

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 58 of 2016

BETWEEN : FIJI DEVELOPMENT BANK
PLAINTIFF

AND : DANIELE VAKATAWABAI
FIRST DEFENDANT

AND : LAILA MAKARITA
SECOND DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr P Kumar [Nands Law]

DEFENDANT : Ms R Lal [Lal/Patel/Bale Lawyers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 07 March 2019

INTERLOCUTORY RULING

[Striking Out action for want for prosecution pursuant to Order 25 rule 9 High Court Rules]

Application

1. On 24 August 2017 the Court on its own motion caused a Notice under Order 25 rule 9 to be issued on the grounds that no steps have been taken in this cause for more than six months.

The Plaintiff is further directed to give a Notice of Intention to proceed in terms of Order 3 Rule 5 if it wishes to proceed with the action.

As per the notice if the Plaintiff fails to take action, matter will be struck off in terms of Order 25 rule 9.

Parties are required to show cause why it (cause) should not be strike out for want for prosecution or as an abuse of the process of the court.

2. The Plaintiff has filed an Affidavit to show cause on 18 October 2017. None has been filed by the Defendants.

Background of the proceedings

3. The Plaintiff caused a Writ of Summon and Statement of Claim to be issued in 11 March 2016.

Claim was for \$82,388.18 being balance of debt outstanding to the Plaintiff by the Defendants pursuant to a loan agreement dated 28 June 2002; 18 December 2003 and 15 December 2010.

4. There is no Affidavit of Service to confirm when the Writ of Summon was served on the Defendants.
5. However there is an Acknowledgment of Service filed on behalf of both the Defendants by its previous lawyers FA & Company. As per the acknowledgment to service the Defendant intended to contest the proceedings.

The said acknowledgment of service was filed on 12 July 2016.

6. Court records show that on 14 September 2016 and later on 29 September 2016 the Plaintiff had lodged with the registry its praecipe and a judgment in default of statement of defence.

The same was not processed due to typographical error.

Thereafter no action was taken by either party in respect of the matter.

Grounds for not Striking Out the matter

7. Surendra Prasad, a Team Leader Asset Management Unit of the Plaintiff informs that their counsel was served with an acknowledgment of service on 13 July 2016.

On or about 29 September 2016, they had filed for search for defence with praecipe and Judgment in Default for vetting.

Upon enquiries, they were informed by the Civil Registry that the Registry did not have any document for vetting.

Hence they made fresh copies of documents and filed with the Registry for vetting.

Later an Order 25 rule 9 notice was served on the solicitors on 5 September 2017.

Thereafter they have made enquiries with the registry about the document. They have collected the document for correction.

The Plaintiff intends to proceed with the matter in terms of the Default Judgment as no Statement of Defence has been filed.

If the matter is struck out it will be prejudicial to the Plaintiff who have advanced loans to the Default Judgment and which remains unpaid.

Determination

8. It is the duty of the parties and their counsel to follow up with registry in respect of document filed.

Hence the Plaintiff after filing document in September 2016 did not follow up on the same until Order 25 rule 9 notice was issued.

9. Nor is there any correspondence to confirm Plaintiff/Solicitor followed up but the Default Judgment was not issued due to negligence of the registry.
10. I do not accept Mr Prasad's version concerning the filing and vetting of the Default Judgment.
11. As stated earlier court record shows the first search and Default Judgment was returned for correction.

Another set of document was filed on 29 September 2016 with correction done but had other minor errors and annexure "S" in the affidavit to show cause is the copy of those documents.

12. I find after 29 September 2016 the Plaintiff's Solicitors failed to uplift document and do necessary amendments and correction and file the Praecipe and Default Judgment.

13. Whilst making my finding I take into account following two questions:

- a. Is there deliberate default non-compliance with a peremptory order of the Court or the conduct amounting to an abuse of process of the court?
- b. Is there inordinate and inexcusable delay on part of Plaintiff and is such delay giving rise to substantial risk that it will not be possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the Defendants either between themselves and the Plaintiff or between each other or between them and a third party?

14. There is a delay of eleven (11) months within which Plaintiff and/or its Counsel did not taken any further action.

15. There were certain submissions made by the Defendants Counsel from the bar table without any affidavit evidence. As such I cannot rely on these submissions to make a finding.

16. I take note that there was no statement of Defence filed by the Defendants within the time stipulated by the Rules.

Neither did the Defendants moved the court in any other manner under the rules.

17. I do not find any prejudice being caused to the Defendants.

18. Considering the above I made following order:

- a. The Plaintiff is to **file and serve** a Notice of Intention to Proceed **on or before 4pm on 11 March 2019;**
- b. The Defendants are at liberty under the rules to make necessary applications [since they are out of time] to defend the matter. They are to **file and serve their necessary applications on or before 4 pm on 14 March 2019;**
- c. Should the Defendants fail to file and serve their applications on or before 4pm on 14 March 2019, the Plaintiff shall **file with the Registry a search/praeceipe and Default Judgment on or before 4pm on 18 March 2019.**

If there is no application made by the Defendants and **unless** the Plaintiff files a search/praeceipe and Default judgment **by 4pm on 18 March 2018 the Action shall stand dismissed.**

19. I shall not make any order for costs against the Plaintiff as the Defendants on their part have also failed to move the Court in a timely manner.



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Vandhana Lal [Ms]
Acting Master
At Suva.