

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

**CIVIL ACTION NO. HBA 14 OF 2022
M.C. LAUTOKA CIVIL ACTION NO. 10 OF 2021**

**BETWEEN : THE NEW INDIA ASSURANCE COMPANY
APPELLANT/ ORIGINAL PLAINTIFF**

**AND : PRANIL PRAKASH CHAND T/A EADY'S RENTAL
RESPONDENT/ ORIGINAL DEFENDANT**

BEFORE : Hon. Mr. Justice Mohamed Mackie

**APPEARANCES : Mr. S. Krishna, with Ms. R. Prasad, for the Appellant
Mr. A. Chand, for the Respondent**

DATE OF HEARING : 24th July 2023

**WRITTEN SUBMISSIONS: Filed on 9th May 2023 by the Appellant
Filed on 13th June 2023 by the Respondent**

DATE OF JUDGMENT : 25th September, 2023

JUDGMENT

A. INTRODUCTION:

1. This judgment is pronounced in relation to the Appeal preferred to this Court by the Plaintiff-Appellant ("the Appellant") against the Ruling pronounced by the learned Magistrate of Lautoka on 10th of June 2022 in the above numbered action.
2. The learned Magistrate, on 18th May 2022, being the first call date of the action, having summarily heard the counsel for both parties on the, purported, preliminary objection raised by the Counsel for the Defendant –Respondent ("the Respondent") on the question of jurisdiction, by the impugned Ruling pronounced on 10th June 2022 struck out the Appellant's action.
3. Being aggrieved by the said ruling, the Appellant, having filed the Notice of Appeal on 16th June 2022, thereafter on 22nd June 2022 filed its six (6) grounds of Appeal, which are reproduced in paragraph 8 bellow for easy reference.

B. BACKGROUND HISTORY:

4. At all the times material, the Respondent had obtained a Motor Vehicle Comprehensive Insurance Policy no. 3105/ 10195536/000/00 from the Appellant's Lautoka Branch and the

said Policy, according to the Appellant, was valid, enforceable and subject to the terms and Conditions thereof.

5. As per the Insurance Policy (the contract), a total sum of \$7,184.20 was, allegedly, payable by the Respondent, and despite the same being demanded by the Appellant's letter dated 21st July 2020, the Respondent said to have failed and/or unlawfully refused to pay the Appellant.
6. The Appellant Company, initially, on 15th January 2021 had filed its writ of Summons, together with the particulars of its claim against the Respondent before the Magistrate Court. As it was not served within 12 months period due to the outbreak of Covid-19 pandemic and the closure of Courts, subsequently, with the leave of the Court filed a fresh summons on 6th April 2022, which was issued and reportedly served on the Respondent. The Appellant had prayed for the recovery of \$7, 184.20 together with the costs.
7. Accordingly, when the matter was called on 18th May 2022, being the first date of call, the learned Magistrate, after hearing both the Counsel briefly on the, purported, preliminary objection raised on behalf of the Respondent on the question of jurisdiction, by her Ruling pronounced on 10th June 2022 struck out the Appellant's writ of summons without costs. It is against this Ruling, this Appeal is before this Court on the following grounds of Appeal.

C. GROUND OF APPEAL:

8. The Appellant's six (6) grounds of Appeal are as follows;
 1. *THAT the Learned Magistrate erred in law and in fact in not ordering the Respondent to file a Motion and an Affidavit in Support, as oppose to hearing Counsel from the bar table in that:*
 - a. *No Notice of Intention was filed, which is in breach of the mandatory requirement pursuant to Order 6 Rule 6 of the Magistrates Court rules, whereby the Respondent failed to file a Notice of Intention to Defend.*
 - b. *That the Learned Magistrate erred in law and in fact in Paragraph 4 of Judgment in making a finding that "On the 18th May, 2022 Anil Chand Lawyers filed its Notice of Appointment of Solicitors for the Defendant", when the Notice of Appointment was not served on the Plaintiff in that the rules requires a notice of Intention to Defend (Order 6 Rule 6) as oppose to a Notice of Appointment of Solicitors.*
 2. *THAT the Learned Magistrate erred in law and in fact in erroneously and unjustly applying the interpretation of Order 13 rule 1 of the Magistrates Court Rules as set out in paragraphs 11, 12 and 13 of the Judgment in that:*
 - a. *The Writ of Summons and particulars filed was commenced in the proper jurisdiction in that the Learned Magistrate failed to transfer the suit to Nausori Division as outlined in number 4 below.*
 - b. *In that the suit was filed in the correct jurisdiction in law where the Magistrate Court has the power to hear and determine the case.*
 3. *THAT the Learned Magistrate erred in law and in fact in striking out the claim pursuant to Order 13 Rule 1 (c) (iii) of the Magistrate's Court Rules when there were other provisions in*

