

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 268 of 2018

BETWEEN : **NAG MANI PILLAY** aka **NAG MANI** of Sydney, Australia, as the Administratrix of the Estate of Rangaswamy aka Rangaswami, **SOM SUNDARAM PILLAY** of Sanasana, Nadi, **SAVITRI PILLAY** of Watrisi, Ba, **KALIAMMA** of Nadi, **SHOMA SHEGARAN PILLAY** of Nadi and **NAG MANI PILLAY** aka **NAG MANI** of Sydney, Australia.

PLAINTIFFS

A N D : **SUMINTRA DEVI** as the sole Administratrix of the Estate of Damodran Pillay of Sanasana, Nadi.

1ST DEFENDANT

A N D : **SUMINTRA DEVI** of Sanasana, Nadi, Domestic Duties.

2ND DEFENDANT

Appearances : (Ms.) Shayal Kant for the plaintiffs
(Ms.) Shivangi Dutt for the defendant

Hearing : Friday, 06th December, 2019.

Decision : Friday, 13th March, 2020.

DECISION

[A] INTRODUCTION

(01) The plaintiff, Nag Mani Pillay, has two applications before the court;

- (a) The application seeking leave to discontinue the proceedings commenced by Originating Summons filed on 12-12-2018.
- (b) The application to strike out the “affidavit in reply” filed by the

defendant sworn on 26-09-2019 and filed on 27-09-2019 opposing the plaintiffs application seeking leave to discontinue the proceedings

- (02) The plaintiffs' first application was made by notice of motion dated 09-08-2019 and was supported by an affidavit by Nag Mani Pillay, the administratrix of the estate of Rangaswamy aka Rangaswami.
- (03) The application is made pursuant to Order 21, rule 3(1) of the High Court Rules 1988 and the inherent jurisdiction of the Court.
- (04) The application was opposed by the defendant who filed an "affidavit in reply" sworn on 26-09-2019.
- (05) The plaintiffs' second application was made by notice of motion dated 08-10-2019 and was supported by an affidavit sworn by Nag Mani Pillay, on 08-10-2019.
- (06) The defendant did not file any affidavit in reply to the plaintiffs' notice of motion to strike out the defendant's affidavit in reply sworn on 26-09-2019 in opposition to the plaintiffs' application seeking leave to discontinue the proceedings. Counsel for the defendant informed Court that they will rely on legal arguments to respond to the plaintiffs' striking out application.

[B] Application to Strike Out

- (01) A number of challenges were ventured. It was the submission of Counsel for the plaintiffs' that the "**affidavit in reply**" filed by the defendant sworn on 26-09-2019 (in opposition to the plaintiffs' application seeking leave to discontinue the proceedings) is **irregular**. Counsel for the plaintiffs submitted that;
 - (A) The defendant's affidavit in reply has been filed out of time.
 - (B) The plaintiffs' consent has not been obtained for late filing under Order 3, rule 4(3) of the High Court Rules.
 - (C) The defendant has not sought leave of the Court under Order 3, rule 4 (1) for leave to file out of time.
 - (D) The affidavit in reply filed is a scanned copy. No leave of the Court has been obtained to file scanned copies.

The above points are adequately reflected in the Plaintiffs' supporting affidavit¹.

- (02) I acknowledge the force of this criticism. I note with concern that the defendant did not

¹ See paragraphs 07 to 15 in the Affidavit in Support of the Motion sworn on 08-10-2019.

file an answering affidavit explaining the non-compliance with the requirements as to time contained in the directions of the court, a course which she was entitled to take.

