

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

Civil Action No. HBC 177 of 2021

BETWEEN GREAT WALL BUILDERS PTE LTD. A duly registered Company  
in the Republic of Fiji Islands, having its Registered place of  
business at lot 1 California road, Lovu. Lautoka

**PLAINTIFF**

Vs

SICHI LIU, of lot 85, Naisoso Island, Nadi- Businesswomen

**DEFENDANT**

**BEFORE** : A.M. Mohamed Mackie-J  
**COUNSEL** : Ms. Tunikula , J. for the Plaintiff.  
: Ms. Choo N. For the Defendant.  
**DATE OF HEARNG** : On 8<sup>th</sup> November 2024.  
**DATE OF RULING** : On 11<sup>th</sup> November 2024.

## **R U L I N G**

[On the Application for Leading Evidence via Zoom / Skype]

### **A. INTRODUCTION:**

1. This ruling pertains to the brief hearing held before me on 8<sup>th</sup> November 2024 in relation to the NOTICE OF MOTION dated and filed on 4<sup>th</sup> November 2024 on behalf of the Defendant moving , *inter alia*, for the following orders:

1. *That leave be granted to the Defendant of **107, Elan, Ervine, CA 92618, and United State of America**, to give evidence by Zoom / Skype during the hearing scheduled for 12<sup>th</sup> to 13<sup>th</sup> November 2024.*

2. *That an Order be granted for abridgment of time for service of the Notice of Motion and Affidavit in Support of **Sichi Liu**, on the Plaintiff.*

2. The Notice of Motion is supported by the scanned copy of an Affidavit sworn by the Defendant on 3<sup>rd</sup> November 2024, in the United State of America, and filed with liberty to file the Original thereof once it is received. It also accompanies annexures, such as a Certified Copy of the Bio-Data page of her **PASSPORT** bearing No- E 63937421 issued in CHINA, a Certified Copy of her **PERMANENT RESIDENT CARD** in the United States Of America, and that of a publication, namely '**GENERAL ELIGIBILITY REQUIREMENT**' by the U.S. Citizenship & Immigration Services, all marked as "SL-1", and a copy of the email dated 30<sup>th</sup> October 2024 sent by the Defendant's Solicitors to the Plaintiff's Solicitors in this regard marked as "SL-2".
3. The Notice of Motion states that it is made pursuant to Order 39 Rule 1 (1) of the High Court Rules 1988 and the inherent jurisdiction of the Court.

**B. BACKGROUND:**

4. The Plaintiff has sued the Defendant, by filing its Writ of Summons and the Statement of Claim on 20<sup>th</sup> August 2021, seeking, *inter alia*, for the following reliefs.
  - i. *The balance sum of \$ 141, 096.05 (One Hundred and Forty-One and Ninety-Six Dollars and five Cents) owed to the Plaintiff for the construction and variation works, carried out on the Defendant's premises.*
  - ii. *The sum of FJD \$64,215.00 (Sixty Four Thousand Two Hundred and Fifteen Dollars), for the consequential losses incurred by the Plaintiff, due to the Defendant's unlawful possession of the Plaintiff's Business Chattels and Machinery.*
  - iii. *Punitive damages for breach of contract, and interest.*
5. All the PTC formalities being perfected and the matter being mentioned before me on 28<sup>th</sup> November 2023, two days trial was fixed for **12<sup>th</sup> and 13<sup>th</sup> November 2024** with the consent of counsel for both the parties.
6. Accordingly, it is when the trial is around the corner, the Solicitors for the Defendant have chosen to file this Application and filed same on 4<sup>th</sup> November 2024, seeking for "Skype" hearing facilities for the Defendant to give evidence from the United State of America.

