IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 205 of 2015

BETWEEN : **MOHAMMED ASHRAF KHAN** of Valelevu, Nasinu, Minibus Operator.

PLAINTIFF

AND : **JANIFA BI** of Lot 10, Natuvucika Road, Tacirua East, Retailer.

DEFENDANT

BEFORE: **Master V. D. Sharma**
COUNSEL: **Mr. Romanu** - for the Plaintiff
Mr. Anand Singh - for the Defendant

Date of Hearing: **16th June, 2016**
Date of Ruling: **20th September, 2016**

RULING

[Application by the Defendant seeking an order to strike out the Plaintiff's Writ and the Statement of Claim pursuant to Order 18 Rule 18 of the High Court Rules, 1988]

APPLICATION

1. This is the **Defendants Amended Application** seeking an order to **Strike Out** the Plaintiff's **Writ of Summons** and the **Statement of Claim** on the following **Grounds;-**

   (a) That it discloses no reasonable cause of action;

(b) That it is scandalous, frivolous or vexatious; or

(c) That it is otherwise an abuse of the process of the court.

2. The application was made pursuant to ***Order 18 Rule 18 (1) (a), (b), (c) and (d) of the High Court Rules 1988*** and under ***the inherent jurisdiction of the High Court.***

3. The Plaintiff opposed the Defendant's Striking out application and filed an Affidavit in Reply in the initial application accordingly.

4. The application was heard in terms of the affidavit evidence filed coupled with the written and oral submissions made in this proceedings.

BACKGROUND

5. ***The Plaintiff's Claim is that in 2010 - 2012 he had discussions with his younger sister, the Defendant. The Plaintiff was seeking financial assistance from her. According to the Plaintiff it was agreed between the Plaintiff and the Defendant that the Plaintiff will transfer his Native Lease being Lot 10 in Tacirua Sub-Division in return the Defendant was to provide him with $33,000 to pay Merchant Finance for the Plaintiff's motor vehicle.***

According to the Plaintiff, the Defendant demanded that the Plaintiff construct a double storey house for her which the Plaintiff claims was at cost of $190,000.

The Law and Practice

6. The law on **striking out pleadings and endorsements** is stipulated at ***Order 18 Rule 18 of the High Court Rules 1988*** which states 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 discloses no reasonable cause of action or defence, as the case may be; 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).

7. In **Paulo Malo Radrodro vs Sione Hatu Tiakia & Others,** HBS 204 of 2005, the Court stated that:

> *"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*
>
> a. *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*
>
> b. *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry****[1892] 3 Ch 274 at 277.*
>
> c. *It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*
>
> d. *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
>
> e. *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed -* ***ESSO Petroleum Company Limited v Southport Corporation*** *[1956] A.C at 238" -* ***James M Ah Koy v Native Land Trust Board & Others*** *- Civil Action No. HBC 0546 of 2004.*

f. *A dismissal of proceedings "often be required by the very essence of justice to be done"..... - Lord Blackburn in Metropolitan - Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation - Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"*

8. His Lordship Mr Justice Kirby in **Len Lindon -v- The Commonwealth of Australia** (No. 2) S. 96/005 summarised the applicable principles as follows:-

a. *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c. *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d. *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e. *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in*

proper form, a Court will ordinarily allow that party to reframe its pleading.

f. *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

Issues for Determination

9. Following are the **issues** which require determination by this honourable court;-

(a) Whether the Plaintiff's Writ of Summons and the Statement of Claim **discloses any reasonable cause of action** or not?

(b) Whether the Plaintiff's Writ of Summons and the Statement of Claim **is scandalous, frivolous or vexatious?**

(c) Whether the Plaintiff's Writ of Summons and Statement of Claim is an **abuse of the process of the Court** or not? And

(d) **Alternatively, *whether the Plaintiff should supply particulars of its Claim to the First Defendant to enable the First Defendant to file a Statement of Defence as stated in the application?***

ANALYSIS and DETERMINATION

Scandalous, Frivolous or Vexatious & Abuse of Process of the Court

10. 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).

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...."***

12. ***Whether the Plaintiff's Writ of Summons and Statement of Claim discloses any reasonable cause of action?***

13. The following notes to ***Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11*** on what is meant by the term **'a reasonable cause of action'** sufficiently provides the answer to the applications.

> ".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck **[1893] 1 QB 185)** disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking out (Moore v Lawson **(1915) 31 TLR 418**, CA.; Wenlock v Moloney **[1965] 1 WLR 1238** 1 W.L.R. 1238 [1965] 2 All ER 871, CA)...."

