

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

Civil Action No.: HBC 118 of 2011

BETWEEN : **WAME NIUTAMATA** **PLAINTIFF**

AND : **MAYA WATI** **FIRST DEFENDANT**

AND : **UMLESH CHAND** **SECOND DEFENDANT**

AND : **THE ATTORNEY GENERAL OF FIJI** **THIRD DEFENDANT**

AND : **SURESH CHAND** **FOURTH DEFENDANT**

AND : **PIONEER CONCRETE** **FIFTH DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr Laryon on instruction [Law Solution]

FIRST DEFENDANT : Not Present [Not Represented]

SECOND & THIRD DEFENDANT : Not Present [Attorney - General's Chambers]

FOURTH & FIFTH DEFENDANT : Mr A Narayan [Ak Lawyers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 25 July 2019

INTERLOCUTORY RULING

[Reinstatement of Action]

1. On 7 May 2018 the Plaintiff's Counsel had filed a summons seeking order that:

- a. *THAT leave be granted to the Plaintiff to file its application to set aside the Orders of the Master made on 23rd August 2017 striking out the Plaintiff's Writ of Summons filed on 29th April 2011;*
- b. *THAT the Plaintiff be granted extension of time of further 21 days to file an serve its application to the 4th and 5th Defendants;*
- c. *THAT cost of this application to be costs in the cause;*
- d. *ANY further orders that this Honourable Court may deem just.*

2. According to the Plaintiff, he and his counsel when they appeared on 25 May 2017 were given a date for 20 July 2017. However unknown to them the date of 20 July 2017 was crossed off the minute and substituted with a date of 10 August 2017.

Neither the Plaintiff nor his counsels were informed of the date of 10 August 2017 and subsequent filed search confirms no Notice was issued to the Plaintiff.

When the matter was called on 10 August 2017, Master Sharma (as he was then) in absence of the Plaintiff and First, Second and Third Defendant delivered the ruling and adjourned the matter to 23 August 2017.

The Plaintiff was granted leave to file and serve amended Writ of Summon and Statement of Claim within seven (7) days thereafter on or before 17 August 2017 at 4pm;

The Fourth and Fifth Defendant were at liberty to file and serve their defence in 14 days thereafter on or before 31 August 2017 at 4pm;

The Plaintiff was ordered to pay sum of \$1,500 costs to Fourth and Fifth Defendant.

Unless Order was invoked and was to be activated upon the non-compliance of court's orders of 10 August 2017 as enumerated at paragraphs 25 to 28 inclusive accordingly.

The matter was called on 23 August 2017 with no notice served on the Plaintiff. Again in absence of the Plaintiff, First, Second and Third Defendant, the then Master made following orders:

- a) *Peruse court file plus Ruling of 10 August 2017;*
- b) *Record clearly sets out the orders and are very specific;*
- c) *Plaintiff failed to take necessary action and has not filed and served amended Writ of Summons and indemnity cost of \$1,500;*

- d) *"Unless orders" was imposed and now will be activated.
Strike out the Plaintiff's Writ of Summon forthwith.*
- e) *Files closed with orders imposed.*

The orders of 10 August 2017 and 27 August 2017 were made in the Plaintiff's and his solicitor's absence.

His solicitors were not served with the orders of 10 August 2017 and only became aware of the orders when they were later served with orders of 23 August 2017 and 10 August 2017 on 04 September 2017.

A file search confirmed that no NOAH was served on the Plaintiff or his Solicitors. Neither were they served with copy ruling of 10 August 2017.

The unless order so imposed in his and his solicitor's absence are in breach of principles of natural justice.

On 14 September 2017, his solicitors filed a summons to set aside Master's orders to strike out the Writ of Summon. Said application was made under Order 13 rule 10.

The registry had informed them that the application was to be called before a Judge and not the Master of High Court.

When the matter was called before Mutunayagam J, His Lordship after hearing the parties found that *"the application to set aside must be made before the Master, the Application before him is misconceived"*. The said application was declined.

