IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 161 OF 2012

BETWEEN : **SEVA VARANI** of the MATAQALI NAMATUA of Yanuya Village, Yanuya Island in the province of Nadroga suing in his personal capacity as a member of the Mataqali Yanuya and in a representative capacity for and on behalf of the members of the Mataqali Yanuya of Yanuya Village. Yanuya Island of the province of Nadroga.

PLAINTIFF

AND : **AANUKA ISLAND RESORT LIMITED** trading as AMANUCA RESORT of Colonial National Bank, Level 3, Dominion House Building, Scott Street, Suva.

1ST DEFENDANT

AND : **iTAUKEI LAND TRUST BOARD** a body corporate of Victoria Parade, Suva

2ND DEFENDANT

Counsel:

Mr N Nand for plaintiff

Mr R Singh for 1st defendant

Mr P Nayare for 2nd defendant

Date of Hearing : 21 November 2014

Date of Ruling : 06 February 2015

RULING

Introduction

1. The High Court Registry at Lautoka issued notice dated 17 June 2014 pursuant to O. 25, r.9 of the High Court Rules 1988, as amended ('HCR') to have the cause struck out for want of prosecution or as an abuse of the process of the court.

2. Following the notice, the plaintiff filed an affidavit through Jitoko Vunibola, a Litigation Clerk in Fa & Company (plaintiff's solicitors) to show cause why the action should not be struck out for want of prosecution.

3. The defendants did not file any affidavit in response to the plaintiff's affidavit.

4. At hearing, the matter was orally argued, and only the plaintiff and the second defendant tendered their respective written submissions.

Background

5. (i) On 26 July 2012, the Plaintiff filed a Writ of Summons together with Ex Parte Notice of Motion for injunction seeking damages against Aanuka Island Resort Limited (in receivership), the first defendant ('AIRL') and an injunction against AIRL restraining it from trespassing on to its native land and an injunction against AIRL and iTauke Land Trust Board, the second defendant ('TLTB') from alienating or dealing with Native Lease No. 27684 over Native Land known as MATANIBETO. The court made order to hear the ex parte notice of motion as inter partes notice of motion on 31 July 2012. On that day neither party appeared. As such, the ex parte notice of

motion subsequently converted into inter partes was dismissed without costs.

(ii) Both defendants filed their respective acknowledgement of service of writ of summons. TLTB filed its statement of defence on 9 October 2012 and AIRL filed its statement of defence and counterclaim on 17 October 2012. Thereafter, the plaintiff did not take any step to progress the matter to trial. The plaintiff should have filed and served reply to statement of defence and defence to counterclaim. The matter had been dormant without any action since 17 October 2012 until the court issued notice on its own motion under O.25, r.9.

The Law

6. The court is empowered under O. 25, r.9 of HCR to strike out any matter or cause if no step has been taken for six months. O.25, r.9 provides:

> *'9.-(1) 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.***
>
> *(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.'* (Emphasis added).

7. In **Summers v Fairclough Homes Ltd** [2012] 4 All ER 317 (UKSC-5 Bench decision), **LORD CLARKE SCJ** summarized at para 35 a number of established propositions regarding striking out a claim for want of prosecution or as an abuse of the process of the court as follows:

> *"[35] The pre-CPR authorities established a number of propositions as follows.*
>
> *(i) The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the*

defendant, but also where the court was satisfied that the default was 'intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court': Birkett v James [1977] 2 All ER 801 at 805, [1978] AC 297 at 318 per Lord Diplock. In the latter case it was not necessary to show that a fair trial was not possible or that there was prejudice to the defendant. See also, for example, Arbuthnot Latham

[2012] 4 All ER 317 at 330

Bank Ltd v Trafalgar Holdings Ltd, Chishty Coveney & Co (a firm) v Raja [1998] 2 All ER 181 at 191, [1998] 1 WLR 1426 at 1436 per Lord Woolf MR (with whom Waller and Robert Walker LJJ agreed).

(ii) In a classic, much-followed, statement in Hunter v Chief Constable of West Midlands Police Lord Diplock described the court's power to deal with abuse of process thus ([1981] 3 All ER 727 at 729, [1982] AC 529 at 536):

'[T]his is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power

(iii) The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in Birkett v James that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order.

(iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2959 (Comm), [2007] 1 All ER (Comm) 975, where he summarised the position thus:

'[27] In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR 1.4, 3.3 and 3.4, as well as CPR PD 3, para 1.2, and by reason of its

inherent jurisdiction.

[28] However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR 3.4 or 24.2 and determined well in advance of the trial.'

(v) We agree with Colman J. His conclusions are consistent with Glasgow Navigation Co v Iron Ore Co [1910] AC 293, Webster v Bakewell Rural Council (No 2) (1916) 115 LT 678, Harrow London BC v Johnstone [1997] 1 All ER 929, [1997] 1 WLR 459, Bentley v Jones Harris & Co [2001] EWCA Civ 1724, [2001] All ER (D) 37 (Nov) per Latham LJ at [75] and Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550, (2001) 76 ConLR 62 per Clarke LJ at [104]–[109], especially at [107]."

