

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 156 of 2012

BETWEEN : **SHIU KAMAL SINGH** of Vusuya Road, Nausori, Businessman,
PLAINTIFF

AND : **SUVA CITY COUNCIL** a local body corporate duly constituted under the
local government with the office in Suva **1ST DEFENDANT**

: **LAND TRANSPORT AUTHORITY** duly govern under the Land
Transport Act, having its registered office in Valelevu, Nasinu
2ND DEFENDANT

BEFORE : Acting Master Thushara Rajasinghe

COUNSEL : Mr. Kalisito Maisamoa for the Plaintiff
Ms. A. Mataiciwa for the Defendant

Date of Hearing : 11th March, 2014

Date of Ruling : 23rd May, 2014

RULING

A. INTRODUCTION

1. This is the notice issued by the Court of its own motion pursuant to Order 25 rule 9 of the High Court Rules, demanding the Plaintiff and the Defendants to show cause why this action should not be struck out for want of prosecution or as an abuse of the process of the court.

2. Upon being served with the notice under Order 25 r 9, the Plaintiff and the first Defendant appeared in the court on 25th of November 2013. The Plaintiff sought time to file his show cause as his solicitor on record Nacolawa & Deveta Law is suspended and no longer in active practice. Accordingly, directions were given to the parties to file their respective show cause and responses which they filed accordingly. Subsequently this notice was set down for hearing on 31st of January 2014. Counsel for the Plaintiff and the Defendant made their oral arguments and submissions during the course of the hearing. Having considered the respective affidavits and the submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND

3. The Plaintiff instituted this action by way of a writ of summons dated 7th of June 2012 against the first and second Defendants seeking following orders inter alia ;
 - i. The sum of \$ 227,868.78 for the loss of business in three years,
 - ii. Interest to be decided by the Honorable court,
 - iii. Cost of the action,
 - iv. Such further and / or other relief as this Honorable court may deem just.
4. The Plaintiff's claim against the Defendants is founded on his allegation that the first Defendant intentionally concealed the outstanding arrears due to the second Defendant in relation to the motor vehicle DC 653 when it was sold and transferred to the Plaintiff upon his successful bid to the tender. The Plaintiff claims that consequent to such concealment of facts by the 1st Defendant, the second Defendant negligently refused to transfer the said vehicle into his name which caused him loss of business for three years.
5. The first Defendant filed his acknowledgement of service on the 19th of June 2012 and served his statement of defence on the 5th of July 2012. The Plaintiff served his

reply to the statement of defence on the 25th of July 2012. Subsequent to the pleadings no steps have been taken by the Plaintiff and the action had been laying in abeyance until the court issued this notice of its own motion.

Plaintiff's case,

6. The Plaintiff stated in his affidavit in show cause that the delay was caused due to the suspension of his former solicitors Nacolawa&Deveta Law, hence the delay was not intentional and beyond his control, wherefore, he should not be punished for it. He further stated that he was not able to retrieve his documents from his former solicitors as the office was closed and sealed by the Legal Practitioners' units via an order by the Independent Legal Service Commission. Eventually he managed to retrieve his documents from the receiver, who was appointed by the LPU to audit and handed over the files to the relevant parties.

Defendant's case,

7. The Defendant contended that the Plaintiff's solicitors were ordered by the Independent Legal Service Commission to cease operation only on 20th of June 2013 and the Plaintiff had ample time from 25th of July 2012 to 20th of June 2013 to proceed with the matter. The Defendant urged that shows the lack of enthusiasm and interest that the Plaintiff had for this action.

C. THE LAW

8. Order 25 rule 9 states that ;
 - i. *If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the court,*

ii. Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions.

9. Accordingly the court could strike out an action on two grounds if no step has been taken for more than six months. The first ground is "want of prosecution and the second ground is an abuse of the process of the court.

10. The applicable principles on the ground of "want of prosecution" and "abuse of the process of the court" have discussed in **Birkett v James (1978) AC 297 at 318**) where Lord Diplock held that

" the power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court, or (2) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party".

11. The scope of the definition of abuse of the process of the court in respect of the application of this nature has further expanded in **Grovit v Doctor and Others (1997) 1 WLR 640**), where it was held that

"that for the Plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings when there was no intention of carrying the case to trial it was entitled to dismiss the action".

12. Sir Thomas Bingham MR in Costellow v Somerset County Council (1993) 1 All ER 952, at 959) extensively discuss the suitable approach for striking out of the action on the ground of procedural default, where he held that;

“ this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit ;this principle is also reflected in the court’s inherent jurisdiction to dismiss for want of prosecution. ...

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by O 3 r 5, discretion to be exercised in accordance with the requirements of justice in the particular case.....

Neither of these principles is absolute if the first principle were rigidly enforced, procedural default would lead to dismissal of action without any consideration of whether the plaintiff’s default had caused prejudice to the defendant. But the court’s practice had been to treat the existence of such prejudice as a crucial and often a decisive matter. If the second principle were followed without exception, a well to do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice.....

But in the ordinary way, and in the absence of special circumstance, a court will not exercise its inherent jurisdiction to dismiss a plaintiff’s action for want of prosecution

unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant”.

D. ANALYSIS,

13. Turning my attention to this instance case, I find that the Plaintiff contended that the delay was beyond his control as his former solicitor was suspended by the Independent Legal Commission which he was not aware of. The Plaintiff further stated that the office of the solicitor was closed and sealed by the Legal Practitioners' units therefore; he had no access to his document until the office was handed over to the Receiver.
14. In the meantime, the Defendant argued that the Plaintiff has failed to file Summons for Direction subsequent to the pleadings within the time stipulated for under Order 25 r 1. The Action has been laying in abeyance since 15th of July 2012, which amount to an inordinate and inexcusable delay.
15. The Defendant did not dispute that the former solicitor of the Plaintiff is suspended, but his argument was founded on the ground that prior to his suspension on 20th of June 2013, the Plaintiff had nearly a year subsequent to the pleadings to take appropriate steps to proceed with his claim. The Plaintiff in response to this contention stated in his affidavit in reply that his former solicitor was ordered by the ILSC to cease operation, however it is not precise to me that such order was granted prior to his suspension or not. Beside that the Defendant did not raise any issue of real risk of prejudice due to this delay.
16. Having considered the reasons set out above, I am satisfied that the default of the Plaintiff to take appropriate steps subsequent to the pleadings, is not intentional and contumelious. The suspension of his former solicitor and closing down of his office has effectively prevented him taking further steps. Indeed, I do not completely absolve the Plaintiff for the default. If he had vigilantly and frequently monitored the progress of the proceedings, he would have at least save some wasted time in this

proceeding. However, in the absence of any evidence of the likelihood of any prejudice to the Defendant, I am of the view that this default and the delay caused by the Plaintiff could be compensated with an award of cost to the Defendant. In view of these findings, I permit the Plaintiff to proceed with this matter. Furthermore I am of the view that the interest of justice would be best served by the following orders which I now make ;

- i. The Plaintiff is ordered to file Summons for Directions in two weeks time, if not, this action will deem to be struck out at the expiration of two weeks from this ruling,
- ii. The Defendant is awarded a cost of \$ 750 assessed summarily,

Dated at Suva this 23rd day of May, 2014.



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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva