IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 208/2011

BETWEEN **APIMELEKI KUNAVULA, SAVENACA WAINICAGI, ISAIA GONEWAI (Snr)** all of Korotoga, Sigatoka, self-employed, and **PITA KEWA NACUVA** retired civil servant of Suva, Fiji being the trustees of the Mataqali Naboka

APPELLANTS/PLAINTIFFS

AND **RUKSHANA BIBI KHAN** of Korotoga, Sigatoka, Businesswoman

RESPONDENT/DEFENDANT

APPEARANCES : Mr E Kumar for the Appellant/Plaintiff
Ms Fa for the Respondent/Defendant

DATE OF HEARING : 23 September 2020

DATE OF JUDGMENT : 18 November 2020

DECISION

1. Before the Court for hearing and decision are the following matters:

   i. Summons dated 12 June 2020 whereby the plaintiff seeks leave to appeal the ruling by the Learned Master on 5 June 2020 in which he struck out the plaintiff's claim for want of prosecution pursuant to Order 25, rule 9 of the High Court Rules (where if no step has been taken in any matter for six months the court of its own motion may, having listed a matter for the parties to show cause why it should not be struck out for want of prosecution or abuse or the process of the Court, dismiss the matter).

   ii. Summons dated 9 July 2020 whereby the plaintiff seeks an order under O.48, r.1 High Court Rules that the defendant be summoned to attend before a Magistrate to be orally examined as to her means to satisfy the judgment entered against her by the High Court dated 24 April 2014.

   iii. Summons filed on 22 September 2020 (the day before the scheduled hearing on the matters listed in paragraphs (i) and (ii) above) whereby the defendant sought orders under O.4, r.2 High Court Rules consolidating this 2011 proceeding with proceedings recently commenced by the defendant in 2020 under HBC 223/2020 **Khan v Director of Lands & ors**.

2. The proceedings have a long history. They relate to two blocks of freehold land at Korotoga, Sigatoka that had been leased originally by the then owner, the Director of Lands on behalf of the State, to Baravi Handicraft Limited under a registered lease for a term of 99 years commencing on the 1st July 1999. In 2002 the company transferred its leasehold interest to the defendant, Ms Khan. In 2003 the Director of

Lands transferred freehold ownership of the two blocks (subject of course to the leasehold interest of Ms Khan) to the mataqali, and thereafter the mataqali sought to engage with the defendant over payment of rent, and compliance with the terms of the lease. Sadly, it seems that Ms Khan was poorly advised, and throughout the period from 2003 until now has taken the position that the mataqali was not the lawful owner of the land, and she would neither pay rent to them, or engage with them over rent reviews. She has maintained this position in spite of a ruling of the High Court in 2004 dismissing her claim for an injunction restraining the mataqali from registering the transfer of the land into its name, and the proceedings she has recently filed, with which she wants these proceedings consolidated, indicates that her attitude to the plaintiff's ownership of the land has not changed.

3. The mataqali initially attempted to engage with the defendant, inviting her – at first politely - to make proposals for dealing with the rent reviews due in 2004 and 2009, and to pay rent. She did neither, and eventually the mataqali ran out of patience. Having issued a default notice in 2010 seeking rent arrears of $7,000 (Ms Khan appears to have paid the rent to the Director of Lands rather than to the plaintiff), in 2011 the mataqali commenced the current proceedings by originating summons seeking possession of the land pursuant to section 105 Property Law Act, and damages including rent arrears and damages, including mesne profits in lieu of rent, general damages and costs. Still the defendant sought to contest the plaintiff's ownership of the land and right to payment of rent. Eventually the matter was heard, and judgment was issued by the High Court on 24 April 2014, making the order for possession, and awarding the plaintiffs special damages of $7,000 for the arrears of rent (strictly speaking I would have thought that this was an amount due under the lease, rather than damages for breach of contract, but the result is the same), mesne profits of $25,800 per annum from 1 January 2009 to the date when the plaintiff recovered possession of its land, and referring the issues of general damages and indemnity costs to the Master for determination.

4. On appeal by the defendant the Court of Appeal on 27 May 2016 made orders setting aside the judgment of the High Court, but that judgment was subsequently reinstated in the Supreme Court by a decision dated 21 July 2017. In the meantime, the plaintiffs recovered possession of the property on the 19th December 2014. Accordingly, in terms of the original judgement, the plaintiff was therefore entitled to mesne profits for 4 years and 354 days (not 6 years as the plaintiff suggests) at $25,800 per annum, amounting to $128,222.57. In making its decision the Supreme Court also made an award of costs against the defendant for $8,000 covering both the Court of Appeal, and the Supreme Court costs. The total sum for which the plaintiffs have judgment against the defendant is therefore:

Arrears of rent	7000.00
Mesne profits	128,222.57
Costs (Court of Appeal & Supreme Court	8000.00
	$143,222.57

It is to enforce these judgments that the plaintiff seeks to examine the defendant as to her means.

Leave to appeal against striking out order

5. Order 25 rule 9 of the High Court Rules states:

> ***Strike out for want of prosecution (O.25, r.9)***
> *9(1) 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 of prosecution or as an abuse of the process of the Court.*
> *(2) Upon hearing the application 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 directions.*

6. After the Supreme Court decision in July 2017 no further steps were taken by the plaintiff either to enforce the judgements they had obtained, or to deal with the outstanding issues of general damages and costs. In due course the Master directed that a notice under Order 25, r.9 was to be sent by the Registrar to the parties requiring them to attend in the Master's court on 16 July 2019 to show cause why the proceedings should not be struck out for want of prosecution, or abuse of the court's processes. The notice served on both parties' solicitors, was endorsed with the following warning:

> *Please Note:*
> *Affidavit to show cause to be filed 7 days prior to the above mentioned date. Failure to do will result in the case being struck out.*

7. In response to this notice the plaintiff filed on 8 July 2019 an affidavit of Pita Kewa Nacuva and appeared before the Master (vial counsel) on the 16th July. There was no appearance for the defendant. The court gave the plaintiff the opportunity to make submissions, but none appear to have been filed, and on 28 August 2019, apparently without any form of hearing, the case was adjourned for mention on a date to be notified so that the Master could give his decision on whether to strike out the claim, thus preventing the plaintiff from seeking the indemnity costs awarded in the decision of April 2014.

8. In his affidavit of 8 July 2019 Mr Nacuva explained something of the history of the proceedings, including annexing copies of the High Court, Court of Appeal and Supreme Court decisions. He also said that although the plaintiff mataqali wished to abandon its claim for general damages, it did want to pursue its application for indemnity costs, which Mr Nacuva's evidence suggests came to approximately $45,000 (I say approximately because it seems that some of this amount may include costs related to the defendant's appeal to the Court of Appeal, which may not be covered by the orders made in the High Court). Mr Nacuva's evidence did not include an explanation for the delay in pursuing the proceeding following the judgment of the Supreme Court. The defendant did not respond in any way to the Order 25 Notice, and there was no appearance for her.

9. The Master's decision on the striking out issue was issued on 5 June 2020. In it he reviewed the principles upon which proceedings might be struck out for want of prosecution, referring to the decision of the House of Lords in **Birkett v James** [1977] 2 All ER 801 where Lord Diplock, giving the opinion of the House said (I have reformatted this from the original for clarity):

> *The power should be exercised only where the court is satisfied either:*
> *(1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or*
> *(2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and*
> *(b) that such 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 is 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.*

However, the Master went on to hold that in a case where the court has taken it upon itself to initiate the process prescribed in O.25, r.9, there is presumption that this test is met, which must be rebutted by the party opposing striking out by satisfying the Court that there is no intentional and contumelious delay, and that there has been no inordinate and inexcusable delay, or that any such delay has not caused serious prejudice to the other party (presumably in most cases the defendant).

10. With respect to the Learned Master, I think that the proposition that a notice under Order 25, rule 9 imposes a rebuttable onus on the plaintiff, is wrong. Order 25 is a part of the High Court Rules that deals with case management. Rule 9 provides a tool for the court to use to ensure that cases are managed efficiently so as to enable, if it is still possible, the parties' dispute to be decided on its merits. In **Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9 the Court of Appeal held (at paragraph 16):

> *In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions **of its own motion**. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority.*
>
> *In **Bhawis Pratap v Christian Mission Fellowship** (Civ App ABU 93/05 – 14 July 2006) this court reviewed the authorities and explained that mere delay without prejudice to other parties is not ordinarily sufficient ground for striking out an action for want of prosecution.*

I do not think it is necessary, for achieving this useful purpose intended by O.25, r.9, to read into the rule a requirement for the rebuttable presumption referred to by the Learned Master. A notice issued by the Court of its own motion enables the court to manage and reactivate inactive cases in its list, and provides the parties with the opportunity to argue for or against striking out, as one of a number or orders available to the court as a means of bringing the proceedings to a conclusion.

