IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 02 of 2023

BETWEEN:

SHRI RAM
PLAINTIFF

AND:

RAM KUMAR
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
M. Y. Law for the Plaintiff
No appearance for the Defendant

Date of Hearing:
By way of Written Submissions

Date of Ruling:
02 October 2024

RULING

01. The Court has issued a notice on its own motion on the 26/07/2024 pursuant to Order 25 rule 9 of the High Court Rules 1988 on the Plaintiff to show cause as to why this matter should not be struck out for want of prosecution or as an abuse of the process of the court due to the failure of the Plaintiff to take any steps in the matter for over 06 months.

02. When the matter was first called before this Court on the 07/08/2024 pursuant to Order 25 Rule 9 Notice, the Court granted time to the solicitors of the Plaintiff to file a Notice of Intention to Proceed and an Affidavit to Show Cause as to why the matter should not be Struck Out pursuant to Order 25 Rule 9 of the High Court Rules and written submissions on the same.

03. Following the above directions, the solicitors for the Plaintiff had filed on the 09/08/2024 the Notice of Intention to Proceed and the Affidavit to Show Cause. Written Submissions on behalf of the Plaintiff has been filed on 16/08/2024.

04. This cause has commenced by way of a Writ of Summons and Statement of Claim filed on the 16/01/2023. The claim of the Plaintiff is challenging the last will of Ram Swarup dated 11/10/1986 on which the current Probate (No.27648) had been granted to the Defendant on 23/01/1992. Plaintiff claims that the deceased had left another last will dated 14/06/1991 and hence moves the Court to accept the last will dated 14/06/1991 as the valid last will of Ram Swarup and to cancel the current grant of probate and grant a new probate in Plaintiff's name.

05. Plaintiff on 23/02/2023, by way of an Ex-parte Notice of Motion, had moved for *'leave to serve the Defendant by way of substitute service, out of jurisdiction'* as the Defendant was residing in New Zealand. This application had been granted on 09/03/2023 and the Plaintiff had sealed this order on 21/04/2023.

06. An Affidavit of Service has been filed on 25/07/2023 and pursuant to this affidavit the Writ and the Statement of Claim had been served on the Defendant by way registered post via DHL Express (Fiji) Pte Ltd, at 17, Elizabeth Street, Pakuranga, Auckland, 2010, New Zealand, on 08/06/2023.

07. There was no Acknowledgment of Service and/or a Statement of Defence filed by the Defendant.

08. However, for over 12 months from the date of filing the Affidavit of Service, the Plaintiff failed to take any step to move this matter forward, until the Court issued the Order 25 Rule 9 Notice on its own motion on 26/07/2024.

09. I shall now consider the facts averred in the Affidavit to Show Cause filed on behalf of the Plaintiff and the relevant legal provisions and authorities whilst making my ruling under Order 25 Rule 9 of the High Court Rules.

10. Plaintiff in his Affidavit to Show Cause has submitted that the Writ and the Statement of Claim that was posted to the Defendant via DHL courier services on 08/06/2023 had

been duly served on the Defendant on 30/06/2023. However, as the Defendant failed to file his Acknowledgment or the Statement of Defence, the Plaintiff claims that he came to know that the Defendant was not well and most of the time was being hospitalized. He therefore claims that he instructed his solicitors to *'await his recovery, in order for me to contact him and speak with him in the regard of this application'*. It is further submitted that the Defendants health had kept deteriorating and unfortunately the Defendant had passed away on 13/11/2023. After the demise of the Defendant, the Plaintiff submits that he was awaiting confirmation on a grant of probate or letters of administration over the Defendants estate to move on with this matter.

11. In the written submissions filed on behalf of the Plaintiff, the counsel for the Plaintiff has submitted that in a probate action, a 'default judgment' could not have been entered pursuant to Order 76 Rule 6 and 10 of the High Court Rules. Instead, the counsel submits that the matter could have proceeded pursuant to Order 76 Rule 10 (2) of the Rules and be tried upon affidavit evidence. It is apparent therefore, that the sole reason for the Plaintiff to not proceed pursuant to Order 76 Rule 10 (2) was that he wanted to discuss the matter with the Defendant, when the Defendant had recovered from his health issues.

