

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 266 of 2013

BETWEEN : ARIETA BOSE  
PLAINTIFF

AND : RAGHWAN CONSTRUCTION COMPANY LIMITED  
DEFENDANT

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**APPEARANCES/REPRESENTATION**

PLAINTIFF : Mr Valenitabua [Toganivalu & Valenitabua]  
DEFENDANT : Ms Lata with Mr Narayan [AK Lawyers]  
RULING OF : Acting Master Ms Vandhana Lal  
DELIVERED ON : 25 July 2019

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**INTERLOCUTORY RULING**

[Application for Dismissal Pursuant to Order 25 rule 9]

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**Application**

1. This is the Defendants' summon filed on 19 June 2018 seeking orders as follows:
  - a. *An order that the Plaintiff's action and claim against the Defendants be struck out and dismissed on the grounds that the Plaintiff failed to prosecute the proceedings expeditiously without any real interest in bringing matters to trial and/or has abused the process of the Court and/or thereby has caused prejudice to the Defendants and a substantial risk of a fair trial.*

The said application is made under Order 25 rule 9 of the High Court Rules.

The Defendants filed an affidavit of one Vikash Deepak Kumar in support of the application.

2. According to the Defendants, the Plaintiff instituted proceeding by way of a writ of summons and statement of claim on 16 September 2013. The Plaintiff has not prosecuted the matter with any real interest thus causing delay which is inordinate and inexcusable.

and as such an abuse of process of the court and/or has created a substantial risk that there will be a fair trial on issues thereby causing prejudice to the Defendants.

The last activity was when the Master delivered a ruling on Defendants' striking out application on 31 August 2016. This is the second application for striking out.

The Defendants are desirous of closing their file to avoid costs. They have been put to inconvenience and cost of having to retain solicitors to defend the action and investigation into whereabouts of the witnesses.

Witnesses will be required to recall events which occurred nine (9) years ago. Due to the passage of time, their recollection of events will affect their reliability.

3. The summon was re-dated to 22 August 2018 and served personally on the Plaintiff who informed court on 22 August 2018 that her counsel was Mr Vakaloloma. Court took judicial notice that the practising certificate of the counsel was suspended. The Plaintiff was asked to reconsider her legal representation.

On 30 August 2018, Mr Valenitabua appeared for the Plaintiff. He was directed to file/serve;

- i. *A Notice of Change of Solicitors in seven (7) days;*
- ii. *Affidavit in Opposition in 21 days.*

A Notice of Change of Solicitors was filed on 27 September 2018.

Matter was called for mention on 18 October 2018. There was no appearance by the Plaintiff or her counsel. Neither was an affidavit in opposition filed.

Hence the Court listed the Defendants' application for hearing.

4. On the hearing date (4 March 2019) Mr Valenitabua appeared for the Plaintiff.

The Plaintiff was heard on her written submission only.

Mr Valenitabua submitted the application is res judicata as the Defendants have previously filed a striking out application around 21 October 2015 which application was heard and decided upon by Master Bull. A ruling was delivered on 31 August 2016 dismissing the application.

Furthermore Mr Valenitabua submitted the Plaintiff is ready to commence pre-trial conference and proceed for trial. The Plaintiff should be allowed to proceed for trial with her new counsel on board.

#### **Res Judicata**

5. Gibbs C.J. Mason and Aickin JJ. in **Port of Melbourne Authority v. Anshun Pty. Ltd [1981] HCA 45; (1981) 147 CLR 589** at 597 stated:

*"The rule of res judicata comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which has urged into judgment in a prior proceeding."*

6. The first application by the Defendants was filed on 07 September 2015 seeking following orders:
  - i. *An Order that the Plaintiff's Affidavit Verifying List of Documents be struck off and expunged on the grounds that it has been filed in breach of Order 25 Rule 8 of the High Court Rules;*
  - ii. *An Order that the Plaintiff's Reply to Statement of Defence be struck out and expunged on the grounds that it has been filed in breach of Order 18 Rule 3 of the High Court Rules;*
  - iii. *An Order that the Plaintiff show cause pursuant to Order 25 Rule 9 of the High Court Rules.*

Upon hearing the parties Acting Master Bull on 31 August 2016 delivered her ruling.

The chronology of events relied upon was for period from 16 September 2013 when the claim was filed (proceeding initiated) till 29 March 2016 when Affidavit of Opposition to the Defendants' application was filed.

