

IN THE HIGH COURT OF FIJI AT LAUTOKA
EXERCISING CIVIL JURISDICTION

CIVIL ACTION NO. HBM 53 OF 2023

BETWEEN : **KRISHNA SAMI** of Wairuku, Rakiraki, and Cultivator

APPLICANT
(Original Defendant)

AND : **ALVIN SAVENDRA RAJU** of 3 Chika Place, Lautoka, and School Teacher

1ST RESPONDENT
(Original First Plaintiff)

AND : **NAZMIN NISHA** of 3 Chika Place, Lautoka, and School Teacher

2ND RESPONDENT
(Original Second Plaintiff)

BEFORE : A.M. Mohamed Mackie-J

COUNSEL : Ms. Dutt S. For the Defendant- Applicant
: Mr. Nand S. For the 1st & 2nd Plaintiff- Respondents.

HEARING : By way of written submissions.

W. SUBMISSIONS : Filed by the Plaintiff-Respondents on 30th October 2024.
: Filed by the Defendant – Applicant on 13th March 2025.

DATE OF RULING : On 11th July 2025.

RULING

A. INTRODUCTION:

1. Before me is an **INTER-PARTE SUMMONS** preferred by the Defendant- Applicant (“**the Applicant**”) on 7th November 2023 seeking the following Orders.
 - a. *That the time within which a Notice of Intention to Appeal and Grounds of Appeal are filed to be extended and the Applicant/Appellant do have leave and be at liberty to lodge an Appeal against the decision of the **Honourable Magistrate Mr. Jeremaia N. Lewaravu** delivered on **21st day of November, 2022**, wherein he allowed the Respondents/Original Plaintiff’s Writ of Summons seeking damages and Legal costs by way of Formal Proof Hearing in the sum of \$21,000.00 with Pre and Post Judgment interest to be paid by the Applicant herein.*
 - b. *That the ruling delivered on the **28th day of July, 2023** by **Learned Magistrate Mr. Peni Dalituicama** in Lautoka Magistrates Court Civil Action No. 114 of 2018 be set aside.*
 - c. *That the ruling delivered on the **24th day of October, 2023** by **Learned Magistrate Mr. Peni Dalituicama** in Lautoka Magistrates Court Civil Action No. 114 of 2018 be set aside.*
 - d. *An order that execution of the Judgment of **21st November, 2022**, **ruling delivered on 28th July, 2023** and **ruling delivered on 24th October, 2023** and all proceedings thereunder be stayed until determination of the Applicant/Appellant application therein.*
 - e. *Such further order or other orders that this Honourable Court deems just.*
 - f. *That service of this Inter-Parte Summons be abridged to one day.*
 - g. *That an early date be assigned for this Inter-Parte Summons.*
 - h. *Costs in favor of the Applicant/Appellant.*
2. The Summons is supported by an Affidavit sworn on 7th November 2023 by the Applicant KRISHNA SAMI and filed along with annexures marked as “KS-1” to “KS-9”.
3. The Summons states that it is filed pursuant to Order 29, Order 45 rule 10 and Order 59 rule 10 of the High Court Rules and the inherent jurisdiction of this Court.
4. The Respondents filed their joint Affidavit in opposition sworn on 26th March 2024, together with annexures marked as “AN-1” to “AN-3”, and the Applicant filed his Affidavit in reply on 10th October 2024, together with an annexure “KS-1”.
5. On 19th February 2025, counsel for both parties agreed to have the hearing hereof disposed by way of written submissions instead of an oral hearing and have accordingly filed their respective written submissions as aforesaid.

