

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 256 of 2010

BETWEEN: WAKAYA LIMITED

PLAINTIFF

A N D: MARSHA NUSBAUM

1ST DEFENDANT /
1ST COUNTERCLAIM PLAINTIFF

KENNETH CHAMBERS

2ND DEFENDANT /
2ND COUNTERCLAIM PLAINTIFF

DAVID H. GILMOUR

1ST COUNTERCLAIM DEFENDANT

MELIKI T. TUINAMUANA

2ND COUNTERCLAIM DEFENDANT

RENEE D. S. LALA

3RD COUNTERCLAIM DEFENDANT

DILIP K. JAMNADAS

4TH COUNTERCLAIM DEFENDANT

DEFENDANTS

BEFORE: His Lordship Hon. Justice Kamal Kumar

COUNSELS: Mr. J. Apted and Mr. K. Jamnadas for the Plaintiff, 1st and 4th
Counterclaim Defendants
1st Counterclaim Plaintiff in Person
2nd Counterclaim Plaintiff in Person

DATE OF HEARING: 22 November 2016

DATE OF RULING: 31 October 2017

RULING

(Application to Strike out Defence to Amended Counterclaim)

1.0 Introduction

- 1.1 On 28 September 2015, 2nd Defendant/2nd Counterclaim Plaintiff filed Application by way of Summons seeking following Orders:-
- “1. That **UNLESS** the plaintiff and counterclaim defendants shall within 14 days file and serve an amended statement of defence to counterclaim which does not plead affirmative defences struck out by consent order of this Court dated 14 May 2013 the statement of defence to counterclaim filed in this Court on 27 December 2012 shall be struck out **AND** the counterclaim shall proceed to an expedited trial on damages.
 2. That **UNLESS** the plaintiff and counterclaim defendants shall within 14 days file and serve an amended statement of defence which complies with the High Court Rules the statement of defence to counterclaim filed in this Court on 27 December 2012 shall be struck out **AND** the counterclaim shall proceed to an expedited trial on damages.
 3. **ALTERNATIVELY** that the plaintiff and counterclaim defendants shall within 14 days file and serve an amended statement of defence to counterclaim complying in all respects with the directions of this Honourable Court **AND** the counterclaim shall proceed to an expedited trial.
 4. That the plaintiff shall pay indemnity costs on this application.
 5. For such further or other relief Honourable Court determines appropriate.”
- 1.2 On 25 September 2015, and 28 September 2015, the Applicants filed two Applications, one to strike out Defence to Amended Counter-claim (**Striking Out Application**) and the other for Interlocutory Injunction (**Injunction Application**).

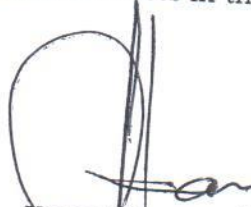
- 1.3 On 2 October 2015, parties were directed to file submissions in respect to Striking Out Application and Injunction Application.
- 1.4 Injunction Application was heard on 27 November 2015, and Ruling was delivered on 20 April 2016.
- 1.5 On application by Counsel for Plaintiff, 1st and 4th Counter-claim Defendants time for filing of Submissions in respect to Strike Out Application was extended to 11 May 2016, and Reply to Submission to 1 June 2016.
- 1.6 Striking Out Application together with pending Application to join parties ("**Joinder Application**") and Application for Leave to file Third Amended Counterclaim ("**Amendment Application**") and Application to Extend Caveat ("**Caveat Application**") was adjourned to 25 August 2016, for hearing with matter to be called on 20 June 2016, to ensure that all documents are in order for hearing.
- 1.7 The Applications were next called on 8 July 2016, when Counsel for Plaintiff, 1st and 4th Counter-claim Defendants sought time to file Supplementary Affidavit in respect to Caveat Application when leave was granted for them to file Supplementary Affidavit with right of Reply given to Chambers.
- 1.8 On 25 August 2016, Counsel appearing for Plaintiff, 1st and 4th Counter-claim Defendants sought time to file fresh Submissions in respect to Caveat Application in view of Injunction Ruling.
- 1.9 Hearing date was vacated and parties were directed to file Submissions by 16 September 2016. Plaintiff, 1st and 4th Counter-claim Defendants were ordered to pay Chambers cost for the day and all four Applications were adjourned to 22 November 2016, for hearing.
- 1.10 On 22 November 2016, Joinder Application, Striking Out Application and Caveat Application was heard and adjourned for Ruling on Notice. The Amendment Application was adjourned to 7 December 2016, for mention due to shortage of time.
- 1.11 On 7 December 2016, this matter was adjourned to 15 December 2016, as 1st Counterclaim Plaintiff just instructed Counsel.

- 1.12 On 15 December 2016, the Application for Leave to file Third Amended Counter-claim was adjourned to 24 January 2017, for hearing.
- 1.13 On 24 January 2017, Application for Leave to file Third Amended Counter-claim was heard when Counsel for parties made Oral Submissions and the Application for Leave to file Third Amended Counter-claim was adjourned for Ruling on Notice.
- 1.14 The Applicants, Plaintiff, 1st and 4th Counterclaim Defendants filed Affidavits and Submissions in relation to the Striking Out Application.
- 1.15 This Court is of the view that since this Court has granted leave to Counterclaim Plaintiffs to file Third Amended Counterclaim there is no need to proceed with the Striking Out Application and the Application should be dismissed and struck out with costs to be cost in the cause.

2.0 Orders

- 2.1 This Court makes following Orders:-
- (i) The Application to Strike Out Statement of Defence to Amended Counterclaim by Summons dated 28 September 2016, be dismissed and struck out.
 - (ii) Cost of the Application to Strike Out Statement of Defence to Amended Counterclaim be costs in the cause.




Kamal Kumar
JUDGE

At Suva
31 October 2017

M/S Jamnadas & Associates for Plaintiff, 1st and 4th Counterclaim Defendants
1st Defendant/Counterclaim Plaintiff in Person
2nd Defendant/Counterclaim Plaintiff in Person