- (03) On the hearing of the plaintiffs' application to strike out, Counsel for the defendant took issue on the points raised in paragraph one (01) above and submitted that:
- (1) The defendant made an application to file the original affidavit out of time
 - (2) The Court allowed the application.
 - (3) The original affidavit which was due on 26-09-2019 was filed on 27/09/2019 which was a Friday and served on the plaintiffs' Solicitors on 30/09/2019.
 - (4) The scanned copy of the affidavit was presented for filing on 26/09/2019.
 - (5) The Court ordered the original to be filed on 27/09/2019 which was complied with on the following day.
 - (6) This was explained to the plaintiffs' Solicitors in the letter dated 03/10/2019.
 - (7) No prejudice was caused to the plaintiffs' by the late filing of the document.

With respect, this is most unsatisfactory. The submission from the Bar Table is not evidence.

- (04) The plaintiffs' objection calls into consideration Order 2 rule (1) and (2) of the High Court Rules, 1988.

Order 2, rule 1 is in these terms;

EFFECT OF NON-COMPLIANCE

Non-Compliance with rules (O.2, r.1)

1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an

irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

Order 2, rule 2 is in these terms;

Application to set aside for irregularity (O.2r.2)

2.(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

(05) Bearing that in mind let me now turn to the plaintiffs' striking out application.

(06) The background facts may be stated briefly. The application for discontinuance of the proceedings was made by notice of motion filed on 13-08-2019. Since the application was vigorously opposed by the defendant, the Court gave directions on 12-09-2019 as follows;

- *14 days for the defendant to file affidavit in opposition .To be filed on or before 26/09/2019.*
- *Seven days thereafter for the plaintiffs' to file affidavit in reply. To be filed on or before 03/10/2019.*
- *Mention 04/10/2019 to fix a hearing date on the plaintiffs' motion seeking leave to discontinue the proceedings.*

(07) As per the above directions of this court the defendant's affidavit in opposition became due on 26-09-2019. On the 26th September 2019, Chaudhary & Associates, the city agents for Shelving Singh Lawyers (the solicitors for the defendant) presented an affidavit of Kiran Umlesh Lata to the High Court Registry.

(08) Kiran Umlesh Lata averred in her affidavit that;

1. *I am a law clerk in the firm of Chaudhary & Associates who are the city agents for Shelvin Singh Lawyers.*
2. *Annexed herein is a scanned copy of the affidavit in reply by Sumintra Devi , the Defendants in this case.*
3. *She is presently in Suva and has signed the affidavit while in Suva. The defendants undertake to lodge the original by 27 September 2019.*

(09) Based on this undertaking, the Court gave directions to the registry to accept the scanned copy of the affidavit in reply which was annexed to the affidavit of Kiran Umlesh Lata.

(10) As per the undertaking given to the Court, the defendant filed the original affidavit in reply on 27/09/201.

(11) There are three observations that should be made at this stage. First, the defendant is one day (01) out of time in filing the affidavit in reply. Secondly, the defendant has failed to comply with the procedural time limit. Thirdly, there was no formal application filed in Court by the defendant seeking an extension of time to file the affidavit in reply.

As a matter of elementary fairness and interest, the defendant should have sought leave of the Court under **Order 3, rule 4(1)** for leave to file affidavit in reply out of time.

(12) For the sake of completeness, **Order 3, rule 4** is reproduced below in full.

4.-(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

(13) Counsel for the plaintiffs referred to Order 3, rule (4) and concluded that;