14. Reference is also made to **Lindley M.R. in *Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited*** [1899] 1QB 86 at page 91 said:

> *".....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression* ***"reasonable cause of action"*** *in* ***rule 4*** *shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".*

15. In this instant case, in summary, the Plaintiff claims is that in 2010-2012, he had discussions with his younger sister the Defendant about seeking financial assistance from her. According to the Plaintiff, it was agreed between them that the Plaintiff will transfer his Native Lease Lot 10 in Tacirua sub-division in return the Defendant was to provide the Plaintiff with $33,000 to pay

Merchant Finance for the Plaintiff's vehicle. According to the Plaintiff, the Defendant further demanded the Plaintiff to construct a double storey house for her whom the Plaintiff claims was at a cost of $190,000. The Plaintiff is claiming for financial loss, Special and General Damages together with interest and cost.

16. It is for the Plaintiff to establish that he has a Cause of Action in this case in terms of the facts and the Pleadings filed herein.

17. On the other hand, the Defendant must establish that the Plaintiff does not have a Cause of Action in this case. It is too early in the proceedings to decide ***Prima Facie*** that there is no cause of action within this proceeding before the Court.

18. The Striking out application of the Defendant is a summary proceeding and is only appropriate to cases which are **plain** and **obvious**.

19. Bearing in mind the **facts** of this case and the **nature of the pleadings** filed by the parties to the proceedings, this case cannot be classed as '**plain and obvious**' in nature. Therefore, it is too early at this stage of the proceedings for this Court to ascertain and determine whether there is a reasonable cause of action or not.

20. 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)."***

21. Whether the nature and contents of the Plaintiff's Claim in terms of the Writ of Summons and the Statement of Claim tantamount to scandalous facts and are irrelevant and therefore makes the Plaintiff's Claim Scandalous? The Plaintiff's Claim is yet to be put to the Test in terms of hearing and determination of the Claim. Therefore, the Defendants cannot submit that the Plaintiff's Summons and the Statement of Claim **is scandalous in nature**.

22. The **issue** of whether the Plaintiff's Claim is **frivolous** or **vexatious?** Reference is made to paragraph 18/19/15 of the Supreme Court Practicec1993, 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; ...."***

23. ***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.*

24. The Plaintiff claims Breach of Agreement, financial loss (as per paragraphs 5, 6, 10 (i)-(vi) inclusive of his Claim), Special, General damages, costs and interests pursuant to *Section 3 of the Law Reform (Miscellaneous) (Interest) Act Cap 27* respectively.

The Defendant submitted that the Plaintiff's Claim simply cannot succeed factually for the following reasons-

- *Discussion took place in 2010-2012;*
- *The Plaintiff will transfer his residential block to the Defendant;*
- *Defendant was in fact the registered proprietor of Lot 10 as from 15th March, 2000 as is evident from the affidavit;*
- *Plaintiff's Claim is incorrect and a falsity as to discussions regarding the property transfer when he was not the proprietor.*
- *No consent from TLTB was purportedly obtained;*
- *No suggestion that the agreement was or is in writing.*

Taking into consideration the above arguments, the Defendant needs to establish that the Plaintiff's Claim lacks merits. This Court needs to hear and determine the same in terms of the law and the evidence that the Parties to the proceedings may produce at the hearing proper.

25. 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.

26. Therefore, in the given circumstances, the Plaintiff's claim cannot be said to be **frivolous** or **vexatious.**

27. Whether the claim is otherwise an **abuse of the process of the Court?**

28. 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)

29. 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."*

30. 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"*

31. Again, the summary procedure should not be used to determine the "**abuse of process of the court**', rather the matter to be heard to determine the issue of the writ making a claim whether it is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it.

32. Further reference is made to the case of **Timoci Uluivuda Bavadra v The Attorney General** (Sup. Ct. (now High Court) C.A. No. 487 of 1987 where **Rooney J** said:

> ***"I am not required to try any issues at this hearing. All I have to decide whether there is an issue to be tried. It is not enough for the defendant to show on this application that the plaintiff's case is weak and unlikely to succeed".***

33. In **Tawake v Barton Ltd** [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows;

> *"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see **Attorney General -v- Shiu Prasad Halka** 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in **Attorney -v- Prince Gardner** [1998] 1 NZLR 262 at 267."*

34. Having perused and analyzed the issues raised by the Defendant couple with the principles dealing with the present application to **Strike out the Plaintiff's Writ of Summons and the Statement of Claim,** this court does not possess all the requisite material and evidence to reach a definite and certain conclusion, since the evidence is untested.

35. Therefore, to determine the aforesaid issues raised herein, examination of the appropriate witnesses are of a paramount requirement to reach a just decision in the circumstances.

36. Hence, considering the nature of the plaintiff's action, this is not the most appropriate stage to determine the success of its claim.

36. Accordingly, I make the following orders-

(i) **That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim is hereby Dismissed and Struck Out .**

(ii) **That the Defendant to pay the Plaintiff a sum of $500 as costs of this application.**

(iii) **The Matter to take its normal cause.**

(iv) **Further directions to be made on 26th October, 2016.**

Dated at **Suva** this **21st day** of **September, 2016**

HIGH COURT OF FIJI SUVA

.....

MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: ***MIQ Lawyers, Suva***
Singh & Singh Lawyers, Suva.