

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

CIVIL ACTION NO. HBC 123 of 2012

IN THE MATTER OF AN APPLICATION SEEKING FOR  
LEAVE TO APPEAL AGAINST AND STAY OF THE  
RULING PRONOUNCED BY THE MASTER OF HIGH  
COURT ON 15<sup>TH</sup> JUNE 2023

**BETWEEN** : **MOHAMMED ALEEM KHAN** of 11 Kennedy Avenue, Nadi, and Businessman  
**APPLICANT**  
**(ORIGINAL DEFENDANT)**

**AND** : **KRISHNA SAMI NAIDU** of Vulovi, Labasa, and Business  
**RESPONDENT**  
**(ORIGINAL PLAINTIFF)**

**BEFORE** : Hon. Mr. Justice A. M. Mohamed Mackie.

**APPEARANCES** : Mr. Singh R. with Ms. Swamy A. for the Defendant-Applicant.  
: Ms. Fatima G. For the Plaintiff- Respondent

**DATE OF HEARING** : 15<sup>th</sup> March, 2024.

**WRITTEN SUBMISSIONS** : Filed on 18<sup>th</sup> October 2023 by the Applicant.  
: Filed on 28<sup>th</sup> March 2024 by the Respondent.  
: Filed on 16<sup>th</sup> April 2024 by the Applicant (Reply)

**DATE OF RULING** : 16<sup>th</sup> October 2024.

**RULING**

1. Before me is an Application (Summons) filed by the above-named Defendant-Applicant ("the Applicant") on **29<sup>th</sup> June 2023** and supported before me *inter parte* on 25<sup>th</sup> July 2023 seeking the following reliefs;

1. *An Order that leave be granted to appeal to the High Court from the Order of the Master Mr. U.L. Mohamed Azhar in this matter delivered on the 15<sup>th</sup> day of June, 2023.*

2. *An Order that there be a stay of execution against the Appellant/Defendant pending the determination of this application and in the event, that such leave is granted until the delivery of the judgment of the High Court on any appeal brought in terms of such leave.*
  3. *An order that costs of this application be costs in the cause.*
  4. *Any further relief or orders that this Honorable Court deems just and appropriate.*
2. The Summons is supported by the Affidavit of the Applicant, Mohamed Aleem Khan, sworn on 28<sup>th</sup> June 2023 and filed along with annexures marked as “A” to “J”, out of which the annexure marked as “H” contained Notice of Appeal and the proposed 10 Grounds of Appeal.
  3. The Summons states that it is made pursuant to Order 59 Rule 11 and Rule 16 of the High Court rules 1988 and the inherent jurisdiction of the Court.
  4. The Summons, reportedly, being served on 29<sup>th</sup> June 2023 at the City Agents of the Solicitors for the Plaintiff-Respondent (“the Respondent”), the Respondent filed his Affidavit in opposition on 22<sup>nd</sup> August 2023, along with an annexure marked as “A”, being an Indemnity Bond dated 22<sup>nd</sup> October 2015 signed by and between the Applicant and Respondent. The Applicant, filed his Affidavit in reply on 01<sup>st</sup> September 2023 along with further annexures marked as “A”.
  5. Accordingly, this matter was taken up for hearing before me on 15<sup>th</sup> March 2024 (along with the connected matters HBC 39 of 2012 Leave to Appeal & HBC 184 of 2019 Appeal) and were fixed for Ruling on 23<sup>rd</sup> July 2024. However, the same could not be delivered on time due to my absence from Fiji for 3 months on account of an urgent medical condition. I tender apologies to the parties and their counsel.
  6. At the hearing, Counsel for both the parties made oral submissions. Additionally, they have filed their respective written submissions as well as stated above.
  7. Parties are not at variance on the procedure adopted and the time frame followed in filing and saving of this Summons for leave to Appeal and stay.

