

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 304 of 2013

BETWEEN : YOGENDRA RAVINESH SHARMA of 47 Howell Road, Suva, Fiji, Businessman.

PLAINTIFF

AND : ADI KAVUNONO ILOILOVATU ULUIVUDA of 1 Loloma Street, Namadi Heights, Suva.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Ms. Jackson for the Plaintiff/Respondent
Mr. Rayawa for Defendant/Applicant

Date of Hearing: 14th February, 2017

Date of Ruling: 16th March, 2017

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 and Section 41 of the Stamp Duties Act, Cap 205 and Rules of Professional Conduct in the Legal Practitioners Decree]

APPLICATION

1. This is the Defendants Summons seeking an order to Strike Out the Plaintiff's Writ of Summons on the following Ground:-

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

2. The Defendant submitted to the Court the issue of 'Conflict of Interest' on the part of the Plaintiff's former Lawyer, Diven Prasad Lawyers. The Defendant stated that Diven Prasad Lawyers have acted for her as the Solicitor in the conveyancing matter

under dispute is therefore prohibited from suing her and/ or commencing a civil action against her from a dispute arising from the very same conveyancing matter.

3. The application was made pursuant to *Order 18 Rule 18 (1) (d) of the High Court Rules 1988* and under Section 41 of the Stamp Duties Act, Cap 205 and Rules of the Professional Conduct in the Legal Practitioners Decree.
4. The Plaintiff opposed the Defendant's Striking out application and filed an Affidavit in Opposition accordingly.
5. Both Counsels representing the parties to the proceedings furnished Court with their written submissions.

THE LAW

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)
- (b)
- (c)
- (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).

Defendant's (Applicant's) Case

7. The Applicant/Defendant submitted as follows-
 - *That the Applicant/Defendant raised objections to the involvement of Diven Prasad Lawyers as the Solicitors initiating the proceedings against her. The complaint laid against Diven Prasad Lawyers was that they had also represented the Defendant in the conveyancing transaction that gave rise to the disagreement which is currently under dispute in civil action number HBC 304 of 2013.*
 - *That Diven Prasad Lawyers having acted for her as her solicitor in the conveyancing matter under dispute is prohibited from suing her and/or commencing a civil action against her from a dispute arising from the very same conveyancing matter.*

- That civil action number HBC 304 of 2013 filed by Diven Prasad Lawyers is unlawful as it breaches Rule 1:3(c) of the Rules of Professional Conduct for Legal Practitioners in Fiji. The rule establishes in situations that when Diven Prasad Lawyers discovered that they would have to sue the Applicant for alleged breach of the clauses of the Sale & Purchase Agreement that Diven Prasad Lawyers prepared for the Applicant/Defendant and the Respondent/Plaintiff as the lawyer acting for both of them as Purchaser/client and Vendor/client, Diven Prasad Lawyers should "decline to act further for my party where so acting would disadvantage any one or more of the clients".
- That the submissions made before the High Court in this case was accepted by Diven Prasad Lawyers. They have conceded that they were the solicitors acting for the Applicant/Defendant as Vendors in the said transaction and also acting for the Respondent/Plaintiff as Purchasers in that same transaction. They have since withdrawn as lawyers for the Respondent/Plaintiff.
- That the Defendant/Respondent respectfully states that the initiation of the civil action was unlawful and therefore it should have been withdrawn by Diven Prasad Lawyers altogether and not that Diven Prasad Lawyers should have advised the Respondent/Plaintiff to engage a separate lawyer or law firm to resolve the dispute.
- That the main reason why the Applicant/Defendant says there is due to the fact that Civil Action Number HBC 304 of 2013 was initiated using information contained in the conveyancing file that also contained information that should not have been used for its privileged status under lawyer/client privilege. The Applicant//Defendant states that the writ itself is tainted and should have been withdrawn.