12. I shall now consider the relevant legal provisions to this matter. Order 25 rule 9 of the High Court Rules provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads,

> *"If no step has been taken in any cause or matter for six 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 of prosecution or as an abuse of the process of the court.*
>
> *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".*

13. As well settled in Fiji, the grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the Court. This is a rule that was introduced to the High Court Rules for case management purposes and was effective from 19 September 2005. The main characteristic of this rule is that the court is conferred with power to act on its own motion in order to agitate the unduly lethargic litigation (**see; *Trade Air Engineering (West) Ltd v Taga* [2007] FJCA 9; ABU0062J.2006 (9 March 2007***).

14. Well before the introduction of this rule, the courts in Fiji have exercised this power to strike out the cause for want prosecution following the leading English authorities such

as ***Allen v. McAlpine*** [1968] 2 QB 299;[1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801.

15. Justice Scott, striking out the Plaintiff's action in ***Hussein v Pacific Forum Line Ltd [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000),*** stated that,

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are* ***Allen v. McAlpine*** *[1968] 2 QB 299;[1968] 1 All ER 543 and* ***Birkett v. James*** *[1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example,* ***Merit Timber Products Ltd v. NLTB*** *(FCA Reps 94/609) and* ***Owen Potter v. Turtle Airways Ltd*** *(FCA Reps 93/205)".*

16. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) held,

> *"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".*

17. Pursuant to the above decision of the Court of Appeal, it is clear that the principles set out in ***Birkett v. James*** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of a new rule (Or 25 r 9). Lord Diplock, in ***Birkett v. James*** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that,

> *"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.*
>
> *To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in* ***Reggentin vs Beecholme Bakeries Ltd (Note)*** *[1968] 2*

*Q.B. 276 (reported in a note to **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 2 Q.B. 229) and **Fitzpatrick v Batger & Co Ltd** [1967] 1 W.L.R. 706*

*The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). **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 inexcusable delay on the part of the plaintiff or his lawyers, 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**".*(emphasis added)

18. The first limb in the above case is ***the intentional and contumelious default***. Lord Diplock gave two examples for that first limb in the above judgment. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus, the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default'*** as illustrated by Lord Diplock in ***Birkett v. James*** (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default.'***

19. House of Lords in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows,

*"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings are brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining*

proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".

20. The Fiji Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006,** followed the principles of **"Grovit and Others v Doctor and Others"** (supra) and held that,

*"During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision, and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court."*

21. Master Azhar in the case of **Amrith Prakash v Mohammed Hassan & Director of Lands; HBC 25/15: Ruling (04 September 2017)** has held,

*"Both the **The Grovit** case and **Thomas (Fiji) Ltd** (supra) which follows the former, go on the basis that, "abuse of the process of the court" is a ground for striking out, which is independent from what had been articulated by Lord Diplock in **Birkett v James** (supra). However, it is my considered view that, this ground of "abuse of the process of the court" is part of **'the intentional and contumelious default',** the first limb expounded by Lord Diplock. The reason being that this was clearly illustrated by Lord Diplock in **Birkett v. James** (supra). For the convenience and easy reference, I reproduce the dictum of Lord Diplock which states that; "…**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…"** (Emphasis added). According to Lord Diplock, the abuse of the process of the court falls under broad category of **'the intentional and contumelious default'**. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus, the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in **Birkett v. James** (supra). This view is further supported by the dictum of Lord Justice Parker who held in **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5 as follows,*

"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary

way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."