**BACKGROUND & CHRONOLOGY OF EVENTS:**

8. The Respondent on 6<sup>th</sup> June 2012 had filed his Writ of Summons and the Statement of Claim against the Applicant seeking, *inter alia*;
  - i. *For an Order that the said property comprised in certificate of title No-12555 Lot 32 on deposited plan No-2631, Land known as “Waadara” (portion of ) situated in the Island of Vitilevu in the District of Nadi, be transferred to the Plaintiff.*
  - ii. *General Damages,*

9. Simultaneously, the Respondent also filed a Notice of Motion pursuant to Order 8 Rule 2 of the High Court Rules of 1998, supported by his Affidavit sworn on 5<sup>th</sup> June 2012, seeking the same reliefs as prayed for in paragraph 1 of the prayer to his Statement of Claim (Vide in paragraph 8 (i) above).
10. The Respondent on 26<sup>th</sup> June 2012 filed an Affidavit of service sworn by one **Jackson Yawala**, in proof of the purported service, by averring that the Writ of Summons and the Statement of claim, along with the aforesaid Notice of Motion and the Affidavit in support thereof were served on 7<sup>th</sup> May 2012 on one **Anil Kumar**, who was said to be an Employee of the Applicant.
11. Subsequently, Messrs. **Tirath Sharma Lawyers**, who came on record for the Respondent, with the leave of the Court obtained on 27<sup>th</sup> August 2012, had on 10<sup>th</sup> September 2012 filed an **Amended Notice of Motion** pursuant to Order 86 Rule 1 of the HCR, supported by the Affidavit of the Respondent sworn on 5<sup>th</sup> September 2012. An Affidavit of Service in this regard sworn by one **Veremo Tuilevu** on 25<sup>th</sup> September 2012 was filed on the same date by averring that the said Amended Notice of Motion was served on said **Anil Kumar** on 24<sup>th</sup> September 2012, who was referred to as the financial controller of the Applicant.
12. Since the service had been done just one day prior to the hearing fixed for 25<sup>th</sup> September 2012 before then Master A. Tuilevuka, as per the direction by the Court, a further Affidavit of service sworn by the said **Veremo Tuilevu** was filed on 1<sup>st</sup> October 2012 averring that the Amended Notice of Motion was served again on 26<sup>th</sup> September 2012 on said **Anil Kumar**, who, purportedly, had accepted the service of the initial Notice of Motion, along with the Writ of Summons & the Statement of Claim and the subsequent Amended Notice of Motion on behalf of the Applicant. It was at this juncture, said Anil Kumar, by playing his dual role filed an Affidavit on 19<sup>th</sup> October 2012 in support of the Respondent's substantial claim by averring, *inter alia*, that the purchase price in the Agreement to sell had been duly paid by the Applicant unto the Respondent.
13. Thereafter, on 19<sup>th</sup> November 2012 an Order in terms of paragraph (i) of the Amended Notice of Motion was granted by the then Master allowing the transfer of the subject property unto the Respondent, notably, in the absence of the Applicant. (Vide sealed order dated 6<sup>th</sup> February 2013). **It is to be noted that by this Order made on the Amended Notice of Motion, the Respondent had managed to obtain the main relief prayed for in his Statement of Claim.**
14. Thereafter, on 31<sup>st</sup> July 2013, the Respondent filed a Notice of Motion seeking Orders for the execution of the said orders by the Applicant or through the Deputy Registrar, in case of failure to transfer by the Applicant. An Affidavit of service sworn by one **Ronnie Ram**, was filed on 23<sup>rd</sup> August 2013 averring that the said Notice of Motion was served on 19<sup>th</sup> August 2013 on **HLB Crosbie & Associates**, being the Accountants of the Applicant **Mohamed Aleem Khan**.

15. After an interval of around 2 months, the Respondent filed a similar Notice of Motion again on 4<sup>th</sup> October 2013, of which an Affidavit of, purported, service by **Veremo Tuilevu**, was filed on 11<sup>th</sup> October 2013 averring that the said Notice of Motion was served on 9<sup>th</sup> October 2013 on the said HLB Crosbie & Associates, who had no authority to accept or act for the Applicant **Mohamed Aleem Khan**.
16. On 10<sup>th</sup> March 2014, the matter being taken out of the cause list, as per the Order of then Judge Mohamed Ajmeer, due to non-appearance of the parties or on their behalf, a Notice of Motion was filed by the Respondent on 4<sup>th</sup> August 2014 seeking for the reinstatement of the matter, and the matter was accordingly reinstated on 21<sup>st</sup> August 2014 in the absence of the Applicant **(without any notice being given)**.
17. Subsequently, an Affidavit of Service sworn by one **Ratu Jackson Mawawai**, was filed on 24<sup>th</sup> October 2014 by averring that the Notice of Motion filed on 4<sup>th</sup> October 2013, seeking for the execution of the transfer, was **personally posted** by him on 1<sup>st</sup> October 2014 to **No-95, Segment Crescent, Shalvey, NSW- 2761**, being the residential address of the Applicant in Australia.
18. Subsequently, on 9<sup>th</sup> December 2014, the matter being mentioned before then Master Hon. Jude Nanayakkara, he made the following observations and adjourned the matter for 30<sup>th</sup> January 2015.

