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

CIVIL ACTION NO. HBM 34 OF 2020

BETWEEN	:	**VILIAME WAQANINAVATU**
		APPLICANT
AND	:	**THE STATE**
		RESPONDENT
BEFORE	:	Hon. Mr. Justice Mohamed Mackie
APPEARANCES	:	Applicant in Person Mr. S. Kant- for the Respondent
DATE OF HEARING	:	1st September, 2022
DATE OF DECISION	:	14th November, 2022

RULING

(On Striking Out –Constitutional Redress)

1. The applicant in the above styled matter has filed four (4) separate applications, by standard form HCCR-1, each supported by subsequent individual affidavits sworn by him, alleging various breaches of his constitutional rights.

2. For the purpose of clarity and easy reference, those applications are described below with the allegations therein and the dates of filing respective affidavits in support thereof.

   a. The application dated 10th August,2020 and filed on 26th August,2020 alleges that the Trial Judge on 23rd February,2018, whilst sentencing the applicant for the offence of rape and attempt to pervert the cause of justice , failed to inform the applicant of his right to appeal , contrary to section 14(2) (o) and 14 (3) of the constitution. The affidavit in support in this regard was sworn and filed on 6th June, 2022. (**Application -1**)

   b. The application dated 10th August,2020 and filed on 22nd September,2020 alleges that on 21st February,2018, the Lautoka High Court disallowed the applicant from being present in court during the summing up of his criminal proceeding , contrary to section 14(2) (h) and 15 (1) of the constitution. The affidavit in support in this regard was also sworn and filed on 6th June, 2022. (**Application -2**)

   c. The application dated 10th August,2020 and filed on 22nd September,2020 , alleges that on 21st February,2018 , the Lautoka High Court failed to accord the applicant a

fair trial when the Learned Trial Judge directed the assessors to assess evidence with the wisdom of the " Fijian Lifestyle" contrary to section 26 (3) (a) of the constitution. The affidavit in support in this regard was also sworn and filed on 6th June, 2022. (**Application** -3)

d. The application dated 10th August , 2020 and filed on 26th August, 2020 , which, subsequently, was amended by application dated 30th December,2020 and filed on 19th March, 2021, alleges that on 20th February,2020, the applicant was arrested and charged for the offence of conspiracy to defeat the cause of justice , for which offence the applicant was already convicted and sentenced and the evidence with respect to his earlier conviction were concealed from the applicant , contrary to section 14(2) (c) and (e) . 15 (1) and (26 (1) of the constitution. The affidavit in support in this regard was also sworn and filed on 6th June, 2022. (**Application -4**)

3. On perusal of the record, it transpires that the applicant was on 21st February, 2018, found guilty, by the High Court of Lautoka, on one count of rape and one count of attempting to pervert the Course of Justice, on which the applicant, on 23rd February, 2018, was sentenced to 8 years imprisonment with minimum term of 7 years for the offence of rape and 18 months imprisonment for the offence of attempt to pervert the course of justice, a term to be served concurrently with the sentence for the offence of rape.

4. Thus, it is clear that his purported breaches of constitutional rights mainly arise out of the Criminal proceedings held against the applicant in the High Court.

5. The respondent, having filed the acknowledgment of service on 10th September, 2020 through the Attorney General, instead of filing the affidavits in opposition, on 10th October, 2020, filed an Inter-parte Summons to Strike Out pursuant to Rule 7 of the High Court (Constitutional Redress) Rules 2015, Order 18 Rule 18 of the High Court Rules 1988, and Section 44(4) of the constitution the Republic of Fiji.

6. At the hearing of the matter on 1st September, 2022, the learned Counsel for the respondent filed his written submissions and made oral submission as well. The applicant too made oral submissions, who on 19th March, 2021 had filed written submission against the summons for strike out and subsequently filed his written submission in support of his application for constitutional Redress at the hearing. He also filed a supplementary submission on 21st September, 2022.

THE LAW:

7. The respondent in making this Strike Out Application relies on section 44(4) of the Constitution, Rule 3(2) of the High Court (Constitutional Redress) Rules 2015 and Order 18 Rule 18(1)(a) of the High Court Rules of Fiji 1988 (HCR) and the inherent jurisdiction of this Court.

Section 44 (1) of the Constitution states that:

"If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress."

Section 44 (4) of the Constitution States:

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.

1. Rule 3(2) of the Constructional Redress Rules states:

An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.

