

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 446 of 2007**

**BETWEEN : MUKURCHAND RAMSWARUP of Vaileka, Rakiraki, Fiji, Businessman.  
PLAINTIFF**

**AND : ARTHUR SNOW the trustee of the Estate of Edward Snow of Rakiraki, Fiji,  
businessman.**

**FIRST DEFENDANT**

**: SUSAN HELEN DOUGLAS of Suva, Fiji, Retired Consultant.**

**SECOND DEFENDANT**

**: THE REGISTRAR OF TITLES AND THE ATTORNEY GENERAL OF  
FIJI.**

**THIRD DEFENDANT**

**BEFORE : Master Thushara Rajasinghe**

**COUNSEL : Mr. Mishra V. M. for the Plaintiff  
Mr. Maharaj for the 1<sup>st</sup> Defendant  
Mr. Singh R. for the 2<sup>nd</sup> Defendant**

**Date of Hearing : 9<sup>th</sup> June, 2014**

**Date of Ruling : 12<sup>th</sup> September, 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 an abuse of the process of the court.

2. Upon being served with this Notice, the Plaintiff and the Defendants appeared in court on the 28<sup>th</sup> of March 2014. The Plaintiff was given directions to file his show cause within 14 days and this notice was fixed for hearing on 9<sup>th</sup> of June 2014. However the Plaintiff failed to file his show cause within the time given for that and sought leave of the court to file the same on the date of the hearing. All the parties consented to conduct the hearing by way of written submissions. I accordingly granted the Plaintiff leave to file his affidavit in show cause on the 9<sup>th</sup> of June 2014. The learned counsel for the first Defendant informed the court that he is not supporting this notice, though he opted not to file any affidavit. The second Defendant was then given time to file his affidavit in opposition, which was filed accordingly. Parties were then given directions to file their respective written submissions, but none was filed. I accordingly proceed with my ruling having only considered the affidavits filed by the Plaintiff and the 2<sup>nd</sup> Defendant.

**B. BACKGROUND,**

3. The Plaintiff instituted this action by way of a writ of summons on 20<sup>th</sup> of September 2007. This matter had been pending through number of applications for interlocutory issues, amendments to pleading with unprecedented numbers of adjournments. This matter was lastly mentioned before the Hon. Master Amaratunga (as his lordship then was) on 14<sup>th</sup> of June 2011, where the Plaintiff once again sought an adjournment to conduct and conclude the Pre-Trial Conference minutes (P.T.C.). The Plaintiff has sought that adjournment irrespective of the orders given by the court on number of previous occasions to finalise the Pre-trial conference minutes and take this matter to a speedy trial. It should be noted that Hon. Master Udit in his order dated 17<sup>th</sup> of November 2008, has emphasized and ordered a speedy trial for this action and the parties were dispensed from the Summons for directions.

4. Hon. Master Amaratunga granted another adjournment on 14<sup>th</sup> of June 2011. Ever since, this action has been laying in abeyance without taking any steps to take the matter to its conclusion until the court issued this notice of its own motion pursuant to Order 25 r9.

**The Plaintiff's case,**

5. The Plaintiff stated in his affidavit in response that he is old and not in good health. He further deposed that the attempts were made to settle the matter and finalise the pre-trial conference minutes. However, the composite nature of the dispute and involvement of four sets of lawyers made the finalization of the pre -trial conference minutes a difficult process.

**Defendant's case,**

6. The 2<sup>nd</sup> Defendant in her affidavit in opposition stated that the Plaintiff's delay is inexcusable and inordinate. She further deposed that her solicitors have been trying to conclude PTC minutes, but the unresponsive delay of the Plaintiff over the years has frustrated the progress of this action. This has caused serious prejudice to the Defendants. This delay has prevented her to sell her portion of this disputed property. She alleged that she has been throttled by this inexcusable delay over the years, causing her serious prejudice.

