

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 62 of 2014

IN THE ESTATE OF JAGMOHAN JIWAN
NARSEY aka JAGMOHANLAL NARSEY aka
JAGMOHANLAL NARSEY late of 42 Knolly Street in
the Republic of Fiji, Retired, Company Director, Deceased,
Testate.

BETWEEN : DR MAHENDRA KUMAR MOTIRAM of 236 Princess Road, Tamavua, Suva, Medical
Practitioner.

PLAINTIFF

AND : RAJENDRA JAGMOHAN NARSEY of Investigator Drive, Woodcroft S.A. 5162,
Australia, Business Manager and HEMANT JAGMOHAN NARSEY of 17 Kansa Place,
Toongabbie, NSW 2146, Australia, Computer Programmer as Executor and Trustees of the Estate
of Jagmohan Lal Jiwan.

1ST DEFENDANT

AND : REGISTRAR OF TITLES of Suvavou House, Suva.

2ND DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Mr. Nand - for the Plaintiff
Mr. Ritesh Singh - for the 1st Defendant
Ms. Bali - for the 2nd Defendant

Date of Hearing: 23rd March, 2016

Date of Ruling: 12th July, 2016

RULING

(Application for striking out of Plaintiffs Originating Summons & Affidavit in Support pursuant to Order 18 Rule 18(1) (b) (c) & (d) and Order 5 Rule 2 (c) of the High Court Rules, 1988 and the Inherent Jurisdiction of the Honourable Court.)

INTRODUCTION

1. This is a Summons filed by the 1st Defendant seeking the following orders-
 - (i) That the Plaintiff's action be struck out against the Defendants on the following grounds-
 - (a) *That the Plaintiff's action is improper in procedure and has been wrongly filed;*
 - (b) *It is scandalous, frivolous /or vexatious and is otherwise an abuse of the process of the Court;*
 - (c) *It is statute barred and the Plaintiff is guilty of laches; and*
 - (d) *That it is prejudicial to the 1st Defendant.*
 - (ii) *That the Plaintiff pay costs on a full Solicitor/Client indemnity basis.*
2. The application is made in support of an Affidavit deposed by Rajendra Jagmohan Narsey and is pursuant to *Order 18 Rule 18(1) (b) (c) & (d) and Order 5 Rule 2 (c) of the High Court Rules, 1988 and the Inherent Jurisdiction of the Honourable Court.*
3. The Plaintiff opposed the 1st Defendant's application and filed his affidavit in Response.

LAWS

Principles relating to striking out application

4. The Application to strike out the Plaintiff's action is made pursuant to *Order 18 Rule 18 (1) (b) (c) & (d) AND Order 5 Rule 2 (c) of the High Court Rules, 1988* provides as follows:
 - 18 (1) the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:*
 - (a) *It.....; or*
 - (b) *It is scandalous, frivolous or vexatious; or*
 - (c) *it may prejudice, embarrass or delay the fair trial of the action; or*
 - (d) *It is otherwise an abuse of the process of the court;*

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph 1(a).

Principles relating to Mode of beginning civil proceedings

5. *Order 5 Rule 2 (c)* of the High Court Rules, 1988 states as follows-

(c) in which a claim is made by the plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision), where the damages claimed consist of or include damages in respect of the death of any person or in respect of personal injuries to any person or in respect of damage to any property;

Principles relating to the Limitation Act

6. *Section 15 of the Limitation Act Cap 35* deals with the limitations period in terms of mistake discovered provides as follows-

15. Where, in the case of any action for which a period of limitation is prescribed by this Act, either-

(a)

(b).....

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

ANALYSIS and DETERMINATION

7. In essence the issue this court needs to determine is "whether the Plaintiff's Claim should be Struck Out on the following Grounds-

- (i) *That the Plaintiff's action is improper and has been wrongly filed; and*
- (ii) *Whether the Plaintiff's claim is scandalous, frivolous or vexatious; or*
- (iii) *Whether it may prejudice, embarrass or delay the fair trial of the action; or*
- (iv) *Whether the claim is otherwise an abuse of the process of the court; and*
- (v) *Whether the Plaintiff's claim is statute barred in law and guilty of laches.*

8. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: *Timber Resource Management Limited v. Minister for Information and Others* [2001] FJHC 219; HBC 212/2000 (25 July 2001).

9. In dealing with the issue of striking out of application, I bear in mind the following passage from Halsbury's 4th Ed. Vol. 3 at para 435:

"The power to strike out, stay or dismiss under the inherent jurisdiction is discretionary. It is a jurisdiction, which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed, it ought to be exercised sparingly and only in exceptional cases. However, for this purpose the court is entitled to inquire into all the circumstances of the case, and to this end affidavit evidence is admissible."

10. In the case of *Khan v Begum* (2004) FJHC 430; HBC0153.2003L (30 June 2004) Justice Connors discussed 18 (1) (a) and (d) where he held that;

"It is said that the fact the court has this inherent jurisdiction is one of the characteristic which distinguishes the court from other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the rules. It is not in issue that if a party relies solely upon Order 18 rule 18 there no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court."

11. In *National MBF Finance (Fiji) Ltd v. Buli* Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded

then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

Ground (i) - Plaintiff's action is improper and has been wrongly filed?

