THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 141 of 2014

BETWEEN : MEREONI MATAVOU

PLAINTIFF

AND : EMOSI TALOGA

FIRST DEFENDANT

AND : COLONIAL WAR MEMORIAL HOSPITAL

SECOND DEFENDANT

AND : SUVA PRIVATE HOSPITAL

THIRD DEFENDANT

AND : ATTORNEY GENERAL OF FIJI

FOURTH DEFENDANT

BEFORE:	Master Vishwa Datt Sharma
COUNSELS:	Mr. Rayawa for the Plaintiff
	Mr. Ronal Singh for the 1st Defendant
	Ms. Faktaufon for the 2nd & 4th Defendant
	Mr. Filipe for the 3rd Defendant
Date of Hearing:	07th June, 2016
Date of Ruling:	08th September, 2016

RULING

[Application to strike out the Plaintiff's substantive Writ of Summons and Amended Statement of Claim pursuant to Order 25 Rule 9 of the High Court Rules, 1988]

INTRODUCTION

1. The Court on its own **Motion issued a Notice** to the parties on 15th April, 2015, listing the matter for the parties to show cause why the case should not be **struck out for want of prosecution** or as an **abuse of the process of the Court** since no action was taken for a period of more than **six (6) months.**

2. This Notice was issued pursuant to ***Order 25 Rule 9 of the High Court Rules, 1988.***

3. The Plaintiff and the 3rd Defendant filed their Affidavits on 30th September and 16th July, 2015 respectively. No affidavits were filed by the 1st, 2nd and 4th Defendants. Written submissions were filed by the Plaintiff, 2nd, 3rd, and 4th Defendants.

4. The application was heard on Written and Oral Submissions on 07th June, 2016.

(A) BACKGROUND

5. In summary, the Plaintiff filed a **Writ of Summons** and the **Statement of Claim** on 22nd May 2014 on 'Tort of Negligence.'

6. The Plaintiff was involved in a motor vehicle accident on 22nd May, 2011, while travelling from Nadi to Suva with her family. She was admitted at the 2nd Defendant's Hospital from 22nd May, 2011 to 25th May, 2011.

7. The 1st Defendant advised the Plaintiff and her husband that the medical treatment was not available at the 2nd Defendant's Hospital but at 3rd Defendant's Hospital and the Plaintiff and the Husband agreed to undertake the specialist treatment at the 3rd Defendant's hospital.

8. In essence his claim is for medical negligence, Special, General, Specific and Punitive Damages.

(B) THE LAW

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

> *"(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. The basic law on ***Order 25 Rule 9*** has been crystallized in the leading authority of **Birkett vs James (1978 AC 297 (1977) 2 ALL ER** whereby the House of Lords held"

> *"The power should be exercised only where the court is satisfied wither (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; (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 it is likely to cause or to have caused serious prejudice to the defendants wither as between themselves and the plaintiff or between each other or between and a third party."*

11. In the Case of **Abdul Kaddus Hussein vs Pacific Forum Line Civil Appeal No. ABU 0024 of 2000s (30th May 2003)**, the Court of Appeal readopted the principles expounded in Birkett vs James (supra).

12. The test in **"Birkett vs James" (supra)** has two limbs. The first limb is "intentional and contumelious **default"**. The second limb is **"inexcusable or inordinate delay and prejudice."**

13. In **Pratap v Christian Mission Fellowship, (2006) FJCA 41**, The Court of Appeal discussed the principles expounded in **Brikett v James Fellowship"** – (supra) held "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.

14. While citing **Abdul Kadeer Kuddus Hussein v Pacific Forum (supra)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 297; [1977] 2 All ER 801.**

> *"(7) The question that arises for consideration is what constitutes" **intentional and contumelious default"** (First Limb). The term "**Contumely**" is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor, Civil Appeal No, ABU 0041/2006,***
>
> 1. *Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as dishonor or humiliate.*
> 2. *Disgrace; reproach."*

15. While the "**Summons**" may not seek for strike out on the **abuse of process**, the court can on its own inherent jurisdiction strike the matter out for abuse of process.

