

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

Civil Action No. HBC 174 of 2021

**BETWEEN:**

**SABIR QAYUM HUSSAIN**  
**PLAINTIFF**

**AND:**

**MUKESH NAND**  
**1<sup>ST</sup> DEFENDANT**

**AND:**

**NEMANI TUIFAGALELE**  
**2<sup>ND</sup> DEFENDANT**

**AND:**

**ATTORNEY GENERAL**  
**3<sup>RD</sup> DEFENDANT**

**BEFORE:**

Acting Master L. K. Wickramasekara

**COUNSELS:**

Sunil Kumar Esquire for the Plaintiff  
Naidu Lawyers for the 1<sup>st</sup> Defendant

Tuifagalele Legal for the 2<sup>nd</sup> Defendant  
Attorney Generals Chambers for the 3<sup>rd</sup> Defendant

**Date of Hearing:**

03 September 2024

**Date of Ruling:**

04 October 2024

## **RULING**

01. The 1<sup>st</sup> Defendant in this matter has filed the current summons for Stay of Proceedings on 19/07/2023 with the Supporting Affidavit of Mukesh Nand, the 1<sup>st</sup> Defendant.
02. Plaintiff has opposed this summons and has filed an Affidavit in Opposition on 18/09/2023. 1<sup>st</sup> Defendant thereupon filed an Affidavit in Response on 03/10/2023.
03. As per directions of the Court for the parties to file written submissions, the 1<sup>st</sup> Defendant had filed written submissions on 23/10/2023 and the Plaintiff on 10/11/2023. The 1<sup>st</sup> Defendant has filed a further written submission in reply on 16/02/2024.
04. The matter was then taken up for Hearing on 03/09/2024 where both parties made oral submissions before this Court. Parties further relied upon their written submissions. Having carefully considered the affidavit evidence before the Court and the submissions on behalf of the parties, I now proceed to make my ruling.
05. It is clear from the material before the Court that this application is for a temporary stay of the proceedings in this matter pending the outcome in the Supreme Court case of CBV 15/2020.
06. Background to this application reveals that the current 1<sup>st</sup> Defendant in this case had been a solicitor representing the current Plaintiff in the High Court action, HBC 197/2014. The Plaintiffs in that case (who are not a party in this current action before me) had sued the Defendants (which one of the named Defendants being the Plaintiff in this current action) over a breach of a construction agreement. The High Court in the above case had entered judgement in favour of the Plaintiffs and had ordered the Defendants in that case (specifically the Plaintiff in this current matter) to pay a sum of \$ 149898.75 with interests and costs of \$ 4000.00. That matter is now before the Supreme Court (CBV 15/2020) pending for leave to appeal.

07. Plaintiff in this matter, as per the Amended Statement of Claim filed on 17/11/2022, alleges that the 1<sup>st</sup> Defendant and as well as the 2<sup>nd</sup> Defendant (who are both legal practitioners in Fiji) had acted on behalf of the Plaintiff and had represented the Plaintiff in the High Court case of HBC 197/2014 without consulting and/or having any instructions from the Plaintiff to do so. Plaintiff therefore alleges gross negligence on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and of conduct contrary to the Legal Practitioners Act. Plaintiff therefore claims that the High Court in HBC 197/2014 entered an adverse judgement against him as a result of the alleged conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this matter. It is moreover alleged, that the Plaintiffs in HBC 197/2014 had registered charges against the properties owned by the Plaintiff in this matter as a means of execution of the judgement in that case.
08. The Plaintiff in this matter is therefore claiming as relief from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgement sum in HBC 197/2014 and to pay general, punitive and exemplary damages caused to the Plaintiff as a result of the alleged conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
09. The 1<sup>st</sup> Defendant, as per the Affidavit filed in support of this summons, claims that the Plaintiff in the action before the Supreme Court (CBV 15/2020) is seeking as a relief to have the judgement of the High Court in HBC 197/2014 to be set aside and an order for retrial of that matter.
10. The 1<sup>st</sup> Defendant has further averred that on 03/03/2022, the Supreme Court has granted a stay of execution of the judgement in HBC 197/2014.
11. It is, therefore, the contention of the 1<sup>st</sup> Defendant, that if in the final outcome of the Supreme Court matter (CBV 15/2020), the judgement in HBC 197/2014 is set aside, then the Plaintiff's current action shall become redundant on the claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgement in HBC 197/2014. The 1<sup>st</sup> Defendant further alleges that it is, therefore, improper and unjust for the Plaintiff to proceed with this matter whilst the appeal in HBC 197/2014 is pending before the Supreme Court. It is also submitted that the 1<sup>st</sup> Defendant is incurring substantial legal costs as a result of this action and that it would be just and convenient to have the proceedings in this matter temporarily stayed until a final determination is made in the Supreme Court action of CBV 15/2020.
12. Plaintiff on the other hand has submitted that the current action before the Court is based on the negligence and professional misconduct of 1<sup>st</sup> and 2<sup>nd</sup> Defendants as legal practitioners and the harm caused to the Plaintiff in representing him without having consulted and/or having any instructions from him, in the case of HBC 197/2014. Whereas the matter before the Supreme Court (CBV 15/2020) is based on the errors in the judgement in HBC 197/2014 and the legality of the proceedings in that matter. It is therefore the contention of the Plaintiff that the final decision in CBV

15/2020 shall not have any bearing on the current matter before the Court and that, therefore, there's no real basis for a grant of a stay as prayed for by the 1<sup>st</sup> Defendant.