B. BACKGROUND HISTORY:

6. The Respondents, on 17th October 2018, filed their original action against the Applicant before the Magistrate Court of Lautoka by way of their Writ of Summons & Statement of Claim, for which the Applicant filed his statement of Defence on 21st August 2019.
7. Due to the absence and non-representation of the Applicant and failure to finalize the PTC minutes, the matter being fixed for formal proof hearing, the Respondents filed their affidavit evidence in chief on 21st September 2022, upon which a judgment was delivered on **21st November 2022** by the then **Hon. Magistrate Jeremaia N. Lewaravu**, in favour of the Respondents granting \$20,000.00 as Special and Liquidated damages, 5% pre-judgment and 5% post judgment interest, together with the costs in a sum of \$1,000.00, all to be paid in 21 days.
8. Being aggrieved by the aforesaid formal proof judgment dated **21st November 2022**, the Applicant on 3rd January 2023 preferred an application for setting aside before the learned succeeding Magistrate seeking orders, *inter alia*,
 - a. *That the execution of The Orders obtained by the Plaintiff against the Defendant on 21st November 2022 be stayed pending Hearing of this application.*
 - b. *That the Orders obtained by the Plaintiff against the Defendant on 21st November 2022 be set aside unconditionally.*
 - c. *Costs of this application be as decided by this Honorable Court.*
9. After filing of Affidavit in opposition thereto to by the Respondents, reply thereto by the Applicant and pursuant to the hearing, the learned Magistrate **Hon. S. Dalituicama**, by his Ruling dated 28th July 2023, dismissed the Applicant's Application for setting aside the formal proof judgment entered on 21st November 2022 by the former Magistrate **Hon. Jeremaia N. Lewaravu**.
10. Being dissatisfied with the above Ruling pronounced by Hon. Dalituicama on 28th July 2023, the Applicant on **19th September 2023** filed before the same Magistrate a NOTICE OF MOTION seeking the following Orders;
 1. *That the time within which a Notice of Intention to Appeal and Grounds of Appeal are to be filed be extended and the Appellant be given leave to Appeal against the decision of the Honorable MR. JEREMAIA N. LEWARAVU delivered on the 21st of November, 2022 wherein he allowed the Respondent's/Original Plaintiff's Writ of Summons seeking damages and Legal costs by way of Formal Proof Hearing in the sum of \$21,000.00 with pre and post judgment costs to be paid by the Appellant/Original Defendant.*
 2. *An Order that the execution of the Judgment of 21st November, 2022 and Ruling of 28th July, 2023 and all proceedings thereunder be stayed until the determination of the Appellant's application herein.*
 3. *That the cost of this application be cost in the cause.*
 4. *Such further and/or other reliefs or orders that this Honorable Court deems just and expedient.*
11. After hearing the aforesaid Notice of Motion too, the same Magistrate **Hon. S. Dalituicama**, by his Ruling dated **24th October 2023** struck out the said Notice of Motion

filed on 19th September 2023 with a further Order for **Messrs. Chetty & Associates** (Applicant's Solicitors) to pay the Respondents costs in a sum of \$750.00.

12. It was after the said Ruling of the Magistrate dated **24th October 2023**, the Applicant filed the current **Inter-Parte Summons** before this Court on **7th November 2023 for Leave to Extent Time to File Notice of Intention to Appeal, Grounds of Appeal and for stay pending Appeal**, as stated in paragraph 1 above, seeking reliefs (a) to (h) therein.
13. The proposed (8) grounds of appeal are annexed as "KS-8" to the Affidavit in support sworn by the Applicant KRISHNA SAMY, which are reproduced as follows.

PROPOSED GROUNDS OF APPEAL

1. *THAT the Learned Magistrate erred in law and in fact by directing himself to award the Plaintiff liquidated damages in the sum of \$20,000.00.*
2. *THAT the Learned Magistrate erred in law and in fact in directing himself in not considering that Plaintiff had made payments to a third party rather than to the Appellant/Original Defendant.*
3. *THAT the Learned Magistrate erred in law and in fact when directed himself to disregard the fact that it was during the COVID 19 period wherein people were maintaining social distancing and operations were not normal which led to the Appellant/Original Defendant's non-appearance in Court.*
4. *THAT the Learned Magistrate failed to take into account the matters that was raised as triable Defence.*
5. *THAT the Learned Magistrate erred in law and in fact and there was a substantial miscarriage of justice in that the Learned Magistrate misconstrued the facts put by the Appellant in his Defence and did not provide the Appellant with an opportunity to be heard.*
6. *THAT the Learned Magistrate failed to exercise his discretion properly by ignoring the crucial ingredients of the Defence which is that the Respondents had paid their consideration of the Sale & Purchase Agreement to a third party and not to the Appellant.*
7. *THAT the Appellant reserves the right to add and file further grounds of Appeal within Twenty-one (21) days form the date of the hearing of the Appeal on receiving the Court Record.*
8. *AND UPON such further and other grounds as the Appellant may be advised in due course.*