2. Order 18 Rule 18 of the High Court Rules 1988 states as follows:

18.-(1) The Court may at any stage of the proceedings order to be struck out or amended 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...

8. The respondent's Summons to strike out is founded on paragraph (a) of the Order 18 Rule 18 above, which does not require any evidence. Thus, no affidavit in support was filed by the respondent. However, the applicant chose to file an affidavit in response sworn on 30th June, 2022 complaining about non-filing of submissions by the Respondent as per the direction. However, it is observed that submissions have been filed at the end, wherein I don't find any convincing legal submissions by the applicant that he has a reasonable cause of action or why the striking out application should be dismissed.

9. The learned counsel for the respondent filed a detailed and well research written submissions, wherein the counsel , while addressing on the absence of reasonable cause of action, constructed his further arguments on three main issues that:

a. This application for constitutional redress is filed in contravention Rule 3 (2) of the constitutional redress rules - 2015,

b. The applicant has an adequate alternative remedy with the Court of Appeal and therefore cannot burden this court under a constitutional redress proceeding to review the Criminal Proceeding.

c. If this court grants the orders sought by the applicant, it would be seen as usurping the functions of the Criminal Court and a hindrance to the criminal justice system.

NO REASONABLE CAUSE OF ACTION:

10. In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch 506** it was held that *"the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea".*

In **Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All ER 1094** it was held;

> *"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".*

In the case of **Walters v Sunday Pictorial Newspapers Limited [1961] 2 All ER 761** it was held:

> *"It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases".*

In **Narawa v Native Land Trust Board [2003] FJHC 302; HBC0232d.1995s (11 July 2003)** the court made the flowing observations:

> *"In the context of this case I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:*
>
> *"First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".*

11. From the decisions cited above, it is clear that the power to strikeout a claim is a discretion conferred upon the court and the court must exercise such discretionary power with great caution and only in an exceptional case.

12. The main ground on which the striking out is sought is that the application does not discloses a reasonable cause of action. The application is also objected to by the respondents on the ground that it has been filed out of time, he has alternative remedy and intervention of this court in this manner could be seen as usurping the functions and authority of the criminal courts.

13. On the other hand, what the applicant complains in his aforesaid four (4) application are that

    a. When he was sentenced by the High Court on 23rd February, 2018, the trial judge failed to inform him of his right to Appeal. (Application- 1) ,
    b. On 21st February, 2018, the Lautoka High court disallowed him being present in Court during the summing up of the Criminal proceeding. (Application-2)
    c. On 21st February,2018 , the Lautoka High Court failed to accord the applicant a fair trial, when the learned trial judge directed the assessors to assess the evidence with the Wisdom of the "Fijian Lifestyle" (Application-3)
    d. He was arrested and charged for the offence of conspiracy to defeat the cause of justice, for which offence the he was already convicted and sentenced and the evidence with respect to his earlier conviction were concealed from him.

14. Careful perusal of the above allegations shows that these are matters that should have been raised and addressed in the High court itself at the appropriate time, if in fact there were any such instances. These mere allegations cannot give birth to a cause /s of action for the applicant to invoke the jurisdiction of this Court under the label of constitutional redress.

15. Reference is made to Supreme Court Practice (UK) 1999 Vol1, Paragraph 18/19/10 at page 349 which states:

> *"A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered* ***(per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 ALL E.R 1094, C.A.)...".***

16. The respondent's counsel has outlined the background of the applicant's criminal case in the High Court. It is on the propriety of the certain proceedings or steps during the trial, the applicant bases his complain for the current constitutional redress applications.

17. The applicant was found guilty after trial by the High court for rape and attempt to pervert the cause of justice and sentenced for 8 years imprisonment, with 7 years minimum term before any parole for the offence of rape and 18 months imprisonment for the attempt to pervert the cause of justice both to be served concurrently.

18. His application in Criminal Appeal No-AAU 0057 of 2018 to the Court of Appeal for the enlargement of time and bail pending Appeal was dismissed by the Court of Appeal by ruling dated 27th July, 2020. The record does not discloses the next move made by the applicant if he was dissatisfied with the ruling of the Court of Appeal. The applicant seems to have failed to move therefrom.

19. It is fairly evident from the aforesaid background of the applicant's criminal case that has been disposed by the Court of Appeal and the applicant is now seeking this Court to review the proceedings and the decision of the Criminal High Court and that of the hierarchy thereof.

