

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 16 of 2013

BETWEEN : KWON SOON JAE of Embassy of Republic of Korea.

PLAINTIFF

AND : BENJAMIN PADARATH of Duncan Street, Suva

1ST DEFENDANT

AND : THE ESTATE OF ADISH PADARATH

2ND DEFENDANT

AND : LAVENIA PADARATH of Duncan Street, Suva

3RD DEFENDANT

BEFORE: Master Vishwa Datt Sharma
COUNSEL: Ms. Raikaci for the Plaintiff
Mr. Naco for Defendants

Date of Hearing: 25th August, 2016
Date of Ruling: 06th February, 2017

RULING

[2nd and 3rd Defendant's Amended Application to Strike out the Plaintiff's Amended Statement of Claim filed on 03rd March, 2014 pursuant to Order 18 Rule 18 (1) (a) and (d) of the High Court Rules, 1988 and the inherent Jurisdiction of Court]

INTERLOCUTORY APPLICATION

1. The 2ND and 3RD Defendants filed an Amended Summons on 20th July, 2015 and sought for the following orders-
 - (i) That the Plaintiff's Amended Statement of Claim filed on 03rd March, 2014 be **struck out** on the grounds that:
 - (a) It discloses no reasonable cause of action; AND
 - (b) It is an abuse of process of the Court.
2. That the orders of the Court staying the execution of the default judgment entered on 21st May, 2013 be quashed, and
3. That the restriction of the payment of Trust Funds in favour of the 2nd and 3rd Defendants be uplifted forthwith; and
4. Costs of \$2000 to be paid by the Plaintiff, and
5. Such further or other orders as the Court may deem fit to make in the circumstances.
6. The application is supported by an Affidavit deposed by Lavinia Padarath.
7. The application is strongly opposed by the Plaintiff.

THE LAW

8. 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).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

(Application is made in terms of (a) & (d) only)

ANALYSIS and DETERMINATION

9. The 2ND AND 3RD Defendants are seeking that the Plaintiff's Amended Statement of Claim filed on the 03rd Day of March, 2014 be struck out on the grounds that-
- (a) It discloses no reasonable cause of action; and
 - (b) It is an abuse of the process of the Court.
10. The application also seeks the following further orders-
- (i) That the orders of the Court staying the execution of the default judgment entered on 21st May, 2013 be quashed,
 - (ii) That the restriction of the payment of Trust Funds in favour of the 2nd and 3rd Defendants be lifted forthwith, and
 - (iii) Costs of \$2000 to be paid by the Plaintiff.

Preliminary Objection

11. Counsel representing the Plaintiff raised a preliminary objection that the present Summons filed before this Court by the 3rd Defendant should not be heard, since she has not purged her contempt by the non-compliance of the two Court Orders dated 08th May, 2013 and 27th June, 2013 respectively. This was raised in her written submissions filed in Court.
12. In fact I find that there is no formal application before this Court to deal with the alleged Contempt on the part of the Defendants. Secondly, the Master of the High Court does not have the Jurisdiction to hear and determine any application regarding the issue of Contempt.

13. If the Plaintiff's Counsel was of the view that the 3rd Defendant was in Contempt and or non-compliance of any Court orders, then the Counsel should have taken appropriate steps in terms of the set down Rules and Procedures and allow the Court to hear and determine the same.
14. Therefore, I will make no orders as sought for by the Plaintiff's Counsel in respect of the Contempt issue, rather the Counsel is at liberty to consider filing any formal application appropriate in the circumstances.
15. I must remind both Counsels that when this matter was called before me, the Court was informed that the parties to the proceedings were talking settlement and there was every possibility that the matter will be settled. Time and again, for this very reason and upon the application of Counsels, this Court had to adjourn this case.
16. The 3rd Defendant should be given the right to be heard and this Court will proceed to hear and determine the present application accordingly.

No Reasonable Cause of Action

17. I will now determine *whether the Plaintiff's Amended Statement of Claim discloses no reasonable cause of action.*
18. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional case **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
19. The test for **reasonable cause of action** does not require the court to determine whether the cause of action in the pleadings will eventually succeed. The only issue to be considered is that the facts pleaded in the pleadings **disclose some cause of action** or a dispute fit to be decided by the court as per the case of **Bano v Rashid** [2014] FJHC 266.
20. In **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208. 1998L (23 February 2005) his Lordship Justice Gates (current Chief Justice) stated as follows:-

"A reasonable cause of action means a cause of action with "some chance of success" per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 All ER 1094 at p.1101f. The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the

Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277.