13. Apart from the above contention of the Plaintiff, there's a preliminary objection that is being raised by the Plaintiff as against the current summons, as the Plaintiff alleges that the current summons has been filed on a wrong provision of the law.
14. Counsel for the 1<sup>st</sup> Defendant, however, submits that the summons has been filed under Order 4 of the High Court Rules, but due to a typographical error the specific rule under Order 4 has been wrongly quoted.
15. This Court notes that, as per the summons dated 19/07/2023, it is being filed pursuant to Order 4 Rule (1) (a) (6) (c) of the High Court Rules. Order 4 of the High Court Rules does not have Rule (1) (a) (6) (c). The correct rule applicable to this summons should be Order 4 Rule 2 (a), (b), (c).
16. Considering the fact that the current summons has been filed under Order 4 of the High Court Rules and that there is no Rule (1) (a) (6) (c) under Order 4 of the High Court Rules, I have no reservations in accepting the explanation provided by the counsel for the 1<sup>st</sup> Defendant that this was but a typographical error. Court, therefore, finds that there is no merit in the preliminary objections raised by the Plaintiff and shall accordingly treat this summons to have been filed under Order 4 Rule 2 (a), (b), (c).
17. Order 4 of the High Court Rules preliminary deals with 'Consolidation of Proceedings' when there are two or more causes or matters pending which may have some connection to each other. Courts may favour consolidation of matters in cases where it is promoting judicial economy without causing prejudice to the parties. The rule provides for what matters to be considered and the orders that may be made by the Courts in such circumstances as identified therein. Stay of proceedings is an order the Court may make in such circumstances under this rule. The rule clearly provides for the exercise of the Court's discretionary power.
18. Order 4 Rule 2 of the High Court Rules reads to the following effect.

*Consolidation of Proceedings (O.4, r.2)*

2. *Where two or more causes or matters are pending, then, if it appears to the Court-*
  - (a) *that some common question of law or fact arises in both or all of them, or*
  - (b) *that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or*

*(c) that for some other reason it is desirable to make an order under this rule,  
the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.*

19. Pursuant to the unambiguous language in the above Rule, there is a wide discretion that is given to the court. It is fundamental that for this rule to apply, there must be two or more matters or causes pending in the court which may have some kind of connection. Further, it must appear to the court that one of the three sub-paragraphs of the rule is satisfied. And finally, the orders the court may make under this rule are clearly mandated in the Rule.
20. The court may make three orders under this rule. They are,
  - (a) order those causes or matters to be consolidated on such terms as it thinks just, or
  - (b) may order them to be tried at the same time or one immediately after another, or
  - (c) may order any of them to be stayed until after the determination of any other of them. The order (a) for consolidation is different from other two orders (b) and (c), even though it has been used in a looser sense to include other two orders.
21. The ultimate purpose of the orders made under this rule is to reserve costs and time. No order will be made under this rule unless there is some common question of law or fact. Most of the available case authorities on this rule mainly dealt with the ‘consolidation of several actions’. However, the principles applicable when considering a stay of a particular action under the rule would more or less be the same. **The White Book 1999**, in Vol I para 4/9/2 states at page 30 that:

*The main purpose of consolidation to save costs and time, and therefore it will not usually be ordered unless there is “some common question of law or fact bearing sufficient importance in proportion to the rest” of the subject-matter of the actions “to render it desirable that the whole should be disposed of at the same time” (Payne v. British Time Recorder Co. [1921] 2 K.B. 1 at 16; Horwood v. British Statesman Publishing Co. Ltd [1929] W.N. 38; Daws v. Daily Sketch [1960] 1W.L.R 126; [1960] 1 All E.R. 397, CA). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same, or where the plaintiff or defendants or all are difference (Horwood v. British Statesman Publishing Co. Ltd (1929) per Sankey L.J. at 59). The circumstances in which actions may be consolidated are therefore generally similar to those in which parties may be joined in one action under O, 15, r, 4.*

