

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 171 of 2015

BETWEEN : **DILIP JAMNADAS** **PLAINTIFF**
AND : **RENEE D. LAL** **FIRST DEFENDANT**
AND : **RAINA LAL PATEL** **SECOND DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr. K Jamnadas [Jamnadas & Associates]
FIRST DEFENDANT : Ms. R Lal [Lal/Patel/Bale Lawyers]
SECOND DEFENDANT : [Matter Discontinued]
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 13 May 2016 the Court on its on Motion issued a notice pursuant to Order 25 rule 9 and Order 3 rule 5 of the High Court Rules.
2. Said notice is issued when no steps are taken in the cause for more than six (6) months. The parties are required to give notice of intention to proceed. They are further to show cause why the court should not strike out the matter for want for prosecution or as an abuse of process of the court.
3. Following Affidavits have been filed by parties to show cause under Order 25 rule 9:
 - a. For the Plaintiff Affidavit of Dilip Kumar Jamnadas sworn on 9 June 2016 and filed on 9 June 2016;

- b. For the First Defendant Affidavit of Renee Devina Sina Lal sworn on 13 July 2016 and filed on 13 July 2016;
 - c. For the Plaintiff Affidavit of Dilip Kumar Jannadas sworn on 21 July 2016 and filed on 21 July 2016.
4. Parties have also filed respective submissions as follows:
 - a. For the plaintiff submission filed on 25 October 2016;
 - b. For the First Defendant submission filed on 14 February 2017;
 - c. For the Plaintiff submission filed on 21 November 2017.

History of the Proceeding

5. On 01 May 2015 the Plaintiff had caused a Writ of summon to be issued against the 2 Defendants – Renee D. Lal as First Defendant and Raina Lal Patel as Second Defendant.

An Affidavit of Service was filed on 21 April 2016 stating that the Writ of Summons was served on the First Defendant Renee Lal on 20 April 2015. An Acknowledgment of Service been filed by the First Defendant on 5 May 2016.

Later on 25 September 2018 the Plaintiff discontinued the matter against the Second Defendant – Raina Lal Patel.

Reason Stated by Parties - Showing Cause Under Order 25 Rule 9

6. According to the Plaintiff, after filing of the Writ of Summon the same was mistakenly placed in the folder for another action HBC 313 of 2013 where the Plaintiff had obtained a judgment by default against the First Defendant.

This was only discovered in early April 2016 after the Plaintiff made enquiring on the progress of the matter.

A thorough check for the file was conducted and the error discovered.

Upon discovering the Writ, the First Defendant was served on or about 19 April 2016.

The First Defendant filed an acknowledgment of service which was served on Plaintiff's law firm on 6 May 2016. There is no application before the court challenging the service of the writ.

The First Defendant hence had to file a Statement of Defence for Plaintiff to file a reply to Statement of Defence thereafter.

For this reason, the notice should not have been issued by the Registry. The Defendant ought not to benefit from their own in-action.

They had difficulty in serving the Second Defendant and Plaintiff had intention to make application for extension of writ and apply for substituted service of the writ.

There will be no prejudice to the Defendants as they are for sometimes aware of facts surrounding the case and the allegation against them. The case largely relies on documents which the First Defendant is aware of.

In the interest of justice the Court should allow the matter to continue as there are serious allegations against both the Defendants and also involves a large amount of funds being fraudulently removed and converted for the First Defendant's use and/or benefit.

If allowed to continue the Plaintiff gives undertaking to promptly make appropriate application necessary to continue with the matter.

7. According to the First Defendant, service of the writ was first attempted on her on or about 19 April 2016 outside the Masters Chambers. She had informed the clerk from the Plaintiff's law firm that it was wrong for him to attempt service in the court premises and service can be effected at her office later.

The clerk later visited her office and the First Defendant received the Writ of Summons from the clerk.

Her office acknowledged receipt of the writ of summon and statement of claim.

The First Defendant filed an acknowledgment of service on 5 June 2016 as a matter of course.

She did not file a Statement of Defence as according to her this was not required due to the plethora of legal hurdles the Plaintiff faced at the time of the service. The service was irregular and she had notified the Plaintiff's clerk of this at the time of service. She further informs that she was in the process of carrying out searches at the High Court Registry in order to make an application to strike out the action when she was served with the Order 25 rule 9 application.

The Statement of Claim is a repeat of HBC 363 of 2013. The parties and cause of action and reliefs are identical. This writ was never served on her. A notice pursuant to Order 25 rule 9 was issued. Later on 30 March 2016 her office received a Notice of Discontinuance in HBC 363 of 2013.

Some two (2) months after the Plaintiff refiled this action. Given the striking out of Action 363 of 2013 one would assume that the Plaintiff's firm would have been more diligent in the prosecution.

The First Defendant claims to be prejudiced as she does not have information. She is disadvantaged as filing of a defence will be difficult for her.

The events are seven (7) years ago witnesses, recollection have been adversely affected.

One of the witnesses is Roslyn Bi who was the accounts clerk at the Plaintiff's firm has migrated to New Zealand. First Defendant does have contact with her. Roslyn's evidence is critical to First Defendant's defence.

Notice Of Intention To Proceed

8. Order 3 rule 5 asks for a Notice of Intention to proceed to be given by the parties intending to proceed to every other party where six (6) months or more has elapsed since the last proceeding in a cause or matter.

This notice must be given not less than one month.

An application on which no order was made is not a proceeding for the purpose of this rule.

9. Under the rule the notice should be given after the six (6) months period.
10. In the current case, the First Defendant was served with the Writ on 20 April 2015 and had acknowledged service of the Writ on 05 May 2016.
11. Hence Notice of Intention to proceed ought to be served after the six (6) months period from 05 May 2016 had the parties not taken any action in the 06 months period.

Duration And Renewal Of Writ

12. For the purpose of service, a writ is valid in the first instance for twelve (12) months – Order 7(1) of the High Court Rules.
13. The Writ of Summon was filed on 01 May 2015.
14. The Affidavit of Service filed on 21 April 2016 stated that the Writ of Summon was served on 20 April 2015.

I find the year 2015 is an error since the Writ of Summon was issued on 1 May 2015 and the parties in their respective Affidavits also confirm Writ of Summon was served on 20 April 2016.

15. Pursuant to Order 7 rule 1 the Plaintiff had one year since 1 May 2015 to serve the Writ of Service.

Service was effected within the 12 months period.

Was the Service Irregular?

16. Pursuant to Order 10 writ must be personally served on each defendant by the Plaintiff or his or her agent.

As per the Affidavit of Service the writ was served on the First Defendant personally.

Apart from raising issue of irregular service the First Defendant has failed to address the court how the service was irregular.

Neither had she made any formal application objecting to the service and having the service set aside.

Final Orders

17. Since the Plaintiff had 12 months period with effect from 1 May 2015 to serve the writ, I find the Order 25 rule 9 notice so issued by the Registry on 13 May 2016 to be premature as the 6 months period expired on 4 November 2016 [from 5 May 2016 when the Acknowledgment of Service was filed by First Defendant].


Accordingly the Notice pursuant to Order 25 rule 9 is hereby dismissed with no order as to cost.

18. Since the Plaintiff has withdrawn the action against the Second named Defendant it is prudent that they file an amended pleading to reflect the same on the Writ and Statement of Claim.

Plaintiff is to file and serve amended Writ of Summons and Statement of Claim in 14 days.

19. The First Defendant is to file and serve her Statement of Defence in 14 days thereafter.
20. Plaintiff to reply in 14 days thereafter.




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Vandhana Lal [Ms]
Acting Master
At Suva.