

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 203 of 2005

BETWEEN : **NAKAULEVU BHAJAN RAMAYAN MANDALI** a religious body duly registered under the Religious Bodies Registration Act Cap 68 of Karachi Road, Nakaulevu, Navua in the Republic of Fiji

PLAINTIFF

AND : **RAM NARAYAN JOKHAN** (father's name Jokhan) of Nakaulevu, Navua in the Republic of Fiji Islands, Farmer.

1st DEFENDANT

AND : **THE TRUSTEES OF ASSEMBLIES OF GOD** a religious body duly registered under the Religious Bodies Registration Act Cap of having its head office at 85 Robertson Road in the Republic of Fiji

2nd DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSEL: **Ms. Rakai** - for the Plaintiff
Mr. Gounder - for the Intended 1st Defendant
Ms. Choo - for the 2nd Defendant

Date of Ruling: **10th May, 2017**

RULING

(Notice to show cause why the Plaintiff's Writ of Summons should not be struck out for want of prosecution or as an abuse of the process of the court pursuant to Order 25, Rule 9 AND Order 3 Rule 5 of the High Court Rules, 1988.)

(A) INTRODUCTION

- 1 The Court on its own motion issued a **Notice** on 24th August, 2015 pursuant to **Order 25, Rule 9 of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable court.**
- 2 The 'Notice' sought for the following orders-
 - (a) 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;
- 3 Subsequently, the Plaintiff filed an affidavit to show cause on 02nd October, 2015.
- 4 The 1st Defendant according to the Court Records has taken demise while the 2nd Defendant did not file any affidavit rather supported the striking out application.
- 5 Written submission was furnished by the Plaintiff only but the two Defendants supported the striking out application accordingly.

(B) BACKGROUND

- 6 The substantive Action was commenced by a Writ of Summons, filed on 03rd May, 2005.
- 7 The Plaintiff prays for the following orders:
 - (i) An order for specific performance against the Defendant to transfer to the Plaintiff of the said property comprised and described in Block one being part of Certificate of Title No. 29049 being Lot 2 on Deposit Plan No. 7323 and known as Block 2, Deuba in the district of Serua in the Island of Vitilevu comprising an area of 966 square metres;
 - (ii) Judgment in the sum of \$25,000 plus interest at 12.5%; and
 - (iii) Costs.

(C) THE LAW & PRACTICE

8 This application is issued pursuant to *Order 25 Rule 9 of the High Court Rules 1988 and to the Inherent Jurisdiction of this Honourable Court*, 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.'*

9 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."

10 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)**.

11 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.**"

12 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.

13 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."*

14 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 establish 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."

- 15 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."

- 16 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.

(D) 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 on 03rd May, 2005. All the subsequent pleadings were completed thereafter. Orders on the Order 34

Summons was made on 02nd August, 2010 and the file was then allocated to a Judge of the High Court accordingly.

- 19 On 21st March, 2011, the Plaintiff's Counsel then filed a Summons seeking an order to **Amend the Statement of Claim** in terms of **O20, R.5 HCT Rules, 1988, but** the Plaintiff **subsequently** withdrew the Summons on **04th May, 2011**. There was no returnable date assigned in this case after the withdrawal of the Plaintiff's Amendment application and the matter went to rest until after a lapse of nine (9) months that the Plaintiff decided to proceed with the matter.
- 20 **Notice of Intention to proceed** was filed by the Plaintiff on **08th February, 2012** and the Plaintiff failed to proceed with the matter as intended in terms of **Order 3 Rule 5 of the High Court Rules, 1988**. Still the Plaintiff did not pursue the matter and thereafter, again on **01st September, 2015**, after a **lapse of three (3) years (from 08th February, 2012 - 01st September, 2015)**, filed a second **Notice of Intention to proceed**. This was done after the Plaintiff was served with the **Notice** from the Court Registry seeking the Plaintiff to show cause and explain the delay as to why the Substantive action should not be struck out for want of prosecution.
- 21 The Plaintiff filed its Affidavit showing cause on 02nd October, 2015.

