

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HPP No. 2 of 2014
L/A DBN No. 50530

IN THE MATTER of the Estate of RAM DIN aka
RAMDEN father's name Harkhu late of Naitasiri, Fiji,
Cultivator, Deceased, Testate.

BETWEEN : SAVITRI DEVI and RITESH BILASH the Executors and Trustees of the last Will and
Testament of Phul Mati who was the Administrator of the Estate of Ram Din aka Ramden, late of
Naitasiri, Cultivator, Deceased, Testate.

PLAINTIFFS

AND : SUNIL DUTT aka SUNIL DATT of 11 Darwin Road, Edmondson Park 2174, Sydney, New South
Wales, Australia, Telecom Technician.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Sunil Kumar for the Plaintiff
Mr. Nilesh Sharma for the Defendant

Date of Decision: 30th July, 2018 @9am

RULING

*[Defendant's application seeking an order to strike out the Plaintiff's Statement of Claim
pursuant to Order 18 Rule 18 (1) (a) (b) and (d) of the High Court Rules, 1988
and the inherent jurisdiction of this Honourable Court]*

APPLICATION

1. This is the Defendant's Summons to Strike Out, and seeks the following orders:

- (a) That the Plaintiff's Writ of Summons and the Amended Statement of Claim be struck out under Order 18 Rule 18 (1) of the High Court Rules 1988 and/or under the inherent jurisdiction of this honourable Court

Upon the following Grounds:

- (i) That it discloses no reasonable cause of action.
(ii) That it is scandalous, frivolous and vexatious.
(iii) That it is an abuse of the process of the Court.

2. The summons is filed in support of an affidavit deposed by Shoma Anand.

3. The Summons is opposed by the Plaintiff herein.

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) *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).

BACKGROUND

5. The Plaintiff's substantive claim is seeking for the following orders:

- (i) That the Defendant Sunil Dutt aka Sunil Datt be removed as the Administrator under Letters of Administration De-Bonis non of the Estate of Ram Din aka Ramden;
- (ii) That the Plaintiff and her son Ritesh Bilash the Executors of the last Will and Testament of Phul Mati be appointed as the Administrator of the Estate;
- (iii) That the Defendant furnishes the Plaintiff with proper and complete accounts relating to the administration of Ram Din's Estate;

- (iv) Damages for pain, Suffering and Humiliation; and
- (v) Restraining the Defendant from any way interfering with the quite enjoyment of the Plaintiff's and her children's share in their paternal grand father's Estate;
- (vi) Costs.

ANALYSIS and DETERMINATION

6. The issues for court's determination are *Whether the Plaintiff's Statement of Claim"-*

- *Discloses no reasonable cause of action;*
- *Is Scandalous, Frivolous or Vexatious;*
- *Is an abuse of the court process?*

Further, whether the Defendant is entitled to any costs of this application?

7. The Defendant's Summons seeking an order for the striking out of the Plaintiff's Statement of Claim can be dealt with and determined without going into detail to deliberate and determine any of the aforementioned grounds for striking out because the Affidavit in Support of the Defendant's striking out Summons is filed in support of an affidavit deposed by Shoma Anand who is a Partner with the law firm of Neel Shivam Lawyers, the firm which is representing the Defendant in this case.
8. The question therefore for me to deal is –"Whether Shoma Anand can depose this affidavit on the premise that she has been duly authorized by the Defendant? Further, there is no authority annexed to the Affidavit in Support to confirm the authorization.
9. I make reference to the following provisions of the law which state as follows-

Filing of affidavits (O.41, r.9)

(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

Reasonable Cause of Action

10. It is for the Plaintiff to establish that they have a Cause of Action in this case against the Defendant in terms of the facts and the Pleadings filed herein.
11. On the other hand, the Defendant must establish that the Plaintiff does not have a Cause of Action in this case against the Defendant.

12. 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)...."

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"

13. The Plaintiff's substantive claim relates to the Deceased Estate of Ram Din aka Ramden and is based on Fraudulent Conversion and Unjust enrichment and seeks various orders.
14. The Defendant has not filed any Statement of Defence, rather thought fit to file and proceed with an interlocutory application seeking an order to strike out the Plaintiff's Statement of Claim on various grounds.
15. I find that the Plaintiff is generally seeking an order for Sunil Dutt to be removed as the current Administrator from the Estate and the Plaintiff and his son Ritesh Bilash be appointed as the Administrator instead, seeks for proper and complete account of the Estate so far, damages and costs.
16. In light of above, I find that prima facie, the Plaintiff have a Cause of Action within his Statement of Claim as filed herein. It is for the Plaintiff to prove his case on the balance of probability at the full hearing.
17. Further, this is a contentious Probate action that needs to heard and determined on evidence at a trial.

