IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 157 of 2015

BETWEEN : **LEELA WATI** aka **LILAWATI SHANKARAN** aka Bernadette Chetty of Nadi retired School Teacher and as the Administratrix in the Estate of Ganesh Shankaran under Letters De- Bonis- Non

Plaintiff

A N D : **BERNADETTE** aka **BERNADETTE CHINNA** aka **BERNADETTE SHANKARAN** of Wailoaloa, Nadi, School Teacher

1ST Defendant

A N D : **INISE NEISAU** of Saunaka Nadi as the Executor and Trustee of the Estate of Vijai Shankaran and **MICHAEL JOSEPH** Shankaran of Wailoaloa, Nadi

2nd Defendant

A N D : **DIRECTOR OF LANDS** Government Building, Suva

3rd Defendant

A N D : **THE REGISTRAR OF TITLES** Ground Floor, Civil Tower, Suva

4th Defendant

A N D : **ATTORNEY GENERAL'S OFFICE** Level 7, Suvavou House, Victoria Parade, Suva

5th Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. D. S. Naidu for the Plaintiff
Ms. N. Samantha for the 1st Defendant
3rd to 5th Defendants excused

Date of Ruling: 13th November 2020

RULING

01. This ruling refers to the summons filed by the 1st defendant pursuant to Order 18 rule 18 of the High Court Rules to strike out the plaintiff's defence to the 1st defendant's counter claim. The factual background that triggered this summons is albeit brief that, plaintiff, claiming to be a beneficiary of Estate of late Ganesh Shankaran sued the defendants by the writ issued by this court on 16.092015 and sought various orders pertaining to distribution properties according to the Last Will of the said Late Shankaran. The plaintiff then filed the amended statement of claim on 09.12.2015. Whilst claiming that, the Estate of Late Shankaran was not distributed and wound up, the plaintiff alleged fraud on part of the first defendant in dealing with the some immovable properties of the Estate.

02. The 1st defendant filed the statement of defence and counter claim. However, the plaintiff failed to file the reply to defence and defence to counter claim, despite the directions given by the then Master of the High Court. The Master then imposed an 'unless order' to strike out plaintiff's amended statement of claim, if she failed to file and server the reply to defence and defence to counter-claim of the first defendant. Eventually the then Master struck out the statement of claim of the plaintiff for failing to comply with the 'unless order'. The plaintiff made an attempt to secure leave to appeal against striking out of her statement of claim, however it proved abortive. The judge refused to grant leave to appeal. The plaintiff did not proceed with the appeal against the refusal, but filed the defence to counter-claim of the 1st defendant. The 1st defendant then alleged that the plaintiff had raised all her claims, which were hitherto struck out, again in the defence to counter-claim. Therefore the first defendant brought the instant summons under Order 18 rule 18 seeking to strike out the same. The summons is supported by an affidavit sworn by the 1st defendant and founded on the grounds that the defence to counter claim:

    a. Does not disclose reasonable grounds of defence,
    b. It is frivolous or vexatious and or
    c. It is otherwise an abuse of process of this court.

03. The summons also seeks cost to be paid by the plaintiff and or her solicitors personally on a solicitor/client full indemnity basis. The plaintiff filed her affidavit opposing the summons. However the 1st defendant decided not to file the affidavit in reply as it was not warranted. At hearing the both counsels made oral submission and later filed their written submission. Briefly, the argument of the first defendant is that, the plaintiff repeated her claims, that were struck out by the previous Master, in her defence to counter-claim and the same does not show a reasonable defence; it is frivolous or vexatious and abuse of the process of the court. Accordingly, the three issues to be determined in this summons. Firstly, whether the plaintiff be allowed to re-produce all her claims that were struck out in her defence to counter-claim? Secondly, whether the said defence should be struck out under Order 18 Rule 18 as prayed by the first defendant

in the instant summons? Finally, whether the first defendant is entitled to claim the cost on client/solicitor indemnity basis?

