IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 333 of 2011

BETWEEN : PRAKASH SINGHof Veisari, 7 ½ Miles Lami, Suva, Farmer

PLAINTIFF

AND : DEO RAJ of 8 ½ Miles, Nasinu, PO Box 17304, Suva, Businessman

DEFENDANT

BEFORE : Master ThusharaRajasinghe

COUNSEL : Ms. Mishra N. with Mr. Katri N. for the Plaintiff
In Person Defendant

Date of Hearing : 16th April, 2014
Date of Ruling : 27th June, 2014

RULING

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 this Notice, both the Plaintiff and the Defendant appeared in court on 19th of November 2013. The directions were given to the Plaintiff to file his show cause in 14 days and the Defendant to file his affidavit in opposition in 14 day thereafter which they filed accordingly. This notice was then set down for hearing on the

16th of April 2014 where the counsel for the Plaintiff and the Defendant in person made their respective oral submissions. The Plaintiff tendered his written submissions at the hearing and the Defendant was given further time to file his written submissions which he did not file. Having considered the respective affidavits and the submissions, I now proceed to pronounce my ruling as follows.

A. Background,

3. The Plaintiff instituted this action by way of a writ of summons on 3rd of November 2011 seeking to set aside the consent orders made before Master Udit on 31st of January 2008 in the Civil Action No HBC546 A of 2007. The affidavit of service was filed on 11th of November 2011 and the Defendant has filed his statement of defence on 4th of September 2012. After that there have been no steps taken by the Plaintiff to proceed this action further.

The Plaintiff's case,

4. The Plaintiff stated in his affidavit in response that he filed this action in person and had no legal representation at that time. He stated that after serving the Defendant the writ, he made a search at the High Court registry for the statement of defense. He then found that no statement of defense or acknowledgement of service of the Defendant was filed.He was under the impression that the registry will assign a date and inform him. With that belief, he had been waiting ever since leaving this action in abeyance until he was served with this notice under O 25 r9.

Defendant's case,

5. The Defendant in his affidavit in opposition stated that the Plaintiff was well aware with the proceedings and he had been delaying the repayment of money owed by him.

B. The Law

6. Order 25 rule 9 states that ;

"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,

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.

7. According to O 25 r 9, the court is allowed to strike out an action for the failure of taking of steps for six months on two grounds. The first ground is for want of prosecution and the second is an abuse of the process of the court.

8. The applicable principles for strike out an action 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) (1977) 2 All E.R 801** 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".

9. The Fiji Court of Appeal in **<u>Pratap v Christian Mission Fellowship (ABU 0093 of 2005)</u>** has approved and applied this celebrated passage of Load Diplock in **<u>Birkett v James (supra)</u>**.

10. The scope of the definition of abuse of the process of the court and the intentional delay in respect of the application of this nature has further discussed and elaborated in **<u>Grovit v Doctor and Others (1997) 1 WLR 640), (1997) 2 All E.R 417</u>** where Lord Woolf held that;

   " *the court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if the justice so requires (which will frequently be the case) the court will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James*".

C. Analysis,

11. The main contention of the Plaintiff is that he was unrepresented and was not aware of the procedures of the court which caused this delay. The Plaintiff instituted this action to set aside the consent order entered on the 31st of January 2008 in Civil Action HBC 546 of 2007. He stated that he was not aware of the procedure to set aside the consent order and was advised by the court to institute this action. It is noteworthy to mention that the Plaintiff took nearly four years from the date of said consent oder to institute this action. He then served the writ on the Defendant and filed his affidavit of service. He subsequently made a search at the registry for the notice of acknowledgment of service

and the statement of defense. He then left the matter in abeyance and too no steps to take this action forward. He now attempts to find refuge from his lack of knowledge of the court procedures. However, the Plaintiff failed to explain why he opted not to retain a service of a solicitor if he was not aware of the court procedures. There is no evidence of lack of financial situation. Ironically, he promptly retained the service of a solicitor and took steps to file a summons for default judgment once he was served with this notice pursuant to O25 r9.

12. The Plaintiff's inactivity of taking the action forward since the service of writ of summons in November 2011 cannot be sympathetically masked with his lack of knowledge of court procedures and lack of legal representation, specially in the absence of reasonalbe explanation for not retaining a solicitor at that point of time. The action has been languished in the registry for more than two years. The Plaintiff after making a search in the registry for the statement of defense on the 2nd of February 2012, has not taken any steps to move this action forward. I am mindful of the fact that the Defendant filed his statement of defense on 4th of September 2012. The Plaintiff alleges that the Defendant did not serve his statement of defense to him. However, that does not relieve the Plaintiff's responsibility. He is required to vigilantly follow the progress of the action which he instituted. The Plaintiff should not be allowed to find refuge in his lack of understanding in court proceedings and lack of legal representation. If the court adopts such a tolerant approach, a person could institute an action with no intention to conclude the proceedings and find sanctuary on such excuses. I am mindful of the fact that a lay man may find difficulties to institute and proceed an action through somewhat cumbersome procedure of civil litigation. However, if he is genuinely keen to take his claim to a conclusion, he must seek for legal assistance either from a legal practitioner if he could afford, or from an alternative source.

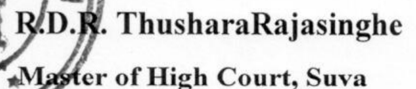
13. Turing back to this instance case, as I mentioned above, there is no acceptable explanation for why the Plaintiff opted not to obtain a service of a solicitor until he was served with this notice. This action was instituted in 2011 to set aside a consent order made on 31st of January 2008, the Plaintiff had not taken any steps to move the matter to

the conclusion for over a period of two years. His explanation for the delay unfortunately is not acceptable. I accordingly hold that the default of the Plaintiff to take this action to its conclusion is intentional and amount to abuse of the prose of court.. This finding of mine falls within the first limb of the celebrated passage of Lord Diplocl in **Birkett v James (supra)**. In view of Lord Woolf's observation in **Grovit v Doctor and Others (supra)** that if there is an abuse of process, it is not strictly necessary to establish other limbs identified by Lord Diplock in **Birkkett v James (supra)** to dismiss an action pursuant to O 25 r 9. I accordingly make following orders;

i. This Action is hereby struck out for abuse of the process of court pursuant to Order 25 rule 9 of the High Court Rules

ii. The Defendant is awarded cost of $ 1000 assessed summarily,

Dated at **Suva** this **27th day** of **June , 2014**.



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R.D.R. ThusharaRajasinghe

Master of High Court, Suva