The applicant being a Police Officer, cannot claim that he was unaware of the position that he can make an appeal to the Court of Appeal in time. The ignorance of the law is not an excuse for the applicant's non-action. For the reason best known to him, he has not made an application to the court above, if he was dissatisfied with the ruling of the Court of Appeal. This court cannot perform a function of another Court in the system.

Hence, the finding of guilty of the applicant by the High Court of Lautoka and the dismissal of the applicant's application by the Court of Appeal, which is within the Criminal Jurisdiction, does not give rise to a "cause of action" sufficient to file, support and/ or maintain an application for Constitutional remedy against the State .

DELAY:

20. Even if it is assumed for the sake of argument that the applicant has had some sort of ground/ cause of action to make an application of this nature, the fact that he is guilty of inordinate delay in making this applications in hand will not allow this Court to extend its helping hand to the applicant.

The relevant Criminal Proceeding in the High Court against the applicant ended with his conviction in February, 2018. He made his Application 1 and 4 above on 26th August, 2020 and the Application 2 and 4 on 22nd September,2020 after the laps of around two and half (2 ½) years . This delay remains unexplained, which is fatal to his applications.

21. Rule 3 of the High Court (Constitutional Redress) Rules 2015 provides:

> *"(2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the Application outside of that period".*

22. The applicant has not given any reason for the delay in coming to court and therefore, the court does not have any grounds to act under rule 3(2) of the High Court (Constitutional Redress) Rules 2015 and to hear the application made outside the period of time prescribed by the said rules.

ALTYERNATIVE REMEDY:

23. Upon perusal of Section 44(4) of the Constitution of the Republic of Fiji (2013), I find that it specifically provides this court to exercise its discretion not to grant the relief sought in relation to an application or referral made under the Bill of Rights Chapter, if it considers that an adequate alternative remedy is available to the person concerned.

24. In the current applications before me, I find that the Court of Appeal has adjudicated on his application for extension of time to Appeal and Bail pending Appeal. Thereafter, the applicant has failed to exhaust the alternative remedy available to him whereby the applicant could have made an application to the Supreme Court seeking remedy.

25. On his failure to exhaust the adequate alternative remedy available to him only renders his applications to be misconceived and premature respectively. The learned counsel for the respondent submitted in his written submission that the applicant has an adequate alternative remedy and this application for the constitutional redress must be dismissed pursuant to Section 44 (4) of the Constitution. Section 44 (4) of the Constitution states that:

> *"The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned."*

26. The matters raise by the applicant in his purported applications can be addressed in the very criminal court system itself and the intervention of this Court is uncalled and unwarranted. Therefore, I am satisfied that the applicant already has an adequate alternative remedy pursuant to Section 44 (4) of the Constitution.

27. It is a settle legal principle in the domains of constitutional, human rights and criminal laws, not to allow an application for constitutional redress if there an adequate alternative remedy is available. Having discussed the principles laid down by the Privy Council in number of cases, the Fiji Court of Appeal in **Singh v Director of Public Prosecutions [2004] FJCA 37; AAU0037.2003S (16 July 2004)** held that:

> *"We note that the Privy Council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect. These cases set out the relevant principles for the court to follow when considering and applying s.41 (4) of the Constitution."*

CONCLUSIONS:

28. Taking into consideration above and the Orders sought herein by the applicant in terms of his Constitutional Redress applications, I reiterate, the same have already been addressed by the Court of Appeal and, if still aggrieved, he has alternative remedy

within the very system. If any such powers to be exercised by this Civil High Court, it will only result in usurping the functions of the Criminal Courts.

29. The Applicant has failed to satisfy this court that there was any breach of his constitutional rights when the Criminal Courts heard and determined his case accordingly.

30. I find that the applications of the applicant for constitutional redress have not disclosed any reasonable cause of action and also amount to an abuse of process of the court. Hence, I find that the summons for strikeout filed by the respondent should succeed.

31. Further, the applicant is guilty of laches and has not adduced any exceptional circumstances to justify his undue delay for this Court to accept and act upon, on the assumed basis that he has a cause of action and no alternative remedy available.

32. Accordingly, for the aforementioned reasons, I find no merits in the applicant's Constitutional Redress Applications and it warrant nothing but striking out.

FINAL OUTCOME

A. The respondents Summons, seeking to strike out the applicant's Constitutional Redress Applications, succeeds.

B. The applicant's all four (4) applications, for Constitutional Redress, are hereby struck out.

C. There will be no Order as to costs.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 14th day of November, 2022.

SOLICITORS:
For the Applicant: **In Person**
For the Respondent: **Attorney General's Chambers**