- (A) The defendant is guilty of abuse of process.
 - (B) The affidavit in reply filed out of time is an “**irregular**” document.
 - (C) It would be an abuse of practice of the Court to permit an **irregular document** to remain upon the record.
- (14) It is unfortunate that there was a total denial of procedural fairness to the plaintiffs. The plaintiffs’ consent was not obtained for the late filing of the affidavit in reply. The defendant’s position appeared to disregard the denial of natural justice to the plaintiffs when she concluded that “*an application was allowed to file the original affidavit on 27-09-2019*”.
- (15) No formal application for leave to file out of time was made. The defendant as a matter of elementary fairness and interest should have sought leave of the Court to file out of time under Order 3, rule 4(1). The defendant failed to do so. The period could be extended by the Court under the powers given by Order 3, rule 4. What is more damaging is that the defendant has not sworn an affidavit seeking to explain and excuse the delay.
- (16) Of course, I do not deny for a moment that the affidavit in reply filed out of time is an irregular document. All I am saying is that the delay was just a day .
- (17) In the present case, there are no special circumstances, such as an excessive delay. Have the plaintiffs being irreparably injured by the delay and the irregularity of the document? Indeed, Counsel for the plaintiffs did not seek to persuade the Court by way of affidavit evidence that irreparable mischief would be done to the plaintiffs by allowing the irregular document to remain on the record. It is not shown by way of affidavit evidence that the plaintiffs have suffered irreparable damage as a result of the defendant’s delay in filing the affidavit in reply. Of course, I do not deny for a moment that any delay in filing a pleading is prejudicial. All I am saying is that any prejudice caused by the delay in filing a pleading by the defendant may be compensated for by the payment of costs because it is not shown by affidavit evidence that the other side have **suffered irreparable damage** as a result of the delay in filing a pleading.
- (18) The delay should not bar the defendant from the door of the Court. I do not consider that the door of the Court should, at this stage, be closed to the defendant by visiting the sins of the solicitors on the defendant. Our courts are open to all and it is only in very exceptional circumstances that the doors of the Court will be closed upon anyone who is serious about defending the proceedings. A refusal will have a devastating effect upon the defendant’s right to contest the notice of discontinuation. On the facts of this case, it would not be unreasonable to give the defendant an indulgence.
- (19) In my view, the defendant should not be deprived of the evidence by striking out the affidavit in reply on irregularity. This Court’s main concern is the inability of the

plaintiffs to prove that they have suffered detriment through the delay and irregularity. I cannot resist my temptation to say that the plaintiffs seek only to take tactical advantage from the failure of the defendant to comply with the time limit.

- (20) The Court thinks that the overall justice of the case requires that the defendant should not be deprived of the evidence.

In all the circumstances, I decline to strike out the defendant's affidavit in reply filed on 27-09-2019 on the ground of irregularity.

[C] **Application seeking leave to discontinue the proceedings**

- (01) The plaintiff Nag Mani Pillay's application seeking leave to discontinue the proceedings commenced by Originating Summons filed on 12-12-2018, was made pursuant to Order 21, rule 3 (1) of the High Court Rules, 1988. So far as is relevant, rule 3(1) states;

WITHDRAWAL AND DISCONTINUANCE

Discontinuance of action, etc., with leave (O.21, r.3)

3.-(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

- (02) Order 21, rule 3 confers a discretion that is to be exercised judicially by the Court.
- (03) The requirement to obtain leave is based on the principle that a plaintiff who has engaged the defendant in litigation should not, after the proceedings have reached a certain stage, be allowed to withdraw because of a realization that the chances of success had diminished. It is for the Court to determine whether the proceedings should be discontinued and on what terms².

On the other hand, it is also accepted that a plaintiff should not be compelled to litigate or continue litigation against his will. For this reason leave will usually be granted provided that no injustice will be caused to the defendant³.

² The Fiji Medical Centre v Sachinda Nand Mudaliar
Civil Action No.HBC 84 of 2009, Decision 09 November, 2009

³ Supreme Court Practice 1991 Volume 1 paragraphs 212 – 5/11 to 212 – 5/12.

(04) The grounds for the plaintiff Nag Mani Pillay's application to discontinue the proceedings are set out in the affidavit sworn on 09-08-2019. She avers that;

1. *I am the named Plaintiff's in this matter and I am the Administratrix of the Estate of Rangaswamy aka Rangaswami.*

2. ***That other named Plaintiffs are; SOM SUNDARAM PILLAY, SAVITRI PILLAY, KALIAMMA SHOMA SHEGARAN PILLAY.***

3. *That I depose to the facts herein which are within my knowledge save and except where otherwise stated to be on information and belief, and where so stated I verily believe the same to be true and accurate to the best of my knowledge, information and belief.*