*"The service is improper. The Plaintiff has not sought leave of the Court to serve the Motion out of the jurisdiction"*

19. In order to overcome the above predicament, the Respondent on 30<sup>th</sup> January 2015 filed an Ex-parte Notice of Motion, supported by an Affidavit sworn by one **Dorin Monisha Devi**, seeking to serve the Notice of Motion out of jurisdiction at the address given in paragraph 17 above. The order to that effect being made on 26<sup>th</sup> February 2015, (vide Order sealed and filed on 18<sup>th</sup> March 2015), an Affidavit of, purported, service thereof was filed on 20<sup>th</sup> April 2015. **It is to be noted that as per the Affidavit, the above service has been effected not at the address sought to be served, but at a different address, namely, No-147, Hyatts Road, Plumpton, NSW2761, Australia.**
20. Thereafter, having done a search for the Statement of Defence, the Respondent's Solicitors on 3<sup>rd</sup> July 2015 caused the **interlocutory Judgment (default judgment)** to be entered by the Deputy Registrar and accordingly same being entered on 9<sup>th</sup> July 2015, the then Hon. Judge, Mohamed Ajmeer, on 26<sup>th</sup> October 2015 directed the matter to be placed before the Master for the assessment of damages.
21. Subsequently, Messrs. R. Patel Lawyers, having come on record as new Solicitors for the Respondent, filed an Ex-parte Summons on 30<sup>th</sup> November 2016, supported by the Affidavit of the Respondent, **Krishna Sami**, seeking for an Order authorizing the Chief Registrar to execute the Transfer.

22. Though, the said Ex-parte Summons was supposed to be issued returnable on 13<sup>th</sup> of June 2016, nothing had been moved by the Respondent's Solicitors for about 4 years to serve the said Summons on the Applicant, until Messrs. Patel and Sharma Lawyers came on record for the Applicant on 10<sup>th</sup> September 2020 and filed before the Master an Inter-Parte Notice of Motion supported by an Affidavit sworn by **Ms. Ayesha Khan**, seeking Orders, inter alia, for the **stay of execution** of the interlocutory Order made by the then Master on 19<sup>th</sup> November 2012 and the Default judgment entered by the Deputy Registrar on 9<sup>th</sup> July 2015.
23. The Applicant also, simultaneously, filed a Summons, supported by the same Affidavit of **Ms. Ayesha Khan**, seeking Orders, inter alia, for the unconditional **setting aside** of the interlocutory Orders made by the then Master on 19<sup>th</sup> November 2012 and the Default judgment entered on 9<sup>th</sup> July 2015.
24. The reasons relied on by the Applicant for setting aside, inter alia, were that the **Respondent;**
- i. *Did not serve the Defendant (the Applicant) with any pleadings in the action herein.*
  - ii. *Failed to seek an order from the High court to issue proceedings against the Defendant as required under Order 6 Rule 6 of the High Court Rules.*
  - iii. *Failed to obtain an Order for substituted service on the Defendant as required under Order 11 Rule 1 of the High Court Rules.*
25. In response to the said Summons, after entertaining the Affidavit in opposition from the Respondent and the Reply Affidavit by Ms. Ayesha Khan, on behalf of the Applicant, the learned Master, having heard the counsel for both parties on 11<sup>th</sup> October 2022, pronounced the impugned Ruling on **15<sup>th</sup> June 2023** making Orders, to dismiss the Applicant's Summons for setting aside of the interlocutory Order dated 19<sup>th</sup> November 2012 and the Default judgment dated 9<sup>th</sup> July 2015. The Master also dismissed the Motion for stay and imposed summarily assessed Costs of \$7,500.00 payable within one month time.
26. It is against the above Ruling, the Applicant has come before this Court, by way of his timely Application filed on 29<sup>th</sup> June 2023, as stated in paragraph 1 above, seeking for leave to Appeal and Stay of the execution.