22. It is however, to be noted that the Defendant, is under no duty to prove the prejudice to him/her, or for that matter for the Court to consider the prejudice to the Defendant, to strike out an action under Order 25 Rule 9 of the High Court Rules 1988, if the abuse of the process of the Court is established**.** Whereas it is sufficient to establish Plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences, for an action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

23. The burden of proof in determining the matters under Order 25 Rule 9 of the High Court Rules may fall as a "negative burden of proof' on the Plaintiff itself. Master Azhar in **Amrith Prakash v Mohammed Hassan & Director of Lands** (Supra) further held,

"If the court issues a notice, it will require the party, most likely the Plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the Plaintiff to show to the Court negatively that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay, and no prejudice is caused to the Defendant. This is the burden of negative proof. In this case, the Defendant does not, even, need to participate in this proceeding. He or she can simply say that he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out plaintiff's cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the Plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion. Thus, the Plaintiff has the burden of negative proof and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court."

24. The second limb of the ***Birkett v. James*** (supra) is (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, 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. In short, inordinate, and inexcusable delay and the prejudice which makes the fair trial impossible.

25. Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999),** unanimously held that, *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case"*. However, in **Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)** the Fiji Court of Appeal cited the meaning considered by the court in an unreported case. It was held that,

> *"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in **Owen Clive Potter v Turtle Airways Limited v Anor** Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

26. In considering whether a period of delay to be inordinate and contumelious pursuant to Order 25 Rule 9 of the High Court Rules, Master Azhar in **Amrith Prakash v Mohammed Hassan & Director of Lands** (Supra) went on to hold,

> *'Order 25 Rule 9 by its plain meaning empowers the Court to strike out any cause either on its own motion or an application by the defendant if no steps taken for six months. The acceptable and/or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and excusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which to be determined in the circumstances of each and every case."*

27. All in all, since the notice was issued by this Court on its own motion pursuant to Order 25 Rule 9, it is the Plaintiff who must show cause why his action should not be struck out under that rule.

28. The reason for delay in proceedings as advanced by the Plaintiff in this matter is, in my view, quite farfetched. The Plaintiff has taken all measures to file and serve a Writ of Summons and a Statement of Claim in the matter but claims after service of the same, he wanted to discuss the matter with the Defendant before proceeding further and hence instructed his solicitors not to move on with the matter as the Defendant was unwell and that he wanted to await till his recovery.

29. Moreover, even after the death of the Defendant on 13/11/2023, for almost 07 months, Plaintiff failed to take any steps to move on with the matter pursuant to Order 15 Rule 7 and 8 of the High Court Rules. Other than claiming that the Plaintiff was unaware whether a probate or letters of administration being issued in the estate of the Defendant, the Plaintiff provides no valid reason for his failure to act under Order 15 rule 7 and 8 of the Hogh Court Rules.

30. It should thus be noted that as held in ***Amrith Prakash v Mohammed Hassan & Director of Lands (Supra)***, the legally acceptable period for inaction in a civil cause in Fiji is 06 months as embodied in Order 25 Rule 9 of the High Court Rules 1988.

31. Even if this Court is to accept the above-mentioned reasons by the Plaintiff to justify the delay of over 01 year of inaction in this matter, there is another serious procedural issue noted by the Court in these proceedings, which shall obviously render the entire proceeding a complete nullity of the matter.

32. The Plaintiff when filing the Writ has named the Defendant to be residing in New Zealand, which is out of the jurisdiction of this Court. However, in the event, it is mandatory for the Plaintiff to seek leave of the Court to have the Writ issued out of jurisdiction, pursuant to Order 6 Rule 6 of the High Court Rules.

33. Order 6 Rule 6 reads as follows,

> *"**Issue of writ (O.6, r.6)***
>
> *6.-(1) No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court, provided that if every claim made by a writ is one which by virtue of an enactment the High Court has power to hear and determine, notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provision shall not apply to the writ.*
>
> *(2) Issue of a writ takes place upon its being sealed by an officer of the Registry.*
>
> *(3) The officer by whom a concurrent writ is sealed must mark it as a concurrent writ with an official stamp.*
>
> *(4) No writ shall be sealed unless at the time of tender thereof for sealing the person tendering it leaves at the Registry a copy thereof signed, where the plaintiff sues in person, by him or, where he does not so sue, by or on behalf of his solicitor and produces to an officer of the Registry a form of 104 High Court Rules Cap 13A acknowledgment of service in Form No. 2 in Appendix [1]210 for service with the writ on each defendant."*

