

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

**High Court Civil Appeal No. HBA 14 of 2023**

**IN THE MATTER** of an Appeal from the decision of the learned Magistrate of the Magistrate's Court of Lautoka in Civil Case No. 119 of 2020

**BETWEEN** : **PRADEEP CHAND** trading as LIONS MINIMART as sole trader  
businessman situated at 1 Drasa Avenue, Lautoka  
**APPELLANT  
(ORIGINAL DEFENDANT)**

**AND** : **RADHE KRISHNA JEWELLERS PTE LTD**, a limited liability company  
having its registered office at Main Street, Nausori  
**RESPONDENT  
(ORIGINAL PLAINTIFF)**

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

**APPEARANCES** : Mr. F. Daveta, for the Defendant – Appellant (On the Instructions)  
Mr. S. Nand, for the Plaintiff – Respondent

**HEARING** : By way of written submissions

**W. SUBMISSIONS** : By the Appellant filed on 17<sup>th</sup> November 2023.  
By the Respondent filed on 9<sup>th</sup> November 2023.

**DATE OF JUDGMENT** : 29<sup>th</sup> January 2024

**JUDGMENT**

**A. INTRODUCTION:**

1. This is an Appeal arising out of the decision of the learned Magistrate of Lautoka pronounced on 26<sup>th</sup> July 2023 in the above numbered action.
2. By the impugned decision, the learned Magistrate struck out the Statement of Defense and the counter claim of the Defendant – Appellant (the Appellant) and fixed the Plaintiff – Respondent's (Respondent) action for formal proof by allowing the evidence in chief to be adduced by way of Affidavit.
3. Aggrieved by the above decision, the Appellant, having given instant Notice of Appeal orally in the open Court on 26<sup>th</sup> July 2023 itself, has subsequently filed his timely Grounds of Appeal on 17<sup>th</sup> of August 2023.

4. Though, the Appellant, along with his grounds of Appeal, has filed a written Notice of Intention of Appeal on 17<sup>th</sup> August 2023, due to its belatedness, it has to be disregarded. However, I observe that the oral Notice of Intention of Appeal given by the Appellant as stated above, will serve the purpose for proceeding with this Appeal.

#### **CHRONOLOGY OF EVENTS:**

5. The Respondent on 9<sup>th</sup> June 2020 filed its writ of Summons and the Statement of claim against the Appellant claiming, inter alia, a sum of \$20,600.00 being the arrears of shop rental, \$1,500.00 being the arrears of Water bill, and a further sum of \$10,000.00 being the damages for breach of Tenancy Agreement.
6. The Appellant filed his Statement of Defence on 28<sup>th</sup> September 2020, together with a counter claim and moved to strike out the Respondent's claim with indemnity costs. The Respondent on 24<sup>th</sup> February 2021 filed its Reply to Defence and Defence to Counter Claim and moved to strike out the Appellant's Statement of Defence and Counter Claim.
7. After filing the PTC minutes on 21<sup>st</sup> November 2022, on 23<sup>rd</sup> November 2022, the matter was first fixed for hearing on 08<sup>th</sup> March 2023.
8. When the matter had come up for hearing on 08<sup>th</sup> March 2023, the Appellant, due to the absence of his Counsel, had moved for an adjournment and the same was allowed subject to payment of cost in a sum of \$1,250.00 to be paid before the next hearing date, which was subsequently fixed for 26<sup>th</sup> July 2023.
9. Accordingly, when the matter had come for hearing on 26<sup>th</sup> July 2023 before the Magistrate, counsel for the Respondent had raised an objection that since the cost ordered on 8<sup>th</sup> March 2023 in a sum of \$1,250.00 had not been paid, the hearing cannot be proceeded with. In response, Counsel for the Appellant, while admitting that the Appellant had not paid the said cost of \$1,250.00, intimated that he is ready for the hearing. In response, Counsel for the Respondent had submitted that in order to proceed with the trial, the Appellant has to pay the cost ordered on 8<sup>th</sup> March 2023 in a sum of \$1,250.00 and if he was not ready to pay the cost the statement of Defence and the Counter Claim should be struck out and the matter should be fixed for formal proof.
10. The learned Magistrate, instantly, made the following order ;  
  

*".....Having considered overall facts and submissions made by both the Counsel, I find that the defendant has not complied with the Court order dated 8<sup>th</sup> march 2023 and as such hearing of this case cannot be proceeded as the final adjournment was granted. As such I strike out the Statement of Defence and the counter claim filed by the defendant and fix this case for formal proof ...."*
11. Having made the order as above, the leaned Magistrate also had ordered the Respondent to file Affidavit evidence for the formal proof of its case against the Appellant, which was fixed for 04<sup>th</sup> October 2023. It is against the above order, the Appellant has preferred this Appeal on the following grounds of Appeal.