11. In the present case there is no suggestion of intentional and contumelious inactivity by the plaintiff, and the striking out, if correct, must be justified under the second aspect of the test in **Birkett v James**, i.e. inordinate delay causing prejudice. In reaching the decision that he did to strike out the plaintiff's claim the Master did not, because of his view that the notice issued under Rule 9 gave rise to an assumption against the plaintiff of inordinate delay and prejudice that the plaintiff had failed to rebut, address this issue. In this case there was no assertion by the defendant that she was prejudiced by the plaintiff's delay in finalising the issue of costs. Perhaps understandably she was happy to let sleeping dogs lie on that issue, in the hope that it might never be resurrected. While there was certainly inordinate and unexplained delay on the part of the plaintiff (from the bar it was suggested for the plaintiff that the delay was the fault of the court for not re-starting the costs process once the Supreme Court had issued its decision. I don't for a moment agree that the court has such a responsibility), it is hard to see how the defendant might be prejudiced by that delay when the case has been heard and decided, and the only outstanding issue relates to the calculation of costs. If there were particular circumstances whereby the defendant was prejudiced by the delay, she could have, but did not, provide evidence of this.

12. Accordingly I am satisfied that the plaintiff should be given leave to appeal against the decision of 20 June 2020 striking out its claim.

Order for examination of judgment debtor

13 Order 48, rule 1 states:

> ***Order for examination of judgment debtor (O.48, r.1)***
>
> *1(1) Where a person has obtained a judgment or order for the payment by some other person (hereinafter referred to as "the judgment debtor") of money, the Court may, on an application made ex parte by the person entitled to enforce the judgment or order, order the judgment debtor or, if the judgment debtor is a body corporate, an officer thereof, to attend before the Registrar or such Magistrate as the Court may appoint and be orally examined on the questions-*
>
> *(a) whether any and, if so, what debts are owing to the judgment debtor, and*
>
> *(b) whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order;*
>
> *and the Court may also order the judgment debtor or officer to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination.*
>
> *(2) An order under this rule must be served personally on the judgment debtor and on any officer of a body corporate ordered to attend for examination, and appropriate conduct money must be paid or tendered.*

Normally this application would be made ex parte, as the rule above suggests, but here it was quite properly made on notice, given that the parties were already before the court on the other applications. However, the defendant has not opposed the application, or made any submissions on the issue, and an order is made accordingly that the defendant is to attend before the Magistrate at such time as the Magistrates Court directs to be orally examined on oath as to:

(a) whether any and, if so, what debts are owing to her, and

(b) whether she has any and, if so, what other property or means of satisfying the judgment or order;

She is also then to produce any books or documents in her possession relevant to these questions.

Consolidation

14. In an attempt to retrieve the situation she finds herself in, the defendant Ms Khan, by writ of summons dated 22 September 2020 (the day before the hearing before me) has issued new proceedings in the High Court at Lautoka under HBC 223/2020 against the Director of Lands, the Registrar of Titles, the Attorney General and the mataqali Naboka. In those proceedings she asserts that her leasehold interest in the Korotoga property referred to in paragraph 2 above was unlawfully cancelled and transferred to the mataqali without compensation to her. She seeks a declaration that the lease remains in effect, or an order that the lease be reinstated, plus monetary compensation ($10m is the amount claimed) pursuant to sections 37 and 38 Land Transfer Act 1971, and sections 27 and 29 of the Fiji Constitution.

15. Having commenced this new action, Ms Khan applies under Order 4, rule 2 for an order consolidating the current (2011) proceedings, with her new claim. In support of this she says, in her affidavit in support of the application, having annexed a copy of the writ and statement of claim:

> *10. ... it is beyond dispute that the [mataqali's] Application will be redundant if the Court rules in favour of me in [HBC 223/2020] as the claims that the [mataqali] is making against me in the present matter arose out of the unlawful cancellation of my Crown Lease No. 503051 without compensation paid to me.*

16. Leaving aside all issues of res judicata, limitation and the like that might be pleaded in response to these new proceedings it seems that Ms Khan and her advisors are suffering under a fundamental misapprehension about what happened in 2003 when freehold in the land was transferred to the mataqali. At that time Ms Khan held a registered lease over the property, as she points out, with a term of 99 years from 1 July 1999. That lease was not 'cancelled' by the transfer of the underlying freehold title to the mataqali. The lease continued – as the mataqali, through its solicitors - affirmed in correspondence at the time. As the new owner of the property, and (now) Ms Khan's lessor, all that the mataqali asked of her was to meet her obligations under the lease, i.e. to pay the rent, and take part in a rent review process every 5 years. For reasons that have not been explained, she refused to do so, and so, eventually, in 2009 the mataqali terminated the lease for breach, and commenced action to obtain vacant possession of the land, and to recover rent and damages for her occupation of it. Even at that point Ms Khan could have applied to the court for relief against forfeiture, which, if granted, would have resulted in the lease being reinstated, on the condition that she paid all arrears and costs.

