

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 109 of 2015

BETWEEN : **RAVINDRA'S NADRO FOOD MART LIMITED** a company incorporated in the Fiji Islands and having its registered office at Sigatoka.

PLAINTIFF

AND : **B L NAIDU PROPERTIES LIMITED** a company incorporated in the Fiji Islands and having its registered office at Main Street, Queens Highway, Solevu, Sigatoka.

DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: **Mr. Shelvin Singh** for the Plaintiff
Ms. Devan for the Defendant

Date of Ruling: **1st August, 2017**

RULING

[Summons by the Defendant seeking an order to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 (1) (a) (b) (d) of the High Court Rules, 1988 and the Inherent Jurisdiction of the High Court]

APPLICATION

1. On the outset, it is important to note that there is another Civil Case impending determination for an order for vacant possession, filed by B.L Naidu Properties Limited. The Defendant in the current matter before this court is the Plaintiff in the other Matter HBC 135 of 2015. Both Counsels agreed that the current matter HBC 109 of 2015 should take precedence over HBC 135 of 2015 which seeks for an order for vacant possession.
2. The Current Summons is filed herein by the Defendant seeking an order to Strike Out the Plaintiff's Statement of Claim against the Defendant on the following:

Grounds:
 - (i) That it discloses no reasonable cause of action,
 - (ii) That it is Scandalous, frivolous or vexatious; and
 - (iii) That it is otherwise an abuse of the process of the Court.
3. The application is made pursuant to *Order 18 Rule 18 (1) (a), (b), and (d) AND order 22 Rule 8 of the High Court Rules 1988* and under *the inherent jurisdiction of the High Court*.
4. The Application was opposed by Plaintiff.
5. The application was heard in terms of the affidavit evidence filed coupled with the written and oral submissions made in this proceedings by the Plaintiff and the Defendant.

BACKGROUND

6. The Defendant is the registered owner of a commercial property legally described as lots 3 and 4 on Deposit Plan No. 4556 being the Certificate of Title No. 17614 situated in Sigatoka town.
7. The Defendant acquired the said commercial property on or about 04th July, 2013.
8. The Plaintiff was a Tenant/Lessee of part of the said commercial premises and was specifically in occupation of shops 3 and 4 and a car park under a lease agreement dated 29th October, 2012.
9. The Defendant acquired the shareholding in Prabhu Brothers Limited which was the previous registered owner/lessor of the said commercial property.

10. Under the terms and conditions of the said agreement, the Plaintiff had lease of shops 3 and 4 for a period of 3 years commencing on 01st July, 2012 and such period/term expiring on 30th June, 2015.
11. The said lease was subject to a right for further 2x three years terms.
12. Clause 7 of the lease expressly provides for the renewal of the lease.

The LAW and PRACTICE

Order 18 Rule 18 OF THE High Court Rules 1988:

13. 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).

14. 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.*

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- b. *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable - Lindley LJ 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"*
15. 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

16. 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?
 - (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?

ANALYSIS and DETERMINATION

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

17. 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)...."

18. 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".

19. It is for the Plaintiff to establish that they have a Cause of Action in this case in terms of the facts and the Pleadings filed herein.
20. On the other hand, the Defendant must establish that the Plaintiff does not have a Cause of Action in this case.
21. The Plaintiff's contention is that the Defendant is the owner of the property comprised in Certificate of Title No. 17614 being Lots 3 and 4 on DP 4556 and the landlord for the Plaintiff under a written lease agreement dated 29th October, 2012. The said lease was for a term of 3 years expiring on 30th June, 2015 and under Clause 7 of the Lease Agreement, the Plaintiff was entitled to 2x3 years of renewal if a notice of intention to renew the lease agreement was provided in terms of Clause 7 of the lease. The Plaintiff informed Court that he had provided an oral notice of renewal of the agreement and has been led by the Defendant's conduct to believe that his lease has been extended till the year 2021. In breach of the agreement of the meeting in or about end of April, 2013, the Defendant served a notice dated 08th April, 2015 to the Plaintiff to quit and deliver possession of the said premises on or before 30th June, 2015. The Defendant has refused to honour the extension of the lease agreed to with the Plaintiff and if there has been a breach of any covenant of the lease, which is denied by the Plaintiff, the Defendant has failed to provide any reasonable opportunity to the Plaintiff to remedy the breach. It can be ascertained from the Plaintiff's Statement of Claim that his case in fact hinges on at least three (3) Causes of action, *Agreement to Lease, Estoppel and Breach of Commerce Commission Decree 2010*.

22. The **Defendant** submitted that the term of the **lease agreement** effectively expired on 30th June, 2015. Clause 7 of the lease agreement is clear that in the event that the Plaintiff intended to renew the lease for a further period of say, six years, the Plaintiff as the lessee was required to give the Defendant notice in writing six months prior to the expiration of the period. The Defendant asserts that if the Plaintiff has failed to give such notice and if its claim were true that the lease had been renewed and extended to 2021, why didn't the Plaintiff record such agreement in writing since it was clearly in its interest to do so. The Defendant cited Clause 2 of the agreement and further stated that it only reviewed rental to compensate the greater usage of space/area by the Plaintiff is more credible because the Defendant carried out a proper assessment and gave notice of review of rental.
23. The **Striking out** application of the Defendant is a **summary proceeding**. **Striking Out** is only appropriate to cases which are **plain and obvious** in nature.
24. Bearing in mind the **facts** of this case and the **nature of the pleadings** filed by the parties to this proceedings, this case cannot be classed as '**plain and obvious**' in nature.
25. In this instant case, in particular, the Plaintiff's substantive claim is seeking for various **Declaratory Orders and Damages** for the **breach of the contract**.
26. In considering the allegations and pleadings filed herein, I find **prima facie tribal issues** that ought to be determined by the test of evidence at a full hearing. The evidence given at the hearing will enable the court to determine what transpired between the Plaintiff and the Defendant and what were the arrangements reached between them, if any. Therefore, the Plaintiff at the outset has shown **prima facie a reasonable cause of action** which needs to be **determined** accordingly.
- Whether the Plaintiff's Writ of Summons & the Statement of Claim is Scandalous, Frivolous or Vexatious & Abuse of Process of the Court**
27. 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).
28. 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...."