The Appellant prays: -

- a. *Judgment dated **21st November, 2022** be set aside and/or stayed in the interim pending the final determination of the Appeal;*

b. That the matter be referred for a full trial.

c. Costs of Appeal to be held in cause.

d. Any such further or other orders as the High Court of Fiji – Lautoka shall deem just.

C. ANALYSIS:

14. At the outset, I observe that the impugned decisions sought to be appealed against by the Applicant hereof being decisions by the Magistrate Court, strangely, the Applicant has chosen to come before this Court by relying on Orders and Rules of the High Court Rules 1988 (HCR). For the Applicant to rely under Order 29 of the HCR, this is not an application for injunction. Likewise, for the Applicant to move under Order 45 Rule 10 or Order 59 Rule 10 of the HCR, there has to be a Ruling or Judgment by the Master or the Judge of the High Court. Thus, on account of the Applicant's failure to follow the relevant Orders and Rules, and for relying on wrong Orders and Rules alone, this Application can be dismissed *in limine*.
15. When the formal proof judgment was entered against the Applicant, as stated in paragraph 7 above, what the Applicant supposed to do was purging his default of appearance before the Magistrate, which led to the judgment being pronounced against him in his absence. This mean that he has to satisfy the Magistrate as to what prevented him from appearing in Court to face his trial. Unless the Applicant sufficiently excuses his absence to the satisfaction of the Magistrate and/ or shows some defence on merits, the Magistrate is not bound to set aside the default judgment so entered.
16. At a hearing for the setting aside of a default judgment, the Magistrate will not engage in an exercise of examining the correctness or otherwise of the impugned default judgment. The Magistrate's concern is whether the Applicant has adduced valid grounds to purge his default and/ or he has valid defence on merits. Even if the Applicant satisfies the Magistrate with the reason for his default, it alone will not allow the impugned judgment to be set aside. He also will have to convince the Magistrate that he has meritorious defence, if the impugned substantive judgment had been entered on consideration of evidence.

Reason for Default of Appearance:

17. It is the propriety of the Ruling dated **28th July 2023** pronounced by the learned Magistrate, refusing to set aside the default judgment, this Court will examine at this stage. In this matter, learned Magistrate in his ruling dated 28th July 2023, has correctly analyzed the purported reason adduced by the Applicant to purge his default.
18. The proposed ground of Appeal No-3 states "***THAT the Learned Magistrate erred in law and in fact when directed himself to disregard the fact that it was during the COVID 19 period wherein people were maintaining social distancing and operations were not normal which led to the Appellant/Original Defendant's non-appearance in Court.***"