17. Order 4, rule 2 governing consolidation of proceedings states:

> ***Consolidation of Proceedings (O.4, r.2)***

2. *Where two or more causes or matters are pending, then, if it appears to the Court-*
   (a) that some common question of law or fact arises in both or all of them, or
   (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
   (c) that for some other reason it is desirable to make an order under this rule, the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

18. As the commentary to this rule states, considerations that the Court may take into account in exercising its discretion whether to allow or refuse consolidation include:

i) which court is the most suitable to hear and determine the cases;
ii) the nature of the cases;
iii) the interests of all parties;
iv) the convenience of parties and witnesses;
v) expenses;
vi) the ends of justice in determination of issues in view of most efficient administration of the court;
vii) whether the proposed transfer/consolidation achieves the purpose of an expeditious conclusion of actions.

19. Taking into account what I have said in paragraph 16 above I am firmly of the view that consolidation does not serve the interests of justice in this case. The plaintiff has already incurred the costs and extensive delays of getting this matter to the point that it is, where the plaintiff has obtained judgment for amounts that are I think indisputable (rent or the equivalent of rent for the defendants occupation of its property). Even if I am wrong in my assessment above, any rights that the defendant is found to have will not relieve her of the obligation to pay rent for the period until she was forced to vacate the property. Given my doubts about the likelihood of success in these new proceedings, I see no reason why the plaintiff should be denied the fruits of the judgment it has obtained, or have its rights under those judgments possibly compromised by having these proceedings consolidated with the defendant's new claim. The current proceedings are coming to an end, and should not be revived or made more contentious by amalgamating them with the possibly speculative claims that the defendant has now commenced.

20 The application for consolidation is dismissed.

Costs

21. I make no order as to costs. Although the plaintiff is successful in its application for leave to appeal, that application is necessary only because of the plaintiff's inactivity for three years in pursuing its right to costs in the original High Court proceedings. On the application for an order for examination any costs can be dealt with at the time any orders are made following the examination, once information is available to the court as to the defendant's means. The application for consolidation was made only days before the hearing of the other matters, and was – with the

cooperation of the parties - able to be decided at the same hearing, and without the plaintiff having to file any response or provide any written submissions.

Orders

22. I therefore make the following orders:

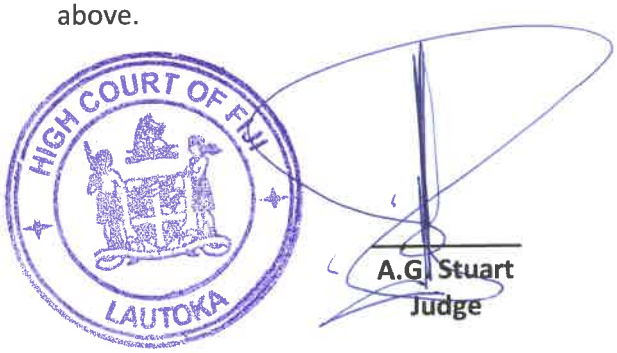
i. plaintiff is given leave to appeal against the decision of 20 June 2020 striking out its claim. In terms of O.59, r.9(b) any appeal must be filed and served within 7 days from the date of this decision.

ii. the defendant is to attend before the Magistrate at such time as the Magistrates Court directs to be orally examined on oath as to:
   (a) whether any and, if so, what debts are owing to her, and
   (b) whether she has any and, if so, what other property or means of satisfying the judgment or order. She is also then to produce any books or documents in her possession relevant to these questions.

iii. The defendant's application for consolidation of this proceeding with proceedings commenced by her under HBC 223/2020 is dismissed.

iv. There is no order as to costs.

v. The proceedings are adjourned for mention to 24 November 2020 at 10.30am to enable the plaintiff to file and serve its appeal as set out in (i) above.



At Lautoka this 18th day of November, 2020

SOLICITORS:
Parshotam Lawyers, Suva for the Appellant/Plaintiff
Fa & Company, Suva for the Respondent/Defendant