04. The 1st defendant whilst totally denying the plaintiff's claims, made counter claim that, the plaintiff collected and uplifted rentals from 2007 to 2014 which were the property and entitlement of the Estate of Alumelu and or Estate of Prem Felix Shankaran of which she (plaintiff) is the executrix and trustee. In addition the 1st defendant claimed that, the Estate of Alumelu and or Estate of Prem Felix Shankaran are entitled to accounts of all such rentals collected by the plaintiff. Therefore, the first defendant claimed that, all such rentals should be paid to the 1st defendant, and the grant *De Bonis Non* issued to the plaintiff should be revoked.

05. Conversely, the plaintiff filed her defence to counter-claim on 26.01.2018 and notably repeated all the averments of her amended statement of claim that was struck out by the then Master. The 1st defendant annexed a copy of amended statement of claim of the plaintiff for comparison. It shows that, except few paragraphs of the amended statement of claim, all other paragraphs which set out two causes of action are re-produced together the prayers sought in the amended statement of claim that was struck out. What is important is that, the neither the plaintiff, nor her counsel did deny this repetition. Both admitted repetition of claims into the defence to counter-claim. The plaintiff in paragraphs 3, 4 and 5 of her affidavit, filed in opposition of the instant summons, stated two reasons for including all of her claims that were struck out. First is that, the matters raised in her amended statement of claim were not ligated on their merits and she is entitled to put them in the current form in her defence to counter-claim, as striking out may have been irregular. Second is that the all issues that are in dispute between the parties will be determined on their merit and no prejudice is caused to the 1st defendant. The counsel for the plaintiff too in his submission at hearing of the summons stated that, impugned defence filed by his client brings all the issues before the court for determination.

06. Two important, but necessary points should be made here in relation to the reasoning and justification of the plaintiff and her counsel for re-producing the struck out claim in the defence to counter-claim. Firstly, this is not the correct time to complain about the striking out of amended statement of claim by the then Master, and to call it as irregular on the basis that, the matters were not adjudicated on merits. The then Master made an 'unless order' to strike out plaintiff's statement of claim if he had failed to file the 'Reply to defence and defence to counter-claim'. Since the plaintiff failed to comply with that order, he activated the 'unless order' and struck out plaintiff's amended statement of claim. That order remains intact after failure of the plaintiff to obtain leave to appeal. As such, the question whether the striking out order is right or wrong or irregular is not the concern of this court at this time. Whether it is right or wrong, and or regular or irregular, the order striking out the plaintiff's amended statement of claim remains on the record.

Neither the litigants nor their solicitors are allowed themselves to judge whether an order was null and void - whether it was regular or irregular. They should apply to the competent court to discharge it. It must not be disobeyed as long as it exits. Romer LJ in **Hadkinson v Hadkinson** [1952] 2 All ER 567 referred to a dictum of Lord Cottenham L.C. in **Chuck v. Cremer**, [Cooper temp. Cott. 205, 338], and held at page 569 that:

> It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.

07. Secondly, the 'unless order' stems from the courts' general power to manage the proceedings before it, in order to ensure that its process is not subverted so as to become an instrument of injustice. The sanction, that automatically applies when the respective party fails to comply with an 'unless order', is striking out of either the claim or the defence. Lord Justice Moore-Bick, with whom Lord Justice Pill and Lord Justice Keene agreed, succinctly explained the courts' power to impose sanction by way of 'unless order' in **Marcan Shipping (London) Limited v. George Kefalas and Candida Corporation** [2007] EWCA Civ 463 and held at paragraph 10 that:

> In order to ensure that its process is not subverted so as to become an instrument of injustice every procedural system must place at the disposal of the court the power to manage proceedings before it, if necessary by imposing sanctions on litigants who fail to comply with its rules and orders. The ultimate sanction, of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognised way of imposing a degree of discipline on a dilatory litigant is to make what is known as an "unless" order by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period.

