

IN THE HIGH COURT OF FIJI AT SUVA.
CIVIL JURISDICTION

High Court Civil HBC No. 243 of 2011

BETWEEN: **VERESA ROKODUGUNU VALEMEI** of Sector 2, Lot 21 Lomaivuna, Naitasiri, Farmer, as the widower and Intended administrator of the Estate of his late wife **SERA NAIKELEKELEVESI WAQANIVAVALAGI**, Deceased, Domestic Duties, Interstate.

PLAINTIFF

AND: **KAMINIELI TUIMAVANA** of Lot 48, Block 4, Goodsir Road, Raiwai, Driver.

1st DEFENDANT

AND: **RAIWAQA BUSES LIMITED** a limited liability company having its registered office G. Fi Whiteside & Co, 211 Ratu 4ukuna Road, Suva in Fiji.

2nd DEFENDANT

AND: **THE NEW INDIA ASSURANCE COMPANY LIMITED** a limited liability company having its registered office at New India Assurance Building, 87 M. G Road, Fort Mumbai — 400001 and having its principle place of business in Fiji at Harifam Centre, 2nd Floor, Cnr Renwick Road and Greig Street, Suva in Fiji.

1ST NAMED THIRD PARTY

AND: **LAND TRANSPORT AUTHORITY** a statutory body established under the Land Transport Act, 1998 and empowered under Section 6 (2) to sue and be sued upon, having its principle place of business at Lot 1 Daniva Road, Valelevu, in Fiji.

2ND NAMED THIRD PARTY

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. D. Singh for the Applicant
Ms. S. D. Prasad for the 2nd Defendant
Ms. E. Samuela for the 1st named and 3rd Party

Date of Hearing: 6.5.2024

Date of Judgment: 20.5.2024

JUDGMENT

INTRODUCTION

- [1] First Named third Party (Applicant) filed a summons within action for strike out of action against them based on res judicata, where Applicant was discharged after hearing based on same issue (issue estoppel), involving same incident.
- [2] Plaintiff filed this action seeking compensation for loss of life of his late wife as a result of a fire of a bus. She was one of unfortunate victim due to fire in a bus.
- [3] A large number of passengers in the bus got injured due to this incident and they filed number of cases seeking damages. In one such action HBC351 of 2009 after trial claim against Applicant was struck off in the judgment handed down on 30.9.2020. This judgment was appealed to Court of Appeal and awaits hearing.
- [4] Applicant is relying on the said judgment of this court handed down by a brother judge after conclusion of the action considering the evidence before the court.
- [5] Applicant in the written submission relied on principal of Res Judicata. The decision handed down on 30.9.2020 is subjected to appeal and not final, hence Res Judicata (issue estoppel) is not applicable to the claim against Applicant.

FACTS

- [6] Plaintiff filed this action for damages arising from the death of his late wife. Deceased was traveling in a bust that caught fire suddenly that resulted death and injury to passengers of the bus.
- [7] Plaintiff filed this action against the Driver of the bus that caught fire and also employer of the said driver for breach of statutory duties and or negligence.
- [8] Apart from Plaintiff number of passengers of the said bus who got injured filed separate actions.
- [9] The claim against first named third party is based on 'Motor Comprehensive Policy and Compulsory Third Party Policy' which allegedly covered risks associated with 'any incident or accident in connection to the vehicle'. (see paragraph 8 of affidavit in support of inter –partes motion filed on 30.9.2011.
- [10] Third party notice was served to Applicant on 11.11.2011, and it was acknowledged on 6.12.2011.
- [11] Third Party statement of claim was filed on 6.5.2013 and accordingly particulars of the claim against third party was based on second Defendant's Motor Comprehensive Policy No 922623/3104/286256 which allegedly

covered 'indemnity, legal costs, legal defences in relation to any incident or accident in connection with the vehicle and Comprehensive Third Party Policy No 922623/3144/272916 'which covers third party property damage and passenger risks in relation to any incidental accident in connection with the vehicle'. (see paragraph 6 of third party statement of claim.)

[12] While admitting the two insurance policies Applicant in its third party statement of defence inter alia pleaded 'exclusion' in terms of the said policies and specifically stated that the claim against Applicant was not covered as the cause of fire was due to 'unsafe condition or unroadworthy condition or without proper certificate of fitness or is loaded contrary to law', or 'damage to or failure to breakage or the engine transmission, mechanical or electrical systems , unless arising from external accidental cause."

[13] Applicant in paragraph 8 of its statement of defence stated

"The motor vehicle RBLOO1 was mechanically defective and after the alleged hasty repair works and without test drive was engaged in a long journey and sustained damage by fire caused by defective electrical and other connections.'

[14] Applicant in its statement of defence further relied on investigation concluded by Chief Executive of LTA in collaboration with forensic officer from Australian Federal Police, Fiji Police, National Fire Authority and Mechanical Division of the Ministry of Works. The said conclusions on the investigations were pleaded in paragraph 9 of its statement of defence.

[15] After Trial claim against Applicant was denied on the basis of evidence before court, but the decision was appealed and awaits hearings. Applicants summons based on said decision.

[16] 'Doctrine of Res Judicata' in Halsbury's Laws of England (2020) states¹

"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal². It is most closely associated with the legal principle of 'cause of action estoppel'³, which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later

¹ Halsbury's Laws of England Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740) > 25. Finality of Judgments and of Litigation > (2) Res Judicata > (i) The Doctrine of Res Judicata

² See eg *Christou v Haringey London Borough* [2013] EWCA Civ 178 at [39], [2014] QB 131 , [2014] 1 All ER 135 per Elias LJ.

³ See PARA 1570 et seq.

proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter⁴. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue⁵."

- [17] Applicant neither in the written submission nor in the oral submission stated that its summons based on issue estoppel, but its contention is based on issue estoppel based on the above quote from Halsbury's Laws of England⁶ (2020) (Vol11) Plaintiff and or Defendants objected to the application as the said judgment is under appeal.
- [18] Applicant stated that this court cannot await the decision of Court of Appeal as there can be a further appeal to Supreme Court and also review application/s. This argument of Applicant is without merit.
- [19] It is a fundamental requirement in the doctrine of res judicata is subject to an appeal.
- [20] The judgment handed down on 30.9.2020 denied claim against Applicant, but this decision is appealed hence there is no finality as to issue estoppel. Res judicata cannot be applied to strike out the claim against third party until conclusion of the Appeal awaiting hearing in Court of Appeal.

⁴ See eg *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 104, [1991] 3 All ER 41 at 46, HL, per Lord Keith of Kinkel. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment: *Arnold v National Westminster Bank plc* at 104, 46 per Lord Keith of Kinkel.

⁵ See *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA; and see eg *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 105, [1991] 3 All ER 41 at 47, HL, per Lord Keith of Kinkel.

See also PARA 1588 et seq.

⁶ Halsbury's Laws of England Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740) > 25. Finality of Judgments and of Litigation (2) Res Judicata > (i) The Doctrine of Res Judicata

FINAL ORDERS

- a. Summons for strike out is dismissed.
- b. No cost awarded considering circumstances.




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Deepthi Amaratunga
Judge

At Suva this 20th day of May, 2024.

Solicitors

Daniel Singh Lawyers,
M A Khan Esq,
Krishna & Co.