4. *That I filed an application in Lautoka High Court by way of an Originating Summons on 12th December, 2018 in the within action seeking following orders:-*

(i) *An order that the Terms of Settlement filed on 25th April, 2012 be varied.*

(ii) *An order that the Plaintiff; Nag Mani Pillay aka Nag Mani to be at liberty to purchase the Estate property comprised in Crown Lease No. 6198 being Lot 7 on Plan No. 5099 including farming Tractor and equipment for \$50,000.00.*

(iii) *That costs of this application be costs in cause.*

(iv) *Any further Order and/or relief as this honourable Court may deem fit and expedient.*

5. *That my above application was made based on the written consent of the other named Plaintiffs; **SOM SUNDARAM PILLAY, SAVITRI PILLAY, KALIAMMA, SHOMA SHEGARAN PILLAY** in the within action for me to purchase the estate property.*

Annexed herein and marked as annexure "A" is a copy of the said letter.

6. *That the matter was listed for hearing on 12th July, 2019 and on that day my Counsel was surprised to see that the other named Plaintiffs namely Kaliaamma and Savitri Pillay wrote a letter to the High Court objecting my application and in the circumstances my Counsel had no choice and decided not to proceed with the hearing.*

Annexed herein and marked as annexure "B" is a copy of their said letter.

7. *That the Defendant's Counsel insisted costs to be paid and a hefty costs in the sum of \$2,500.00 was awarded by the Court and the same to be paid within 14 days.*
8. *That on 2nd August, 2019 the costs of \$2,500.00 was paid vide my Lawyers trust account cheque.*

Annexed herein and marked as annexure "C" is a copy of the said letter.

9. *That on 2nd August, 2019 the Defendants Solicitor has issued a Trust Account receipt on the like sum.*

Annexed herein and marked as annexure "D" a copy of the said receipt.

10. *That my Counsel suggested to Court that the Estate matter could be resolved by selling the property at the market value and the proceeds to be shared as per the requirement of the law.*
11. *That since the beneficiaries who are also the other named Plaintiffs objected to my application so I choose not to proceed the matter in court and decided to hand over the sale of the property to the real estate agent to sell at the best market price and proceeds to be shared as per the requirement of the law.*
12. *That on 24th July, 2019 my Solicitors filed Notice of Discontinuance.*

Annexed herein and marked as annexure "E" a copy of the Notice of Discontinuance.

13. *That based on the above I am seeking order in terms of application.*

(05) As I understand her supporting affidavit, the sole ground of the application is that the other named plaintiffs (who are also the beneficiaries) objected to her application to purchase the estate property comprised in Crown Lease No. 6198 being Lot 7 on Plan No. 5099.

(06) The defendant's grounds of objection are set out in paragraph six (06) of the affidavit in reply sworn on 26-09-2019. The defendant avers that: (reference is made to the paragraph six (06) of the affidavit in reply).

6. *I refer to the contents of paragraphs 5 and 6 of the said affidavit and say:*

- a. *the matter of consent is for the Plaintiffs.*
- b. *I am the party sued and have been put to costs.*
- c. *There are 6 Plaintiffs named in the Originating Summons and only one of them is withdrawing.*
- d. *It was a matter for MA Khan to be clear on their instructions before acting for the 6 parties.*
- e. *The fact that they have filed an action with 6 named parties does not mean that without severing the other 5 parties in the action that MA Khan and Ms. Nagmani Pillay can simply withdraw the whole claim.*
- f. *I have a counter claim. I need this action to be resolved. I request for orders as per paragraph 22 of my Affidavit in Opposition filed in this action.*

(07) Nag Mani Pillay is the administratrix of the estate of Rangaswamy. She commenced proceedings by way of Originating Summons. The substantive relief sought by Nag Mani Pillay in her Originating Summons are;