08. The striking out of claim or defence is the ultimate sanction imposed on the defaulting party. Obviously, the matters that are raised in the respective claim or defence will not be determined on their merits if it is struck out as a sanction for default. However, this will not allow the defaulting party to bring the same claim or defence through another way defeating the purpose of the sanction imposed by the court. No party can claim that, his or her claim was not heard on merits as it is the very effect of the sanction. The courts have recognized the same sanction and allowed to discipline the dilatory litigant since the time dating back well into the nineteenth century: **Marcan Shipping (London) Limited**

v. George Kefalas and Candida Corporation(supra). Accordingly, I am reinforced in the conclusion that, the plaintiff cannot be allowed to re-produce the claims that had already been struck out by the then Master under the 'unless order' he made for the default of the plaintiff, unless and until the same order is set aside by a competent court.

09. The next question is whether defence to counter-claim should be struck out as prayed by the first defendant under Order 18 rule 18 of the High Court Rules. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> *18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) It is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading* (emphasis added)

10. The unambiguous wording of the above rule makes its effect very clear that, the power to strike out the pleadings is permissive and not mandatory. Even though the court is satisfied on any of those grounds mentioned in the above rule, the pleadings should not necessarily be struck out as the court can, still, order for amendment. The underlying rational is that, the access to justice should not, merely, be denied by glib use of summery procedure of pre-emptory striking out.

11. Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 held at page 1101 that;

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 Vol I, p 284, para 18/19/3, under the heading 'Exercise of Powers under this Rule' in the notes under Ord 18, r 19. One which might be added is Nagle v Feilden [1966] I All ER 689 at 695, 697; [1966] 2 QB 633 at 648, 651. Reference has been made to four Recent cases: Rondel v Worsley [1967] 3 All ER 993, [1969] I AC 191, Wiseman v Borneman [1969] 3 All ER 275, [1969] 3 WLR 706, Roy v Prior [1969] 3 All ER 1153, [1969] 3 WLR 635, and Schmidt vSecretary of State for Home Affairs [1969] I All ER 904, [1969] 2 Ch 149. .....There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule".

12. Marsack J.A. in his concurring judgment in **Attorney General v Halka** [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

> "Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

13. Every person has access to the justice and has fundamental right to have his or her disputes determined by an independent and impartial court or tribunal. This fundamental right, guaranteed by the supreme law of the country, should not lightly be taken away unless the case is unarguable. Salmon LJ said in **Nagle v Feilden** [1966] I All ER 689 at 697:

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

14. Accordingly, the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot strike out an action for the reasons it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence. The first defendant's first ground for striking out is that, the defence to counter-claim filed by the plaintiff does not disclose reasonable ground of defence. The court has to look at mere pleadings to decide whether a reasonable cause of action is disclosed or not [**Razak v Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005)]. The same reasoning applies to the defence as well, and the court has to look at mere pleadings to come to conclusion as to reasonable defence.

15. There are several cases which guide the court to form an opinion of reasonable cause of action for the purpose of Order 18 Rule 18. However, there is no much cases which deals with the other part of first ground that is the reasonable defence, as the said sub rule states '*It discloses no reasonable cause of action or* ***defence****, as the case may be'*. The reasons being that, if there is no defence, generally the plaintiffs will seek to enter the summary judgement under Oder 14, rather than seeking relief under Oder 18 rule 18 to strike out the defence. In any event, if there is any such application to strike out any pleading for not disclosing a *defence,* the courts can adopt the meaning given by Sir Roger Ormond in **Alpine Bulk Transport Co. v. Saudi Shipping Co. Inc** (1986) 2 Lioyd's Rep, 221 for the *'defence'* which is *"a real prospect of success"* and " *carry some degree of conviction*". Thus, the court must from a provisional view of the probable outcome of the action. In addition, the court can also consider whether legal questions of importance and difficulty are raised in an impugned defence filed by either party.