#### **PROPOSED GROUNDS OF APPEAL**

27. Following are the proposed Grounds of Appeal adduced by the Applicant.
1. *THAT the Learned Master of the High Court erred in law and in fact in holding that the Order entered against the Appellant on the 19th of November 2012 and 9th of July 2015 was regular and dismissed the application setting aside the same.*
  2. *THAT the Learned Master of the High Court erred in law and in fact in holding that the leave pursuant to Order 6 Rule 6 of the High Court Rules was not required to serve the Appellant who was out of the jurisdiction of Honorable Court at all material times.*

3. *THAT the Learned Master of the High Court erred in law and in fact in holding that the Writ of Summons and Notice of motion filed on the 6<sup>th</sup> of June 2012 were properly served on the Appellant when the Respondent caused the same to be served on one Anil Kumar deemed that the acceptance of service by the said Anil Kumar as proper service.*
4. *THAT the Learned Master of the High Court erred in law and in fact by not considering that the orders for judgment entered on the 19<sup>th</sup> November 2012 was made on the basis of the Amended Notice of Motion filed on the 10<sup>th</sup> September 2012, which Amended Notice of Motion was not served on the Appellant.*
5. *THAT the Learned Master of the High Court erred in law and in fact when the Court held that there was a sufficient proof of service of the Writ of Summons and Notice of Motion when these were served on Anil Kumar in place of Appellant when;*
  - 5.1 *There was no authority adduced to establish that the said Anil Kumar was authorized to accept such service for and on behalf of the Appellant.*
  - 5.2 *There was no leave obtained that service on Anil Kumar would be sufficient service in the proceedings.*
  - 5.3 *The originating process needed to be personally served on the Appellant.*
  - 5.4 *Anil Kumar filed an Affidavit sworn on the 19<sup>th</sup> of October 2012 and filed on the 19th of October 2012 for and on behalf of the Respondent which was filed by the solicitors for the Respondent.*
6. *THAT the Learned Master of the High Court erred in law and in fact in not considering that the Respondent obtained leave to serve the Appellant out of the jurisdiction of this Honorable Court on the 6<sup>th</sup> of February 2015 on his address at 95 Segmen Crescent, Shalway NSW, 2761, but posted the papers to the address 147 Hyatt Road, Plumpton NSW 2761, Australia.*
7. *THAT the Learned Master of the High Court erred in law and in fact in taking judicial notice of the proceedings in Civil Action No. 231 of 2018, when that matter was not properly adjudicated upon but withdraw and made assumptions based on the withdrawal of the said Civil Action No. 231 of 2018 without notice to the parties and or right of response.*
8. *THAT the Learned Master of the High Court erred in law and in fact in holding that the judgment entered on the 19<sup>th</sup> of November 2012 was not irregular.*
9. *THAT the Learned Master of the High Court erred in law and in fact in when the Court held that the Order made on the 19<sup>th</sup> of November 2012 was a consent order*
10. *THAT the Learned Master of the High Court erred in law and in fact when the Court ordered indemnity Costs.*

**PRINCIPLES ON LEAVE TO APPEAL:**

28. The law on leave to appeal an interlocutory order was set out in ***Bank of Hawaii v Reynolds [1998] FJHC 226*** by Pathik, J (as he was then). Referring to the case of *Ex Parte Bucknell [1936]* his lordship stated in the judgment that:

*“At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerate which should be regarded as a jurisdiction for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment”.*

29. The Court in Bucknell went on to state at page 225:

*“But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success to the proposed appeal”.*

30. On the question of leave to Appeal, the following extract from the decision of the President, Fiji Court of Appeal in ***Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr. (Civ. App. 51/95)*** is also relevant and I adopt the same view to the facts and circumstances of this case:

