IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 165 of 2011

BETWEEN : ARUN PRASAD SHARMA of Lot 3, Sukhi Feeder Road, Vuci South Road, Nausori.

PLAINTIFF

AND : THE ESTATE OF JASODA DEVI SHARMA aka JASODA (f/n Ram Shankar Maharaj).

1ST DEFENDANT

AND : FIJI PUBLIC TRUSTEE COOPERATION LIMITED having its registered office at Suva.

NOMINAL DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Plaintiff in Person.
Mr. O. Driscoll for the First Defendants
No appearance for the Second Defendant.

Date of Hearing: 06th August, 2015
Date of Ruling : 16th November, 2015

RULING

(A) INTRODUCTION

1. This court issued a Notice of its own motion pursuant to *Order 25, r 9 of the High Court Rules 1988.*

2. The Notice required the Plaintiff to show cause as to why the within action ought not to be struck out for want of prosecution or an abuse of process of this court since no steps have been taken by the Plaintiff in this cause for more than six (6) months.

3. The Plaintiff filed an affidavit in response to the Order 25. Rule 9 application on 27th July, 2015.

4. The matter was heard by this court on 06th August, 2015.

(B) BACKGROUND

5. The Plaintiff acting in Person, instituted this proceedings against the following two Defendants:

   (a) 1st Defendant, which is a Deceased Estate;

   (b) 2nd Defendant, Fiji Public Trustee Cooperation Limited being a nominal defendant in this case.

6. The Plaintiff's claim is for transfer of shares, payment of various amounts of money received from the sale of properties and an order for transfer of property with other relief as enumerated at paragraphs (i)- (xiv) of his amended statement of claim filed on 07th August, 2013.

7. The Defendants did not file any Statement of Defence to the Plaintiff's Amended Statement of Claim.

8. Henceforth, no action was taken by the Plaintiff regarding his Amended Statement of Claim and the High Court Civil Registry issued and served the Order 25 Rule 9 Notice.

(C) THE LAW

9. This application is made pursuant to *Order 25 Rule 9 of the High Court Rules 1988*, which *inter-alia* states as follows:

> *"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.'*

10. Abovementioned rule was introduced on 13th September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.

11. Prior to the introduction of Rule 9, the Court of Appeal in **Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s** (30th May 2003) in readopting the principles expounded in *Birkett v. James [1978] AC 297;* [1977] *2 All ER 801* and explained that:

> *"The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the curt; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such 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 either as between themselves and the Plaintiff or between each other or between them and a third party."*
>
> (Emphasis added)

12. Basically the Court of Appeal affirmed the principle enunciated in *Brikett v. James (1978) AC 297 (1977) 2 ALL ER* where the House of Lords held as follows:-

> *"The power should be exercised only where the court is satisfied either:-*
>
> *(i) That the default has been intentional and contumelious e.g. disobedience to pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or*
>
> *(ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it 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 then and a third party."*

13. After the introduction of Order 25 rule 9, ***Birkett v. James*** was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.

14. The first case which went on appeal and decided by the Court was ***Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005*** (14 July 2006). His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in ***Brikett v. James.*** At para. 23 of judgment the Court unreservedly stated:-

> *"[23] – The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Line Civil Appeal No. ABU*

0024 of 2000 - FCA B/V 03/382 the court, in readopting the principles expounded in *Birkett v. James [1978] AC 297;* [1977] *2 All ER 801"*

(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)

15. Again the Court of Appeal was invited to consider the position of Order 25 rule 9 in the *Trade Air Engineering (West) Ltd v. Taga Civil Appeal No. ABU 0062 of 2006 (9 March 2007) (per Gordon P, Barker and Scott JJA.* In considering the appeal the Court categorically formulated the following question:-

"[4] - The central question raised by this appeal is whether the Court's powers under O 25 r 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court."

(Emphasis added)

16. In Observing the new feature of Order 25 rule 9 their Lordships stated:-

"[15] - A notable feature of the new Order 25 rule 9 is that it confers on the court the power to act on its on motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2 (6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."