16. The defence filed by the plaintiff in this case too must be looked at, in this background. The whole action revolves around distributing the Estate of Ganesh Shankaran who died testate on 11.12. 1968. He left his wife, two sons and the plaintiff as beneficiaries. However, there was a condition precedent for the plaintiff to become a beneficiary under the Will of late Shankaran that the plaintiff should have been unmarried at the time when youngest son name Prem Shankaran reaching the age of 21 years. There is no dispute among the parties that, the plaintiff married after Prem Shankaran reached 21 years. Accordingly, the plaintiff claims that she is the only original and absolute beneficiary of the Estate of late Shankaran. She sued the defendant on her personal capacity and as the holder of Letter of administration De Bonis Non. In reply to the counter-claim of the first defendant in relation to collecting rental Estate property, the plaintiff claims in her defence that, she is entitled due to the partial distribution of Estate of Ganesh Shankaran.

17. The first defendant too admitted in her statement of defence to amended claim that, the plaintiff was a contingent beneficiary under the Will of late Ganesh Shankaran. The wife of late Ganesh Shankaran, Alumelu, who was the first beneficiary of his Estate passed away, and two sons of late Ganesh Shankaran too passed away. The first and second

defendants are the Executors and Trustees of two sons of late Ganesh Shankaran. The plaintiff is the only original beneficiary of Estate of Ganesh Shankaran, as rightfully claimed by her. Accordingly, benefits and entitlement of the plaintiff and first two defendants, over two Estates of late Ganesh Shankaran and his wife late Alumelu respectively, to be determined in this matter. This determination involves with the complicated legal issues in relation to distribution of both Estates. Though the impugned defence of the plaintiff to the counter claim repeated all of her claims in her amended statement of claim that was struck out, her defence cannot be struck out under Order 18 rule 18 (1) (a), because it shows the defence with some degree of conviction. Some legal questions of importance and difficulty are disclosed in that statement of defence.

18. The first defendant also invoked the jurisdiction of this court under other grounds of striking out under Order 18 rule 18 that, pleadings or defence is scandalous, frivolous or vexatious. If the statement of claim or defence contains degrading charges which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (see: **The White Book** Volume 1 (1999 Edition) at para 18/19/15 at page 350). Likewise, if the proceedings were brought with the intention of annoying or embarrassing a person or brought for collateral purposes or irrespective of the motive, if the proceedings are obviously untenable or manifestly groundless as to be utterly hopeless, such proceedings becomes frivolous and vexatious (per: Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491). The pleadings in the defence to counter-claim filed by the plaintiff do not fall in any of the above categories, but simply set out her defence for the counter claim of the first defendants.

19. In the case of **Goldsmith v Sperrings Ltd [1977] 2 All ER 566**, Lord Denning said as follows at 574:

> "In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer".

20. The plaintiff's defence to counter-claim, prima facie, is to vindicate her right over the rentals she collected and on her eligibility to hold the letter administration De Bonis Non. It does not appear to have been brought in order to serve extortion of oppression on the defendants to achieve an improper end. The pleadings in the defence to counter-claim filed by the plaintiff do not fall in any of the above categories, but simply set out her

defence for the counter claim of the first defendants. The only concern is that, it has mixed the defence to counter-claim with the original claims in the statement of claim that were struck out for default.

21. The court has equal discretion under Order 18 rule 18 either to strike out any pleadings or to order to amend the same. Since the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised only in exceptional cases, I decide that, it would be prudent and for the interest of justice, to allow the plaintiff to amend her defence to counter claim by deleting her entire claim that were hitherto struck out. The plaintiff should limit her defence only to the counter-claim pleaded in paragraphs 17, 18 and 19 of the first defendant's statement of defence.

