

THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 111 of 2015

IN THE MATTER of an application by RATU ELIA MALAKAI BAKANNICEVA aka ELIA MALAKAI BAKANICEVA for Summary Possession of Land under Order 113 of the High Court Rules 1988.

BETWEEN : RATU ELIA MALAKAI BAKANNICEVA aka ELIA MALAKAI BAKANICEVA of Vuanirere Subdivision, Nausori, Professional Rugby Player.

APPLICANT

AND : FILIMONI TAGICAKIBAU of Vuci South Road, Nausori.

RESPONDENT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Bukarau - for the Plaintiff  
The Defendant - in Person

Date of Ruling: 22<sup>nd</sup> June, 2017

RULING

*[Summons to Re-instate the Plaintiff's Action Order 19  
Rule 9 of the High Court Rules, 1988]*

### APPLICATION

1. This is the Plaintiff's Summons seeking the following orders-
  - (i) That the order of this Honourable Court to Strike Out the application of the Plaintiff for non-appearance of the Plaintiff's counsel on the morning of the 05<sup>th</sup> July, 2016 be set aside;
  - (ii) That the matter be re-instated to proceed with its normal cause;
  - (iii) That the costs of and incidental to this application be costs in the cause; and
  - (iv) That any other order that this Honourable Court deems just.
2. The application is made pursuant to *Order 19 Rule 9 of the High Court Rules, 1988*.
3. The Defendant strongly opposed the Re-Instatement Application.

### THE LAW

4. *The application is made pursuant to Order 19 Rule 9 of the High Court Rules, 1988.*

This particular provision of the law provides as follows-

*9. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.*

5. *Further, Order 32 Rule 5 (1) and (4) states as follows-*

*Proceeding in absence of party failing to attend (O.32, r.5)*

*5. (1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.*

*(4) Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list.*

6. *Order 32 Rule 6 states that order made ex-parte may be set aside-*

*6. The Court may set aside an order made ex parte.*



ANALYSIS AND DETERMINATION

7. The issues for this Court to determine is whether the Plaintiff's Application struck out for non-appearance on 05<sup>th</sup> July, 2016 be reinstated to the list with costs to the Defendant?
8. In order to determine the Plaintiff's re-instatement application, it would be appropriate to see the **chronology of events**. It will give this court an indication how the matter proceeded up to the time when the Plaintiff's substantive Originating Summons and the Interlocutory Joinder applications were struck out:

Chronology of events

- 27<sup>th</sup> February, 2015- Originating Summons for summary possession of land filed;
- 02<sup>nd</sup> April, 2015- Defendant present sought time to defend. Plaintiff/Counsel absent;
- 16<sup>th</sup> April, 2015- No appearance of Plaintiff/Counsel. Matter struck out;
- 21<sup>st</sup> April, 2015- Plaintiff filed Summons seeking re-instatement of application: (1<sup>st</sup> Application)
- 26<sup>th</sup> May, 2015- Application to reinstated adjourned to 12<sup>th</sup> June, 2015;
- 12<sup>th</sup> June, 2015- Adjourned for hearing on 24<sup>th</sup> August, 2015;
- 24<sup>th</sup> August, 2015- Application heard and court delivered ruling re-instating the matter;
- 16<sup>th</sup> November, 2015- Order 113 application hearing vacated and adjourned to 01<sup>st</sup> February, 2016;
- 01<sup>st</sup> February, 2016- Plaintiff to file a joinder application, adjourned to 09<sup>th</sup> March, 2016;
- 09<sup>th</sup> March, 2016- No joinder application filed, adjourned to 30<sup>th</sup> March, 2016;
- 08<sup>th</sup> March, 2016 - somehow Joinder application filed on 8<sup>th</sup>. but not on court file on 9<sup>th</sup>;
- 30<sup>th</sup> March, 2016- Defendant objected to joinder application, adjourned to 07<sup>th</sup> April, 2016;
- 07<sup>th</sup> April, 2016- Case vacated to 13<sup>th</sup> April, 2016, N/A of both parties;
- 13<sup>th</sup> April, 2016- No appearance of Plaintiff/Counsel, Both applications struck out;
- 13<sup>th</sup> May, 2016- Application to re-instate the Plaintiff's application to the list: (2<sup>nd</sup> Application)
- 07<sup>th</sup> June, 2016- Directions made adjourned to 05<sup>th</sup> July, 2016;
- 05<sup>th</sup> July, 2016- No appearance of Plaintiff/Counsel, Application to reinstate struck out;
- 05<sup>th</sup> August, 2016- Plaintiff Summons seeking re-instatement of application: (3<sup>rd</sup> Application)
- 21<sup>st</sup> June, 2017- Current Plaintiff's Re-instatement Application for Ruling. (underline mine)

9. It can now be ascertained from the above chronology of events that the Plaintiff and/or the Counsel failed to appear in court on the returnable date (02<sup>nd</sup> April, 2015) of the Originating Summons, whilst the Defendant unrepresented appeared and entered his appearance. Since the Defendant sought time to defend himself, the Court granted him time to file and serve his affidavit response. The matter was then adjourned to 16<sup>th</sup> April, 2015. The Plaintiff/Counsel was again not present on this day in Court and upon hearing the Defendant, this Court had no other alternative but to **strike out** the