*“... In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted”.*

31. Court of Appeal in ***Shankar –v- FNPF Investments Ltd and Anr. [2017] FJCA 26; ABU 32 of 2016***, 24 February 2017 at paragraph 16:

*“The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (Niemann –v- Electronic Industries Ltd [1978] VicRp 44; [1978] V.R. 431 and Hussein –v- National Bank of Fiji (1995) 41 Fiji L.R. 130).”*

32. In ***Niemann v. Electronic Industries Ltd [1978] VicRp 44; [1978] V.R. 431*** at page 441 where Supreme Court of Victoria (Full Court) held as follows:

*“...leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.”*

33. Here the Applicant should demonstrate the imminent injustice that would befall on him if the interlocutory order/ Default judgment remained intact. There should be some injustice that is continuing and could not be cured after the final decision is made in the Appeal. So it should be an immediate injustice or a loss that cannot be cured later.

### The Principles on Stay:

34. Master's impugned Ruling hereof dated 15<sup>th</sup> June 2023 was, undisputedly, an interlocutory decision. Hence granting of leave to Appeal and stay will temporarily affect the progress of the action towards the final result intended by the Respondent. The Court of Appeal in **Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr [1995] FJCA 15; Abu0034d.95s** (18 July 1995) it was held:

*"The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted."*

35. The principles governing a stay has been stated thus in Halsbury's Laws of England (4th Ed Vol 37 para 699):

*"Two principals have to be balanced against each other as to whether a stay of execution pending the appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation, and secondly, that an appellant should not be deprived of the fruits of a successful appeal"*

36. The principles relating to stay are fully set out in the Notes to Or. 59 r. 13/1 (The Supreme Court Practice 1979 p.909). It states, *inter alia*, that the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled' pending an appeal. (The Annot Lyle (1886) 11 P.D. at p.116, C.A.; Monk v Bartram [1891] UKLawRpKQB 15; (1891) 1 Q.B. 346).

37. The White Book states that;

*"this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from ..."* However, it also has to be considered that "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory" (Wilson v Church (No.2) (1879), 12 Ch. D at pp 458, 459 CA.). Here there is a risk that the appeal will prove abortive if it is successful and a stay is not granted, in that case the Court will normally exercise its discretion in favor of granting a stay [Scarborough v Lew's Junction Stores Pty., Ltd [1963] VicRp 20; (1963) VR 129 at 130]. Therefore, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay (Wilson v Church (No. 2) (1879) 12 Ch.D.454).

38. The grant or refusal of a stay is a discretionary matter for the Court [AG v Emberson (1889), 24 Q. B.D., pp 58, 59]. It will be granted where the special circumstances of the case so require. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it [Emberson (supra)]. Also where there is a risk that if a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion refuse the Application.



39. Furthermore, it was stated in **Atkins v G. W. Ry (1886)**. 2 T. L.R. 400 that:

*“As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and the costs were paid there is no reasonable probability of getting them back if the appeal succeeds.*

40. It was held in **Linotype-Hell Finance Ltd v Baker (1992)**, 4 All ER p.887 that:

*“Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.”*

41. In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU0011.2004S (18 March 2005)**(Unreported) Fiji Court of Appeal laid down the criteria for granting stay .

42. The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):

*“On a stay application the Court’s task is to carefully weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful”*: **Duncan v Osborne Building Ltd (1992)** 6 PRNZ 85 (CA), at p 87.

43. The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999)** 13 PRNZ 48, at p 50 and **Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993)** 7 PRNZ 200:

- a. *Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory. (This is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- b. *Whether the successful party will be injuriously affected by the stay.*
- c. *The bona fides of the applicants as to the prosecution of the appeal.*
- d. *The effect on third parties.*
- e. *The novelty and importance of questions involved.*
- f. *The public interest in the proceeding.*
- g. *The overall balance of convenience and the status quo.”(Emphasis added)*

44. The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the Appellant if the Appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process. I would deal with the main criteria, briefly in the analysis below, for the purpose of this Application.

