In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 31 of 2016

Sunita Lal

Plaintiff

v.

Initiaz Khan

First defendant

Sadhana Patel

Second defendant

Counsel: Mr D. Singh for the plaintiff

Mr G. O'Driscoll for the defendants

Date of hearing: 28th April,2022

Date of Ruling: 22nd May,2023

Ruling

1. By summons filed on 20th January,2022, the plaintiff seeks to leave to appeal out of time the Ruling of the Master. The supporting affidavit filed by the plaintiff states that her son has a very high chance of success on merits in the personal injury case filed against the defendants.

2. On 22nd December, 2022, the Master declined the plaintiff summons to reinstate this action.

3. The proposed grounds of appeal read as follows:

    a. *The Learned Master erred in law and in fact in holding "it is not a case where an application is being dismissed due to non-appearance of the party moving the Court" when in fact, this was clearly the case.*
    b. *That Learned Master erred in law and in fact in holding it is not a case where a Summon has been dismissed without a hearing by reason of failure of the party who took out the Summons to attend the Court for hearing when in fact this was clearly the case.*
    c. *The Learned Master erred in law and in fact in not analyzing correctly and holding that* ***Samat v Qelelailai HBC Civil Action No. 201 of 2020*** *was a legal precedent applicable to re-instate this action.*
    d. *The Learned Master erred in law and fact in finding that* ***Wati v Wati and Others a Lautoka High Court Civil Action HBC 144 of 2014*** *was inapplicable to the facts of the case at hand and was inapplicable as a Legal Precedent.*
    e. *The Learned Master erred in law and in fact in holding* ***Maharaj v Mata Kula a High Court Civil Action No. 62 of 2015*** *was inapplicable as a Legal Precedent and also thereby concluding that re-instatement was not the proper procedure to be adopted but rather an appeal of the decision was the proper avenues when in fact and in Law the matter was struck off for want of Prosecution without the Plaintiff making any submission or even being heard.*
    f. *The Learned Master erred in Law and in fact in incorrectly applying* ***Prasad v Estate of Ram Dei a Suva High Court Civil Action No. HBC 43 of 1995*** *and finding "even if the application was to be considered again plaintiff cannot blame its previous Solicitors".*
    g. *The Learned Master erred in law and in fact in holding that the 2½ years delay impliedly in paragraphs 20 of her Ruling as being inordinate and inexcusable without analyzing the evidence deposed in the applicant's affidavit in support of her application for re-instatement.*

h. *The Learned Master erred in law and in fact in holding in paragraph 21 of her decision "Hence, I do not find the action can be re-instated without setting aside the orders made on Order 25 Rule 9 Notice when she had the legal authority, powers and inherent jurisdiction to do so in light of the evidence deposed in the affidavit in support of the Summons for Re-instatement, her statutory powers, rules of the High Court 1988, under common law, her inherent jurisdiction and in light of case laws cited in the submission of the Applicant/Plaintiff.*

i. *That the Master failed to consider properly whether the delay was so prejudicial to the defendants, that it would undermine a fair trial.*

j. *That the Master failed to consider properly whether the delay was intentional, contumelious or ma*(la) *fide or inordinate and inexcusable before striking out.*

k. *That the Ruling of the Learned Master is so palpably wrong in fact and in law that it resulted in a miscarriage of justice.*

4. *Chronology of events*

a. 9th February,2016 - Writ of summons was filed
b. 22nd August,2017 - Or 25, r9 issued to parties and their solicitors
c. 13th November,2017 - Notice of Intention to proceed filed
d. 13th March,2018 Matter struck out for non appearance and want of prosecution in terms of Or 25, r9.
e. 22nd December, 2021- Master declined summons filed by the plaintiff on 25th September,2020, to reinstate this action.

5. The question in this leave to appeal application is whether the procedure to be followed by a party aggrieved with an Order striking out an action, (under Or 25, r9) is to appeal or make an application for reinstatement.

6. The answer is succinctly provided in the case of ***Samat v Qelelailai,*** [2012 FJHC 844; HBC Civil Action No. 201 of 2020(30 January,2012) as referred to in the plaintiff's proposed grounds of appeal. I reproduce the relevant passage from that judgment:

> *..an unless order made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio. This however would be in contrast to a ruling made by the Master in exercising the statutory powers under O. 25 r. 9 where matters could be struck out for want of prosecution.* ***A decision made by the Master considering the objections placed before him on a show cause notice under O.29 r.9, is final in nature although not considered on the merits of the cause. Therefore, an aggrieved party would be required to appeal against such an order vis a vis an application to re-instate****.* (emphasis and underlining mine)

7. In that case, it was held that a plaintiff aggrieved by an unless order, could make an application for re-instatement before the same judicial officer.

8. The passage I have cited was reproduced in ***Wati v Wati,*** [2016] FJHC 1094; Civil Action HBC 144 of 2014(2 December,2016), the next decision referred to in the proposed grounds of appeal, which was concerned with non-compliance of a peremptory order.

9. In the third case cited: ***Maharaj v Matakula***, [2019] FJHC 966; HBC 92 of 2015(4 October,2019) the plaintiff's claim was not struck out, as in the case before me.

10. The events that transpired in the judgments quoted are totally different to the present matter.

11. The question has been decided by the Court of Appeal in ***Trade Air Engineering (West) Ltd v Taga*** **[**2007] FJCA 9; ABU0062J.2006 (9 March, 2007). The judgment of the Court at paragraphs 13 and 14 stated:

> ***Generally, a party's only remedy following the striking out of its action is appeal.*** *Exceptions to this general rule such as O 13 r 10, O 14 r 11, O 24 r 17 or O 32 r 6 have no application to Order 25.*
>
> *In our opinion the rehearing by the same judge of substantially of the same issues is, as a matter of principle, to be avoided, if at all possible.* (emphasis added)

12. In my judgment, the Master came to a correct conclusion that the proper procedure to be followed was an appeal of the decision striking out the matter, not reinstatement.

13. ***ORDERS***

a. The plaintiff's summons is declined.

a. I make no order as to costs.

A.L.B.Brito-Mutunayagam
JUDGE
22nd May,2023