IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 203 of 2005

BETWEEN	:	NAKAULEVU BHAJAN RAMAYAN MANDALI
		Plaintiff
AND	:	RAM NARAYAN JOKHAN
		First Defendant
AND	:	THE TRUSTEES OF ASSEMBLIES OF GOD
		Second Defendant
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr K. Singh for the Plaintiff Mr N. Lajendra for the estate of the First Defendant, since deceased
Date of Hearing	:	3 August 2017
Date of Judgment	:	7 August 2017

JUDGMENT

1. At the outset I desire to set down the following. The Second Defendant was represented by Ms Nancy Choo of Counsel. On 27 July 2017, I granted leave to Messer R. Patel Lawyers to withdraw as Counsel for the Second Defendant. (Order). In her presence, I fixed the Plaintiff's application for leave to appeal, on 3 August 2017. On that date Ms Choo was absent, although fully aware of the provisions of Order 67 rule 6(1) of the High Court Rules.

2. The Order was sealed on 2 August 2017. A perusal of the Court file on 3 August 2017 did not disclose any certificate signed by Ms Nancy Choo that the Order had been duly served as required. Thus, Ms Choo shall "be considered the barrister and solicitor of the party (Second Defendant) until the final conclusion of the cause or matter".

3. The above observation is rendered necessary as the Counsel for the Plaintiff was concerned for the Second Defendant as their Counsel was absent at the hearing.

4. This is the Plaintiff's Summons (Summons) seeking leave to appeal against the decision of the Master (Ruling) delivered on 10 May 2017 and for it to be stayed until the final determination of this appeal. It is made pursuant to Order 59 rule 8(2) and rule 11 and supported by the affidavit of Ist Deo sworn on 28 May 2017.

5. The hearing commenced with Counsel for the Plaintiff providing a written submission and then making an oral submission. He said the case was set down for hearing in 2011 and the Plaintiff's solicitors applied to amend the statement of claim. This application was withdrawn on 4 May 2011 by the Plaintiff's solicitors. The Plaintiff's notice of intention to proceed was filed on 8 February 2012. The Court served a notice under the provisions of O.25 r 9 on 24 August 2015. The

First Defendant passed away on 28 September 2011. The trustees of the Plaintiff had to be registered. The Master held there was inordinate delay and a fair trial was not possible.

6. Counsel said the delay was beyond the Plaintiff's powers. There was a serious question of law to be tried as this involved the building of a temple for a particular community and was a matter of public interest. He was not the solicitor for the Plaintiff then. Leave should be granted so that their appeal can proceed.

7. Counsel for the First Defendant then submitted. He said the Ruling was thorough and all matters under O.25 r.9 were considered. There was an inordinate delay and there was no error on the Master's part. Counsel concluded by referring to errors in the Plaintiff's affidavit in support.

8. Counsel for the Plaintiff then referred to paras 6 and 7 of the same affidavit.

9. At the conclusion of arguments I said I would take time to consider my decision. Having perused the written submission and the authorities cited I shall now pronounce my judgment.

10. At the outset, the Court notes that O.25 r. 9 (1) empowers the Court of its own motion to strike out a matter for want of prosecution or as an abuse of the process of the Court where no step has been taken for 6 months.

11. This necessarily entails the Court trawling through the record which discloses the following.

    (1) The writ of summons was filed on 3 May 2005.

    (2) The statement of defence of the (First) Defendant was filed on 1 July 2005.

(3) A notice of intention to proceed was filed on 6 June 2006.

(4) The Second Defendant was joined in this action by an order of the Master on 10 July 2006.

(5) The minutes of the pretrial conference held on 12 March 2008 record there were 3 Counsel present, who respectively represented the Plaintiff, the First Defendant and the Second Defendant.

(6) The Copy of the Pleadings for the Judge filed on 30 April 2008 does not disclose any defence filed by the Second Defendant but it does disclose the order made by the Master on 3 May 2007 that, inter-alia, the pretrial conference be held on 26 June 2007 and its minutes filed by 3 July 2007.