21. The Counsel for the 2nd and 3rd Defendants submitted 'that there is no nexus created by the 2nd Defendant and 3rd Defendant in the entire Amended Writ apart from the cosmetic amendments inserted by the Plaintiff in seeking to rope them into what is clearly a contractual arrangement between the 1st Defendant and the Plaintiff only. The attempt by the Plaintiff in his Amended Writ by cosmetically adding two paragraphs in his attempt to show that there exists a case against the 2nd and 3rd Defendants does not improve their position from the last form of Writ to which the Court had earlier found that no such nexus exists against the 2nd and 3rd Defendants.'
22. Whereas, the Counsel for the Plaintiff submitted that 'Paragraphs 3, 4 and 5 of the Amended Statement of Claim are relevant to the joinder of the 2nd and 3rd Defendants as party to the proceedings. Although the remedy of specific performance is inadvertently omitted in the Statement of Claim, the omission can be cured by further amendment to the Statement of Claim.'
23. Upon my perusal of paragraphs 3, 4 and 5 of the Plaintiff's Amended Statement of Claim, the amendment does meet the appropriate standard of pleadings in so far as they relate to the 2nd and 3rd Defendants as the parties to the proceedings accordingly. The statement of claim pleads 'that the Estate comprises partly of a freehold property located at 57 Duncan Road, Suva of which both the 2nd and 3rd Defendants own an undivided one third share. That the 3rd Defendant is the mother of the 1st Defendant and she is sued both as the executrix of the 2nd Defendant's estate and also by virtue of her undertaking to pay from the proceeds of sale of the property comprising the 2nd Defendant's estate, money that the 1st Defendant had defrauded from the Plaintiff.'
24. I have applied the aforementioned Test to determine if there is any existence of a cause of action in the within action. I find that the pleadings filed in the within action before me discloses some cause of action.
25. I also note from the Court Judgment dated 12th February, 2014 that the Plaintiff was granted orders to consider any amendments to the Statement of Claim and or Writ of Summons within 14 days.

Abuse of the process of the Court

26. Further, the Second issue raised is whether the Plaintiff's Claim is an abuse of process of the Court?

27. 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).

28. The summary procedure or an Interlocutory application should not be used to determine whether there is any "abuse of the process of the court", rather the matter must be heard to determine the issue in the Writ of Summons and the Statement of Claim in terms of the 'Relief sought' making a claim, whether it is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it.
29. The Plaintiff is seeking orders for Special and General Damages, Interest and Costs as set out at prayers 1- 4 inclusive of in his Amended Writ of Summons and the Statement of Claim.
30. It is too early at this stage of the proceedings to determine whether the action should be struck out on the grounds of "Abuse of the process of the Court", since the Plaintiff is seeking orders for 'Damages, Interest and Costs' and I reiterate the court needs to hear evidence in order to determine the issue of 'Damages, Interest and Costs', accordingly.

31. Therefore, the Plaintiff's substantive Writ of Summons and the Statement of Claim cannot be just struck out on a summary or an Interlocutory application.
32. Having perused and analyzed the issues raised by both the 2nd and 3rd Defendants and the Plaintiff in terms of 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 before it to reach a definite and certain conclusion in favour of the Plaintiff.
33. I uphold the submissions of the Counsel representing the Plaintiff and accordingly strike out the 2nd and 3rd Defendants Summons seeking to Strike out the Plaintiff's Writ of Summons and the Statement of Claim.


Stay of Execution of Default Judgment & Uplifting Restriction of Trust Fund

34. With regards to the further orders sought by the 2nd and 3rd Defendants in terms of the following-
 - (a) *That the orders of the Court staying the execution of the default judgment entered on 21st May, 2013 be quashed, and*
 - (b) *That the restriction of the payment of Trust Funds in favour of the 2nd and 3rd Defendants be uplifted forthwith.*
35. The Judge of the High Court had made the abovementioned orders and therefore the Master of the High Court is not vested with the powers and Jurisdiction to either deal with and or determine making any further orders. The Master is ultra virus in the circumstances. Therefore, I make no orders in respect of (a) and (b) above as set out hereinabove.
36. Accordingly, I make the following orders-
 - (i) **That the 2nd and 3rd Defendant's Amended Summons seeking the Striking Out of the Plaintiff's Amended Writ of Summons and the Statement of Claim fails and is accordingly dismissed.**
 - (ii) *No orders are made in respect of quashing the orders staying the execution of the default judgment entered on 21st May, 2013 and uplifting the restriction of the payment of Trust Funds in favour of the 2nd and 3rd Defendants as sought for in the application.*
 - (iii) **No orders are made in respect of the Preliminary Issue raised.**

- (iv) That the 2nd and 3rd Defendants is ordered to pay the Plaintiff costs summarily assessed at \$750 within 14 days.
- (v) Matter adjourned for mention for further directions on 14th February, 2017 at 9am.

Dated at Suva this 06th day of February, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Ms. Raikaci, Raikaci & Ravono Lawyers, Nausori
Mr. Vosorogo, Mamlakah Lawyers, Suva