

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 13 of 2012

BETWEEN : **NITYA DEVI** of Field 40 Lautoka, Domestic Duties.

PLAINTIFF

AND : **JAYANT JEET**, of Drasa Vitogo, Lautoka, Carrier Proprietor/Carpenter, the Executor and Trustee of the Estate of Bimal Indra Jeet aka Bimal Indra Jeet late of Drasa/Vitogo, Lautoka in the Republic of Fiji Islands, retired recorder, Deceased, Testate.

DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. R Singh.** for the Plaintiff
Mr. Vokonovonua J. for the Defendant

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

Date of Ruling : **28th November, 2014**

RULING

A. INTRODUCTION

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

2. Upon being served with this notice, the Plaintiff and the Defendant appeared in court on 14th of March 2014. Both parties were given directions to file their respective affidavits in show cause which they filed accordingly. Subsequently this notice was set down for hearing on the 3rd of July 2014, where the learned counsel for the both parties consented to conduct this hearing by way of written submissions. I accordingly directed the counsel to file their respective written submissions; however, none of them filed written submissions as directed. Wherefore; I now proceed with my ruling having only considered the respective affidavits filed by the parties.

B. BACKGROUND

3. The Plaintiff instituted this action by way of a writ of summons dated 31st of May 2012. She then filed her affidavit of service on 1st of June 2012 to confirm that the Defendant was duly served with the writ of summons. Subsequently, the Defendant filed and served his statement of defence on 18th of June 2012. On the 8th of August 2012, the Plaintiff filed and served her reply to statement of defence. Since then this action has been laying in abeyance without taking any steps to take the matter to its conclusion until the court by its own motion issued this notice to the Plaintiff and the Defendant.

Plaintiff's show cause,

4. The Plaintiff filed an affidavit in show cause, where she deposed the factual background of this dispute between the parties. While admitting that the Plaintiff has not been taking any steps to take this matter to its conclusion since the filing of the reply to the statement to the Defence, the Plaintiff alleged that the Defendant also failed to take any steps to invoke the court jurisdiction under Order 2 r 9 to strike out the claim. Having said that, the Plaintiff claimed that if this action was struck out, it would greatly prejudice the Plaintiff and her interest in the estate of her late father.

Defendant's Objections,

5. The Defendant in his affidavit in opposition deposed that he has been greatly prejudiced due to the lack of interest shown by the Plaintiff to prosecute her claim in this action. He further deposed that he has been paying all the rate and expenses for the estate of their late father and further delaying of this action, only cause him further injustice.

C. 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. It appears that pursuant to Order 25 r 9, the court is allowed to strike out an action for 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.
8. The applicable principles to 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”.


9. In view of this observation of Lord Diplock in **Birkett v James (supra)**, it appears that the judicial approach to exercise its discretionary power under order 25 r 9 has two pronged stages. The first stage is to consider whether the delay or default of the Plaintiff to take necessary steps for six months is either an intentional and contumelious default or an inordinate and inexcusable delay. The second stage is to consider whether such delay will give rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the Defendant.
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 an 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**”.*

12. I now turn to this instance case; the Plaintiff had not been taken any steps to prosecute her claim to the conclusion since the filing of the reply to the statement of defence that was on 8th of August 2012. If the Plaintiff had no other interlocutory application, she would have filed summons for directions and take the matter beyond the pleadings. She has failed to take such steps since 8th of August 2012. In her affidavit in show cause, the Plaintiff has not given any reason or excuse for not taking steps to prosecute her claim. She only tries to find refuge in the allegation that the Defendant was also failed to take any steps to either take the matter to conclusion or make an application to strike out, which I find is misconceived.
13. In the absence of any reasonable show cause from the Plaintiff for her failure to take any steps to take this action to its conclusion since 8th of August 2012, I find that the delay and the default of the Plaintiff amount to an intentional and contumelious default, and an inordinate and inexcusable delay. I accordingly make following orders that:
- i. The writ of summons and the Statement of claim filed by the Plaintiff in this action is hereby struck out on the grounds of want of prosecution and the abuse of the process of court pursuant to Order 25 rule 9 of the High Court
 - ii. The Defendant is awarded sum of \$1,000 for cost assessed summarily.

Dated at Suva this 28th day of November, 2014.




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