7. On prayer 3 for "an order that the Plaintiff show cause pursuant to Order 25 rule-9", Acting Master Bull made following findings:
  26. *Following the filing of the defence on 14 October 2013, the matter went to sleep until the filing of a notice of intention to proceed by the Plaintiff on 3 November 2014, which was served on Messrs O'Driscoll & Company on 4 November 2014. On 11 March 2014, the reply to Defence was filed with an Affidavit Verifying the Plaintiff's List being filed on 12 May 2015. A bundle of documents was then filed by the Plaintiff on 21 May. On 29 May 2015, the Plaintiff filed an Affidavit of Service for the service of the notice of intention to proceed on Vavanalagi & Associates, City Agents of the Defendants Solicitors.*
  27. *An application under Order 25 rule 9 may be brought where no steps has been taken in any cause or matter for at least six months. Prior to the filing of this summons on 7 September 2015, the last action taken by the Plaintiff was the filling of its affidavit verifying list of documents, on 12 May 2015 which is less than six (6) months. An application therefore under Order 25 rule 9 in the circumstances, would be premature."*
8. Hence, I do not find that the principle of res judicata would apply in the present case.

**Order 25 rule 9 – Dismissal for want for prosecution or abuse of process**

9. The Defendants in their affidavit in support allege that the Plaintiff has failed to move the court after the delivery of the ruling on 31 August 2016.
10. Order 25 rule 9 of the High Court Rules provides:
- i. *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 for prosecution or as an abuse of process of the court.*
  - ii. *Upon hearing the applications 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 direction.*
11. There are various local case authorities that have set out the principles upon which the court is allowed to strike out the action under Order 25 rule 9 – **Anita Subamma and Edward Henry Thompson v. The Fantasy Company Fiji Limited & Others** a Lautoka High Court Civil Action No. HBC 111 of 2003; **Nilesh Chand v. Yankesh Naidu & Others** a Labasa High Court Civil Action No. HBC 08 of 2002 delivered on 7 June 2007; **Trade Air Engineering (West) Limited & Others v. Taga & Others** a Fiji Court of Appeal Civil Appeal No. ABU 0062 of 2006 delivered on 28 February 2007 to name a few.

These cases have relied on the principle outlined in **Birkett v. James (1987) AC 297**.

12. In **Brickett** (supra) Lord Diplock on page 18 stated the principles to be:
- “The power should be exercised only; -*
- i. *Where the court is satisfied either 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*
  - ii. *That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer's and that the 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 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.”*
13. *“Although these circumstances are not necessary exclusive and at the end one must always stand and have regard to the interests of justice.”- Eichelbaum CJ in **Lovie v. Medical Assurance Society Limited [1993] 2 NZLR 244** at page 248.*

Intentional And Contumelious

14. In **Brickett's** case (supra), the Court defined the terms by giving example of disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court.
15. Upon perusing the Ruling of 31 August 2016, I do not find there to be any peremptory order made by Acting Master Bull and which the Plaintiff has failed to abide by.
16. What Acting Master Bull had identified was the next course of action that should have taken following the closing of pleadings.
17. On paragraph 22 of the Ruling she noted that:  
*"Automatic directions, strictly followed, should have seen the following happening:*
  - i. *Mutual discovery 14 days subsequent to the close of pleadings;*
  - ii. *Inspection of documents 7 days thereafter."*
18. After the delivering of the Ruling there was no further order made neither was the file called up for a review date to see if parties complied with the requirement of automatic discovery under Order 25 rule 8.
19. There is a gap of two (2) years between when the Ruling was delivered in 2016 and the Defendant filing this application under Order 25 rule 9.

Can it be than said that the conduct of the Plaintiff amounts to an abuse of the process of the Court?

20. The claim by the Plaintiff made pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act and Compensation to Relatives Act claiming for damages and loss due to the death of the Plaintiff's husband whilst executing his duty and working for the First Defendant.
21. Order 25 rule 8 allows for automatic direction in personal injury actions. There should be discovery in 14 days in accordance with Order 24 rule 2 and inspection within 7 days.
22. Under 24 rule 2, the parties to an action between whom pleadings are closed must make discovery by exchanging list of documents. Accordingly they must within 14 days after pleadings are deemed to be closed, make and serve on the other party a list of document in their respective possession, custody or power relating to any matters in question between them in the action.
23. Rule 9 directs a party who has served a list of documents to allow the other party to inspect the documents referred to in the list and to take copies thereof.

24. *"If any party required to make discovery of documents or to produce any documents for purpose of inspection fails to comply with that provision of the rule, then:*
- a) *That party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court; and*
  - b) *The Court may make such order, as it thinks just including, in particular, an Order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly."* - Order 24 rule 16.