PLAINTIFF'S (Respondent's) CASE

8. On the other hand the Plaintiff/Respondent submitted as follows-

- That regarding the Defendant's allegation that Messrs Diven Prasad's had a conflict of interest when they filed the Plaintiff's Statement of Claim, the Plaintiff submits that Messrs Diven Prasad Lawyers were at all times acting under the instructions of the Plaintiff. As deposed to at paragraphs 5 to 7 of the Plaintiff's Affidavit in Opposition filed on 17 August 2016, Messrs Diven Prasad Lawyers had been representing the Plaintiff's interests for over 25 years and were at all material times acting under the instructions of the Plaintiff. This included the period of time in which the Sale and Purchase Agreement was prepared and entered into between the parties on 2 August 2011.
- That the Plaintiff therefore submits that there was no conflict of interest between the Plaintiff's former solicitors and the Defendant and the Defendant has failed to provide any evidence to substantiate her allegations.
- That the Plaintiff further submits that even if there was a conflict of interest, the alleged conflict of interest has been cured by the Plaintiff's change of solicitors. The Plaintiff further submits that if a conflict of interest should arise between solicitor and a party to an action, the proceedings itself are not nullified. There is no need to file a Notice of Discontinuance as suggested by the Defendant at paragraph 5 of Defendant's 'Affidavit in Support filed on 5 July 2016.

- That in the instant matter, any conflict of interest which may have arisen was automatically cured upon Messrs Diven Prasad's withdrawal as solicitors for the Plaintiff.

Issues for Determination

9. Following are the issues which require determination by this honourable court:-
- (a) Whether the Plaintiff's Writ of Summons and Statement of Claim is an abuse of the process of the Court or not?

ANALYSIS and DETERMINATION

10. The Defendant/Applicant is asking this Court to strike out the Plaintiff's Claim on the ground that it is an abuse of the Court process.
11. The Defendant/Applicant cited four (4) reasons that would support the ground that the Plaintiff's Claim an abuse of the Court process-
- (a) Conflict of Interest on the part of the Former Lawyers of the Plaintiff, Diven Prasad Lawyers when he commenced proceedings against the Defendant;
- (b) That the Sale & Purchase Agreement entered into by the Plaintiff and the Defendant on 2nd August, 2011 has not been Stamped in accordance with Section 41 of the Stamp Duty Act Cap 205;
- (c) That the Defendant was not given an opportunity to exercise Independent legal advice prior to the actual execution of the Agreement
- (d) The Defendant is alleging undue influence at the time of executing the Agreement.
12. 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).
13. 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...."

14. In this instant case, in summary, the Plaintiff claims against the Defendant for the alleged breach of clauses of the Sale & Purchase Agreement drawn up by Diven Prasad Lawyers. Further, the same lawyer acted for both parties, the Plaintiff and the Defendant as well and therefore should decline to act further for any party to the proceedings as it will disadvantage any one or both parties in this action.

Conflict of Interest

15. No doubt, the Writ of Summons in the instant case was commenced by Diven Prasad Lawyers on 23rd October, 2013, for the alleged breach of Agreement executed between the parties to this proceedings.
16. I make reference to the Affidavit in Opposition deposed by the Plaintiff at paragraph 5 and filed in Court on 17th August, 2016 wherein the Plaintiff states that '*Ms. Deven Prasad Lawyers were my lawyers at the time of these proceedings were instituted and were at all times representing my interests. Moreover, Ms. Deven Prasad Lawyers had been prior to this action representing my interests for nearly 25 years.*'
17. On 26th January, 2015, Diven Prasad Lawyers informed Court that they would not act further for the Plaintiff any more rather ask the Plaintiff to find another lawyer to represent him. Mr. Vakaloloma came on record on 22nd July, 2015 and subsequently, Saumatua Bale & Faktaufon Lawyers filed a Notice of Change of Solicitors on 26th August, 2015.
18. I note that conflict of interest could arise in various forms and instances between solicitor and a client. The applicable test is explained in the judgment of *Malleons Stephen Jaques v KPMG Peat Marwick 1990] 4 W A R 357*, where the defendant retained the plaintiffs law firm in its dealings in several matters and was aware of the business operations conducted by the defendant. Sometimes later the Corporate Affairs Commission engaged the plaintiffs to prosecute matters under the Corporate

Act, when it was clear that the plaintiff had full knowledge of the operations of the defendant company. The court considered that there was close proximity of relationship between the plaintiff and the defendant; accordingly, there was a conflict of interest.