34. In the case of ***Ralulu v Chand [2019] FJHC 1025; Civil Action 87 of 2013 (25 October 2019)*** the Court has held as follows,

"(10) It is clear from the writ that the defendants are not within the jurisdiction. It is also clear that in those circumstances, it is necessary to obtain leave to issue the writ. In this case the plaintiffs have not sought any leave to issue the writ, and the court has made no order for leave to issue. There can be no uncertainty about the court's jurisdiction to hear the present claim and there is no enactment which gives the High Court jurisdiction to hear a claim for unjust enrichment. The plaintiffs' claim does not fall within the exception mentioned in the proviso to order 6, rule 6(1), so leave is required. I therefore accept the defendants' submissions on Order 6, Rule 6 and hold that it was necessary for the plaintiffs to first obtain leave of this court before issuing the writ.

(11) Order 6, rule 6 (1) is a mandatory provision which a Court is bound to take Notice of. In other words, the Court cannot use its discretion when a provision is mandatory. In ***Lowing v Howell (supra)****, the High Court at paragraph (26) and (27) of the judgment stated as follows;*

[26] The case authority of ***Wellington Newspapers v Rabuka*** *[1994] FJCA 14; Abu0004j.93s (22 March 1994), cited by the plaintiff, is not authority for the proposition that non-compliance with the requirements of O.6, r.6 could be cured by O.2, r.1, which states that (1) where, in beginning or purporting to being any proceedings, ... There has by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, ... or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings.*

[27] The word 'shall' used in O.6 suggests that the provisions are mandatory and must be complied with. Therefore, I am of the view that failure to comply with the mandatory requirements of O.6 is fatal and could not be cured by seeking assistance of O.2, r.1. I accordingly find that the writ of summons should be set aside on the ground that the service on the defendant is irregular.

(12) I therefore reject the plaintiff's submission that non-compliance with the requirements of Order 6, rule 6(1) could be cured by Order 2, rule (1) of the High Court Rules. Such an error is fundamental which the court cannot, in its discretion rectify as mere non-compliance under Order 2, r.1 of the High Court Rules. The failure to obtain leave under Order 6, rule 6 (1) cannot be cured by Order 2, rule 1 as the failure is a fundamental defect and not a procedural irregularity. See also, ***Habib bank Ltd v Raza*** *(2019) FJHC 308.*

...

(19) ***The defendants are not within the jurisdiction. The leave of the Court was not obtained before the writ was issued. The failure to comply with Order 6, rule 6(1) is a fundamental defect and the noncompliance vitiates the entire proceedings. The issue of the writ and the proceedings is a nullity.****"* Emphasis added.

35. In Fiji, it is settled law that non-compliance with Order 6 Rule 6 of the High Court Rules shall render the entire proceedings a nullity. In the current matter too, the Plaintiff has failed to comply with Order 6 Rule 6 of the High Court Rules, and thus this entire proceeding is thereby rendered a nullity. In the above circumstances, there is no difference that the Court's acceptance and/or rejection of the Plaintiffs reasons for delay in proceedings may make, to change the legality of this proceeding.

36. In view of the above procedural issue as outlined in the foregoing paragraphs of this ruling, I find that it is futile to further consider this proceeding under Order 25 Rule 9 of the High Court Rules.

37. As this proceeding has obviously become a nullity pursuant to the non-compliance of Order 6 Rule 6 of the High Court Rules, I find it just and expedient to dismiss this cause on above ground, subject to the Plaintiffs right to commence new proceedings, by way of a fresh action, with proper leave being duly obtained from the Court.

38. Consequently, the Court makes the following final orders,

I. Plaintiff's Writ of Summons and the Statement of Claim is hereby declared a nullity in the failure of the Plaintiff to comply with Order 6 Rule 6 of the High Court Rules,

II. The Cause is accordingly struck out and dismissed on the above ground, subject to the right of the Plaintiff to commence new proceedings by way of a fresh action on the same cause of action in compliance with Order 6 Rule 6 of the High Court Rules.

III. No order for costs.

HIGH COURT OF FIJI SUVA

L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
02/10/2024.