Delay

- 22 The Plaintiff endeavored to explain the reasons for the delay in pursuing this case to its conclusion by filing an Affidavit in Support deposed by Ist Deo:
- That around June, 2011, the solicitor in carriage of this matter had resigned and left the employment of the Plaintiff's solicitor's firm.
 - That on or about 10th July 2012 his lawyers wrote to the High Court Civil Registry requesting for a file search of the court file. Attached and marked "B" is the said letter.
 - That they were called for a meeting with our lawyer where we were requested to attend to change of trustees and then to bring these documentations to our lawyers.
 - That we had a second meeting in 2013 where we advised our counsel that the 1st Defendant had died in 2011 and we were not sure who the Executor and Trustee of his Estate was.

- That on the 16th July 2013, our lawyers wrote to the High Court Registry requesting for a copy of the Probate. Attached and marked 'C' and 'D' reflectively is a copy of this letter and the extracted Probate.
 - That on the 17th July 2013, our lawyers wrote a letter which included 2 sets of Amended registration documents and the requirement check lists. We were also advised to proceed to the amendment of trustees so and appropriate application is filed. Attached and marked "E", "E1" and "E2" respectively is the letter, the check list and the amended registration documents.
 - That on the 14th May 2014 we received a call from Sherani & Co and realized that we had not received a letter that they sent us on the 14th January, 2014 which was sent by registered post. Attached and marked "F" and "F1" is a copy of the letter and registered slip.
 - That we were then able to sort the letter out and its contents and attended to what was requested by our letters. We were being assisted by one Mr. Chettyan Lakshman from Navua. We then proceeded to obtain police clearances and received a letter dated 19th May 2014 from our lawyers with the Police clearances for our 4 trustees. Attached and marked "G" is a copy of this letter.
 - That on the 16th October 2014 we received another letter from our lawyers enquiring about the status of the registration. Attached and marked "H" is a copy of this letter.
 - That on the 22nd May 2015 I went to Sherani & Co and dropped off the set of documents I had, particularly the receipt for registration that I had paid for. Attached and marked "I" and "II" respectively is the receipt and the letter from Sherani & Co.
 - That a few days later I dropped a letter from the Sanatan Dharam Pratinidhi Sabha Fiji body dated 25th May 2015 confirming the Plaintiff's affiliation to the parent body. Attached and marked "J" is a copy of the said letter.
 - That this procedure was necessary to avoid any inconsistency held within the Plaintiff entity and its capacity to sue and be sued. This now meant that the Plaintiff would have to amend the Statement of Claim as well as substitute the First Defendant with his Estate.
 - So the Plaintiff through its trustees was trying to register the amendments with the Registrar so that it could assist with the amendment and then deal with substitution of the First Defendant.
33. 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 21st March, 2011. It should be noted that the **Notice of Intention to Proceed** is not a **cause of action** in itself. It is only a Notice expressing the Intention to proceed with the case. Even thereafter, no genuine interest was shown by the Plaintiff to pursue

the case further expeditiously bearing in mind that the matter was commenced in 2005,

34. 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

35. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.
36. The Plaintiff was very well aware that he had withdrawn the application to Amend the Statement of Claim in terms of Order 20 Rule 5 of the High Court Rules, 1988. Yet, no active action was taken by the Plaintiff to see how the matter needs to be moved further so the matter could be dealt with by the Court. 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 of the High Court or a Judge. There were no further directions made by the Court and the Plaintiff remained quite over the matter.

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 for the parties to comply.

Delay

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

Intentional

38. 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.
39. **The Plaintiff** in his Affidavit to Show Cause filed on 02nd October, 2015 endeavored to explain the **delay** as enumerated herein at paragraph 22.
40. When the matter was first commenced in court by the Plaintiff, the cause of action was completed and the file remitted to the Senior Court officer for allocation of a Judge accordingly. A Judge was allocated with this case and it was because of the Plaintiff's seeking an amendment to the Substantive Statement of Claim and subsequently withdrawing the same that the matter was dealt with on the withdrawal and not assigned any further date on this case. The Plaintiff set back in the comfort seat and took no active action to move the matter expeditiously and clearly shows that the Plaintiff had no intention to proceed with the matter.
41. Bearing in mind the explanation given by the counsel for the Plaintiff in her written submissions together with the Affidavit filed by one Ist Deo, I find that the delay caused in pursuing the case was the Plaintiff's laxity and that the Plaintiff had no intention to proceed with the case. The Plaintiff only woke up when served with the Court's Notice in terms of Order 25 Rule 9. Although the Plaintiff filed the Notice of Intention to proceed on two (2) consecutive occasions, still failed to pursue with the matter as was required in the circumstances. The delay in the circumstances was materially longer than the time usually regarded by the profession and courts as an unacceptable period.