29. 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)."

30. 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** and irrelevant facts and therefore makes the Plaintiff's Claim **Scandalous**?

According to the **Defendant**, the Plaintiffs claim is devoid of merits. The action is not factually or legally grounded and matters in the pleadings filed by the Plaintiff discloses no reasonable cause of action. That both parties' rights are governed by the lease agreement and in this instance the Plaintiff failed to invoke the provisions of the lease agreement to renew the lease, so hopeless and defective that it will not succeed.

The Plaintiff submitted that the **Defendant** has not pointed out which parts of the Plaintiff's claim is **scandalous**. There is no merit in this part of the Defendant's application.

It would be appropriate for this Court to put the **evidence** of the parties to the proceedings to **test** at the full hearing in order to determine whether the Plaintiff's claim has **scandalous** matters or not. At this stage, that cannot be done within a summary hearing.

31. The issue of whether the Plaintiff's Claim is **frivolous** or **vexatious**? Reference is made to paragraph 18/19/15 of the Supreme Court Practice 1993, 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;"

32. *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'.

33. The Defendant submitted that the Plaintiff's claim is devoid of merits. The action is not factually or legally grounded. Both parties' rights are governed by the lease agreement and in this instance the Plaintiff failed to invoke the provisions of the lease agreement to renew the lease.

34. The Plaintiff submitted that the Plaintiff's claim has a useful and serious purpose. It has a lease of the area which it occupies and that was the lease that was extended by the conduct of the parties before expiry. The Defendant knew of the fact that the Plaintiff wanted to extend the lease over the premises and because the Plaintiff was being asked to pay an increased rent, the Defendant represented through its Director Bala Krishna Naidu that the Plaintiff should not provide a written notice of intention to renew. The Plaintiff has relied on this assurance and done exactly that; it has not provided a notice to renew in writing but has made rental payments to its detriment believing that the lease had been renewed.

The parties are not coming to court with clean hands. Therefore, it is appropriate that the matter is heard and determined by the Court in terms of the law and evidence which the parties to the proceedings can only produce at the hearing proper.

35. Taking into consideration the above matters together with the written/oral submissions and arguments raised in Court by the both Counsels representing the parties to this proceedings, the Defendant has failed to establish that the Plaintiffs claims against the Defendant lacks merits and tantamount to frivolous and vexatious claim. The Plaintiff's claim is properly formulated and can be deliberated at a full hearing accordingly.

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

37. 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).

38. 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."

39. 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"

40. The Plaintiff commenced proceedings against the Defendant on 14th July, 2015 at the High Court in Lautoka, claiming certain declaratory orders and Damages for breach of Contract including the contravention of the Commerce Commission Decree 2010. The matter upon application was subsequently transferred to the Suva High Court and listed before the Master on 03rd May, 2016. The Defendant thought fit to file and serve a striking out application against the Plaintiff's claim. Thereafter, the affidavits were filed by the parties to enable Court to hear and determine the application. Thus before this Court now for deliberation.

The Defendant has not shown any evidence against the Plaintiff as to how the abuse of the Court process sets in this case. A mere file search will reveal that the Plaintiff has not in any way misused the Court machinery or not in good faith and for proper purposes.

The substantive issues that needs to be determined by the Court are 'whether there was contravention of the Commerce Commission Decree 2010 and breach of contract on the part of the Defendant? Whether the Declaratory orders sought together with the Damages for the breach of Contract should be allowed.

Above issues can only be determined by testing the evidence subjecting it to cross examination that would reveal; what actually transpired between the Plaintiff and the Defendant and whether there was any existence of any mutual arrangement and agreement reached between the parties in terms of the tenancy agreement or not?

Therefore, I find that the Plaintiff has used the Court process, in good faith and for proper purposes, and has not misused the Court machinery to commence the proceedings and bring the same to conclusion. There is no abuse of court process by the Plaintiff as claimed by the Defendant herein.

41. 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."

42. Having perused and analyzed the issues raised by the Defendant and the Plaintiff 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 possess all the requisite material and evidence to reach a definite and certain conclusion as enumerated hereunder.

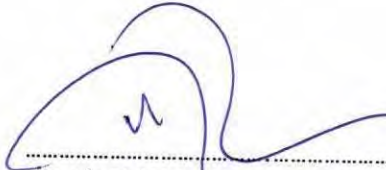
43. Accordingly, I make the following orders-

44. ORDERS

- (i) That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim hereby fails and is accordingly dismissed.
- (ii) That the Plaintiffs Writ of Summons and the Statement of Claim remains intact for Court's further consequent directions.
- (iii) The Defendant to pay to the Plaintiff summarily assessed cost of \$1,000 within 14 days.
- (iv) Orders accordingly.

Dated at Suva this 1st day of August, 2017




MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Shelvin Singh Lawyers, Suva
Neel Shivam Lawyers, Suva.