

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

Civil Action No. HBC 291 of 2019

**RAJENDRA DEO PRASAD**

**V**

**MOHAMMED SHAMEEM AHMAD  
NUR AHMED & CO LIMITED**

**COPY RECORD**

**BEFORE MASTER OF THE HIGH COURT MS. V LAL  
IN COURT ON 01<sup>ST</sup> AUGUST 2023**

**Counsels:** Not Present for the Plaintiff  
Default Judgment entered for the First Defendant.  
Mr. AK Narayan for the Second Defendant

**Court:**

**EX – TEMPORE RULING**

1. Action was instituted when the Plaintiff's solicitors filed a Writ of Summon on 03<sup>rd</sup> September 2019. This was served on the Insurance Company on 17<sup>th</sup> September 2019 and later personally on the Defendants on 21<sup>st</sup> October 2019.
2. The second Defendant acknowledged service on 15<sup>th</sup> November 2019 and subsequently filed a defence on 03<sup>rd</sup> December 2019.

3. The Plaintiff's solicitors again on 11<sup>th</sup> December 2019 served the Writ of Summon on the first Defendant at the last known add of the first Defendant.
4. On 25<sup>th</sup> March 2020, the Plaintiff's solicitors filed a reply to the second Defendant's Statement of Defence.
5. Later on 03<sup>rd</sup> June 2020 they filed a praecipe and search to have an Interlocutory judgment sealed.
6. The interlocutory judgment against the first Defendant was sealed on 08<sup>th</sup> June 2020 and served on the first Defendant on 17<sup>th</sup> June 2020.
7. Plaintiff filed his Affidavit Verifying List of Documents on 10<sup>th</sup> August 2020, whilst the second Defendant filed its Affidavit Verifying List of Documents on 05<sup>th</sup> February 2021.
8. Thereafter no action was taken up by either party for more than 06 months, causing the court on its own motion to issue an order 25 rule 9 notice.
9. Order 25 rule 9 of the High Court Rules reads:
  - (i) *If no steps has been taken in any cause or matte for 06 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 for prosecution or as an abuse of the process of the court.*
  - (ii) *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."*
10. In Trade Air Engineering (west) Limited –v- Taja, a Court of Appeal, Civil Appeal Case ABU 62 of 2006 (delivered on 09<sup>th</sup> March 2007), the Court of Appeal at Paragraph 16 held: "While the power (under Order 25 rule 9 to strike out or give direction may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or

wider jurisdiction to the court to dismiss or strike out on grounds which differ from those already established by past authority.”

11. In *Brickett –v- James* [1978] AC 297; [1977] 2 ALL ER 801, Lord Diplock articulated the principles for striking out an action for want for prosecution:  
*“The power should be exercised only where the court is satisfied either*
  - (1) That the default has been intentional and contumelious e.g. 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 in excusable delay on the part of the Plaintiff and/or his lawyer, 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. ”*
12. In *Bhawis Pratap-v- Christian Mission Fellowship* (CV Appeal 93 of 2005) delivered on 14<sup>th</sup> July 2006, the court reviewed the authorities and explained that mere delay without prejudice to the other parties is not ordinarily a sufficient ground for striking out an action for want for prosecution.
13. In *Grovitt –v-Doctor* [1997] UKHL 13; [1997] 2 ALL ER 417, it was pointed out that it is an abuse of the court’s process to commence proceedings without the intention of prosecuting them with reasonable diligence.
14. In the current proceeding, according to the Plaintiff, his solicitors on 15<sup>th</sup> July 2021 had initiated pretrial conference.

Later the counsel handling his file resigned from the law firm.

Also due to COVID 19 pandemic his solicitors could not proceed with the matter in a timely manner.

His counsel Mr. Sen was in Police custody, from 24<sup>th</sup> June 2022 and since Maqbool & Co was shut down, the Plaintiff had to engage the services of AK Singh Law.

Upon receipt of the Order 25 rule 9 notice his solicitors on 06<sup>th</sup> September 2022 filed a notice of intention to proceed.

There is no prejudice caused to the Defendants.

15. The second Defendant complains that it has been 02 years since the cause of action arose. The investigation and confirmation of investigation took some time. Due to Tower Insurance's inability to locate and interview the first Defendant, delayed the investigation process.

AK Lawyers sent draft Pretrial Conference Minute on 13<sup>th</sup> October 2021 and followed up on this with Plaintiff's Solicitors on 14<sup>th</sup> December 2021.