Determination

8. The plaintiff was inactive after the defendants filed their statement of defence and counterclaim. AIRL filed its defence and counterclaim on 17 October 2012. The plaintiff did not take any step thereafter to progress the matter. The plaintiff failed to serve reply to defence and defence to AIRL's counterclaim. The court on its own motion, pursuant to O.25, r.9, issued notice dated 17 June 2014 for the plaintiff to show cause why the action should not be struck out for want of prosecution or as an abuse of the process of the court. The matter was dormant until the registry issued notice. The notice was served on the plaintiff's solicitor on 26 June 2014. Since iTLTB filed its statement of defence the Plaintiff has taken no action to prosecute the claim, i.e for almost 1 year and 9 months.

9. It will be noted that the plaintiff has failed to take step in the matter for more than six (6) months. In the circumstance, O.3, r.5 of HCR applies. That rule provides:

*'5. **Where six months or more has elapsed since the last proceeding in a cause** or matter, **the party who desires to proceed must give** to every other party not less than **one month's notice of his intention to proceed** A summons on which no order was made is not a proceeding for the purpose of this rule' (Emphasis provided).*

10. The plaintiff did not give to the defendants one month's notice of his intention to proceed either. He should have given such a notice since the delay is over 6 months. The word 'must' used in rule 5 suggests mandatory compliance. The plaintiff was not even mindful to give the mandatory notice of intention to proceed required by HCR. This attitude clearly shows that the plaintiff has no interest in prosecuting his claim.

11. I would now turn to the plaintiff's affidavit filed to show cause. When a notice is served on the plaintiff under O.25, r.9 to strike out the claim for want of prosecution, he will be bound to show cause why his claim should be struck out on that ground. The plaintiff did not swear the affidavit by himself. The affidavit filed on behalf of the plaintiff has been sworn by a law clerk of the Law Firm of Fa & Co, plaintiff's solicitors.

12. The general rule and practice of the Court is not to allow an affidavit deposed by a lawyer's clerk dealing with substantive issues pertaining to the relevant litigation. I have been referred to the case of ***Repeni Sulimuana Momoivalu*–v- Telecom (2006) (Unrep) Suva High Court Civil Action No: 527/1997s** where His Lordship, Mr Justice Winter, in respect of affidavits deposed by the lawyers clerks had this to say at pages 3 & 4 of the judgement:-

"The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

"It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents

were not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr Joji Boseiwaqa who appeared on instruction from the Plaintiff as the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1977 about the propriety of law clerks deposing affidavits".

The affidavit barely engages the applicant Defendant in many meaningful ways is in any event quite illegitimate. Although the Defendant has in part responded to this document by the law clerk I intend to give it absolutely no weight whatsoever."

13. In this matter, in my opinion, the plaintiff ought to have filed an affidavit showing cause for not striking out the claim for want of prosecution. The plaintiff had opted to file the required affidavit through his solicitor's law clerk which is improper. It is doubtful whether the law clerk that sworn the affidavit on behalf of the plaintiff had ostensible authority to do so. The plaintiff was under obligation to satisfy the court the default was not intentional and not contumelious. There is no valid affidavit sworn by the plaintiff himself here for me to consider. In the end, I am satisfied that the plaintiff has failed to show cause why the claim should not be struck out for want of prosecution or as an abuse of the process of the court.

14. The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was 'intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court: **Birkett v James** [1977] 2 All ER 801 at 805, [1978] AC 297 at 318 per Lord Diplock (Also quoted in Summer's case (supra)).

Conclusion

15. I am of the view that the plaintiff failed to show cause why the action should not be struck out for want of prosecution or as an abuse of process of court. Initially, the plaintiff filed ex parte notice of motion seeking an interim injunction order against the defendants. He defaulted in appearance on the hearing day. As such the motion was dismissed. The matter was dormant for over one year and nine months. He did not even give to the defendants the month's notice required under O.3, r.5. He also failed to show cause on affidavit. The delay and default remain unexplained. In the circumstances, I am satisfied that the default was intentional. I would therefore strike out the action for want of prosecution.

Costs

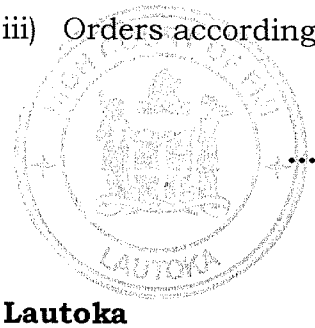
[16] The matter has been moved by the court on its own motion and volition and not by application of the defendant. iTLTB did not push the issue of cost. However, the first defendant pressed and asked for cost in the sum of $10,500.00 for the reasons of the plaintiff's conduct in these proceedings. The first defendant filed its defence and counterclaim. But they also did not take any step on their counterclaim. After the prescribed period allowed under HCR for service of reply to defence and defence to counterclaim, the first defendant should have proceeded with their counterclaim by moving the court for default judgment on the counterclaim which they have failed. The first defendant also is responsible for delay in the progress of the matter. At least, they should have filed the strike out application. They had waited until the court issued notice to strike out the claim. It is true they participated in these proceedings and filed written submissions. For that they seek costs on higher scale. I would decline to award costs to the first defendant, for they are also to be blamed for the delay.

Final Order

i) Plaintiff's statement of claim filed on 26 July 2012 is struck out for want of prosecution.

ii) Each party will bear its own costs.

iii) Orders accordingly.



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M H Mohamed Ajmeer
PUISNE JUDGE

At Lautoka

06 February 2015