Hence the Plaintiff, is now seeking leave of the court to file this application to set aside the orders of the Master dated 23 August 2017.

The Plaintiff claims to have reasonable chances of success in this matter and if granted leave he will proceed with the matter with reasonable expedience.

There are serious issues to be tried hence the matter should be reinstated and heard before a competent Court.

He has lost his wife and his children their mother, due to the accident and if the matter is not reinstated he will be deprived of his rights to seek justice from the Defendants.

3. The Fourth and Fifth Defendants who oppose the application states as follows.

The application by the Plaintiff is misconceived, irregular, incurable, an abuse of the court's process and ought to be dismissed.

There was an application filed by the Fourth and Fifth Defendant for striking out of the claim under Order 18 rule 18 of the High Court Rules on the following grounds;

- a) *That the Plaintiff's action be struck out against the Fourth and Fifth Defendant on the grounds that;*
 - i. *It discloses no cause of action;*
 - ii. *It is scandalous, frivolous;*
 - iii. *It is eitherwise an abuse of process of the court.*
- b) *The service of the Writ purporting to be an entity known as "Pioneer Concrete" be set aside as being irregular as there is no company known as such;*
- c) *In the alternative, the Plaintiff's action be dismissed on the trial of preliminary issue that the Plaintiff's action is irregular and unmaintainable on the grounds provided in (b) above against the Fourth and Fifth Defendant.*

The matter was not called on 28 August but on 23 August 2016 to fix a hearing date. On 15 May 2017 matter was adjourned for ruling on notice.

The Master called the matter on 16 May 2017 to obtain clarification on whether the said solicitor's position is that the matter should not be struck out if the error can be cured by awarding cost. There was no appearance by parties hence the matter was adjourned to 23 May 2017.

Since there was no appearance by Plaintiff, First, Second and Third Defendant court issued a NOAH for the matter to be called on 25 May 2017.

Thereafter the matter was adjourned to 20 July 2017 for ruling.

On 20 July 2017, the Fourth and Fifth Defendant were informed that ruling will be on notice.

On 9 August 2017, the solicitors for Fourth and Fifth Defendant were informed by a court clerk that the ruling will be delivered on 10 August 2017.

The matter was also listed in the cause list for mention on 23 August 2017.

4. The said application is made under Order 14 rule 11 and Order 59 rule 8, 9, 10, 11 and 12 of the High Court Rules and inherent jurisdiction of the Court.
5. The Fourth and Fifth Defendant's Solicitors submit that Order 14 does not apply in the present case.

6. Order 14 rule 11 reads;

"Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the court on such terms as it thinks just".

Order 14 of the High Court Rules deals with application for summary judgment. Rule 1 outlines when and how Plaintiff is allowed to apply to court for a summary judgment. Whilst rule 5 outlines circumstances when and how a party can apply for summary judgment on a counter claim.

7. The orders made on 23 March 2017 was not a judgment entered on a summary judgement application.

Hence I agree with the Plaintiff that Order 14 rule 11 has no relevance to the application by the Plaintiff.

The application fails on that ground.

8. Order 59 rule 8, 9, 10, 11 talks about Appeal from Master's decision and extension of time for appeal.

9. Hence the application shall also fail under said Order and rules, as order 59 rule 8 is clear that an appeal shall lie of a final order or judgment of Master to a single Judge of High Court and in case of interlocutory order or judgment leave is required to be obtained from judge of High Court.

10. The striking out orders of 23 August 2017 is based on unless orders which is an interlocutory order.

11. Mutunayagam J. on 20 March 2018 on the Plaintiff's application to a Judge to set aside the order had stated at paragraph's 10 that:

"10. This authority lays down that the remedy available to a party upon striking out of its action is an appeal. The exemptions are contained inter alia in Order 13, rule 10.