(7) At the trial of the action before the judge on 14 March 2011, the Counsel for the Plaintiff sought leave to amend the statement of claim.

(8) On 21 March 2011, the solicitors for the Plaintiff filed an application for leave to amend the statement of claim, which was withdrawn by them on 4 May 2011.

(9) On 3 February 2012 the Plaintiff filed it's notice of intention to proceed.

(10) On 22 January 2016 the Plaintiff filed a summons for orders to substitute the First Defendant with the executor of his estate and for leave to amend the writ of summons and the statement of claim.

(11) The sorry tale ends on 10 May 2017 when the Master dismisses and strikes out the Plaintiff's substantive action.

12. I set out below some of the inordinate and inexcusable delays in the litigation:

(a) A notice of intention to proceed was filed 11 months after the filing of the defence.

(b) The pretrial conference was held 1 year and 8 months after the Second Defendant was joined in the action.

(c) Further the above conference was held on 12 March 2008 although the Master had ordered it be held on 26 June 2007.

(d) The Plaintiff's application to amend the writ and the claim was filed about 4 years after the Plaintiff filed another notice of intention to proceed. To date (3 August 2017) this has still not been done.

13. This litigation satisfies the requirements set out in the Supreme Court Practice 1995 for dismissal for want of prosecution. There was delay after the issue of the writ which will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. The effect of the lapse of time on the memory of witnesses or of their death are examples of prejudice to the defendant. (see pages 472 – 474). Here the First Defendant died on 28 September 2011, more than 6 year after he filed his defence without the Plaintiff having brought the action to an actual hearing.

14. It should therefore be as plain as a pikestaff to any clear headed or clear sighted observer that there was inordinate delay on the part of the Plaintiff. The Oxford Advanced Dictionary of Current English defines "inordinate" as "excessive". This excessive delay could not be hidden by the voluminous documents filed by the solicitors.

15. In the light of the decision I am reaching it would inexpedient to refer to the authorities cited by Counsel for the Plaintiff. Instead, I adopt what the Full Court in Victoria in Duncan v Lowenthal [1969] V.R. said at p.188 that "the balance of the justice demands that an end be put to this litigation at this stage".

16. The best evidence that "the litigation is now so stale that there is no way in which justice can now be done to the parties" per Gillard J in Niemann v Electronic Industries Ltd [1978] V.R. at p.448, is the fact that para 5 of the statement of claim refers to a Deed entered into between the Plaintiff and the (First) Defendant on 5th July, 1996. That was 21 years ago. Further, the dilatoriness on the part of the Plaintiff and their legal advisors has resulted in a lapse of 12 years since the filing of the writ.

17. In my opinion there was an unexplained excessive and inexcusable delay and the Plaintiff cannot validly complain that they have to suffer the inevitable consequences of their failure to prosecute their claim. The Plaintiff's solicitors (and I make no distinction between their past and present ones) manifestly evinced a dilatory attitude and omitted to take the necessary steps to expedite the litigation. Indeed the record shows the conduct of the Plaintiff and their legal advisors were attended by indifference and a cavalier attitude to the expeditious prosecution of their claim. Arguments by the Plaintiff's Counsel from the Bar table that there is a question of law and this is a matter of public interest work counter productively because if these were true the Plaintiff and their solicitors would have been motivated and energized to get their act in order at an early stage. It would therefore be plainly unjust to both defendants if the Master's Ruling were to be overturned by me. In any event, I find no reason to do so.

18. The final word has to be the maxim of public policy expressed in Latin which translated into English states "It concerns the state that lawsuits be not protracted". This is the lodestar for any court, to ensure that the expeditious dispensation of justice is not impeded by stale litigation.

19. In the result:

(1) I dismiss the Summons.

(2) I affirm the orders made by the Master on 10 May 2017.

(3) I order the Plaintiff to pay the First Defendant's estate, only, costs summarily assessed at $500 for this Summons.

Delivered at Suva this 7th day of August 2017.

David Alfred
Judge
High Court of Fiji