22. In the case of **Dean v Jan** [2021] FJHC 164; HBC133.2018 decided on 12 March 2021, it was held,
- Accordingly, if there are two or more related cases pending in the same court, that court should first consider whether (a) some common question of law or fact arises in both matters or all of them, or (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or (c) some other reason makes it desirable to make an order under this rule. If the court is satisfied any of the above factors, then the court, considering the circumstances of the cases, may make any of the three orders mentioned in the rules, and they are (a) order that, those causes or matters to be consolidated on such terms as it thinks just or (b) order that, them to be tried at the same time or one immediately after another or (c) order any of them to be stayed until after the determination of any other of them. If the court makes an order for consolidation of several matter as per (a) above, it should then specify as to who will be the plaintiff/s, who will be the defendant/s, who will be cross-defendant/s and which pleading should be the claim and crossclaim etc. This is what that is meant by the phrase “on such terms as it thinks just” in the rule.*
23. In considering the pending actions as per Order 4 Rule 2, there is no necessity that such actions to be between the same parties. The rule does not mandate such requirement. What is mandated under this rule to consider are the requirements that are enshrined in Order 4 Rule 2 (a), (b), and (c).
24. Having considered all the material before this Court as a whole, I do find that there arises a common question of law or fact in this case and in the case before the Supreme Court (CBV 15/2020). Further, if in the final outcome of the Supreme Court matter (CBV 15/2020), the Court set aside the judgment of the High Court in HBC 197/2014, it would have a direct impact on some of the relief prayed for by the Plaintiff in this matter. In reality, if the Supreme Court set aside the judgment HBC 197/2014, then the Plaintiff’s claim for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgment sum in HBC 197/2014 shall obviously become redundant. I therefore reject the Plaintiffs submission that the outcome of the Supreme Court action CBV 15/2020 has no bearing on this matter.
25. However, the fact that the outcome of one matter may have a bearing on the other, alone shall not justify the exercise of the Court’s discretion under this rule. The Court needs to be satisfied under this rule, that such a connection between the two cases would warrant making an order or that it is desirable to make an order under the rule.
26. In careful consideration of the Amended Statement of Claim of the Plaintiff, it is clear that the cause of actions against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this case are for

negligence and professional misconduct and/or unprofessional conduct as legal practitioners. The relief for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgement sum in the case of HBC 197/2014 and the claim for damages based on the charge registered against the Plaintiffs properties pursuant to the judgement in HBC 197/2014 is only a portion of the relief the Plaintiff is claiming against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Independent of the said relief, the Plaintiff is claiming for general, punitive and exemplary damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon the above cause of actions as relied upon by the Plaintiff.

27. In the event the Supreme Court in CBV 15/2020 set aside the judgment in HBC 197/2014, that would only impact the two reliefs as prayed for by the Plaintiff for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgement sum in HBC 197/2014 and the claim for damages based on the charge registered on the Plaintiffs properties pursuant to that judgement. The decision of the Supreme Court in CBV 15/2020, however, would not impact the cause of actions relied upon by the Plaintiff in this action or his claims for damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants based on alleged negligence and/or professional misconduct.
28. Having considered overall facts and circumstances before this Court, I find that it may not be desirable and/or is not justifiable or expedient to stay the proceedings in this matter pending the outcome of the Supreme Court matter, CBV 15/2020. In the event, that the Supreme Court may set aside the judgement in HBC 197/2014, the parties in this matter shall be at liberty to notify the trial Court on the same and to forego the reliefs prayed for as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to satisfy the judgement sum in HBC 197/2014 and the claim for damages based on the charge registered on the Plaintiffs properties pursuant to that judgement.
29. In any event, it is my considered view, that in such a scenario, as mentioned above, the Plaintiff shall be technically compelled to drop his claim for above reliefs and that there shall not be any prejudice caused to the Defendants in such an instance, since the cause of actions in this matter shall survive despite the Supreme Court's decision in CBV 15/2020 and that it would not, in any event, bring an end to these proceedings.
30. On the other hand, if the Court is to stay the proceedings in this matter on the above premise, it would certainly prejudice the right of the Plaintiff to diligently prosecute its claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in damages based on the alleged negligence and/or professional misconduct.
31. All in all, it is the considered view of this Court that it is not in the interest of justice and/or expedient in the circumstances before this Court to grant a temporary stay of proceedings in this matter. In overall consideration of all facts and circumstances in the matter, I conclude that it is just and expedient to refuse the summons for stay of

proceedings and that by doing so, it shall not be prejudicial to the 1<sup>st</sup> Defendant in this matter.

32. In consequence, the Court makes the following orders,

1. The summons filed by the 1<sup>st</sup> Defendant on 19/07/2023 for Stay of Proceedings, is hereby refused and accordingly struck out and dismissed,
2. The 1<sup>st</sup> Defendant shall pay a cost of \$ 1000.00 to the Plaintiff as summarily assessed by the Court as costs of this proceeding.



A handwritten signature in blue ink, appearing to read "L. K. Wickramasekara".

**L. K. Wickramasekara,**  
**Acting Master of the High Court.**

**At Suva**  
**04/10/2024**