11. The Plaintiff makes this application under Order 13 rule 10;

*12. Order 13, rule 10 titled "setting aside judgement reads:
"Without prejudice to rule 8 (3) and (4), the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order."*

13. In my view the application to set aside must be made before the Master. The application before me is misconceived"

12. Since the Plaintiff had previously applied under Order 13 rule 10, her application before the Judge was dismissed as application under Order 13 rule 11 are to be made before the Court who has entered judgment under Order 13.
13. The Plaintiff's application, since the said application under Order 13 rule 11 was irregular, misconceived.
14. As submitted by Fourth and Fifth Defendant, the Plaintiff should have sought leave to appeal the order under Order 59 rule 8.

Though Plaintiff has made application pursuant Order 59 rule 8, this court does not have powers to deal with the same.
15. Hence the application shall fail under Order 59 rule 8.
16. The Plaintiff has also invoked the court's inherent jurisdiction.
17. Court Record of what transpired from 25 May 2017 when the solicitors for the Plaintiff, Ms. Fa. Ms. Faukei for Second and Third Defendants and Ms. Leweni for Fourth and Fifth Defendants were heard on the Fourth and Fifth Defendants application for striking out, is as follows:

Court on 25 May 2017 after hearing the Solicitors made following orders;

"for Ruling on cost addressed in submission and Order 18 rule 18 application by Fourth and Fifth Defendant on notice and/or 20 July 2017."

There is no court record for 20 July 2017.

The next record is for 10 August 2017 when Ruling was delivered by My Predecessor with following orders:

- i. *That the Plaintiff is hereby granted leave to file and serve an Amended Writ of Summons and the Statement of Claim within 7 days timeframe on or before the 17 August 2017 at 4pm;*
- ii. *That the Fourth and Fifth Defendants are at liberty to file and serve their Defences 14 days thereafter on or before 31 August 2017 at 4pm;*
- iii. *That the Plaintiff is hereby ordered to pay a sum of \$1,500 indemnity costs to the Fourth and Fifth Defendants within 7 days timeframe;*

- iv. *"Unless Order" is invoked and will be activated upon the non-compliance of Court's order of 10 August 2017 as enumerated at paragraphs 22 – 28 inclusive accordingly;*
- v. *Orders accordingly.*

On 23 August 2017 only Ms Leweni appeared for the Fourth and Fifth Defendants.

18. I have perused the file and do not find any notice which was served on the Solicitors for the parties.

Records are not clear how the Fourth and Fifth Defendants' Solicitors were notified and thus appeared in court.


Since the matter was not called on 20 July 2017, it was prudent to ensure all parties were notified of the ruling date of 10 August 2017 to ensure they appear in court.

With no proper records on file, I find that justice would not be served if the matter is not reinstated and the Plaintiff is allowed to abide by the orders of 10 August 2017.

19. Accordingly the order of 23 August 2017 is vacated with the matter being reinstated back to the cause list.
20. Via an order of 03 December 2018, the Plaintiff had filed an amended Writ of Summons and Statement of Claim. This was to amend the First Defendant Shalen Prakash who is now deceased to substitute the Executor or Administrator of the Estate as a Party in place of Shalen Prakash.
21. However I take note that the capacity upon which Maya Wati wife of the deceased is named as a party has not been properly outlined neither is the statement of claim amended to that effect.
22. Accordingly the Plaintiff is orders to file a second amended Writ of Summon and Statement of Claim to show amendments done to the writ of summons and statement of claim concerning the Fifth Defendant as per order of 10 August 2017 and the capacity with which Maya Wati is named as a party to the proceedings. The pleading is to be filed in 07 days that is on or before 05 August 2019 and thereafter effect service on all parties.
23. The Plaintiff is also ordered to pay cost so ordered in the Ruling of My Predecessor in 7 days. [\$1,500 to Fourth and Fifth Defendant].
24. If the Writ of Summons and Statement of Claim not filed and the said cost not paid in the 07 days [on or before 05 August 2019] the claim shall stand struck out.

25. On the current application for reinstatement cost is ordered to be in cause.




Vandhana Lal [Ms]
Acting Master
At Suva.