Scandalous, Frivolous and Vexatious

18. It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional cases: **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
19. In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard 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...."

20. **Whether the claim is Scandalous in nature?**

Reference is made to the Supreme Court Practice 1993 (White Book) Vol. 1 at paragraph 18/19/14 states as follows-

"The Court has a general jurisdiction to expunge scandalous matter in any record or proceedings (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6."

Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).

"The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663)."

21. **Whether the nature and contents of the Plaintiff's Claim** in terms of the Writ of Summons and the Statement of Claim tantamount to **scandalous** facts and are irrelevant and therefore makes the Plaintiff's Claim **Scandalous**?
22. The **Plaintiff's Claim** is yet to be put to the **Test in terms of the evidence** to be tendered at the hearing and then for the determination of the Claim.
23. Therefore, the **Defendant** cannot submit that the **Plaintiff's** Summons and the Statement of Claim at this stage of the proceedings is **scandalous in nature**.
24. The **issue** of whether the Plaintiff's Claim is **frivolous** or **vexatious**?

Reference is made to paragraph 18/19/15 of the Supreme Court Practice 1993, Vol. 1 (White Book) which reads as follows:-

"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274, 277; The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1895] P 87, p.90;"

25. **In Devi v. Lal [2014] FJHC 75; HBC 120.2008** (7th February, 2014) - It was held as follows-

"The Oxford Advanced Learners Dictionary of Current English 7th Edition defines the words "frivolous" and "vexatious" as:-

Frivolous: "having no useful or serious purpose"

Vexatious: "upsetting" or "annoying"

'Therefore, for a claim to be frivolous or vexatious, the Appellants must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Applicants'.

26. Taking into consideration the above matters together with the **written submissions** and **oral arguments** raised in Court by both Counsels, the Defendant needs to establish that the Plaintiff's Statement of Claim **lacks merits and is drawn up based on evidence**. The Defendant pointed out that the Statement of Claim is in breach of **Order 18 Rule 14** which states as follows-

14.-(1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.

(3) Every statement of claim must bear on its face a statement of the date on which the writ in the action was issued.

27. This Court needs to hear and determine the same in terms of the law and the evidence that the Parties to the proceedings may and or intend to produce at the hearing proper in order to allow this Court to deliberate and determine the substantive issues as alleged and claiming for the orders as described hereinabove.

However, this claim **prima facie** cannot be judged summarily to be **frivolous** or **vexatious**; it needs to be appropriately investigated, examined and determined in terms of the availability of evidence before a court of law accordingly.

28. Therefore, in the given circumstances, the Plaintiff's claim cannot be said to be **frivolous** or **vexatious**.

Abuse of Court Process

29. 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)

30. The phrase "**abuse of process**" is summarized in Walton v Gardiner (1993) 177 CLR 378 as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"

Again, the **summary procedure** should not be used to determine the "**abuse of process of the court**", rather the substantive matter needs to be heard to determine the issue within the writ and the statement of claim making a claim whether it is **groundless** and **unfounded** in the sense that the plaintiff does not know of any facts to support it.

IN CONCLUSION

31. For the aforesaid rationale, I do not find that it can be found and ascertained from the Plaintiff's Statement of Claim that it has no reasonable cause of action, is Scandalous, Frivolous, and Vexatious and/or is an abuse of the Court process.
32. Therefore, the **Defendant's application seeking an order to strike out the Plaintiff's Statement of Claim against the Defendant** fails.
33. It is only appropriate for obvious reasons that as a result of my **finding** not to proceed to strike out the Plaintiff's Writ of Summons and the Statement of Claim against the Defendant that I decline to grant costs at this stage of the proceedings.
34. If the Plaintiff thinks appropriate to amend its Statement of Claim then he must act expeditiously to do so accordingly.
35. Each party to therefore bear their own costs of this application.
36. Accordingly, I proceed to make the following orders-

FINAL ORDERS

- (i) **The 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 Defendant** remains intact.

- (iii) Each party to bear their own costs.
- (iv) The matter to proceed between the Plaintiff and the Defendant and stands adjourned for further directions on the next cause.
- (v) Orders accordingly.

Dated at Suva this 30th day of July, 2018




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MASTER
VISHWA DATT SHARMA

cc: *Sunil Kumar Esq., Nausori*
Messrs Neel Shivam Lawyers, Suva