- Plaintiff's Originating against the Defendant because of the **non-appearance** by the Plaintiff and or Counsel representing.
10. On 21<sup>st</sup> April, 2015, the Plaintiff filed a Summons seeking an order to re-instate the Plaintiff's application to the list. The application was granted on 24<sup>th</sup> August, 2015.
  11. On 01<sup>st</sup> February, 2016, the Plaintiff filed a joinder application to join iTaukei Land Trust Board as a Nominal defendant to the proceedings. The Defendant opposed the application, directions were made and the joinder application adjourned to 13<sup>th</sup> April, 2016. It was again on this date that the Plaintiff/Counsel failed to appear in Court resulting in the striking out of both the Plaintiff's applications respectively.
  12. Again for the **second time** the Plaintiff filed a Summons seeking an order for the re-instatement of his applications to the list. On the adjournment date of 05<sup>th</sup> July, 2016, the Plaintiff failed to turn up in Court and hence the application for the re-instatement was struck out. Therefore, both the Plaintiff's applications remained struck out.
  13. On 05<sup>th</sup> August, 2016, the Plaintiff again for the **third time** filed a Summons seeking an order for the re-instatement of his applications to the cause list. This time the application for the re-instatement was heard and hence currently for determination.
  14. Upon the perusal of the Court record, it reveals that the Plaintiff/Counsel representing the Plaintiff **absented** himself from appearing in Court on at least two (2) occasions. The Plaintiff's absence on these occasions did not assist the Court rather put this Court in a situation where the matter could not move on and see that it is finally determined and disposed by the Court accordingly. All along and on the adjournments court dates, the Defendant made his presence in Court and was adamant that the case be struck out on the non-appearance of the Plaintiff/Counsel.
  15. Here, the chronology of events speaks for itself. It clearly shows how the matter moved at a Snail pace in terms of ensuring that the interlocutory joinder application as well as the completion of the cause of action in terms of Orders 15 and 113 of the *High Court Rules, 1988*.
  16. It can be clearly seen from the Court record together with the chronology of events set out hereinabove that the Plaintiff had not taken much interest in the matter to ensure that the Court expeditiously hears and determines the interlocutory joinder application and the substantive Originating Summons seeking Summary possession of land. I therefore conclude that the conduct on the part of the Plaintiff rather constituted an **Abuse of the Process** of this Court.
  17. In support of the above, reference is made to the case of *Barton Henderson Rasen -v- Merrett [1993] 1 Lloyd's Rep 540 Saville J* said 'that it is an abuse of the Court's process to issue proceedings with no intention of taking the case any further. In



*contentious matters, the Courts exist for the purpose of determining claims. Therefore, starting a claim with no intention of pursuing it is not using the Court's processes for the purposes for which they were designed." Accordingly, since the commencement and continuation of this proceedings the Plaintiff had no intention of bringing the matter to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the Plaintiff's action.* (Emphasis mine)

18. Further, the Plaintiff's current Application before this Court seeking orders for the setting aside of the Court's orders of 05<sup>th</sup> July, 2016 and to re-instate the Plaintiff's applications to the Cause list is made in support of an Affidavit deposed by Jitutasa Cakautini in his capacity as a Litigation clerk. Should this Court allow the usage of this affidavit deposed by the Litigation Clerk in this case?
19. It is not a good practice for Solicitor's Clerks to depose and file affidavits on behalf of the litigants especially who personally have little or no knowledge of the actual merits, demerits or the substance of this suit. Time and again, the Court's denouncement of the undesired practice of Clerks deposing substantive affidavits seems to have met with a lacklustre from practitioners, who have blatantly opted not to abandon the practice, which may have detrimental consequence to the litigants much to their ignorance. (HBC 148 of 2006- *Ram Kumar Singh -v- Minjesk Investment Corporation Limited and Anor. Refers*).
20. By virtue of O.41, r.4, I have the discretion to allow the use of the affidavit but am reluctant and will not approve of the same because of two (2) reasons-
  - The material contents of the Affidavit prima facie shows that the deponent of his own knowledge may not be able to prove the same facts to the Court.
  - Further, in light of what was said in the case of- *Ba Town Council -v- Fiji Broadcasting Commission [1976] 22 FLR 91 at 94*, His Lordship Mr. Justice Kermode in considering a similar objection as to compliance with O.41, rule (5) said that: '*the rule is mandatory and should be followed by legal practitioners*'.

### IN CONCLUSION

21. In the above circumstances, I will not grant the orders seeking the setting aside of the Court orders of 05<sup>th</sup> July, 2016 together with the re-instatement of the two (2) applications that were struck out for the non-appearance of the Plaintiff/Counsel. Further, considering the manner in which the applications were filed and handled by the Plaintiff and that on each adjournment the Defendant made appearances in Court entitles the Defendant to be awarded reasonable costs.

### FINAL ORDERS

- A. Plaintiff's Summons filed on 05<sup>th</sup> August, 2016 is hereby Dismissed;

- B. Plaintiff to pay the Defendant costs summarily assessed at \$350 within the next 14 days.
- C. Orders accordingly.

Dated at Suva this 22<sup>nd</sup> Day of JUNE, 2017



VISHWA DATT SHARMA  
Master of High Court, Suva

cc: *Muskits Law, Suva- for the Plaintiff*  
*Filimoni Tagicakibau- the Defendant*