**ANALYSIS: (Leave to Appeal)**

45. The Applicant is seeking to Appeal against the decision of the Master dated 15<sup>th</sup> June 2023, whereby the Master dismissed the Application of the Applicant seeking to set aside the Interlocutory Order made on 19<sup>th</sup> November 2012 pursuant to an Ex-parte Notice of Motion, and the Default Judgment entered on 9<sup>th</sup> July 2015 by the Deputy Registrar.
46. The parties are not in dispute as to the nature of the order against which the leave is sought to Appeal and as to the process followed for this purpose.
47. The Applicant in his Affidavit in Support has very succinctly and clearly identified the reasons as to why the Court should grant leave to Appeal the impugned decision of the Master. The proposed grounds of Appeal annexed to the Affidavit as exhibit "H", on the face of them, appear to be convincing and with merits.
48. Disregarding the lengthiness of this Ruling, I have taken trouble in reproducing the chronologies of events that had unfolded before the then Master between the period from November 2012 till February 2015 and thereafter before the then Judges, close scrutiny of which clearly demonstrate several irregularities committed, possibly, with the ulterior motive of keeping the Applicant away from the court proceedings against him, which finally resulted the interlocutory Order dated 19<sup>th</sup> November 2012 and the Default judgment dated 9<sup>th</sup> July 2015 being entered against him in his absence.
49. The purported service on **Anil Kumar**, who was said to be an employee of the Applicant, and on the Applicant's Accountants Messrs. HLB Crosbie Associates, who had no any sort of authority to act and/ or to accept the services of the process on behalf of the Applicant, clearly demonstrate the motive of the Respondent to have the final judgment entered in his favor so swiftly against the Applicant on a Notice of motion by not following the prescribed procedures. Further, with the disputed service of the Statement of Claim on said Anil Kumar, the entry of the Default Judgment by the Deputy Registrar also becomes highly questionable. This warrants close scrutiny at the Appeal.
50. On the other hand, the observation made by the then Master Hon; Jude Nanayakkara on 09<sup>th</sup> December 2014, as highlighted in paragraph 18 above, to the effect "*The service is improper. The Plaintiff has not sought leave of the Court to serve the Motion out of the jurisdiction*", which remains so far un-assailed, is itself sufficient to demonstrate the, alleged, irregularity in entering the interlocutory Order dated 19<sup>th</sup> November 2012, which gave the final relief. This observation also calls upon this Court to delve into the propriety of the service of the papers on the Applicant, who was, undisputedly, residing out of the jurisdiction of this Court during the time material.

51. Subsequent to the aforesaid observation of the then Master Mr. Jude Nanayakkara, made on 9<sup>th</sup> December 2014, though the Respondent had caused to file a fresh Notice of Motion supported by an Affidavit sworn by **Dorin Monisha Devi**, who claimed that she had served it by post personally on the Applicant, I find that the purported service had been effected on a different address in Australia, and not at the address sought to be served as per the Affidavit in support of Dorin Monisha Devi.
52. It was relying on the said , purported , Affidavit of service , the Default judgment seems to have been entered as stated in paragraph 19 above , which the Applicant's Counsel categorizes as an "irregularly " entered judgment, as the , purported , service was on a different address and not on the address sought to be served.
53. The subsequent move made by the Respondent's new Solicitors on 30<sup>th</sup> November 2016, as per paragraph 21 & 22 above, seeking for the execution of the Default judgment was not proceeded with for the reason/s best known to the Respondent and/ or his Solicitors. However, by this time the Applicant's solicitors had come on record and filed the Inter parte Notice of Motion on 10<sup>th</sup> September 2020, seeking for the stay of execution of the Order, and the Summons for setting aside the Default judgment, which were dismissed by the learned Master by his impugned Ruling dated 15<sup>th</sup> June 2023.
54. The salient point that caught my attention is the propriety of the initial service of the Notice of Motion, Writ of Summons and the Statement of Claim on **Anil Kumar**, who was said to be an employee of the Applicant. The fact that the Applicant had not authorized the said employee, Anil Kumar, in any manner either to accept the service of the Summons and other papers or to act for and on his behalf seems to have had escaped the attention of the Master when he made the impugned ruling on 15<sup>th</sup> June 2023. The withdrawal of an action by the Applicant that had been filed against the said Anil Kumar, need not have necessarily justified Anil Kumar's dubious and dual role played in this action in securing a judgment against the Applicant. This need to be gone into at the Appeal, with the leave being granted.
55. The above surreptitious moves and failures, on the part of the Respondent, appear to be demonstrating the serious violation of the Rules that requires the personal service of the Summons and other papers on the Applicant, and the prescribed procedures that ought to be followed when seeking to issue proceedings and affecting the services thereof on the Applicant, who was, undisputedly, resident out of the jurisdiction at the time material.
56. Above all, the very serious question that begs answer is how the Applicant's said employee, **Anil Kumar**, who had initially, purported, to have accepted the service of the Summons and other papers on behalf of the Applicant in the absence of any authority to do so, could have given an Affidavit in favor of the Respondent in order to facilitate the entering of the Default judgment and orders against the