19. *The court is entitled to assume that solicitors and counsel appearing before it possess that independence. Solicitors not only owe a duty to their clients to do the best for them but also owe an overriding duty to the court... As part of their professional responsibility, the solicitors and counsels must ensure that they do not appear in a matter in which they have an actual or potential conflict of interest or where, by reason of their relationship with their client, their professional independence can be called in question or compromised."*
20. The evidence before this Court is that Diven Prasad Lawyers took instructions from the Defendant in drafting the Sale & Purchase Agreement which is the subject matter of this case. (Reference made to the Defendant's affidavit in Opposition at paragraph 3, filed on 05th July, 2016).
21. The Sale & Purchase Agreement by the Defendant had been executed and witnessed before Emmanuel Narayan, a Barrister & Solicitor.
22. There is no affidavit evidence deposed by the Defendant supporting the nature of the conflict of interest that existed when Diven Prasad Lawyers appeared on this application on behalf of the Plaintiff.
23. Diven Prasad Lawyers have withdrawn rather stopped from representing the Plaintiff in this matter when Vakaloloma & Associates took over the representation of the Plaintiff. Later Notice of Change of Solicitors was filed by Saumatua Bale & Faktofaun Lawyers on 26th August, 2015.
24. Therefore, if there existed any Conflict of Interest on the part of Diven Prasad Lawyers then they have already voluntarily withdrawn or stopped from representing the Plaintiff any further. Diven Prasad Lawyers had only filed and commenced the proceedings in this matter and nothing more since the Court was still in the process of completing the cause of action before the file was remitted to the Senior Court Officer for the allocation of a Judge to hear and determine the case.
25. There is no claim of Conflict of Interest by the Defendant on the part of the present Lawyers, Saumatua Bale & Faktofaun Lawyers. They can continue to present the Plaintiff in this matter.
26. Therefore, on the alleged issue of Conflict of Interest this matter cannot be just struck out.

Stamp Duty Act Cap 205

27. Section 41 of the Stamp Duty Act [Cap 205] states that instruments not duly stamped are inadmissible as evidence and there appears to be an exception proviso available which states the terms on which unstamped or insufficiently stamped instruments may be received in evidence.
28. The Defendant's contention submitted before court was that the sale and purchase agreement dated 2nd August, 2011 is inadmissible due to the fact that it has not been duly stamped is clearly not fatal to the proceedings as Section 39(1) of the Stamp Duty Act [Cap 205], provides that a payment of the duty and the fine by the Plaintiff will deem the sale and purchase agreement admissible in evidence.
29. On this point, the Plaintiff's action cannot be struck out as applied for by the Defendant.

Independent Legal Advice

30. Reference is made to the sale and purchase agreement executed by the Plaintiff and the Defendant. The Defendant after being explained the contents by the witness in this case Emmanuel Narayan in his capacity as a barrister and solicitor and commissioner for oaths executed the agreement. The Defendant had every opportunity available to her to seek further independent legal advice if she felt that she was deprived of the independent legal advice if any.
31. On this explanation by the Defendant, this court cannot strike out the Plaintiff's action.

Undue Influence

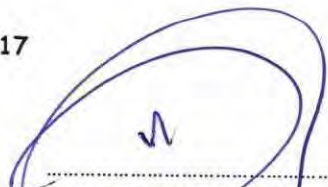
32. The Defendant also alleged that she was unduly influenced to enter into the sale and purchase agreement. Reference is made to annexure marked YS1 of the Plaintiff's affidavit in opposition filed on 17th August, 2016, at paragraph 3 of the letter from the Defendant to the Plaintiff's former solicitors Diven Prasad Lawyers states "In regards with the purchase agreement I signed on 2nd August 2011, I did so in good faith..."
33. I find that the Defendant's allegation in terms of undue influence is baseless and does not have any merit to succeed on the striking out application.
34. The Striking out application of the Defendant is a summary proceeding and is only appropriate to cases which are plain and obvious.
35. 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.

36. 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.
37. Therefore, to fully determine the aforesaid issues raised herein, on merits, examination of the appropriate witnesses are of a paramount requirement to reach a just and fair decision on the substantive matter in the circumstances.
38. Hence, considering the nature of the plaintiff's action, this is not the most appropriate stage to determine the success of its claim.
39. 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 \$1000 as costs of this application.
 - (iii) The Matter to take its normal cause.
 - (iv) Further directions to be made accordingly.

Dated at Suva this 16th day of March, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Saumatua Bale & Faktofaun Lawyers, Suva
Rayawa Lawyers, Suva