The Plaintiff should have been proactive and diligent in prosecuting this matter by following up with his former solicitors to move this matter or promptly instruct another law firm if his former solicitors were not aware of his matter or unable to act on his behalf in absence of Kelepi Ratule.

The last activity by the Plaintiff was in October 2021 when his former solicitors circulated the draft Pretrial Conference minute, by when the lockdowns imposed due to COVID 19 was uplifted and court was fully operational.

According to the 2<sup>nd</sup> Defendant, the Plaintiff is attempting to derive an unfair advantage of the COVID 19 pandemic to justify the inordinate delay and laxity on his part.

The Plaintiff only acted to engage another lawyer after 02 months upon closure of his former solicitors' law firm.

After the Order 25 rule notice was issued, the Plaintiff and/or his solicitors failed to enter appearance twice on 29<sup>th</sup> July 2022 and 26<sup>th</sup> August 2022.

Tower Insurance had engaged an investigator to contact relevant witnesses. He was unable to locate any independent witnesses to the alleged accident on 28<sup>th</sup> July 2017. The attendants working at Total Services Station, Maui Bay (place of accident) were not working at the service station at the time of the accident. The Police did not interview any witnesses who were present at the scene of the accident either.

The second Defendant cannot locate the first Defendant who is a crucial witness and who may have moved to New Zealand in Feb 2019.

16. The last action taken in the matter was when the second Defendant filed its Affidavit Verifying List of Documents on 05<sup>th</sup> February 2021.
17. The country went into a lockdown in April 2021 and court services were fully operational from 18<sup>th</sup> September 2021.
18. Order 25 rule 9 notice was issued by the court on 13<sup>th</sup> June 2022.
19. It was served as Plaintiff's then solicitors' city agent O'Driscoll & Co on 20<sup>th</sup> July 2022.\
20. Since Maqbool & Co was not operational as advised by Legal Practitioners Unit, direction was for notice to be redated and served on AK Singh Lawyers who then were receivers of the law firm.

21. There was a delay of 11 months [02 months from 05<sup>th</sup> February 2021 till end April 2021 and 09 months from September 2021 till June 2022 when the notice was issued] when the Plaintiff failed to move the matter for trial.
22. Despite complaining about prejudice caused to the Insurance Company, second Defendant did not at its own initiative caused a notice to be issued under Order 25 rule 9 of the High Court Rules.
23. There was no disobedience of any court order but rather Plaintiff failed to move the matter forward (in compliance with the Rules) for trial.
24. Though 11 months delay has been caused by the Plaintiff not moving the matter forward, after perusing both the parties affidavits warranting a dismissed under Order 25 rule 9 but rather directions he given with warning to Plaintiff.
25. The order 25 rule 9 notice is converted into a summon for direction with following orders:
  - i. *Discovery (if incomplete) to be completed by 08<sup>th</sup> August 2023;*
  - ii. *A pretrial conference to be convened and a minute is to be filed by 12 noon on 18<sup>th</sup> August 2023;*  
  
*(The Pretrial Conference Minute is subject to LFF)*
  - iii. *If a Pre Trial Conference minute is not filed by the given date/time; a Pre Trial Conference will be convened before this court on 22<sup>nd</sup> August 2023 at 11am. Plaintiff's solicitors should submit to this court a draft Pre Trial Conference minute for perusal purpose by 3pm 18<sup>th</sup> August 2023.*
26. The second Defendant is entitled cost for the delay which is summarily assessed at \$1,000 and to be paid by 12 noon 18<sup>th</sup> August 2023.

27. Pre Trial Conference on 22<sup>nd</sup> August 2023 at 11am if minutes not filed by 12 noon 18<sup>th</sup> August 2023 and if minutes filed will be mention on said date/time.

**(Sgd) Ms. V. Lal  
Master of High Court**

CIVIL ACTION NO. HBC 291 of 2019

RAJENDRA DEO PRASAD

Plaintiff

V

MOHAMMED SHAMEEM AHMAD  
NUR AHMED & CO LIMITED

Defendants

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COPY RECORD FOR EX-TEMPORE  
RULING

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Typed and Prepare by:



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Lusiana Biau  
Secretary

Checked with original and  
certified to be true copy:



.....  
Meli Vakacegu [Mr]  
Actg Senior Court Officer I  
High Court, Suva



Date: 24/8/23 .....