strike out the action.
11. The court has granted leave to the plaintiffs to serve the writ outside the court's jurisdiction. Once the writ is served, the defendant will have the opportunity to

instruct solicitors and state his position. The decision made on 24 May 2023 will not cause prejudice to the defendant as he can file a defence and testify at the trial.

12. The case is one that will turn on the findings to be made by court. Once the parties are before court, it will be possible to make a proper assessment of the evidence and consider the credibility of the witnesses. The issues raised by the defendant are such that affidavits are not the most suitable way in which to make the necessary findings.
13. The defendant contends the writ has lapsed as it was not served within time, and cannot be served at this point. The plaintiffs submit the writ was properly served, and steps were taken on behalf of the defendant.
14. The record discloses an acknowledgment of service on behalf of the defendant. A statement of defence was filed. Whether the acknowledgment and the statement of defence can be acted upon is a matter to be decided after trial.
15. The order to serve the writ to the defendant is so that he would have a proper opportunity to defend himself. The writ remains valid in the circumstances.
16. The court is mindful that this action was filed in 2017. The defendant filed its strike out application in 2022, five years later. The explanation for the delay is that the present solicitor was appointed a short time before the application was filed.
17. In reaching its decision on 24 May 2023, the court was of the opinion that it would not be in the interests of justice to allow the defendant's strike out application.
18. The defendant has not convinced court in this proceeding that the usual considerations in regard to a leave to appeal application are satisfied.
19. The application is dismissed with costs.

ORDER

- A. The defendant's application for leave to appeal the decision of 24 May 2023 is dismissed.
- B. The defendant is to pay the plaintiffs' costs summarily assessed in a sum of \$2,000.00 within 21 days of this decision.

Delivered at **Suva** on this 5th day of **January, 2024**.



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge