IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 117 of 2014

BETWEEN : **RAJESH CHANDRA** as Administrator of the **ESTATE OF VINAY VIKASH CHAND** late of Navoli, Ba Fiji, Welder and his personal capacity.

Plaintiff

AND : **THE PERMANENT SECRETARY FOR HEALTH.**

1st Defendant

THE MINISTRY FOR HEALTH

2nd Defendant

AND : **THE ATTRONEY GENERAL OF FIJI.**

3rd Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsel : Mr. Padarath for the Plaintiff
Mr. Mainavolau for the Defendants

Date of Ruling: 19th January 2018

RULING

(On striking out under Or 25 r 9)

01. This court issued a notice on its own motion on 23.09.2016 pursuant to Order 25 rule 9 of the High Court Rules to the plaintiff to show cause, why this matter should not be struck out for want of prosecution or as an abuse of the process of the court. The plaintiff filed his affidavit sworn by himself and contains 58 paragraphs and 26 annexures. The defendants did not file any affidavit, but supported court's motion. In nutshell, the plaintiff claims damages for the alleged medical negligence, which purportedly caused

the death of his son, namely Vinay Vikash Chand. The plaintiff therefore, took out the Writ issued by this registry on 18th July 2014 and prayed for various types of damages, such as damages for nervous shock, aggravated and exemplary damages, special damages, damages under the Relatives Act etc. The acknowledgement of service was filed by the office of the Attorney General on 21.08.2014. However, no defence was filed on behalf of any of the defendants. Thereafter, no step was taken in this matter except the Notice of intention to Proceed that was filed on 31.07.2015 after almost a year from the acknowledgment. The registry then issued the Notice under Order 25 Rule 9 of the High Court Rules.

02. The Order 25 rule 9 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

> *"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.*
>
> *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".*

03. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the court. This rule was introduced to the High Court Rules for the case management purpose and is effective from 19 September 2005. The main characteristic of this rule is that, the court is conferred with power to act on its own motion in order to agitate the sluggish litigation (**see; *Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***). Even before the introduction of this rule, the courts in Fiji exercised this power to strike out the cause for want prosecution following the leading English authorities such as ***Allen v. McAlpine*** [1968] 2 QB 299;[1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, striking out of plaintiff's action in ***Hussein v Pacific Forum Line Ltd [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000),*** stated that;

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 299;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205)".*

04. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".

05. The above decision of the Court of Appeal made it abundantly clear that the principles set out in ***Birkett v. James*** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of new rule (Or 25 r 9). Lord Diplock, whilst articulating the principles for striking out the actions for want of prosecution and abuse of the court process in ***Birkett v. James*** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that;

"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706

The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). ***The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the***

> ***process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party***".(emphasis added)

06. As Lord Diplock clearly explained in his judgment, the above principles were set out in the notes to Order 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to our Order 25 rule 4 under the Summons for Directions. However those principles of prophesy had caused to the development of the new rule such as Order 25 Rule 9. The first limb in the above case is ***the intentional and contumelious default***. Lord Diplock in his wisdom did not leave the first limb unexplained, but, His Lordship gave two examples for that first limb. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default***' as illustrated by Lord Diplock in ***Birkett v. James*** (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default***' However, Lord Diplock did not explain what act does exactly amount to an abuse of the process of the court.

07. There is a latest judgment by the House of Lords in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** where Lord Woolf held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows;

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

08. The Fiji Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** followed the principles of **"Grovit and Others v Doctor and Others"** (supra) and held that;

> *"During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"*

09. Both, the ***The Grovit*** case and ***Thomas (Fiji) Ltd*** (supra) which follows the former, go on the basis that, *"abuse of the process of the court"* is a ground for striking out, which is independent from what had been articulated by Lord Diplock in ***Birkett v James*** (supra). However, it is my considered view that, this ground of *"abuse of the process of the court"* is part of '***the intentional and contumelious default'***, the first limb expounded by Lord Diplock. The reason being that, this was clearly illustrated by Lord Diplock in ***Birkett v. James*** (supra). For the convenience and easy reference I reproduce the dictum of Lord Diplock which states that; "...***either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court...***" (Emphasis added). According to Lord Diplock, the abuse of the process of the court, with its all forms, falls under broad category of '***the intentional and contumelious default'***. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in ***Birkett v. James*** (supra). This view is further supported by the dictum of Lord Justice Parker who held in ***Culbert v Stephen Wetwell Co. Ltd,*** *(1994) PIQR 5* as follows;

> *"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct*

or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."

10. Sometimes, it is argued that, ***Birkett v. James*** (supra) deals with the ground of 'want of prosecution' only and not the ground of abuse of the process of the court. However, it is evident from the illustrations given in that case that, it deals with both the grounds of 'abuse of the process of the court' and 'want of prosecution' as well. In any event, the defendant is under no duty to establish the prejudice in order to strike out an action if he can prove the abuse of the process of the court. Suffice to establish plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences.

11. The second limb of the ***Birkett v. James*** (supra) is (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants. In short, inordinate and inexcusable delay and the prejudice which makes the fair trial impossible.

12. Their Lordships the Justices of Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)** unanimously held that, *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case"*. However, in **Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)** the Fiji Court of Appeal cited the meaning considered by the court in an unreported case. It was held that;

"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in ***Owen Clive Potter v Turtle Airways Limited v Anor*** *Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

13. According to Order 25 Rule 9, the acceptable and or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and inexcusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which to be determined in the circumstances of each and every case. As established by courts delay of itself, without being shown that the delay is

seriously prejudicial to the defendant, is not sufficient to strike out of an action under the second limb of the ***Birkett v. James*** (supra). The Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)** has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It was held that;

> *"Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants. In Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in Birkett should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay".*

14. In **Pratap v Christian Mission Fellowship [2006] FJCA 41; ABU0093J.2005 (14 July 2006)** the Fiji Court of Appeal cited the dictum of Eichelbaum CJ in Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244. It was held in that case at page 248 by Eichelbaum CJ that;

> *"The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [1970] NZLR 58 it has been accepted that if the application is to be successful the Applicant must commence by proving the three factors listed."*

15. The above analysis of law on striking out of an action clearly shows that, the courts in Fiji had, before the introduction of Order 25 rule 9, exercised the jurisdiction to strike out following the principles expounded in ***Birkett v. James*** (supra). Even after the introduction of the above rule the same principles apply as confirmed by the superior courts. The ground of '*abuse of the process of the court* advanced by the recent case of ***Grovit v. Doctor*** (supra) too comfortably falls into the first limb of ***Birkett v. James*** as Lord Diplock cited *'the abuse of the process of the court'* as one of the two examples for the first limb expounded by him. The rationale is that, commencing an action without the intention of bringing it to conclusion amounts to an abuse of the process of the court and

in turn it is an intentional and contumelious default. A series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can be regarded as contumelious conduct or, an abuse of the process of the court under the second limb of Or 25 r 9. On the other hand the inordinate and inexcusable delay together with the prejudice should be established in order to succeed in an application under first limb of Or 25 r 9.

16. Since the notice was issued by this court on its own motion pursuant to Or 25 r 9, it is the plaintiff who has to show the cause why his action should not struck out under that rule. There had been an inactive period of 2 years and 1 month between date of filling of the acknowledgement in August 2014 and the notice sent by the registry in September 2016. The only action taken by the plaintiff during this long period was filling a notice of intention to proceed on 31.07.2015. Though the plaintiff filed his affidavit containing 58 paragraphs and 26 annexures, his explanation for the delay is averred only in paragraphs 5 to 13 as he sub-divided his affidavit. The paragraphs 14 to 58 speak about his cause of action and the nature of his claim, which are not relevant to the instant ruling, because, the reason for striking out under this rule is want of prosecution as opposed to the striking out under Order 18 rule 18, where nature of claim and the cause of action will be discussed. Explaining his reason for delay, the plaintiff in paragraphs 9 , 10 and 11 states as follows;

> 9. *I do not have sufficient fund to pay my lawyers and asked them if they could do it for me and then collect any sum payable if judgment was entered in my favour.*
> 10. *My Lawyers advised me that they will need to consider this because as a rule they do not conduct matters on a no*-win-no-fee basis.
> 11. *For these reasons, the matter was on hold for a little while.*

17. This clearly indicates that, the plaintiff intentionally failed to take any steps for 2 years and one month, because he knew that was not doing so due to his financial constraints and just left it idle. It seems from his conduct as described above that, he did not have any intention to bring it to conclusion. This amounts to an abuse of the process of the court. The House of Lords in ***"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,*** held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows;

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an*

*abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

18. The only step taken by him was filling of 'Notice of intention to proceed'. The Court of Appeal in ***Singh v Singh [2008] FJCA 27; ABU0044.2006S (8 July 2008)*** held that the filling of notice of intention to defend buys no immunity from exercising the courts inherent power. In that case the court further elaborated that;

"For the avoidance of doubt, the fact that there was a Notice of Intention to Proceed under Order 3 Rule 5 of the Rules of the High Court does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action where such a perpetration was, as here, an abuse. Further, Order 25 Rule 9 does not prevent such a course from being taken. Order 25 Rule 9(1) provides:

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.

The only step that was taken was the filing of the Notice of Intention to Proceed. That predated the application to dismiss a case for want of prosecution by a few days. We do not think that Order 25 Rule 9 provides the only circumstances in which the High Court could use its inherent powers. In the exercise of the discretion of the court, the inactive period which predated the filing of the Notice of Intention to Proceed was available for the Court to consider. In any event, well over the minimum 6 months had elapsed. It could not seriously be contended that the Respondents would have had to wait for another 6 months after the filing of the Notice of Intention to Proceed upon the basis that this was a step taken within the meaning of Order 25 Rule 9".

19. The plaintiff stated in his affidavit that, the defendant did not file the statement of defence after filling the acknowledgment. This is not an excuse, because the plaintiff could have sought the leave of the court for a judgment in default under the Order 77 rule 6. However, he did not file such application. It is true that, the defendant should file the defence to the case presented by his opponent, but the involvement of the defendant in a case is involuntary and different from that of the plaintiff. The defendant is to meet the plaintiff step by step. It is the plaintiff, who voluntarily brings the action, is charged with the duty of diligence in prosecuting his case. That is why there are several provisions in the civil procedure which provide for the steps to be taken by the plaintiff in default of

the defendant. Therefore, failure by the defendants to file their defence in this case is not an excuse for the plaintiff to be inactive and lethargic for 2 years and 1 month.

20. The reason for this failure was that he did not have sufficient fund. This means the delay was deliberate and he was well aware of it. This total failure, on part of the plaintiff to take any step for 2 years and 1 month, is an intentional and contumelious default which warrants the striking out of his action. In this situation, there is no necessity to show the prejudice to the defendant as expounded by Lord Diplock in ***Birkett v James*** (Supra). For the above reasons, the action of the plaintiff ought to be dismissed as this court is satisfied that there is an intentional and contumelious default on part of the plaintiff.

21. However, the counsel for the plaintiff at the hearing of this matter pointed out that, the defendants did not file any affidavit showing that, the delay was inordinate and inexcusable and it was prejudicial to the defendants. Basically, what plaintiff's counsel argues is that, the onus is on the defendant to prove the second limb expounded by Lord Diplock in ***Birkett v James*** (Supra) which is ***(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.*** In fact, the counsel for the defendant urged this ground as well during the hearing of this matter, though he did not file any affidavit.

22. I agree that the burden of the defendant, to establish the inordinate and inexcusable delay and serious prejudice, has been affirmed in number of cases. In all those cases, the summons was filed by the defendants seeking to strike out respective plaintiffs' cases. However, the situation is different here. As I stated above, this matter came up before the court on the notice issued by this court on its own motion. The question, therefore, is whether the defendant is still under duty to establish the inordinate and excusable delay and the prejudice? This court in ***Prakash v Hassan [2017] FJHC 658; HBC25.2015 (4 September 2017)***, discussed the onus of proof on the parties in the proceedings under the Order 25 Rule 9. According to the plain meaning of this rule, the proceedings for striking out any cause for abuse of the process of the court or want of prosecution can be initiated by two ways. One is the application of any party and the other is court's own motion. This additional power to act on the own motion was granted to be valuably employed to agitate sluggish litigation (see: ***Trade Air Engineering (West) Ltd v Taga*** (supra)) When any party makes such an application, that party has to show to the court either of the grounds that, there is want of prosecution or it is an abuse of the process of the court. This is the positive burden on the party who moves for the court to exercise its power to strike out any particular cause. That is to say the applicant, most likely the defendant, has to, positively, prove ***either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to***

a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. In that event, the other party probably, the plaintiff has to rebut what is proved by the defendant in order to get the motion by the defendant dismissed.

23. However, the situation would differ when it comes to the court's own motion. If the court issues a notice, it would require the party, most likely the plaintiff, to show cause why his or her action should not be struck out under this rule for want of prosecution. In such a situation, it is the duty of the plaintiff to show the cause to the satisfaction of the court and to negatively establish that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and no prejudice is caused to the defendant. This is the burden of negative proof. In this case the court issued the notice on its own motion and the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out his cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can consider it were a summons for directions and give necessary directions to the parties. In that event, the plaintiff would be required to serve such directions to the defendant and to take further steps as per the rules of the court.

24. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion. Thus, the plaintiff has burden of negative proof that no prejudice would be caused to the defendant and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court. In fact, the argument of plaintiff's counsel tries to get the plaintiff relieved from showing cause, by putting the burden on the defendant, which cannot be accepted. If this argument is accepted, it would lead to the proposition that, the court should depend on the defendant for the proof of inordinate and inexcusable delay and prejudice, even though it acted on its own motion. As a result, the purpose of granting special power to the court, to act on its own motion to agitate sluggish litigation, will be lost. For these reasons, I am unable to agree with the argument of plaintiff's counsel.

25. As I said above, the acceptable and or tolerable period of inaction in any matter is 6 months as per the plain meaning of the Order 25 Rule 9. The threshold is six months and any delay thereafter would be inexcusable and inordinate so long as no reasonable excuse is provided and justice may not be able to be done between the parties. The plaintiff in paragraph 11 of his affidavit states that, *the matter was on hold for little while.* No reasonable prudent man will consider this 2 years and 1 month period as *little while.* This period is 4 times of the threshold and the financial unsound of the plaintiff in prosecuting

his case cannot be accepted. If the notice was not sent by the registry on 23.09.2016, the plaintiff would have, still, been inactive. Therefore, I conveniently hold that, there is no reasonable excuse for the delay of 2 years and 1 month. As a result, the delay becomes inexcusable.

26. There are litigants who pursue their cases according to the timetable set out by the rules or within the reasonable time, diligence and expeditions. On the other hand there are some who pursue their cases sporadically or make default with the intention to keep the matters pending against the defendants forever. The courts should not ignore the second category of practice. It should be disallowed for several reasons. Firstly, it is an abuse of the process of the court. Secondly, it is the waste of court's time and resources which are not infinite. '*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases to be heard within a reasonable time'* (see; ***Singh v Singh*** -supra). Thirdly, it violates the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read;

> *(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.*
> *(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.*(Emphasis added)

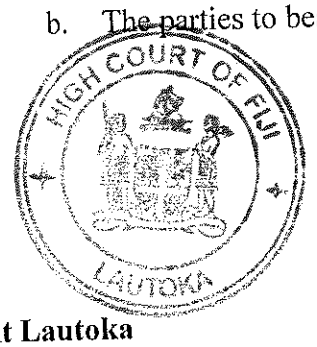
Fourthly, it constitutes as a serious prejudice to the other party as justice may not be able to be done between the parties since the matter is pending idle without any steps being taken by the relevant party. In this case, the matter has been idle in the registry for 2 years and 1 month from August 2014 till September 2016 when the notice was sent by the registry under Order 25 rule 9. The plaintiff cannot expect that the court and the defendant should wait until he get sufficient fund to prosecute his own case.

27. For the reasons expounded above, I am fully entitled to say that, the very existence of an action which the plaintiff has no interest at all in pursuing it, is inexcusable and intolerable. There is no reason why this case should be kept pending when the plaintiff has, absolutely, been inactive and lethargic for 2 years and 1 month. The reason given by the plaintiff for his delay for such a long period is not only unacceptable, but also indicates that the default is intentional and contumelious. Thus, I decide that the plaintiff failed to show cause as to why his action should not be struck out for abuse of the process of the court or for want of prosecution and therefore I strike out the same. Since this notice was issued on the own motion of the court, I make no order as to cost.

28. In result, the final orders are;

a. Plaintiff's action is struck out, and

b. The parties to bear their own cost,



U.L. Mohamed Azhar
Acting Master

At Lautoka

19/01/2018