Order 13 Rule 1 (c) that the circumstance of the case requires the Learned Magistrate to proceed where the suit commenced.

4. *THAT the Learned Magistrate erred in law and in fact in striking out the claim pursuant to Order 13 Rule 1 (c) (iii) of the Magistrate's Court Rules, when she failed to consider the law in respect of the transfer and erred in not applying the said law and transferring and/or reporting to the High Court pursuant to Section 21 (2) and Section 33(1) of the Magistrates Court Act that in circumstances of the case required the Learned Magistrate to report to the High Court.*
5. *THAT the Learned Magistrate erred in law and in fact in striking out the claim pursuant to Order 13 Rule 1 (c) (iii) of the Magistrate's Court Rules, when she failed to consider that the Lautoka Magistrates Court was nearest court to the place in which the contract was commenced and ought to have been performed as the said insurance policy was issued by the Lautoka Branch of the Plaintiff and any claim on the policy ought to have been lodged with the Lautoka Branch of the Plaintiff.*
6. *THAT the decision of the Learned Magistrate is unreasonable and cannot be supported having regard to the evidence and/or circumstances as a whole*

D. RELEVANT LAWS:

9. It is the Order XIII Rule 1 of the Magistrate Court Rules that comes into play when an objection with regard to the "Place of trial and of institution of suits" is raised, and not the Order 30, which the learned Magistrate has correctly alluded to in paragraphs 5, 7 and 8 of the impugned Ruling. It is only in case of non-appearance of both parties, the Order 30 Rule 1 comes into play.

**ORDER XIII. - PLACE OF TRIAL AND OF INSTITUTION OF SUITS when the parties are
(Substituted by Rules 18th April, 1963.)**

Place of trial

1. *Subject to the law respecting transfer, the place for the trial and institution of any suit or matter shall be regulated as follows:-*

Suits upon contract

- (a) *All suits arising out of the breach of any contract may be commenced and determined in the court nearest to the place in which such **contract ought to have been performed**, or in which the defendant, or one of the defendants, resides or carries on business. (Emphasis mine)*

Suits other than suits upon contract

- (b) *Any suit other than a suit founded on contract, may be commenced and determined in the court nearest to the place in which the defendant, or one of the defendants, resides or carries on business.*

Suits commenced in wrong court

(c) Where any suit shall have been commenced in the wrong court, and whether or not the defendant shall plead specially in objection to the jurisdiction, the court may:-

- (i) if the suit should have been commenced in some other court in the same Division in which it was commenced, transfer the suit to the court in which it ought to have been commenced; or
- (ii) Order that the suit shall continue in the court in which it was commenced; or
- (iii) Order the proceedings to be struck out; or
- (iv) Report to the High Court pursuant to section 32 of the Act the pendency

E. DISCUSSION:

Ground -1.