**C. HEARING OF NOTICE OF MOTION:**

7. At the hearing held before me on 7<sup>th</sup> November 2024, Counsel for both the parties made brief oral submissions, wherein the Counsel for the Plaintiff objected the orders being granted.
8. The Affidavit in support sworn by the Defendant states, *inter alia*, as follows;

*"5. THAT presently I am living in United States of America ("USA") as a permanent resident.*

*6. THAT under the USA Immigration Laws, lawful permanent residents (Green Card Holders) are required to maintain their status for 5 years, with a continuous 3 years residency in the USA, before they can apply for US Citizenship.*

*7. THAT I am in the process of fulfilling these requirements before I can apply, which strictly prohibits international travel. Exiting USA at this time would disrupt my eligibility and potentially prevent me from re-entering the country. This restriction is part of my "immigration residence" period, which is essential for meeting the criteria for naturalization .....*

*8. THAT while I am mindful that my presence is necessary for a fair trial including fair practice processes, I strongly believe that my request to conduct the trial via virtual means is not an unrealistic request. ...*

*9 THAT if I leave USA to attend the trial in Fiji on the said dates, I risk jeopardizing my application for Citizenship and breaching the USA immigration laws. Under these circumstances, I am restrained from travelling to Fiji to attend my trial on the said dates.*

*10. THAT I wasn't aware that my physical presence was required for the trial at the time of filing my Statement of Defence and Counter- Claim and at all times understood that I could tender my oral evidence through virtual mode. It was only recently I was informed by my lawyers that I would have to make a formal application to be permitted to have video link/zoom evidence"*

- 9.** Counsel for the Plaintiff made her oral submissions to the effect that it is quite disadvantageous, for them mostly for two reasons, in terms of already decided case law authorities. The first one being the issue of the administration of the oath, which has not been established by the Defendant's Affidavit in support as to whether the Defendant is going to take her oath in a Court that is similar in terms of jurisdiction. Counsel argues that by just having the evidence led via Skype, the Defendant escapes the accountability.
- 10.** The second issue raised by the counsel for the plaintiff is that the process of cross examination would be a difficult task since they have contentious documents and if this Application for Skype evidence is allowed it would be disadvantageous to the plaintiff.
- 11.** Counsel also made submission in relation to the averments of the Defendant on the required period of time to be physically present in USA, which is said to be 30 months out of the total required period of 5 years of stay, in terms of the immigration rules. Here the question, the Counsel raises, is when the Defendant has had her Green Card for permanent residency from the year 2016, for a period of around 8 years, she could have applied for it long time ago, thus she need not face such a requirement now.
- 12.** Counsel also raised issue on bringing this Application on the eve of the trial, when the Defendant was aware of the trial date, and this could have been looked into earlier to the trial that is coming up next week. Counsel urges that these issues should be addressed after considering the Plaintiff's Affidavit in response.
- 13.** In response, Counsel for the Defendant, while admitting that fact that the Defendant is in USA since 2016, submitted that the Defendant had been traveling to Naisoso Island in Fiji for some time and stayed back to oversee the construction works of the building, and

during that period she didn't need to apply right away. Since she is yet to apply and staying under permanent residence visa, she is required to satisfy the criteria showing that she has continuously stayed in the country for minimum period, out of the total required period 5 years. So right now she cannot make an Application for citizenship if she is to travel now on account of the forthcoming trial. Counsel argues that this need not disadvantage or materially affect the plaintiff for proceeding with this case, and there is no cogent grounds on which the Plaintiff's Counsel can object to this Application.

**DISCUSSION:**

**14.** Order 39 Rule 1(1) of the High Court Rules 1988 provides as follows;

**Power to order deposition to be taken (O.39, r.1)**

*"1. - (1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order (in Form No. 17 in Appendix A) for the examination on oath before a judge, an officer of the Court or some other person, at any place, of any person".*

**15.** In **Anderson v Salaitoga [1992] FJHC 24; Hbc0353d.89s (26 June 1992)**, Hon. Justice Fitiaki, as his Lordship then was, after considering an Application made pursuant to Order 39 rule 1 of the High Court Rules, to examine four witnesses who were residing in Melbourne- Australia, on a commission (Letter of Request) to be issued, though dismissed the Application , had accepted that the Court had wide discretion to grant Plaintiff's Application, where if it appears necessary in the interest of justice.