**C. THE LAW**

7. 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.*

8. It appears that according to Order 25 r 9, the court is allowed to strike out an action on the reasons of the failure to take 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.
9. The applicable principles for strike out an action on the grounds of “want of prosecution” and “abuse of the process of the court” have expounded 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”.*

10. The Fiji Court of Appeal in **Pratap v Christian Mission Fellowship (ABU 0093 of 2005)** has approved and adopted this celebrated passage of Lord Diplock in **Birkett v James** (supra) in to the legal domain of Fiji Islands in respect of application made pursuant to Order 25 r 9.
11. 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 **Grovit v Doctor and Others (1997) 1 WLR 640, (1997) 2 All E.R 417** 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”.*

**D. ANALYSIS,**

12. The main contention of the Plaintiff for not taking any steps to take this matter to its conclusion and for the delay is that the composite nature of this dispute and the involvement of four sets of lawyers in the pre-trial conference. In fact, I do not concur with this contention as an excuse for this delay of more than two years since the matter was last mentioned before the Master on 14<sup>th</sup> of June 2011. The 2<sup>nd</sup> Defendant’s affidavit in reply has specifically deposed the chronological sequence of the events took place in respect of the pre-trial conference since July 2010. There have been plentiful of correspondences from the 2<sup>nd</sup> Defendant requesting the plaintiff to proceed with the PTC, which had been fallen into the deaf ears of the Plaintiff. It appears that beside the Plaintiff’s initiative to convey the PTC on 17<sup>th</sup> of May 2001, which was in fact after a series of orders from the court on number of occasions to conduct the PTC, and few subsequent correspondences with the Defendants, the Plaintiff has not taken any progressive step to prosecute this claim to its conclusion.
13. Having carefully considered the proceedings, I find that the continuous delay of the Plaintiff to conclude the PTC minutes in disregarding or perhaps ignoring the number of orders given by the court for that effect, would undoubtedly amount to an intentional

disobedience of the orders given by the court. The Plaintiff in his affidavit in show cause has not given any reasonable explanation apart from his allegation that the involvement of four sets of lawyers in the proceedings has caused the delay.


14. The Plaintiff has not given any substantial explanation for the delay to conclude the PTC and take steps to proceed the matter to the hearing. Though he alleged that he is old and not in good health, he has not provided any material evidence to substantiate such claim. The evidence presented by the 2<sup>nd</sup> Defendant has clearly demonstrated that the Plaintiff has not taken any steps since he was served with the 1<sup>st</sup> Defendant's comments to the draft PTC minutes on 19<sup>th</sup> of July 2011. Under such circumstances, specially in the absence of any reasonable and substantive explanation from the Plaintiff for this continuous delay and disobedience of the orders of the court, I, without any hesitance, conclude that the delay is inordinate and inexcusable.
15. I now turn to consider, whether this inordinate and inexcusable delay would 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.
16. The 2<sup>nd</sup> Defendant has given an undertaking to restrain from dealing with the her property, which forms a part of the disputed property of this action until further order of the court. An order has accordingly been granted by Master Udit on 17<sup>th</sup> of November 2008. She has been deprived with any dealing to this property since then pursuant to the said order dated 17<sup>th</sup> of November 2008. In such circumstance, it has been claimed by the 2<sup>nd</sup> Defendant that this inordinate and inexcusable delay of the Plaintiff has caused her serious prejudiced. Indeed, she has been deprived to exercise her own rights and interest in this property since the inspection of this action in 2007, which is more than seven years. In view of these finding, it is my opinion that the 2<sup>nd</sup> Defendant has been seriously prejudiced by this inordinate and inexcusable delay of the Plaintiff to take this matter to its conclusion.
17. The findings set out above, certainly fall within the two limbs of the celebrated passage of Lord Diplock in **Birkett v James (supra)**. I am mindful of the views of Lord Woolf's

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. Having concluded my opinion that the delay of the Plaintiff to take this action to its conclusion is an intentional disobedience to the court orders and amount to an inexcusable and inordinate delay which has caused serious prejudice to the Defendants, I make following orders;

- i. This Action is hereby struck out on the grounds of an abuse of the process of court and want of prosecution pursuant to Order 25 rule 9 of the High Court Rules,
- ii. The Defendants are awarded with cost, which is to be taxed if the parties failed to reach an agreement on the cost,

Dated at **Suva** this **12<sup>th</sup>** day of **September, 2014**.



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