Applicant. This also seems to have escaped the attention of the learned Master, which again warrants the leave to Appeal, so that the Respondent's Counsel will be in a position to clarify the position.

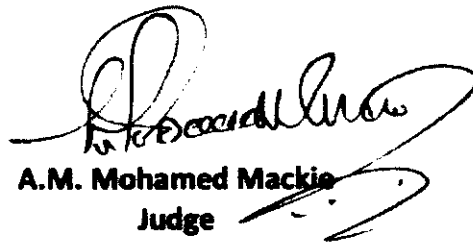
57. There appear to have been a calculated move on the part of the Respondent to obtain a judgment against the Applicant by disregarding the prescribed procedures for the commencement of the action and for the service of the processes therein. The propriety and/or the regularity of the, purported, service of the Summons and other papers, should be deeply delved into and decided at the Appeal, with leave being granted, as such irregularity could, probably, render the Default judgment and the other orders entered in this matter null and void.
58. The proposed grounds of Appeal show that the learned Master seems to have erred in law when delivering the impugned Ruling on 15<sup>th</sup> June 2023 in favor of the Respondent, by failing to take into consideration the pertinent statutory obligations that were required to be satisfied by the Respondent before the Order and judgment were granted in his favor. There are good and valid grounds to move for an Appeal against the impugned Ruling of the Master. Further, none of the orders obtained was served on the Applicant. This shows the motive of the Respondent.

**STAY:**

59. The prejudice to the Applicant hereof, if stay is not granted, is substantial as per the averments of the Applicant's Affidavit in support. This Court stands sufficiently satisfied on it. It is futile to grant only the leave to Appeal without a stay of decisions entered on 15<sup>th</sup> June 2023, which had allowed the execution of the decision dated 19<sup>th</sup> November 2012 entered on the Ex-parte Notice of Motion and the Default judgment entered thereafter on 9<sup>th</sup> July 2015.
60. If no stay is granted, the Respondent will continue to execute the impugned Ruling, Judgment and Orders obtained under the above circumstances, which in turn will put the Applicant in a precarious position causing him serious prejudice, in the event his intended Appeal becomes victorious at the end.
61. The Applicant, having lost his ownership to the land in dispute on account of the impugned interlocutory Order and the Default Judgment entered in his absence, is now at the verge of losing the possession thereof. No prejudice would be caused to the Respondent, if the stay is granted. The balance of convenience favors the grant of stay till the final determination of the intended Appeal by the Applicant.
62. In the circumstances, I grant leave to Appeal against Master's decision dated 15<sup>th</sup> June 2023 and also grant stay thereof until the intended Appeal is heard and finally disposed. Order on costs to be reserved.

**FINAL ORDERS:**

- a. Leave to Appeal the Master's ruling dated 15<sup>th</sup> June 2023 is granted.
- b. The Applicant shall act pursuant to Order 59 Rules 17 (1) and (2) of the High Court Rules.
- c. There will be a stay of proceedings pending the Appeal.
- d. The costs will be in the course of the Appeal.

  
**A.M. Mohamed Mackie**  
Judge



At the High Court of Lautoka on this 16<sup>th</sup> October 2024.

**SOLICITORS:**

For the Defendant-Applicant: Messrs. Patel & Sharma, Barristers & Solicitors

For the Plaintiff-Respondent: Messrs. Patel Lawyers, Barristers & Solicitors. #\*