(Emphasis added)

17. Their Lordships then conclusively and unanimously held that:-

"[16] - In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out

> **on grounds which differ from those already established by past authority."**
>
> (Emphasis added)

18. The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in *New India Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996* emphasized that while inordinate and inexcusable delay might be established, these factors were not, ***on their own, sufficient to warrant the striking out of the action.***

19. The Court of Appeal in ***Bhawis Pratap v Christian Mission Fellowship (supra)*** discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

> *"[28] - Securum Finance Limited v. Ashton (supra is especially instructive since it explains why, following the introduction of the new Rules, the* **courts in England and Wales have been more ready to strike out actions on the ground of delay alone.** *At paragraphs 30 and 31 Chadwick L.J wrote that:*
>
> *"30 the power to strike out a statement of claim is contained in CPR r3.4. On particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process. ...In exercising that power the curt must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while talking into accounts the need to allot resources to other cases".*
>
> *"31. In the Arbuthnot Latham case this court pointed out in a passage which I have already set out that:-*
>
> *"In Birkett v. James the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration which was in issue. From now on it is going to be a consideration of increasing significance."*

> *[29] In* **Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in Securum has not yet become part of our civil procedure.**

20. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in ***Birkett v James*** applies on all fours. This was also confirmed by the Court of Appeal again in 2008; *Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar Civil Appeal No: ABU 44/06 (8 July 2008).*

(D) ANALYSIS and DETERMINATION

21. I have perused the court file in terms of the documents filed as required by the set down procedures and the High Court Rules 1988 accordingly.

22. This case was commenced on 03rd June, 2011. The final steps taken by the Plaintiff was the service of the Amended Statement of Claim on the Defendants and subsequent filing of the affidavit of service on 02nd December, 2013. It is noted that the Affidavit of Service is deposed by the Plaintiff which is improper and unacceptable in law since he is a party to the within proceedings. Further, the affidavit of service is not a cause of action anyway.

23. After the service of the Amended Statement of Claim on the Defendants, the Plaintiff did not take any further steps to pursue with the prosecution of his case. No action was taken by the Plaintiff nor any of the Defendants in order to pursue this case any further until this court on 21st April, 2015 issued the notice in terms of the Order 25 Rule 9 application asking the Plaintiff to show cause why this matter should not be struck out. This meant that since the last application was filed on 07th August, 2013, until this court issued the Order 25 Rule 9 Notice that some One year and eight months had lapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly. **It is also noted that after the Plaintiff was served with the Order 25 Rule 9 Notice, somehow or the other he succeeded in filing a Summons on**

18th June, 2015 seeking leave to lodge caveats and an order again to amend his Writ of Summons and the Statement of Claim. It seems that the Registry inadvertently accepted and issued his Summons dated 18th June, 2015. This court has taken note of this and is of the view that a determination ought to be made on the pending Order 25 Rule 9 application.

24. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the 07th August, 2013.

25. This court is therefore required to deliberate on the following issues in terms of the impending Order 25 Rule 9 application to arrive at a determination whether to dismiss the cause or deal with the application as if it were a summons for directions accordingly:

(i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*

(ii) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers,(* In this case the Plaintiff personally, since he conducted his own case*); and*

(iii) *that such 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 either as between themselves and the Plaintiff or between each other or between them and a third party."*

Default is Contumelious

26. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

In this case, this court on 05th February, 2013 acceded to the Application by the Plaintiff and granted an order allowing the Plaintiff to amend his Writ and the Statement of Claim.

For the above rational, the first arm of the test does not apply herein.

Delay

27. The test for delay is both *'intentional'* and *'inordinate'*.

Intentional

For these two elements to be satisfied, the Defendants must establish that the delay was intentional on the part of the Plaintiff. In other words the Plaintiff has filed an action with having no intention to proceed with the same.

