

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 173 OF 2009

BETWEEN : **PRAVIN RAVINDRA NARAYAN** father's name Jagdish Narayan
of 48 Bavadra Road, Kashmir, Lautoka, Businessman.
PLAINTIFF

A N D : **AIR TERMINAL SERVICES (FIJI) LIMITED**
1ST DEFENDANT

A N D : **JANE NANOBU** of Nadi Airport, ATS Staff.
2ND DEFENDANT

A N D : **LAISA REECE** of Nadi Airport, ATS Staff.
3RD DEFENDANT

Appearances : No appearance for the plaintiff.
Mr R. Singh for the first defendant
Mr K. Tunidau for the second and third defendants

Date of Hearing: 14 June 2018

Date of Ruling : 14 June 2018

R U L I N G

[on striking-out]

Introduction

[01] This is an application for striking-out the claim.

[02] By its application supported by an affidavit filed 18 May 2018, the first defendant ('the defendant') seeks the following orders:-

- i. *That the Plaintiff's action be dismissed out for want of prosecution, the Plaintiff not having made any effort to prosecute and to conclude the matter.*

ii. *Costs on a full Solicitor/client indemnity basis.*

[03] The application is made pursuant to Order 25, Rule 9 and Order 34, Rule 1 (2) of the High Court Rules 1988, as amended ('HCR') and the inherent jurisdiction of the court.

[04] The plaintiff neither appeared in court nor filed a response in opposition.

[05] At the hearing, the defendant relied on the affidavit filed in support of the application.

Chronology of Events

[06] The chronological events as stated by the defendant are as follows:

Item	Document	Date/Filed
1.	The Plaintiff through his solicitors Messrs Iqbal Khan & Associates instituted this action and filed Writ of Summons, Statement of Claim and Acknowledgement of Service against the Defendants claiming damages and costs.	16/09/09
2.	Plaintiff filed Default Judgment.	12/07/10
3.	Plaintiff filed Notice of Assessment of Damages.	21/07/10
4.	First Defendant filed Notice of Appointment of a Solicitor	04/08/10
5.	First Defendant filed Affidavit in Support and Summons (to set aside Default Judgment).	26/08/10
6.	The Defendant's Summons to set aside Default Judgment dated 26 August 2010 came before Master Tuilevuka on 2 September 2010 when he made order that the Default Judgment entered on 9 July 2010 be set aside and the first defendant to file and serve Statement of Defence within 14 days and the matter got adjourned to 27 September 2010 for mention only.	02/09/10

7.	First Defendant filed Statement of Defence.	17/09/10
8.	Plaintiff filed Reply to Statement of Defence	11/11/10
9.	Plaintiff filed Summons for Direction.	23/11/10
10.	Plaintiff filed Affidavit Verifying List of Documents.	14/04/11
11.	First Defendant filed Affidavit Verifying List of Documents.	27/04/11
12.	Plaintiff filed Pre-Trial Conference Minutes	22/09/11
13.	Plaintiff filed Copy pleading.	12/10/11
14.	Plaintiff filed Bundle of Documents.	21/11/11
15.	Plaintiff filed Affidavit in Support and Notice of Motion (To vacate the trial).	02/07/12
16.	Plaintiff filed Affidavit in Support and Summons (to Re-instatement of the matter)	08/09/15
17.	First Defendant filed Affidavit in Opposition (to the Summons filed on 08/09/15 by the Plaintiff)	09/10/15
18.	First Defendant tendered its submissions (opposing the re-instatement application)	27/01/16
19.	The Plaintiff application dated 8 September 2015 came before Justice Ajmeer on 27 January 2016 for hearing when his Lordship struck out application and ordered the Plaintiff to pay the First Defendant costs summarily assessed in the sum of \$350.00.	27/01/16

The Law

[07] The law on striking-out a claim for want of prosecution is found in O.25, Rule 9, which provides:

“(1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or

matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

2) Upon hearing the application the Court may either dismiss the cause or matter on such terms as may be just, or deal with the application as if it were a summons for directions.(Emphasis added)" .

[08] O 34, R 1 (2) provides:

"Time for setting down action (O.34, r.1)

1.-(1) Every order made in an action which provides for trial before a Judge shall, wherever the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.