**16.** We do not have ample civil case law authorities, like in Criminal matters, where the leading of evidence through Skype or video technology from a foreign jurisdiction has been permitted.

**17.** Though, the decision referred to in paragraph 15 above was in a criminal matter, I find that the following observations made therein are of great assistance, which can throw some light in arriving at a justifiable decision on the Application in hand.

*"I accept that this Court has a wide discretion to grant the plaintiff's application where it "... appears necessary for the purposes of justice". The "purposes of justice" however are not only served by advancing the interests of plaintiffs. These must be carefully weighed against the interests of defendants and all the circumstances of each case"*

**18.** In **State v Hurtado [2016] FJCA 115; AAU00148.2015 (30 September 2016)** His Lordship Hon. W. Calanchini, President of the Court of Appeal, as his Lordship than was, made the following observation.

*"[39] It is clear that the interests of justice are not confined to the interests of an accused. The only matter that the learned trial judge considered when he authorized the use of Skype was the respondent's constitutional right to call witnesses. But the right to call witnesses was not an issue. The issue was the mode of calling witnesses. The interests of justice required the learned trial judge*

to ensure the trial was fair to both the defence and the prosecution and that there was accountability over the witnesses called by the parties. Witnesses who give evidence from overseas via Skype escape any form of accountability because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So there is a risk that an overseas witness may not give truthful evidence via Skype because of lack of any form of accountability. The learned trial judge did not consider any of these matters when he authorized the respondent to lead evidence from his overseas witnesses on a contested issue of language difficulty via Skype. For these reasons, I am satisfied that the learned trial judge erred in law in authorizing the use of Skype to receive evidence from overseas witnesses in the circumstances of this case. Ground 3 is upheld".  
(Underlining mine)

**19.** In *Lotawa v State [2014] FJCA 186; AAU0091.2011 (5 December 2014)* Justice Madigan JA with the concurrence of S.Gamalath –J and W. Calanchini –J (president C.A) observed as follows.

*"Skype is a relatively new medium used extensively in social media and for personal contact between parties in place of telephones. It is noted that it has been used in Courts for the taking of evidence in Canada, Sri Lanka, and Australia and in Fiji and as such it has been a very useful medium for the admission of evidence in 2 obvious circumstances. First, for the protection of a "vulnerable" witness, provided for in sections 295 and 296 of the Criminal Procedure Decree 2009 and secondly for the good administration of justice, to hear a witness from abroad pursuant to section 131(2) of that Decree. Evidence by " Skype " although convenient and immediate, suffers of course from the vagaries of any other electronic medium in that it can crash, perform erratically or be deceptive as to colour, sound and light. The quality of its transmission will depend on the quality of the equipment being used at each station and in particular the cameras both at transmission and reception. It is impossible when receiving evidence by "skype " to properly observe the demeanour and reactions of a witness: in a case heavily dependent on credibility, the witness' words are often no match for his or her reaction to questions or for his or her display of sincerity or insincerity in giving evidence. It is therefore a much inferior method of receiving evidence, inferior to live viva voce evidence and for these reasons alone, although allowed by s.131(2) and section 295, it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons. In any event as Gamalath JA says care must be taken by the presiding Judge to comply with the procedure set out in s.295 and state judicially why he is allowing evidence to be adduced by that medium"(emphasis mine)*

**20.** Perusal of authorities related to the criminal proceedings shows that our Courts have exercised great caution when considering the Applications for leading of evidence from other jurisdictions via Skype or Video technology. Undoubtedly, the main consideration therein, apart from various other factors, is the question of identification of the accused on trial. Even a slightest vagueness, imprecision or inaccuracy, which is sufficient to create a reasonable doubt, could bring about disastrous consequences.