Lord "Woolf" in "**Grovit and Others v Doctor and Others**" **(1997) 01 WLR 640, 1997 (2) ALL ER, 417**, has discussed the **principles for striking out** for "**Abuse of process**" (The second ground in Order 25 Rule 9 (1)) as follows:

> *"The Court had power under its inherent jurisdiction to strike out or say actions on the grounds of abuse of process irrespective of whether the test for dismissal for **want of prosecution** was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to established **want of prosecution** by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."*

16. The Court of Appeal in **Thomas (Fiji) Ltd v Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit v Doctor** as ground for striking out a claim, in addition to , and independent of principle set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:

> *"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v Doctor [1997] 2 ALL ER 417. That was an important decision and the judgment was*

perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v James [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court."

11. It seems that under **"Grovit and Others v Doctor and Others"** (supra) there is no need to **show prejudice** any more for it says that maintaining proceedings without a serious intention to progress then may amount to "abuse of process" which justifies for **want of prosecution** without having to show prejudice.

(C) **ANALYSIS and DETERMINATION**

17. 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.

18. This case was commenced by a Writ of Summons and a Statement of Claim on 22nd May, 2015.

19. All the Defendants were served and accordingly filed their **Acknowledgement of Service** together with the **Statement of Defence**. The 4th Defendant filed its Statement of Defence on **07th July, 2014** and this was the **final activity** in terms of the pleadings filed in this proceedings.

20. The Court records reveal that no **Reply to Defences** were filed by the Plaintiff which prompted the Court to issue and serve the '**Order 25 Rule 9 Notice**'.

21. On **15th April, 2015**, this Court on its own **Motion** issued a '**Notice**' to the parties to the proceedings to **show cause why the case should not be struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than **six (6) months**.

33. This Court notes from the Court record that after **07th July, 2014**, no action was taken by the Plaintiff nor any of the Defendants in order to pursue this case any further until **15th April, 2015**, when the Court Registry issued a **Notice** for **the Plaintiff to show cause as to why the within action should not to be struck out for want of**

prosecution or as an abuse of the process of the court pursuant to pursuant to ***Order 25, r 9 of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable court.***

34. This meant that since the last pleading was filed on **07th July, 2014**, and until the ***Order 25 Rule 9*** application was filed, a period of **nine (09) months had lapsed.**

35. 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. The Plaintiff in this case commenced the proceedings and he should have made sure to bring this action to a conclusion without any delay bearing in mind the nature of the substantive claim impending Court's determination.

36. The **onus is now 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 July, 2014. If the Plaintiff was not pursuing his case any further, then the Defendants need not wait rather should have proceeded with alternative applications to ensure that this matter is brought to a conclusion.**

37. 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; 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

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

39. **The final** pleadings filed in this proceedings was the 4th Defendant **Statement of Defence filed** on **07th July, 2014**. The **Plaintiff** did not file any Reply to any of the **Defences filed by the Defendants** as required in terms of the Law. The case was commenced by a Writ of Summons where there is no requirement under the ***High Court Rules, 1988*** for the High Court Registry to assign a returnable date. The Defendants upon being served with the Writ is required thereafter under the law to file and serve their Defences on the Plaintiff. Still no returnable date would be assigned since there is no requirement under the law as such, but certain time period is allocated as a requirement for the **Plaintiff** to file **Replies to the Defences,** and hereafter, the parties are required to pursue the claim and act in compliance with the set down procedures and the ***High Court Rules, 1988*** respectively until a time comes when the parties have fully complied with the pleadings and the case is ready for hearing either before a Master or a Judge of the High Court.

In fact, no action was taken by the **Plaintiff** after the **Defendants** filed their **Defences.**

For the above rational, the **first arm of the test** does not apply herein since this court at this stage of the proceedings did not make any directions, rather the set down procedure in law should have been adhered to or exercises in the circumstances.