25. Since all parties were represented by solicitors, the parties should have convened a pre-trial conference pursuant to Order 34 rule 2.
26. *"Solicitor for any of the parties shall make a request to all other solicitors for other parties to attend a conference at a mutually convenient time and place with the object of reaching agreement as to possible ways of curtailing the duration of the trial and in particulars as to all or any of the matters"* as outlined in Order 34 rule 2 (a) – (g).
27. If a solicitor refuses to attend, the solicitor requesting may apply to Court for an order that such conference be held – Order 34 rule 2 (3).
28. The Plaintiff on 12 May 2015 filed its Affidavit Verifying List of Document with a Bundle of Documents filed on 21 May 2015.
29. After the ruling of August 2016, the Defendants should have complied with Order 24 rule 2 of the High Court Rules and made discovery by exchanging list of documents.

This was not done. Upon enquiring by this Court, counsel for the Defendants informed the Court that there should have been a summons for direction filed or a request made for pre-trial conference. The Plaintiff had the duty to move the court.

30. I agree the Plaintiff could have moved the court, however pursuant to Order 34 rule 2 solicitor for any party may request for conference and if the other party refuses to attend, request for an order under Order 34 rule 2 (3).

The Defendants' counsel cannot blame the Plaintiff or her solicitors as they on their part failed to move the court accordingly.

31. On 22 August 2018, this court took note that the Plaintiff's than solicitor Mr Vakaloloma had his practising certificate suspended.
32. However this Court finds that prior to August 2018 and June 2018, the Plaintiff and/or her solicitors should move the court under Order 34 rule 2 (3).

33. I find that both the parties are to be equally held responsible for the delay in the proceeding.

Does this delay of two (2) years since last action taken in file and ten (10) years since the cause of action, likely to cause or to have caused serious prejudice to the Defendants?

34. The Defendants claim that due to the delay there will not be a fair trial on the issues thereby causing prejudice to the Defendants.

The Defendants are said to be desirous of closing their file to avoid costs of it having to maintain a contingency reserve fund in the event of an adverse judgment at trial.

The Defendant is said to be put to the inconvenience and cost of having to retain solicitors to defend the action including further investigation into the current whereabouts of the witnesses.

The witnesses will be required to recall events of 2009. Their recollection of events due to the passage of time will affect their reliability.

35. There are no evidence of any of Defendants witnesses disappearing or there being death of a witness or that relevant records are not available.
36. There is a dispute in facts relating to the cause of death and whether the Defendants were negligent and did not provide proper working attires instruct the deceased to work on a top floor building.

Hence testimony of the witnesses will address these evidences.

37. In **Chand v. Naidu a Labasa High Court Civil File HBC 08 of 2002** delivered on 07 june 2007, the then Master of the High Court Mr Udit had stated at paragraph 28:  
*Although, it is an acceptable presumption that the longer the delay the more difficult it can be for the witnesses to accurately remember the events, more so when it happens to be material evidence. Where the evidence is written down or where records are available (as long as the written document is available) witnesses will be able to refresh their memory. This an acceptable means of overcoming any prejudice occasioned by delay.*

38. Further on paragraph 30, Master Udit had outlined what the Defendant in the said cause has said "what the prejudice in the matter was?";  
*"That the delay in brining of the matter to trial has resulted in difficulty of maintaining contact with witnesses for the defendants. As such, the defendants will stiller prejudice without the personnel appearance of the witness. Even if the witnesses are located the delay would no doubt affect their recollection."*

39. Master Udit found the Affidavit failed to provide material prejudice. He also found none of the Defendant's witnesses were identified; nor was their nature of evidence. Further findings were as follows: *"there is no evidence of non-availability of the witnesses. If so, what efforts if any were made to locate the witnesses? When was the last occasion the defendants contacted the witnesses? Not iota of evidence of any such impediment is deposed. At least one of the important witnesses is the Police officer who investigated the accident. Where is he now? Has any effort being made to contact him?"*

40. Master Udit also held:

*"A bare statement that the witnesses cannot be traced is unconvincing."*

41. Similarly in this case, the affidavit in support fails to prove material prejudice as highlighted above.

42. The Second Defendant is a holding insurance company of the First Defendant. Hence definitely they would have conducted their independent investigation and have the investigation and assessors written reports submitted.

There is a possibility of written records available for witnesses to refresh their memories.

43. In the circumstance though there has been inexcusable delay (**by both parties**), the Defendants have failed to show prejudice.

Further I do not find that there has been an abuse of process.


Accordingly the application shall fail with costs to be in <sup>course</sup> ~~course~~.

44. Further to ensure the matter is heard and determined earliest I make directives as follows:

- i. The Defendants are to file and serve their Affidavit Verifying List of Documents in 07 days;
- ii. Parties to complete discovery in 7 days thereafter;
- iii. Parties to convene a Pre-Trial Conference in 14 days thereafter and minute is to be filed in 7 days.

Either party failing to abide by the above directions will have unless orders invoked against them which may result in striking out of the respective pleadings.



  
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Vandhana Lal [Ms]  
Acting Master  
At Suva.