10. As far as the grounds 1 is concerned, I find that the Counsel, who had appeared for the Appellant on 18th May 2022, seemingly for a limited purpose, had not objected to the method adopted by the Respondent's counsel in raising his purported preliminary objection. Counsel for the Appellant could have insisted on adducing of some evidence in support by the Respondent in that regard, on which the learned Magistrate could, probably, have acted accordingly in dealing with the said preliminary objection on the question of jurisdiction.
11. It is also alleged under paragraph (a) of this ground of Appeal, that **NO Notice of Intention to defend** had been filed, which the Appellant's Counsel argues as a mandatory requirement under Order VI Rule 6 of the Magistrate's Court Rules. However, on careful perusal of the record, I find that the Respondent, by sending a letter to the Registry on 6th April 2022 has intimated his intention to defend the action. It is also revealed, as observed by the learned Magistrate, that the Notice of Appointment of Solicitors had also been filed on the 18th of May 2022, both of which the Appellant claimed to have not been served. None of these alleged failures to serve had been brought to the notice of the learned Magistrate.
12. On careful perusal of the page 2 of the "Hearing Transcript" of the brief hearing held on 18th May 2022, I find that the learned Magistrate in her impugned ruling has considered only the question of jurisdiction of the Court, (Vide; the last 3 lines in page 2), which reads as follows;

Court: "Yes, very well. Well the application from the Defendant well I have to look into it and states my Ruling on this issue in terms of Jurisdiction because it's the only issue stated by the Defendant."
13. Thus, it is clear that the learned Magistrate has not made any adjudication on the alleged failure to serve. By not raising any objection for the alleged failure to serve the Notice of Intention to defend and the Notice of the Appointment, Counsel for the Appellant had waived the right for service, which in any event need not have caused any serious prejudice to the Appellant. The grounds of Appeal 1 (a) and (b) do not warrant serious consideration.

14. However, I find that due to the failure on the part of the Respondent to adduce some form of evidence by filing a Motion together with a Supporting Affidavit on the question of jurisdiction, and by the learned Magistrate's decision to strike out the action by entertaining mere oral submission made by the Respondent's counsel, a serious prejudice has been caused to the Appellant. Because, the learned Magistrate, at that primitive stage, could not have proceeded to do so in the absence of any sort of evidence. The Appellant's action could have proceeded with till a considered decision is pronounced on the evidence led in a preliminary hearing on the issue at hand. The Appellant's right in this regard seems to have been violated. Accordingly, this part of the ground of Appeal, in my view, is meritorious.

Ground-2.

15. As far as the ground 2 above is concerned, which revolves around Order XIII (1) (a) of the Magistrate Court rules, I find this ground too is with merits. Why I am saying this is that under Order XIII (1) (a), the Magistrate is clothed with jurisdiction in 3 ways. The Appellant heavily relies on the first one of it, which I am of the view that the Appellant is entitled to do so. The sub rule (a) states as follows;

(a). All suits arising out of the breach of any contract may be commenced and determined in the court nearest to the place in which such contract ought to have been performed, or in which the defendant, or one of the defendants, resides or carries on business. (Emphasis mine)

16. The pertinent question that arises here is, as to how the learned Magistrate could have decided the place, in which the contract ought to have been performed, was not within the jurisdiction of the Magistrate Court of Lautoka, in the absence of any evidence in that regard, particularly when she had observed in paragraph 12 of the impugned Ruling to the effect **"Whether the contract ought to have been performed in Lautoka is unclear from the Plaintiff"**. Obviously, it was without looking into the feasibility of proceeding with the action by relying on the above highlighted ground in the Rule (a) or under Rule (C) (ii) or (iv), the learned Magistrate had decided to strike out the Appellant's action.
17. The earliest opportunity for the learned Magistrate to decide whether to continue with the action or not could have been created by filing a Notice of Motion supported by an Affidavit in that regard as alluded by the Appellant's Counsel in the Ground of Appeal 1 above. The Counsel for the Respondent failed to adduce any evidence to substantiate his position. This seems to have escaped the attention of the learned Magistrate.
18. The pivotal question as to where the relevant contract of Insurance was to be performed is a question of fact, which requires evidence to decide, unless it is categorically stated in the relevant contract, which in this case was not before the Court at that stage. When a preliminary objection is raised with regard to the territorial jurisdiction of the Court, it is always advisable to decide it based on the evidence, unless the lack of jurisdiction is palpably clear.
19. In my view, the performance of contract of Insurance, unless otherwise stated, cannot be anything more than the acts of entering into the contract by and between both the parties,