Delay

40. 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** in her Affidavit filed on 25th June and 30th September, 2015 respectively states at paragraphs 4-8 as follows-*
>
> *4. 'That the main reason why I have not been able to file my summons for directions is due to the fact that a crucial document in the form of a written medical report has not been prepared by my physician despite the fact that I have made several requests for it'.*
>
> *5. 'That the **summons for directions** will require me to file a list of documents and to swear an affidavit verifying my list of documents that forms the evidential basis of my claim against the Defendants.'*

6." That the 1st Defendant is one of the only two specialized Orthopedic Surgeons in the whole of Fiji whose medical opinion can only be rebutted by my Doctor who is the second out of the only two specialized Orthopedic Surgeons in Fiji of the same medical ranking.'

7. 'That despite several requests, I have not been able to get a written report from my Doctor.'

8.' That those medical practitioners have also examined me and had prepared written reports but they do not have the same level of expertise as the 1st Defendant.'

The Plaintiff submitted that he prays for the right to be heard and the right to present his case in a trial and that he be not denied his right to be heard.

Firstly, the substantive case before this Court is filed in terms of "**Tort of Negligence**, claiming for damages under various heads. Therefore, is there a need for the Plaintiff to file a **Summons For Directions** to pursue the matter further or should he revert to the **Automatic Directions in terms of *Order 25 Rule 8 of the High Court Rules, 1988.*?** *I leave this to the Plaintiff to decide.*

Bearing in mind the arguments raised by counsels for the Plaintiff orally and by the written submissions, I find that the delay caused in pursuing the case was the Plaintiff's failure and in addition, the difficulties in obtaining the medical report from the 1st Defendant who is the Orthopedic Surgeon. The accident took place on **22nd May, 2011**, some **5 years** ago and the Plaintiff filed its Claim against the Defendants on **22nd May, 2014**, after a lapse of almost **3 years'** time frame but within the Limitation period in Law. The Plaintiff was unable to obtain the medical report that he wanted to in 5 years' time but informed Court now only after the '***Notice pursuant to Order 25 Rule 9***' was issued and served on her that she had finally managed to obtain the medical report. The delay if one carefully counts from the time of issuance of the "Notice" to **07th June, 2016,** when this application was heard by the Court, adds up to a period of one **(1) and year and eleven (11) months**. However, I would rather in all fairness calculate the **Delay** only up to the time of issuance date of the "**Notice**" which is nine (9) months, which in the circumstances is **materially longer** than the time usually regarded by the profession and courts as an acceptable period. There is only oral statement by the Plaintiff that he has obtained the medical report but there is no concrete formal evidence in black and white when the medical report was obtained by the Plaintiff, since the Court and the Defendants are yet to cite the same. Further, in this case the Plaintiff went off to sleep and took no further steps to pursue his case until the Court issued a Notice in terms of Order 25 Rule 9. It is not for the Courts to wake up the Plaintiff. However, since the Plaintiff was dealing with an Orthopedic Specialist in

obtaining the medical report and has somewhat explained his delay in obtaining the same, I would in the circumstances give the Plaintiff the benefit of doubt but I must express that she should have continued the knock the Orthopedics' door until she succeeded in obtaining the medical Report. **Therefore, I hold that the delay in the manner and circumstances was not intentional on the part of the Plaintiff.**

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

Inordinate

This relates to the **length of delay**. The word '**inordinate**' is defined in the Supreme Court Practice meaning '***materially longer than the time usually regarded by the profession and courts as an acceptable period.***'

The final pleading filed in the present proceeding was the **Statement of Defence by the 4th Defendant** on 07th July, 2014. The Plaintiff failed to file and serve any Reply to the Defendant's Defenses. The Plaintiff did not pursue the cause of action hereafter. The time calculated from the date of the filing of the pleadings in terms of the Statement of Claim, and until the issuance of the ***Order 25 Rule 9*** Notice on 15th April, 2015, adds up to nine (09) months.