"(2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just." (Emphasis supplied)

[09] When considering an application for striking-out for want of prosecution, O 3, R 5 also comes to play. Rule 5 says:

"Notice of intention to proceed after 6 months delay (O 3, R 5)

5 Where 6 months or more have elapsed since the last proceeding in a cause or matter, a party intending to proceed must give not less than one month's notice of that intention to every other party. An application on which no order was made is not a proceeding for the purpose of this Rule."

The defendant's evidence

[10] The summary of the defendant's evidence by affidavit may be stated as follows:

- a) the matter was listed before the Master of the High Court on 27 January 2014, when both parties did not appear in Court and due to non-appearance by both parties the Court made order that the matter to be taken off from the cause list.*

- b) *From 7 August 2012 to 8 September 2015, the plaintiff did not take any action and/or steps to proceed with the matter or to have the same concluded within a reasonable period of time.*
- c) *On 27 January 2016, the court on the plaintiff's application dated 8 September 2015 to restore the matter back to the cause list was struck out with cost (\$350.00) to the defendant.*
- d) *Since 27 January 2016 to 20 April 2018, it's more than 2 years and 3 months the plaintiff has simply not prosecuted his claim. This delay has caused prejudice to the first defendants in that it has incurred unnecessary legal costs to defend a proceeding which has moved for more than 2 years.*
- e) *There has been an unreasonable delay on the part of the plaintiff and it will cause a grave injustice to the first defendant to have a fair trial of this action because there would be difficulties locating witnesses and ensuring they remember what occurred since this happened more than 9 years ago.*
- f) *The course of action arose on 2 July 2009 and this is almost 9 years old matter. Most of the first defendant witnesses' whereabouts are not known.*
- g) *The plaintiff's prolonged delay has caused prejudice to the first defendant by this action hanging over the Company for at least 9 years.*

[11] The striking-out application was served on the plaintiff calling to show cause as to why the action should not be struck out for want of prosecution. The plaintiff failed to show any cause as required of him.

[12] On 27 January 2014, the matter was taken off the cause list as there was no appearance by either party. Thereafter, on 8 September 2015 (some 7 months after the matter was taken off the cause list), the plaintiff filed an application for reinstatement of the case back to the cause list. That application was refused by the court on 27 January 2016. The plaintiff did not appeal the decision that refused the plaintiff's application to reinstate the matter. The action has been

dormant from 27 January 2016, the date the court struck out the plaintiff's application for reinstatement. In other words, the matter has been lying in court without any steps being taken by the plaintiff for more than 2 years.

[13] The plaintiff did not file notice of intention to proceed as required by O 3, R 5, of the HCR. It is required under that rule: *Where 6 months or more have elapsed since the last proceeding in a cause or matter, a party intending to proceed must give not less than one month's notice of that intention to every other party.*

[14] The conduct of the plaintiff clearly shows that he has no intention to proceed with the matter and bring it to a conclusion. The plaintiff did not even bother to attend the court and show cause as to why his claim should not be struck out for want of prosecution. This fortifies the plaintiff's intention to not proceed with the case.

[15] Setting down the action for trial within the period set by the court does not arise in this instance as the action had been taken off the cause list for want of appearance by either party. Therefore, O 34, R 1 (2) of the HCR has no application here.

Conclusion

[16] I have considered the application and the affidavit filed in support of this application. There has been no appearance by or for the plaintiff. There has been no explanation for the delay and for not taking any steps from 27 January 2016. This is a 2009 matter. The action has been stagnant for more than 2 years without any action being taken. It demonstrates that the plaintiff has no interest to prosecute the action and bring it to termination. The plaintiff has failed to show his ability to pursue the proceedings with reasonable diligence and expedition. I

would, therefore, act under O 25, R 9, strike out and dismiss the action for want of prosecution. At the hearing, the defendant did not press for cost order, as such I make no order as to costs.

The Result

- 1) Action dismissed for want of prosecution.
- 2) No order as to costs.

M.H. Mohamed Ajmeer
14/6/18

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M.H. Mohamed Ajmeer
JUDGE



At Lautoka
14 June 2018

Solicitors:

For the plaintiff: M/s Iqbal Khan & Associates, Barristers & Solicitors

For the first defendant: M/s Sherani & Company, Solicitors