the payment of the prescribed premium by the Respondent, and honoring the contract by the Appellant as and when a claim is lodged by the Respondent. Parties are not in dispute that the contract of Insurance was entered into at Lautoka Branch of the Appellant. Whatever the initial payment was also, admittedly, done at the Lautoka Branch, and any claim on the policy also has to be lodged at the Lautoka branch of the Appellant. The above facts, in my view, are prima facie sufficient to arrive at a conclusion as to where the contract was to be enforced. Further, in my view, the performance of this kind of contracts cannot be equated with the performance of other contracts, such as for the construction or delivery of goods, in which the place of performance is specifically stated.

20. However, the argument advanced by the counsel for the Appellant that the learned Magistrate could have acted under Order XIII Rule (1) (c) (i) and transferred the action to the Magistrate's court of Nausori will not hold water. It is not only contrary to his position that the Magistrate's court of Lautoka has the jurisdiction, but also will not support his stance as the Magistrate's Court of Nausori is not situated within the division where the Magistrate Court of Lautoka is situated. Both Courts are situated in two different divisions. The transfer under Order XIII Rule (1) (C) (i) is possible only when both the Courts are situated in the same division.

Ground -3:

21. When the action has been filed in a wrong Court, the striking out is not the only option available under Order XIII Rule (1) (C) for the Magistrate to act upon. There are other options available under which the Magistrate could have assumed jurisdiction and proceeded with the action.
22. Despite the fact that the action was commenced in the wrong Court, the learned Magistrate in this action could have still continued with it in the same Court by acting under Order XIII Rule (1) (c) (ii), particularly, in view of the stern argument on behalf of the Appellant that the contract was sought to be performed in Lautoka.

Ground -4.

23. As far as this ground is concerned, this Court stands convinced that the learned Magistrate, instead of resorting to strike out the proceedings by acting under Order XIII Rule (1) (c) (iii), could also have opted to transfer the case to the High court by acting under Sub rule (IV) thereof.

Ground -5 & 6.


24. I find these grounds stand covered under the grounds discussed above. The Appellant has taken up a stern position that the Lautoka Magistrate's Court was the nearest Magistrate's Court to the place in which the contract was commenced and ought to have been performed as the said Insurance Policy was issued by the Lautoka Branch, initial payment was done at that branch and any claim is also required to be submitted to that Office. .

25. This Court is of the view that the learned Magistrate of Lautoka had the jurisdiction to proceed with the action under Order Xiii (1) (C) (ii) of the Magistrate Court Rules, without proceeding to strike out the action, pursuant to Rule (1) (C) (iii).
26. I find that the Appellant has been compelled to endure unnecessary costs on account of the frivolous objection taken up on behalf of the Respondent and this resultant Appeal. Thus, imposition of a reasonable amount as costs on the Respondent is justified.
27. For the reasons stated above, this Court stands convinced that the Appeal should be allowed and the impugned ruling has to be set aside with an Order for the trial to proceed after filing of the Statement of Defence by the Respondent. The Respondent has to pre-pay the costs ordered

F. FINAL ORDERS:

- a. The Appeal is allowed.
- b. The impugned Ruling dated 10th June 2022 pronounced by the learned Magistrate of Lautoka is hereby set aside.
- c. The Magistrate's court proceedings shall continue, with the filing of the Statement of defence, as it would be directed by the learned Magistrate.
- d. The Respondent shall pay the Appellant a sum of \$1,000.00 (One thousand Fijian dollars) being the summarily assessed costs, within 28 days from today.
- e. The Original record shall be dispatched to the Magistrate Court of Lautoka forthwith, together with a copy of this Judgment.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 25th day of September, 2023.

SOLICITORS:

For the Appellant:

Messrs. Krishna & Co. – Barristers & Solicitors

For the Respondent:

Messrs. Anil Chand Lawyers- Barristers & Solicitors