- (a) *An Order that the Terms of Settlement filed on 25th April, 2012 be varied.*
- (b) *An order that the Plaintiff **NAG MANI PILLAY** aka **NAG MANI** be at liberty to purchase the Estate property comprised in Crown Lease No. 6198 being Lot 7 on Plan No. 5099 including farming Tractor and equipment for \$50,000.00.*
- (c) *That the costs of this application be costs in cause.*
- (d) *Any further Order and/or relief as this honourable Court may deem fit and expedient.*

(08) The other beneficiaries who are also the plaintiffs in this matter opposed Nag Mani's action and the reliefs sought in the Originating Summons. Consequently, Nag Mani Pillay filed a Notice of Motion seeking leave to discontinue the action.

(09) I am bound to say that the defendant's grounds of objection for discontinuation of the proceedings is most unsatisfactory and oppressive.

(10) It is a complete misstatement of the position to aver that ".....I have been put to costs".

- (11) **The matter was listed for hearing on 12-07-2019. On that day, Counsel for the plaintiff Nag Mani intimated to Court that the action will be discontinued since the other beneficiaries who are also plaintiffs in this case have written to the High Court Registry objecting to the plaintiff Nag Mani's application. Consequently, the Court vacated the hearing and awarded a cost of \$2,500.00 to the defendant. The costs have been paid on 02-08-2019.**
- (12) The discontinuing Nag Mani has already paid to the defendant a cost of \$2,500.00. **It is worth noting that there was no hearing at all.** But she has paid the defendant's costs. Thus, it was not right for the defendant to argue that ".....*I have been put to costs*".
- (13) Next, the defendant contends that the plaintiff Nag Mani needs to get the sanction of the other plaintiffs to discontinue the proceedings.

It is critical to note that on the 01st July, 2019 the other plaintiffs who are also the beneficiaries of the estate of Rangaswamy wrote to the High Court Civil Registry **expressing their unwillingness to support the application of Nag Mani Pillay.** In no uncertain terms, they intimated to the High Court Registry in writing that they have not consented to institute proceedings in this Court. That being the case, I do not see any need to obtain the consent of other beneficiaries to discontinue the action. The defendant, of course, knew at the beginning of the case that the other plaintiffs who are also beneficiaries of the estate of Rangaswamy have not consented to institute the proceedings because this was intimated to Court on 12-07-2019.

That being the case, it is disingenuous to aver that "*there are six plaintiffs named in the Originating Summons and only one of them is withdrawing*".

- (14) Next, the defendant says that she has a counter-claim and she seeks orders as per paragraph (23) of her affidavit in answer filed on 21-02-2019.
- (15) The relief claimed in the counter-claim is this ;

"I counter claim against the plaintiff for all records and information on the farm income from 2016 until date and seek that she provides accounts of the farm income and pays me the share of Damodran Pillay".

- (16) It is wholly inappropriate to include a counter-claim as part of the answering affidavit. An affidavit is a sworn statement of fact which is used as evidence in Court. One cannot bring a counter-claim in an affidavit. This is trite law and known to every legal practitioner.
- (17) In the circumstances, I cannot help feeling quite convinced that the defendant's grounds of objection for the plaintiff Nag Mani's application for discontinuation of the proceedings is **most unsatisfactory, unfair and oppressive.** I cannot help

thinking that the stance taken by the defendant involves some improper purpose and ulterior motive. In the circumstances, I consider it quiet proper that the defendant should pay Nag Mani's costs of this application.

- (18) I state with conviction that the reason put forward by Nag Mani Pillay is sufficient for the Court to exercise its discretion and to grant leave to discontinue the proceedings.


[D] ORDERS

In all the circumstances, I make the following orders;

- (01) The plaintiff Nag Mani Pillay is given leave to discontinue her proceedings.
(02) The defendant is ordered to pay costs of \$1,000.00 to the plaintiff Nag Mani Pillay within 14 days from the date of this decision.



At Lautoka
Friday, 13th March, 2020


..... 13/03/2020
Jude Nanayakkara
[Judge]