12. The 1st Defendant submitted that the Plaintiff commenced this proceedings by way of an Originating Summons and filed within the Probate Jurisdiction and therefore has opted a wrong procedure which is an abuse of Court's process.
13. Further, the Plaintiff has based his claim in terms of *Section 168 of the Land Transfer Act Cap 131* which doesn't gives the Plaintiff a cause of action but provides powers to Court in any proceedings to grant at its discretion such relief as stated in this very section. Further, the Court has the discretion under section 168 to regularize defects but has to be exercised properly and correctly. This section doesn't provide that proceedings need to be brought or filed by way of an Originating Summons or in the Probate Jurisdiction, which the Plaintiff has done in this case.
14. On the other hand, the Plaintiff submitted that the *Land Transfer Act, Cap 131* allows for the applications to be made to the Court and therefore the procedure adopted is correct and in compliance with the relevant law. He added, that *Order 5 Rule 3 of the High Court Rules* provides for proceedings which must be begun by Originating Summons.
15. The claim prima facie cannot be judged summarily to be either improper or wrongly issued. It is too early in the stages of the summary proceedings and the Court would need to hear the case in its entirety to determine this issue accordingly.

Ground (ii) - Whether the Plaintiff's claim is scandalous, frivolous or vexatious-

Scandalous

16. Whether the claim is Scandalous?

Reference is made to the *Supreme Court Practice 1993 (White Book) Vol. 1* at paragraph 18/19/14 states as follows-

"The Court has a general jurisdiction to expunge scandalous matter in any record or proceedings (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6."

Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).

"The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663)."

17. Whether the nature of the Plaintiff's Claim in terms of the Originating Summons filed herein seeking an order 'that the 1st Defendant execute a Deed or any other documents to be approved by the 2nd Defendant to regularise the error on the Transfer Dealing No. 3465912 to reflect the true and correct undivided share held by each proprietors of Certificate of Title No. 5890.'

This court is far from hearing the evidence and cite documents that initially gave legal basis to the transfer dealings No. 3465912. Again, this cannot be summarily determined but on a full hearing.

Therefore, the Defendants cannot submit that the Plaintiff's Summons and the Statement of Claim is scandalous in nature.

Frivolous or Vexatious

18. The issue of whether a claim is frivolous or vexatious? Reference is made to paragraph 18/19/15 of the Supreme Court Practice 1993, Vol. 1 (White Book) which reads as follows:-

"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274, 277;.... The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1895] P 87, p.90;"

19. *In Devi v. Lal [2014] FJHC 75; HBC 120.2008 (7th February, 2014)- It was held as follows-*

"The Oxford Advanced Learners Dictionary of Current English 7th Edition defines the words "frivolous" and "vexatious" as:-

frivolous: "having no useful or serious purpose"

vexatious: "upsetting" or "annoying"

Therefore, for a claim to be frivolous or vexatious, the Appellants must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Applicants.

20. The Plaintiff is seeking an error on the Title to be corrected and hence has brought this application to court by way of an Originating Summons in terms of section 168 of the Land Transfer Act, Cap131 and filed within the Probate Jurisdiction.
Bearing in mind the nature of the Plaintiff's substantive claim or application, the claim or the application rather needs to be heard and determined by the Court in terms of the law and the evidence that the Parties to the proceedings may produce at the hearing proper.
21. The claim prima facie cannot be judged summarily to be frivolous or vexatious; it needs to be appropriately examined by a court of law accordingly.
22. Therefore, in the given circumstances, the Plaintiff's claim cannot be said to be frivolous or vexatious.

Ground (iii) - Whether it may prejudice, embarrass or delay the fair trial of the action

23. The substantive case was commenced by the Plaintiff on 26th November, 2014. This matter has been in the system for some 20 months now for the reasons best known to the Counsels.
24. Whenever any case is commenced in a Court of Law, obviously Courts will determine the matter and the impending issue in a just and fair manner.
25. Considering the nature of the application herein, a fair trial of the impending issue is rather important to be determined by this court for once and all in the best interest of all the interested parties.
26. Therefore, this ground of the 1st Defendant doesn't succeed.

Ground (iv) - Whether the claim is otherwise an abuse of the process of the court

27. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process and reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.-
At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18)

28. In Halsbury's Laws of England Vol 37 page 322 the phrase "abuse of process" is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was

originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

29. The phrase "abuse of process" is summarized in Walton v Gardiner (1993) 177 CLR 378 as follows:
- "Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"*
30. Again, the summary procedure should not be used to determine the "abuse of process of the court", rather the substantive matter should be heard to determine the impending issues. The parties to the proceedings should come with clean hands to court to iron out the impending issues whether an order by the Court should be granted to regularise the error on the transfer Dealing No. 3465912 to reflect the true and correct undivided share held by each proprietors of the Certificate of Title No. 5890.
- Ground (v) - Whether the Plaintiff's claim is statute barred in law and guilty of laches.*
31. 1st Defendant's contention is that the Plaintiff submitted that there was a mistake and thus rely on section 15 of the Limitation Act. Further he states that no evidence has been shown to this effect; the transferors have not given any affidavit to indicate they have not transferred their share to Jagmohan Narsey; never challenged the transfer; therefore the 1st Defendant submits that the registration of the transfer with the second Defendant is a conclusive evidence of the ownership on the said Title.
32. I have given a careful consideration of the application, opposition and both submissions before me. It has become obvious that there are issues and disputes that need to be heard and determined on a full hearing rather than by a summary procedure.
33. The Plaintiff will not be entitled to Costs of this application bearing in mind the nature of the application made to Court seeking orders in terms of the mistake realised at this stage. Further, Counsels representing parties to proceedings should always take caution to avoid any mistakes if there exists any.
34. Therefore, I proceed to make the following orders-

ORDERS

- (i) 1st Defendants Summons seeking to strike out the Plaintiff's action is hereby Dismissed accordingly.
- (ii) Each party to bear their own costs at the discretion of this Court.
- (iii) Substantive matter to take its normal cause.
- (iv) Adjourned to Tuesday, 19th July, 2016 for further directions to be made.

Dated at Suva this 12TH Day of JULY, 2016



.....
MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Nands Law, Suva
Sherani Solicitors, Suva