22. The final issue for determination is the question of cost on indemnity basis as claimed by the first defendant for this application. As this court emphasized in other recent cases, the primary purpose of awarding cost is to compensate a successful party. It is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation, and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from accessing to justice and seeking to enforce their rights through the courts. Edwards J in **Taylor v Roper** [2019] NZHC 16 (21 January 2019) discussed the purposes of awarding costs in paragraphs 6 and 7 and said:

> The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law. Costs are not ordered as punishment against the losing party, nor as a reward for the winner. An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.
>
> An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

23. The cost on indemnity basis is allowed by the courts when there are exceptional reasons to do so, and or when there is some special or unusual feature of the case which justifies the same. This includes, among others, some form of delinquency in the conduct of the proceedings; commencing or continuing an action for some ulterior motive or willful

disregard of the known facts or clearly established law; abuse of the process of the court; unmeritorious behaviour by a losing litigant and disgraceful behaviour where such behaviour is deserving of moral condemnation;

24. Scutt J in **Prasad v Divisional Engineer Northern (No 2)** [2008] FJHC 234; HBJ03.2007 (25 September 2008) cited number of cases that lay down the principles governing the indemnity costs. Needless to re-produce all of them here. The principle that follows from those authorities is that, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party is reprehensible to a significant degree.

25. Kirby, P in **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** [1991] 2 Lloyds Rep155 held at page 176 that:

> '... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order'

26. Fiji Court of Appeal in **Public Service Commission v Naiveli** [1996] FJCA 3; Abu0052u.95s (16 August 1996) citing two English authorities unanimously held that:

> ....neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable - see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163.

27. In this case, as mentioned above, the amended statement of claim of the plaintiff was struck out by the then Master of this court, due to failure to follow the direction of the court. The plaintiff made an attempt by way of an appeal to set aside the said order of striking out. However, it proved abortive, as the judge refused to grant leave to appeal against the said order of the then Master. Thereafter, the plaintiff repeated the same claims, which were struck out by the court, in her defence to the counter-claim of the first defendant. The first defendant's solicitors wrote to the solicitors of the plaintiff to amend the same considering the orders made by the court. However, neither the plaintiff, nor her solicitors considered the same. In addition, both the plaintiff in her affidavit and her counsel in his submission to the court justified the same on an unaccepted ground that,

they were not determined on merits. This conduct of both the plaintiff and her solicitors cannot be condoned by the court. If this conduct is allowed, it would defeat the very purpose of the court to impose the sanction on the party who fails to fulfill the directions of the court. This is a reprehensible conduct that wasted the time of the other party and the court, causing unreasonable costs to the opposing party. The conduct of both the plaintiff and her solicitors warrant a special order for cost on indemnity basis.

28. The summary of the above discussion is that, the plaintiff cannot be allowed to repeat the claims that were hitherto struck out by the court. However, the statement of defence filed by the plaintiff cannot be struck out in whole, as it reveals reasonable defence to the counter-claim of the first defendant. The plaintiff has mixed the claims that were struck out with the defence to the counter-claim by the first defendant. Therefore, it is prudent to allow the plaintiff to amend the same. However, the conduct of the plaintiff and her representatives is so unsatisfactory as to call out for a special order on costs.

29. In result, I make the following orders,

a. The plaintiff is ordered to delete all the averments in the statement of defence filed 26.01.2018 to counter-claim of the first defendant, in relation to her original claims that were struck out on 02.05.2016,

b. The plaintiff should limit her defence to counter-claim pleaded in paragraphs 17,18 and19 of first defendant's statement of defence and counter claim filed on 19.02.2016,

c. The plaintiff should file the amended statement of defence within 14 days from today, i.e. on or before 27.11.2020,

d. The plaintiff and her solicitors should jointly pay the cost to the first defendant on solicitor/client indemnity basis for this application, and

e. The matter to be mentioned on 15.02.2021 to check on compliance.

U.L Mohamed Azhar
Master of the High Court

At Lautoka
13/11/2020