Therefore the delay in the circumstances was **intentional** on the part of the Plaintiff.

42. The other requirement is the '*inordinate*' delay.

Inordinate

43. 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.*'
44. Well the initial proceedings was commenced on 03rd May, 2005. Necessary pleadings were filed by the parties in order to complete the cause of action in terms of the High Court Rules, 1988 and thereafter to allocate the file to a Judge. On 30th April, 2008, this Court made the orders on the Order 34 Summons for the allocation of a Judge in the matter.
45. On 04th May, 2011, this matter was finally called before the Judge and the Plaintiff's Counsel had withdrawn the application to amend the Plaintiff's Statement of Claim. Thereafter, no date was assigned to this file by the Judge. Hence, this matter went to rest for a period of nine (9) months and then the Plaintiff decided to proceed with the matter.
46. **Notice of Intention to proceed** was filed by the Plaintiff on 08th February, 2012 and the Plaintiff failed to proceed with the matter as intended in terms of **Order 3 Rule 5 of the High Court Rules, 1988**. Thereafter, again on 01st September, 2015, after a lapse of three (3) years (from 08th February, 2012 - 01st September, 2015), filed a second **Notice of Intention to proceed**. This was done after the Plaintiff was served with the **Notice** from the Court Registry seeking the Plaintiff to show cause and explain the delay as to why the Substantive action should not be struck out for want of prosecution.
47. In the above circumstances, I am of the finding that the Plaintiff is to be blamed for causing the delay.
48. It is the duty of the Plaintiff to prosecute his case diligently and this includes the procuring of legal representation and continue with the litigation until such time that this matter is brought to an end.
49. Reference is made to the case of *Nakula Enterprises Ltd v ITaukei Land Trust Board (2014) FJHC 745*, the court referred to *Grovit v Doctor and Others (1997) 1 WLR 640(1997) 2 ALL E.R 417* states-

'The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution.'

50. Also, the court can on its **own inherent jurisdiction** strike the matter out for **abuse of process**. Case hereunder Refers-

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 stay 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 establish 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."*

51. Taking into consideration the Plaintiffs written submissions and the affidavit showing cause, I find that the Plaintiff has not satisfactorily explained his delay in pursuing with this case and bringing it to a conclusion and therefore tantamount to an inordinate and inexcusable delay which is unacceptable to this court.

Prejudice

52. It is trite law that the Defendants must establish that they are prejudiced by the delay.
53. 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

Interest of Justice

41. The Plaintiff commenced proceedings on 03rd May, 2005.
42. Subsequently, the Plaintiff failed to proceed with the case after 04th May, 2011 when the matter was last called before the Honourable Judge of the High Court. No active action was taken by the Plaintiff to move the matter. The Court issued and served a Notice in terms of Order 25 Rule 9 for want of prosecution accordingly.
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 Plaintiff satisfies the requirements in **Birkett v James**. 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. Both Defendants asked Court to strike out the Matter for want of prosecution although both did not intend to file and serve any affidavit response.
46. 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.'

47. 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 inordinate and intentional;**

- (ii) *Explanation has not been sufficiently provided by the Plaintiff explaining the delay as such the Plaintiff has not overcome the factor of excusable;*
- (iii) *Although the default is not contumelious and the Plaintiff has not disobeyed any orders of this court, still there has been unreasonable delay which goes unexplained instead; and*
- (iv) *In the interest of justice, a fair trial is still not possible bearing in mind that the matter was commenced in 2005 and it is way too long to think that a hearing is possible in the circumstances.*

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

- (a) Application seeking dismissal of the substantive action in terms of Order 25 Rule 9 application for want of prosecution is hereby acceded to;
- (b) The Plaintiff's substantive action is hereby struck out for want of prosecution accordingly;
- (c) The Plaintiffs to pay each of the two (2) Defendants costs summarily assessed at \$750, a total of \$1500 within 14 days.

Dated at Suva this 10th Day of May, 2017



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Sherani Lawyers, Suva
Lajendra Law, Suva
R.Patel Lawyers, Suva