

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 291 of 2013

BETWEEN : **NED THOMAS HICKS** of Woronora Avenue, Leumeah, NSW 2560, Australia.

PLAINTIFF

AND : **BANK OF SOUTH PACIFIC** a registered commercial bank having its registered office at 371 Victoria Parade, Suva.

1ST DEFENDANT

AND : **ALOESI ADIMAIDRANO DAKUIDREKETI** of 18 Kedrakulu subdivisions, Sigatoka, Fiji.

2ND DEFENDANT

AND : **REGISTRAR OF TITLES** at the floor of Civic Towers, Suva.

3RD DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI** as a nominal defendant under the relevant provision of the Crown Proceedings act and is vicariously liable for any negligence deprived from any errors or tortfeasor committed by any government agencies as its legal custodian.

4TH DEFENDANT

BEFORE: Master V. D. Sharma

COUNSEL: Mr. Radio - for the Plaintiff
Mr. Amrit Chand - for the 1st Defendant

DATE OF RULING: 12th July, 2018

RULING

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

APPLICATION

1. This is the 1st Defendant's Summons to Strike Out, and seeks the following orders:
 - (a) *That the First Defendant having secured Judgment dated 30th January 2015, the Plaintiff's Writ of Summons and Statement of Claim be struck out as it discloses no reasonable cause of action;*
 - (b) *That costs of this application be costs in the cause.*

1st Defendant relies on:

*Order 18, Rule 18 (1)(a) of the High Court Rules, 1988; and
The Inherent Jurisdiction of the Honourable Court.*

2. *No affidavits were filed either in support of the application and/or in Response to the 1st Defendant's application since the application was made pursuant to Order 18 Rule 18 (1) (a) and in terms of Order 18 , Rule (2) no evidence shall be admissible on an application under paragraph (1) (a).*
3. *The application was heard in terms of the oral and written submissions made in this proceedings by the Plaintiff and the 1st Defendant.*

THE LAW and PRACTICE

4. *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)
 - (c)
 - (d)

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).

5. *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.
- 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"

1st DEFENDANT'S CASE

6. 1st Defendant relied on the written submissions filed herein.
7. The 1st Defendant filed its counter-claim against the Plaintiff in respect of residual debt owed by the Plaintiff to the 1st Defendant.
8. On 9th January, 2014, Judgment by Default was entered against the Plaintiff for the sum of \$67,000 together with interests.
9. On 04th April, 2014, 1st Defendant was served with Summons to set aside the default judgment entered against the Plaintiff.
10. The same was heard and determined on 30th January, 2015, refusing and dismissing the Summons to set aside the Default Judgment with costs.
11. That Order 18 Rule 18 application [Summons] is made in consideration of the fact that due to the fact the Plaintiff's Statement of Claim having no real bearing practically, should be struck out. Noting the Ruling dated 30th January, 2015, the pleadings of the said claim now is plain and obvious case for the court to deal with. The Plaintiff cannot succeed to the fact the court recognises mortgage sale to be valid.

12. The **cause of action** pleaded in the Writ of Summons and Statement of Claim has now been displaced because of the Ruling dated 30th January, 2015.
13. The Plaintiff filed a Motion to seek Leave to Appeal the Decision of 30th January, 2015. No stay application was filed.
14. The Ruling recognised that the Bank acted in good faith in selling the mortgaged property in dismissing Summons to set aside the default Judgment against the Defendant and should be struck out in the interests of justice.
15. The present form of Statement of Claim discloses no reasonable cause of action because of the Ruling and finding of 30th January, 2015.
16. The Plaintiff's claim in essence is against David James Hicks who is not a party to this action. In the statement of claim at paragraphs 31, 32 and 37, the Plaintiff claims that David James Hicks was to make necessary repayments towards the mortgage on behalf of the Plaintiff.

PLAINTIFF'S CASE

17. The 1st Defendant did not exercise its powers of sale in good faith and acted in bad faith in exercising its right to sell the mortgaged property as per paragraph 49 of the statement of claim.
18. That the 2nd Defendant conspired with David James Hicks to default on the mortgage repayments in order to enable the 2nd Defendant to purchase the property on mortgagee sale; therefore the 2nd Defendant is not a bona-fide purchaser.
19. The 1st Defendant knew of the Plaintiff's concerns over the said property as well as his willingness to retain the property.
20. The 1st Defendant also knew that David James Hicks was responsible for paying the mortgage as enquiries made to the 1st Defendant by the Plaintiff was in relation to whether David James Hicks was up to date with mortgage repayments.
21. The 1st Defendant knew that the 2nd Defendant was the wife of David James Hicks, a co-mortgagor in the property who ultimately has an interest in the property.
22. This court needs to determine on the validity of the mortgagee sale and whether the 1st Defendant acted in good faith when selling the property via mortgagee sale to a purchaser whose husband is a co-mortgagor and has defaulted in mortgage payments.