The Plaintiff through his written submissions and the Affidavit in Response to the Order 25 Rule 9 Notice reiterates that he has been waiting for a grant to be issued in the Deceased Estate of Jasoda Devi Sharma in order to enable him then to serve the documents on the administrator and proceed with his case. He said he cannot proceed because of the non issuance of a grant. He relies on his Statement of claim filed and asked court to allow him sometime so that justice to be done in this case. The Plaintiff also puts blame on the Registry staff for misleading him. He also stated to court that there was an impending Judgment to be delivered on notice in a related Probate Case No. 29 of 2011. I have cited the pending judgment court file sometime back and note that a Judgment is still pending to be delivered. For these reasons ,I find that the delay was not intentional on the part of the Plaintiff as he is still awaiting a grant to be issued in the pending Probate application No. 49781 and pending Judgment in a related Probate Action HPP 29 of 2011 before the Honourable Judge of the High Court.

28. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the length of delay.

The explanation given by the Plaintiff for delay being that he has been awaiting the outcome of the pending Judgment in HPP 29 of 2011 and issuance of a Grant in Estate application No. 49781.

In the above circumstances I am of the finding that the Plaintiff has not intentionally contributed to the delay in prosecuting his case any further, until an administrator is appointed in the Estate of Jasoda Devi Sharma reference No. 49781, which will enable the Plaintiff serve his respective documents and application on the Administrator accordingly. So far he only succeeded in serving the second Defendant, Public Trustee Cooperation Limited.

Even if the Defendants in particular the second Defendant at this stage of the proceedings, succeeded in establishing inordinate and inexcusable delay, these factors would not, on their own, be sufficient to warrant the striking out of this action.

Prejudice

29. It is trite law that the Defendant(s) must establish that is prejudiced by the delay.

30. The Plaintiff submitted that no party in this matter will be prejudiced if this matter is allowed to proceed further and await issuance of a grant in the Deceased Estate and pronouncement of Judgment accordingly.

31. I find, there is no prejudice to any party in this proceeding bearing in mind the status quo of the matter before me.

Interest of Justice

32. Even if the Defendant(s) satisfies the requirements in ***Birkett v James,*** (as hereinabove at paragraph 12), the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in

Chandar Deo v Ramendra Sharma and anor: Civil Appeal No. ABU 0041 of (23 March 2007) (Unrep) stated as follows:-

> *[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.*

33. In ***Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248.*** Eichelbaum CJ reviewed the authorities and concluded:

> 'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and ***at the end one must always stand back and have regard to the interests of justice,*** *in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

34. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In Dey v. Victorian Railway Commissioners (1949) 78 CLR 62, at 91 Dixon J said:-

> '26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship [2006] FJCA 41*. Also refer to; *New India Assurance Co Ltd v Singh [1999] FJCA 69.*
>
> *The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway*

Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

35. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-

(i) *The delay is neither inordinate nor intentional;*
(ii) *Explanation has been provided by the Plaintiff for the delay as such the Plaintiff has overcome the factor of not inexcusable;*
(iii) *The default is not contumelious and the Plaintiff has not disobeyed any orders of this court;*
(iv) *The Defendant(s) has not suffered any real prejudice; and*
(v) *In the interest of justice, a fair hearing is still possible.*

36. *Further, the ruling in the pending case file HPP 29 of 2011 may allow the Plaintiff in this action to reconsider his present position in terms of the cause of action that he may decide to take henceforth.*

37. For the aforesaid rational, I make the following orders:-

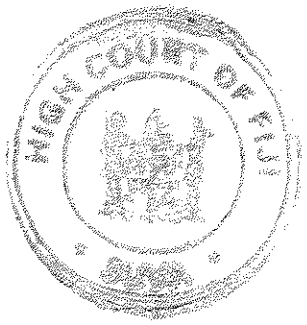
(a) **Application in terms of Order 25 Rule 9, seeking dismissal of the substantive action for want of prosecution is hereby dismissed;**

(b) This case to take its normal cause;

(c) Further directions in terms of the compliance of consequent pleadings to be made accordingly on 10th December, 2015 at 9.00 am.

(d) Each party to bear their own costs.

Dated at Suva this 16th Day of November, 2015



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VISHWA DATT SHARMA
Acting Master of High Court, Suva

cc: *Mr. Arun Prasad Sharma, Suva.*
Mr. O'Driscoll, Driscoll Lawyers, Suva.
The Public Trustee Cooperation Limited, Suva.