

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 272 of 2018

BETWEEN : **RAHMAT ALI** of 153, Vomo Street, Lautoka, Businessman.

PLAINTIFF

AND : **MOHAMED HANIF** of 34, Belo Street, Samabula, Suva, Businessman.

1st DEFENDANT

AND : **MERCHANT FINANCE AND INVESTMENT COMPANY LIMITED** a duly registered company having its registered office at Level 1, Ra Marama House, Gordon Street, Suva.

2nd DEFENDANT

AND : **CRP INDUSTRIES LIMITED** a limited liability company having its registered office at Market Subdivision, Varoka, Ba, Fiji.

3rd DEFENDANT

AND : **REGISTRAR OF TITLE** Government Building, Suva.

4th DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI** Attorney General's Chambers, Suva.

5th DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. V. Nettles for the Plaintiff
Mr. N. Padarath for the 3rd Defendant

Date of Ruling: 17.06.2022

RULING

01. This is the summons filed by the third defendant pursuant to Order 18 rule 18 of the High Court seeking to strike out the plaintiff's case against the third defendant on all four grounds under the said rule. The summons is supported by an affidavit sworn by Rajesh Kumar Patel – the Director of the third defendant company. The summons is opposed by the plaintiff and he filed an affidavit. The third defendant opted not to file the affidavit in reply and the matter was fixed for hearing. At hearing of the summons the counsels for the plaintiff and the third defendant made submission and filed the written submission. The other counsels were excused at hearing as the current summons filed by the third defendant concerns the plaintiff only.

02. 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)

03. 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 summary procedure of pre-emptory striking out.

04. 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 1, 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] 1 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] 1 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 v Secretary of State for Home Affairs [1969] 1 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”.

05. 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”.

06. Every person has access to 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] 1 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’.


07. 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 reason that, it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.
08. Though the instant summons filed by the third defendant is based on all four grounds of the Order 18 rule 18, the primary ground is Order 18 rule 18 (1) (a). No evidence is required to consider an application under that subsection; instead the court has to examine the allegations in the pleadings to come to a conclusion on reasonable cause of action. His Lordship the former Chief Justice A.H.C.T. Gates (as His Lordship then was) in **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

“To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18 (2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498”.
09. The plaintiff stated in his statement of claim that, he and the first defendant were the registered proprietors of Crown Lease No 17197 being Lot 1, SO 5489 in the Province of Ba and District of Vuda comprising an area of 3.2689 hectares. They mortgaged that property to Habib Bank Limited under Mortgage No. 343560. The plaintiff further stated that, according to his belief, the property was leased to Automart Limited by the first defendant and it displayed its vehicles till October 2018. When Automart Limited vacated the property the plaintiff inquired about it and came to know that, the third defendant is the current registered proprietor.
10. The plaintiff further pleaded in paragraphs 6 onwards that, the property was transferred to second defendant in 2012 and thereafter to the third defendant in 2014 without his knowledge and consent. The plaintiff alleged that, the first and second defendant fraudulently and unlawfully transferred the property to the third defendant. Particularizing the fraud and unlawful actions of the first and second defendant, the plaintiff claimed that, both the first and second defendant received substantial sum of monies from those two transfers. However, there is no allegation whatsoever against the third defendant in the statement claim of the plaintiff. The statement of claim merely states that, the property was transferred to the third defendant without the consent of the plaintiff.

11. The third defendant company is not the direct transferee from the plaintiff or the first defendant. The property was first transferred to the second defendant company and then to the third defendant company. The third defendant company is under no obligation to obtain the consent from the previous proprietor to buy the property. The reason being that, the Torrens System of registration introduced by the Land Transfer Act cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown (per: Windeyer J in **Breskvar v. Wall** (1971-72) 126 CLR 376 at page 400). This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right.
12. The important feature of indefeasibility of title under the Torrens System that was upheld by the Privy Council in **Frazer v Walker** [1966] UKPC 27; [1967] 1 AC 569 is that, the current owner of a property will have indefeasible title if he was unaware of fraud, even though the previous owner had fraudulently obtained the title. The allegation of fraud against the first and second defendants cannot affect the title of the third defendant unless it is clearly pleaded and proved that; third defendant is part of the alleged fraud. However, there is no allegation of fraud by the plaintiff against the third defendant in purchasing the property from the second defendant. Accordingly, there is no reasonable cause of action pleaded by the plaintiff against the third defendant.
13. For the reasons mentioned above, I hold that, the statement of claim filed by the plaintiff does not disclose a reasonable cause of action against the third defendant and the intervention of the court in this matter is warranted. Accordingly, I make the following orders:
 1. The plaintiff's action against the third defendant is struck out, and
 2. The plaintiff should pay a summarily assessed cost of \$ 1,500 to the third defendant within a month from today.



At Lautoka
17.06.2022


U.L Mohamed Azhar
Master of the High Court