**21.** The above position may not be correct in case of civil trials since the degree of proof differs. But this does not, necessarily, mean that the Civil Courts can adopt a lenient approach, when Applications for the usage of this technology in court proceedings are under consideration, since various other factors too should be considered in deciding whether the Application should be allowed or not.

- 22.** The only reason adduced by the Defendant to justify an order in terms of her Notice of Motion is that she cannot travel out of USA until her required period of stay in USA is fulfilled in terms of the rules that govern US Citizenship and Immigration Services.
- 23.** However, the most important factor that requires consideration by this Court, as alluded to by the Plaintiff's Counsel, is in relation to administering oath in the foreign jurisdiction. In this regard, this Court and the Plaintiff's Counsel have to be satisfied on the appropriateness of the venue for administering the oath and giving evidence, on the requirement of person/s to be in charge of the proceedings including to administer the Oath, and on the independency of those person/s to be involved in the process at that end. Further, attention also have to be paid to the time difference between two Countries, the clarity and the durability of the connection process to be relied up on for this purpose. The involvement of a judicial officer, or a Commissioner or an independent Barrister or Solicitor practicing law at that end to administer oath and oversee the process would, undoubtedly, create a conducive atmosphere for this purpose. Further, an appropriate venue for this purpose also may have positive impact in ensuring the decorum and dignity of the process. A place such as a Court Room or Tribunal, or any other independent venue like the Embassy or Consular Office of Fiji there, with necessary sanction, can be utilized for this purpose.
- 24.** This Application in hand has been made on the eleventh hour, in the absence of any such arrangement in place. Leading of evidence in a judicial process cannot be done in the manner similar to having an ordinary video call. The Affidavit in support by the Defendant does not indicate about any of such appropriate arrangements or preparations in place for relaying the Defendant's evidence from USA.
- 25.** Further, on contentious issues such as the Defendant's fulfillment of required period of stay and her travel history out of USA, which may be crucial in determining this Application, the Plaintiff should be afforded an opportunity to duly respond by way of Affidavit in response. This opportunity was deprived due to the belatedness of the Application which necessitated the abridgment of service. Any submissions made by the Counsel for the Defendant in this regard from the Bar Table, cannot be admitted and acted up on as evidence in this regard.
- 26.** The trial in this matter was fixed on 28<sup>th</sup> November 2023, almost one year prior to making this Application. Now the trial is coming up on 12<sup>th</sup> of this month leaving no room for the Plaintiff to respond appropriately. The Defendant could have made this Application well in advance, with the appropriate arrangements in place at that end as stated above.
- 27.** If it is the factual position of the Defendant that she cannot travel out of USA for the time being, due to her immigration requirement, she should not be deprived of her right to defend herself and prosecute her counter claim through the proposed mode. However,

she should have exercised this right well in time, with all necessary arrangements alluded to above in place. She also could have annexed the relevant pages of her passport which show her travel history to substantiate her position

- 28.** For the reasons stated above , this Court decides to dismiss the Application of the Defendant , however, leaving her at liberty to file a renewed Application , with the aforesaid appropriate arrangements being done well in time to the satisfaction of the Court and the Plaintiff's Counsel.

**FINAL ORDERS:**

- a. The Notice of Motion, filed by the Defendant on 4<sup>th</sup> November 2024, is dismissed, with liberty to file a renewed Application.
- b. In the event, the Defendant decides to file such an Application, it should be made with all the appropriate arrangements in place, satisfactory to the Court and the Plaintiff.
- c. The Defendant shall pay the Plaintiff \$500.00 (Five Hundred Fijian Dollars), being the summarily assessed costs of this Application, within 14 days from today.

On this 11<sup>th</sup> Day of November 2024 at the High Court of Lautoka.



A.M. Mohammed Mackie

Judge.

High Court (Civil Division)

At Lautoka



**SOLICITORS:**

**Messrs. Alpha Legal- Barristers & Solicitors – for the Plaintiff.**

**Messrs. R. Patel Lawyers – Barristers & Solicitors for the Defendant.**