ANALYSIS and DETERMINATION

23. The only **issue** for this Court to determine is-

'Whether the Plaintiff's Statement of Claim should be struck out against the 1st Defendant since the claim has no reasonable cause of action against the 1st Defendant?

24. The 1st Defendants contention in summary is that on 9th January, 2014, Judgment by Default was entered against the Plaintiff on its counter-claim for the sum of \$67,000 together with interests.
25. Therefore, the cause of action pleaded in the Writ of Summons and Statement of Claim has now been displaced because of the Ruling dated 30th January, 2015.
26. The 1st Defendant may or may not be unaware of, should know that in law in a court of law when a Plaintiff(s) files any civil writ against a defendant(s), and on the other hand, the Defendant(s) as in this case 1st Defendant filed a counter-claim, then there will be **two (2) separate causes of action**. One cause of action will be within the Plaintiff's claim whilst the other within the Defendant's counter-claim accordingly. Both claims of the parties to proceedings must be determined by court unless resolved, and/or determined by a court of law resulting in mitigating the claim of the party concerned.
27. It is for the Plaintiff to establish that he has a Cause of Action in this case against the 1st Defendant in terms of the facts and the Pleadings filed herein.
28. On the other hand, the 1st Defendant must establish that the Plaintiff does not have a Cause of Action in this case against him.
29. Reference is made to 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)...."*
30. 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".*
31. The purpose of the Court's Jurisdiction to strike out pleadings is two-fold. First, it is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that as a matter of Justice, Defendants are permitted to defend a claim fairly and are not subjected to the expenses and inconvenience of defending an unclear or hopeless case- *Civil Action No. HBC 214 of 2012* citing *Paul Malo Radrodro v Sione Hatu Tiakia and Others-HBC 204 of 2005* succinctly summarised the principles as follows-

"The law with regards 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."

32. The Plaintiff apprised Court that 1st Defendant did not exercise its powers of sale in good faith and acted in bad faith in exercising its right to sell the mortgaged property. That the 2nd Defendant conspired with David James Hicks to default on the mortgage repayments in order to enable the 2nd Defendant to purchase the property on mortgagee sale; therefore the 2nd Defendant is not a bona-fide purchaser.
33. The Plaintiff's substantive claim is seeking orders for the nullification of the mortgagee sale on 16th August, 2013 by the 1st Defendant to the 2nd Defendant. Further, an order to cancel the registration of the transfer of the mortgaged property to the 1st Defendant.
34. The parties are aware that the application by the Plaintiff seeking to set aside the default judgment entered against the 1st Defendant on 30th January, 2015 was refused and dismissed by the court. Further, there is no application made as such for any stay of the proceedings and /or orders.
35. The test of 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*.
36. Obviously, it cannot be disputed by the 1st Defendant that the Plaintiff does raise dispute within the statement of claim and thus alleges that the 1st Defendant did not exercise its powers of sale in good faith and acted in bad faith. That the 2nd Defendant conspired with David James Hicks to default on the mortgaged repayments in order to enable the 2nd Defendant to purchase the property on mortgagee sale and that the Defendant is not a bona-fide purchaser. That this court needs to determine the validity of the mortgagee sale and whether the Defendant acted in good faith.
37. There exists triable issue within the pleadings which needs to be heard and determined at a full hearing accordingly. The Plaintiff is also seeking an order for the nullification of the mortgagee sale of 16th August, 2013 and an order to cancel the registration of the transfer of the mortgaged property to the 1st Defendant.
38. I find for the aforesaid rational that the Plaintiff's statement of claim cannot be struck out summarily as sought by the 1st Defendant and remains intact.
39. It is only appropriate for above reasons that as a result of my finding not to strike out the Plaintiff's Writ of Summons and the Statement of Claim against the 1st Defendant that I am also inclined to grant costs to the succeeding party (Plaintiff).

The 1st Defendant is therefore ordered to pay a summarily assessed costs of \$650 to the Plaintiff within 14 days hereof.

40. Accordingly, I proceed to make the following final orders-

FINAL ORDERS

- (i) The 1st Defendant's application to strike out of the Plaintiff's Writ of Summons and the Statement of Claim fails.
- (ii) The Plaintiff's Writ of Summons together with the Statement of Claim against the 1st Defendant remains intact.
- (iii) Cost against the 1st Defendant on this application is summarily assessed at \$650 to be paid by the 1st Defendant to the Plaintiff within 14 days' time frame.
- (iv) The matter to proceed with the next cause of action expeditiously and stands adjourned for further directions on 12th July, 2018 @ 9 am.
- (v) Orders accordingly.

Dated at Suva this 12th day of July, 2018



MASTER
VISHWA DATT SHARMA

cc: *Legal Division, Bank of South Pacific, Suva
Lagilevu Law, Suva*