

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 334 of 2011

BETWEEN : **MAYA WATI** of Lot 11 Koronivia Road, Nausori, Home Maker and
PRANITA DEVI of Lot 5 Pagoda Street, Nakasi, Nausori, Home Maker as
Administrators Pendente Lite in the Estate of Salen Prakash Maharaj.

PLAINTIFFS

AND : **UMLESH CHAND** of Lot 23 Tuirara Subdivision, Driver.

1ST DEFENDANT

AND : **PERMANENT SECRETARY FOR MINISTRY OF WORKS,
TRANSPORT AND PUBLIC UTILITIES.**

2ND DEFENDANT

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

3RD DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. Singh D.** for the Plaintiff
Mr. Pratap for the 1st, 2nd & 3rd Defendants

Date of Hearing : **3rd September, 2014**

Date of Ruling : **17th October, 2014**

RULING

A. INTRODUCTION

1. This is a Summons filed by the Plaintiff seeking an order to re-instate this action which was struck out due to the noncompliance of the unless order dated 19th of November 2013.

2. The first named Plaintiff Maya Wati Prakash filed an affidavit in support of this Summons. She stated in her affidavit, that she together with the second named Plaintiff Pranita Devi, who is the daughter- in- law of her, filed this action as *administrators pendents lite* in the estate of Salen Prakash Maharaj. She further stated that this action was instituted pursuant to the order given by Hon. Master Amaratunga (as his lordship then was) in his order dated 24th of May 2011, where both Plaintiffs were appointed as *administrators pendents lite* in the estate of Salen Prakash Maharaj. In the meantime, the first named Plaintiff instituted a probate action No 3 of 2010 against the 2nd named Plaintiff seeking an order to revoke the letter of administration granted on the 2nd named Plaintiff as she is the appointed trustee in the last will of late Mr. Maharaj. Hon. Justice Balapatabedi delivered his Judgment in the action No 3 of 2010 on 11th of October 2013, whereby ordered to revoke the letter of administration granted to the 2nd named Plaintiff. However, the 2nd named Plaintiff lodged an appeal against the judgment of Justice Balapatabedi. Justice Kumar in his order dated 28th of April 2014 stayed the judgment of Justice Balapatabedi pending the determination of the application for leave to appeal out of time by the Fiji Court of Appeal.
3. Mrs. Prakash deposed that since the judgment of justice Balapatabedi is stayed pending the hearing of application for leave to appeal out of time, the learned counsel of the Plaintiff is not in a position to amend the Statement of Claim and take this action to the hearing. Wherefore, the learned counsel for the Plaintiffs is required to wait until the outcome of the application for leave to appeal out of time to determine the actual Plaintiff of this action and proceed to the hearing.
4. Upon being served with this Summons, the Defendant appeared in court and informed that they do not wish to file any affidavit in opposition, though they objected for this Summons on the ground of unnecessary delay. The Plaintiff then filed an affidavit of Mrs. Prem Lata Narayan, the solicitor of Mrs. Prakash in the civil action No 03 of 2010 in support of this Summons. Subsequently this Summons was set down for hearing on 3rd of September 2014, where the learned counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions. The learned counsel for the Defendant tendered his written submissions at the conclusion of the hearing. Having carefully

considered the affidavits and the submissions of the parties, I now proceed to pronounce my ruling as follows.

B. THE LAW

5. Justice Wickramasinghe in Smart v Qeelai (2012) FJHC 844; HBC201.2002L (30 January 2012) has discussed the applicable principles on unless orders, where his ladyship found that:

“Fundamentally, courts are required to determine cases on merit rather than dismissing them summarily on procedural grounds. However, for better case management, the courts at time are required to exercise its inherent jurisdiction and make unless orders against parties who persistently default adhering to court orders. The court therefore makes unless orders requiring the defaulting party to comply with the order by a certain date and specify the consequence of the default. Clearly, unless orders can only be made by courts in exercising its inherent jurisdictions. Further, an unless order should only be made when the court determines that the defaulting party is breaching the court order made relating to procedural compliance either intentionally or contumaciously or acting lethargically and dragging his feet- so to say, thereby causing delays in the conclusion of the case. When making unless orders, a court must act fairly and reasonably.”

6. Wickramasinghe J in Smart v Qeelai (supra) further discussed the jurisdiction of reinstatement of action when it was struck out on the ground of noncompliance of an unless order, where his ladyship held that:

“Unless orders’ that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an unless order made either by a master, a magistrate or a judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio”.

7. In this instance case, the Defendants mainly contended that the Plaintiffs has sufficient time to take steps from the date of judgment of Justice Balapatabedi, wherefore the delay is intentional.
8. However, it appears that the learned counsel was not in a position to properly serve his amended statement of claim within the time allowed by the unless order dated 19th of November 2013 due to the pending application of leave to appeal out of time. I am mindful of the fact that the delay was partly contributed by the Plaintiffs from delaying of giving proper instructions to their counsel. The learned counsel for the Plaintiffs submitted that he took this matter to the pre-trial conference stage, but in order to proceed further he needs to properly identify the proper person who is entitled to manage the estate of late Mr. Maharaj.
9. Having considered the reasons given by the Plaintiff in her affidavit, it is my opinion that the default of the Plaintiff to take necessary steps as ordered by the unless order dated 19th of November 2013 was not intentional. I accordingly make following orders that;
 - i. The writ of Summons filed on 4th of November 2011 together with the statement of claim and other relevant pleadings in this action are hereby re-instated,
 - ii. No order for cost,

Dated at **Suva** this 17th day of **October, 2014**.



A handwritten signature in blue ink, appearing to read 'R.D.R. Thushara Rajasinghe', is written over a dotted line.

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