## **GROUNDS OF APPEAL:**

12. The grounds relied upon by the Appellant are as follows:
1. *That the Learned Magistrate erred in law and in fact in not properly considering that by striking out the defendant's statement of Defence and counterclaim is shutting the defendant's to present its case before the court of law.*
  2. *That the Learned Magistrate erred in law and in fact in not properly considering that the cost factor could have been enforced by way of judgment debt for summons.*
  3. *That the Learned Magistrate failed to properly consider that the defendants were ready for trial and should have proceeded to hear the parties rather than striking out the defendant's statement of Defence and counterclaim which is breach of the rules of natural justice as well as audi alteram partem rule.*
  4. *That the Appellant reserves the right to argue and/or revise his grounds of Appeal upon receipt of the Court Record.*

## **THE ISSUE & DISCUSSION:**

13. The pivotal issue that warrants the consideration of this Court is whether the learned Magistrate could have struck out the statement of Defence and the Counter claim of the Appellant on account of non-payment of the cost ordered on 8<sup>th</sup> March 2023, while the mechanism for recovery of cost was in place and could have been utilized by the Respondent.
14. Counsel for both the parties, instead of going for oral argument before me, agreed to have the matter disposed by way of written submissions and accordingly have filed their respective submissions as stated above. On careful perusal of the record, particularly, the impugned decision of the learned Magistrate and the contents of the written submission filed by both the Counsel, I find that there need not be any serious arguments for the determination of this Appeal in favor of the Appellant, for which the grounds of Appeal, in my view, are meritorious.
15. Careful perusal of the impugned decision made on 26<sup>th</sup> July 2023 shows that what the learned Magistrate had ordered the Appellant was to pay the cost of \$1,250.00 on or before the next hearing date, which fell on the 26<sup>th</sup> July 2023. However, no order had been made indicating that the Statement of Defence and the Counter Claim would be struck off if the payment is not made on or before the said date. In other words, the learned Magistrate had not made any unless order to take effect if the payment was not made within such time period. Even if such an order had been made, it would not be fair to allow such an order to stand as it would deprive the Appellant from having his day in Court and advancing his Defence and counter claim.
16. Apart from the order for the said amount of cost made on 8<sup>th</sup> March 2023, on previous two occasions too the Appellant had been ordered to pay certain amount of costs, which also remained unpaid by the fateful day of 26<sup>th</sup> July 2023. The presence of the mechanism for the recovery of costs ordered by the Court and the Respondent hereof was at the liberty to utilize it seem to have had escaped the attention of the learned Magistrate.

17. As per the impugned order, the learned Magistrate also seems to have been under the impression that the Appellant's Counsel was moving for an adjournment of the hearing on 26<sup>th</sup> July 2023 as well. Despite the Counsel for the Appellant had indicated that he was ready for the hearing, the learned Magistrate had proceeded to strike out the Defence and Counter claim on the sole ground of nonpayment of the cost in a sum of \$1,250.00.
18. Instead of striking out the statement of Defence and Counter claim, the learned Magistrate could have commenced and continued with the hearing of the action by leaving the issue of costs aside for the same to be recovered through the relevant mechanism.
19. I, therefor find that the grounds of Appeal hereof are meritorious, and on those grounds alone the Appeal should be allowed, the decision of the learned Magistrate should be set aside and the Statement of Defence and Counter claim should be reinstated paving the way for the hearing to be held before another Magistrate of Lautoka Magistrate's Court.
20. Considering the circumstances, I order a sum of Five Hundred Dollars (\$500.00) in favor of the Appellant to be paid by the Respondent, being the summarily assessed costs of this Appeal.

**FINAL ORDERS:**

- A. The Appeal is allowed.
- B. The learned Magistrate's decision dated 26/07/23 is set aside.
- C. The statement of Defence and the counter claim are hereby reinstated.
- D. The matter shall proceed for hearing before another Magistrate
- E. The Respondent shall pay the Appellant a sum of \$500.00 being the summarily assessed cost of the Appeal.
- F. The Original case record, along with a copy of this judgment, shall be dispatched to the Magistrate's Court of Lautoka forthwith.

  
A.M. Mohamed Mackie  
Judge



At the High Court of Lautoka on this 29<sup>th</sup> day of January, 2024.

**SOLICITORS:**

**For the Appellant:** Messrs. Niudamu Lawyers, Barristers & Solicitors-  
**For the Respondent:** Messrs. S. Nand Lawyers, Barristers & Solicitors-