19. When carefully analyzed the above ground with the sequence of events occurred before the Magistrate's Court, it is abundantly clear that during the time material for fixing the matter for formal proof, there was no effect of Covid -19 pandemic or resultant lock down hampering the function of the Magistrate's Court.
20. As per the Ruling dated 28th July 2023, it is clear that initially the case was taken off the list on 22nd September 2020 by the then Senior Magistrate Mr. R. Green, due to non-appearance of both parties. Thereafter, a Motion being filed by the Respondents on 21st October 2020, the matter was reinstated to the role on 22nd February 2021 and both parties were directed to finalize the PTC minutes within 21 days.
21. However, once again the Covid-19 lock-down being imposed, the case was held in abeyance until 25th October 2021 when both parties appeared again and were directed to finalize the PTC minutes by giving further 21 days. But the same was not finalized till 16th August 2022, as a result of which the matter was fixed for formal proof. There was no issue of lock down or closure of the Court during this period. Thus, the Applicant cannot rely on Covid-19 lock-down and social distancing as a valid reason for default. Hence, the purported ground 3 cannot be accepted and acted upon by this Court for the purpose of giving extension and leave to Appeal, to file Notice of intention to Appeal and ground of appeal.
22. Apart from the aforesaid purported reason, the Applicant has not adduced any other justifiable reason to purge his default in attending the trial by timely compliance of pre-trial formalities. He cannot simply pin the blame on the learned Magistrate, while he and his Solicitors had failed to act diligently in defending the action as correctly alluded to by the learned Magistrate in his impugned Ruling dated 28th July 2023.
23. Learned Magistrate has also considered the allegation made by the Applicant against his Solicitors. As correctly pointed out by the learned Magistrate, the issue of non-appearance by his Solicitors is an issue between the Applicant and his Solicitors.

Meritorious Defence:

24. The remaining proposed grounds of Appeal Nos.1, 2, 4, 5 and 6 are in relation to the purported defence that the Applicant intends to advance in the event his application hereof is allowed.
25. On careful perusal of the impugned Ruling dated 28th July 2023, I find that when arriving at his decision dated 28th July 2023 to refuse the Application for setting aside the default judgment, the learned Magistrate had most correctly analyzed the issue before him and relied on the decision in ***Shocked and another v Gold Chmidt and others [1998] 1 All ER 372*** wherein Lord Justice Leggatt dealt with a similar Application.
26. Also, I find as per the contents of paragraphs 28 to 32 of the impugned Ruling dated 28th July 2023, that the learned Magistrate had correctly observed the absence of any meritorious defence for the Applicant to have the impugned default judgment set aside as prayed for before the Magistrate.

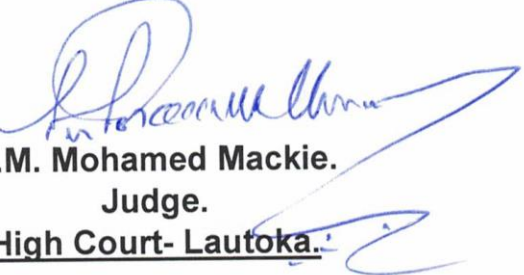
27. As alluded to above, this Court also at this stage will not delve into the propriety of the impugned default judgment dated **21st November 2022** or that of the Ruling made on **24th October 2023** wherein the learned Magistrate correctly dismissed the Application for Leave to Appeal out of time. Instead, what should be subjected to scrutiny before this Court now is the Magistrate's Ruling dated 28th July 2023 by which he correctly dismissed the Applicant's Application for setting aside.
28. I don't find any ground to interfere with the Ruling dated 28th July 2023 pronounced by the learned Magistrate. Accordingly, I decide to refuse leave for the extension of time to file Notice of Intention to Appeal and Grounds of Appeal. The Application for stay also has to be dismissed and the temporary stay granted by this Court on 07th February 2024 has to be discontinued forthwith.

D. FINAL ORDERS:

- a. The Applicant's Inter-Parte Summons filed on **07th November 2023**, seeking Leave for the Extension of Time to file Notice of Intension to Appeal and Grounds of Appeal, is hereby dismissed.
- b. The temporary stay granted on 7th February 2024, in relation to the JDS Summons, is hereby discontinued.
- c. The Ruling dated 28th July 2023 pronounced by the learned Magistrate refusing to set aside the default judgment will remain intact.
- d. The Defendant-Applicant shall pay the Plaintiff- Respondents a sum of \$1,000.00, being the summarily assessed cost of this Application.

On this 11th day of July 2025 at the Civil High Court of Lautoka.




A.M. Mohamed Mackie.
 Judge.
High Court- Lautoka.

Messrs. CHETTY LAW & ASSOCIATES. Barristers & Solicitors -For the Applicant.
Messrs. S. NAND LAWYERS. Barristers & Solicitors- For the Respondents