If the **Defendants** encountered any **delay** on the part of the Plaintiff in pursuing with the cause of action, then the **Defendants** as parties to the proceedings should have filed and proceeded with an appropriate application fitting in the circumstances and leave it to the Court to hear and determine the same rather than wait and only act once the court issued and served the ***Order 25 Rule 9 application.***

In the above circumstances, I am of the finding that all the parties to this proceedings, the Plaintiff as well as the Defendants are to be blamed for contributing to the **delay** of a period of nine (09) months. The reason being that if the Plaintiff did not pursue or prosecuted her case any further, the Defendants could have moved the court further, forcing the Plaintiff to file and serve the respective consequent pleadings to complete the pleadings and the cause. If the Plaintiff still failed, then the Defendants should have taken the alternative steps provided for in the Rules, rather than wait for the Plaintiff to pursue her case further. It is the duty of the Plaintiff to prosecute and continue with the litigation of her case diligently and bring it to a finality rather than seeing that it is delayed unnecessarily.

Taking into consideration the Plaintiffs written submissions and the affidavit showing cause, I find that the Plaintiff has satisfactorily explained the delay on her part which was not under her immediate control. Therefore, the delay explained herein is rather

ordinate and excusable in the given circumstances, is acceptable to this court and does not warrant the striking out of this action in terms of ***Order 25 Rule 9*** application.

Prejudice

42. It is trite law that the **Defendants** must establish that they are prejudiced by the **delay**.

The Counsel for the Plaintiff submitted that the Defendants have not been **Prejudiced** because this case is a relatively new case and has been barely in the system. 1st, 2nd and 4th Defendants did not throw any light as to prejudice.

1st Defendant did and stated that 'it will be severely prejudiced if these proceedings were allowed to continue to trial. Such prejudice rises from the fact that the proceedings concern events that allegedly took place between May 2011 and March 2012 and with the passage of time recollections of witnesses will naturally be severely affected and there is the substantial risk that a fair trial will not be possible.

The Court's view on the 1st Defendants submission is just an anticipation and that it is yet to be seen as to the availability of the witnesses testifying in this case, able to recollect the events and the fair trial in the circumstances.

I have taken into consideration the submissions and the case authorities in terms of **Prejudice**.

I find that the delay was for a period of nine (09) months which in the circumstances is not materially longer than the time usually regarded by the profession and courts as an unacceptable period. Further, the delay has been satisfactorily explained to this Court.

Interest of Justice

41. The Plaintiff instituted the proceedings in 2014 and has been pending in the system for the Plaintiff to complete the pleadings and allow this Court to hear and determine the case once and for all. The substantive matter remains pending in the system with an interlocutory ***Order 25 Rule 9 application to be determined currently***.

43. Therefore, it has become appropriate that the courts in exercise of its jurisdiction must decide as to whether a **fair trial** is still possible, even if the requirements in ***Birkett v James*** are satisfied. 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.*

44. 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.'*

45. 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.'***

46. 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 therefore find as follows:-

(i) The delay is ordinate and unintentional;

(ii) Satisfactory explanation has been provided by the Plaintiff for the delay and as such the Plaintiff has overcome the factor of inexcusable;

(iii) The default does not tantamount to contumelious and the Plaintiff has rather not disobeyed compliance with regards to the cause that was required in Law and Procedure to be adhere to and allow the Court to eventually hear and determine the substantive application for any orders of this court, since the circumstances was such that it was not within his control. Thus the matter remained pending.

(iv) The Defendants have not suffered real prejudice to any extend; and

(v) In the interest of justice, a fair trial is still possible in the circumstances.

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

(a) Order 25 Rule 9 application is hereby Dismissed;

(b) The Plaintiff is hereby directed to proceed with the matter within 14 days by filing and serving any appropriate cause of action and or applications.

(c) I now impose an UNLESS ORDER in place which will be activated upon the Plaintiff's noncompliance or Default immediately.

(d) Each party to bear their own costs at the discretion of this Court.

Dated at Suva this 08th Day of September, 2016

HIGH COURT OF FIJI SUVA

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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Rayawa Law, Suva.*
Munro Leys Solicitors, Suva.
Haniff Tuitoga, Suva.
Attorney Generals Chambers, Suva.