IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 124 of 2022

BETWEEN:

BABITA KUMAR VERMA
PLAINTIFF

AND:

VIDYOTMA NARAYAN and PRAKASH NARAYAN
1ST DEFENDANTS

AND:

SUVA CITY COUNCIL
2ND DEFENDANT

AND:

ISIMELI CERELALA
3RD DEFENDANT

AND:

GLOBAL DEVELOPMENT LIMITED
4TH DEFENDANT

AND:

PROPERTY SOLUTIONS
5TH DEFENDANT

BEFORE:
Acting Master L. K. Wickramasekara

COUNSELS:
Sunil Gosai Law Firm for the Plaintiff
Amrit Chand Lawyers for the 1 Defendants

Date of Hearing:
By way of Written Submissions

Date of Ruling:
16th March 2025

RULING

01. This Ruling deals with the Summons filed on behalf of the 1st Defendants on 08/02/2024, pursuant to Order 25 Rule 9 of the High Court Rules 1988 to strike out the Plaintiff's Writ and the Statement of Claim for want of prosecution and/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. The said Summons was dated for 20/06/2024 to be mentioned in Court and it has been served on the Plaintiffs solicitors on 10/04/2024. No Notice of Intention to Proceed had been filed by the Plaintiff even after the service of the said Summons.

03. Before moving any further, it is to be noted that the requirement of filing a Notice of Intention to Proceed pursuant to Order 3 Rule 5, in the event of over 06 months inaction in proceedings, is a mandatory requirement under the High Court Rules 1988. Plaintiff, as mentioned before, has failed to comply with Order 3 Rule 5 of the High Court Rules. This rule reads as follows,

Notice of intention to proceed after 6 months delay *(O.3, r.5)*

> ***5****. Where six months or more has elapsed since the last proceeding in a cause or matter, a party intending to proceed must give not less than one month's notice of that intention to every other party. An application on which no order was made is not a proceeding for the purpose of this rule.*

04. In ***Seva Varani (as member of Mataqali Yanuya and for and on behalf of Mataqali Yanuya) v Aanuka Island Resort Limited t/a Amanuca Resort & iTaukei Land Trust Board****; HBC 161.2012, Ruling (6 February 2015),* **Justice Ajmeer** (as he then was) has held that,

> *"The word 'must' used in rule 5 suggests mandatory* ***compliance****. The plaintiff was not even mindful to give the mandatory* ***notice of intention to proceed required*** *by HCR. This attitude clearly shows that the plaintiff has no interest in prosecuting his claim".*

05. Be that as it may, the Court shall, in all fairness to the parties, proceed to consider the merits of the matter pursuant to the relevant legal principles governing an application under Order 25 Rule 9 of the High Court Rules.

06. When the matter was first called before this Court on 20/06/2024, the counsel for the Plaintiff sought time to file an Affidavit in Opposition.

07. Following the direction by the Court, the Plaintiff has filed an Affidavit in Opposition on 28/06/2024 whereas the Defendant has then filed an Affidavit in Reply on 12/07/2024.

08. Both parties have then filed written submissions on the current application by 08/08/2024 and when the Summons was taken up for hearing on 28/10/2024, both the parties opted for the Court to proceed with the ruling on written submissions.

09. This cause has commenced by way of a Writ of Summons and Statement of Claim filed on 14/04/2022.

10. At the outset, it needs to be highlighted with much resentment that the Statement of Claim is rather poorly drafted whereas it is plagued with incomprehensibly lengthy paragraphs, and at times having no connectivity and/or continuity to each other. Moreover, the Statement of Claim is riddled with evidence instead of facts and particulars. The causes of actions appear to be contradictory, indifferent to the facts and stated without proper particulars being disclosed. In the above context, the Court finds the Statement of Claim to be a violation of the provisions under Order 18 Rule 6 of the High Court Rules 1988.

11. Regardless of the above blunders, having laboriously gone through the Statement of Claim of the Plaintiff, the Court finds that the Plaintiff's claim arises from a boundary dispute over two adjoining properties between the Plaintiff and the 1st Defendants. The Plaintiff alleges that the 1st Defendants had illegally damaged the fence at the boundary between the Plaintiff's property and the 1st Defendants property and is claiming damages for the alleged demolition and the mental stress caused to the Plaintiff.

12. However, at the same time it appears that the Plaintiff is admitting to the fact that the Plaintiff's disputed boundary has, in fact, encroached upon the property of the 1st Defendants and upon this basis claims against the 2nd Defendant of breach of duty of care and professional misconduct for initially approving the said boundary fence, as the due approving authority, that was allegedly built by the 3rd Defendant, who had been the previous owner of the Plaintiff's property in dispute.

13. The claim against the 3rd Defendant is for fraudulently and/or negligently selling the said land with encroached boundaries to the Plaintiff and the claim against the 4th and 5th Defendants is for negligence in failing to duly identify the said encroachment and notify the Plaintiff of the same, prior to the sale of the property, resulting in Plaintiff buying the said property with the encroached boundaries.

14. The 2nd Defendant has filed its Acknowledgment of Service on 21/04/20222 and the Statement of Defence on 27/04/2022 whereas the 1st Defendants have filed its Acknowledgment of Service on 29/04/2022 and the Statement of Defence and Counter Claim on 13/05/2022.

15. However, the Plaintiff had failed to file a Reply to the Statement of Defence of the 2nd Defendant within the specified time limit pursuant to the High Court Rules but had then proceeded to file a Reply to Statement of Defence of the 2nd Defendant, almost after 04 months, on 19/08/2022 out of time, without the consent of the 2nd Defendant or having obtained any leave of the Court to do so.

16. As per the Affidavit of Service filed by the 1st Defendants, the Statement of Defence and the Counter Claim of the 1st Defendants have been served on the Plaintiff's solicitors on 19/05/2022.

17. The 1st Defendants, on 26/07/2022, proceeded to enter a Judgment by Default against the Plaintiff on their Counter Claim as the Plaintiff failed to file a Reply to Statement of Defence and a Defence to Counter Claim for over 02 months.

18. Plaintiff on 19/08/2022 filed a Summons to Set Aside the Judgment by Default supported with an Affidavit of the Plaintiff.

19. The previous Master of the Court, delivering the ruling[1] on the said Summons, had set aside the said Judgment by Default on 12/04/2023 and had made strict orders for the Plaintiff to file its Reply to Statement of Defence and Defence to Counter Claim of the 1st Defendant by 28/04/2023 and had directed the matter to take its normal cause.

20. The Plaintiff then filed its Reply to Statement of Defence of the 1st Defendants and Defence to Counter Claim on 28/04/2023.

21. It is to be noted that so far the Plaintiff has failed to file any Affidavit of Service as proof of service of the Writ and the Statement of Claim on 3rd and 4th Defendants. It therefore appears that the 3rd and 4th Defendants have not been served with the Writ and the Statement of Claim. In the above context, the Court finds that the Writ has now expired as against the 3rd and 4th Defendants.

22. The Plaintiff, since 28/04/2023, failed to take any steps to move the matter forward for almost 01 year and the 1st Defendants then filed the current Summons to Strike Out the Writ and the Statement of Claim of the Plaintiff on 08/02/2024.

23. The delay is substantial and well over the acceptable 06-month period of inaction pursuant to Order 25 Rule 9 of the High Court Rules, as it is over 10 months from the last steps taken in the matter. The Plaintiff, therefore, must explain the delay and any non-compliance of the High Court Rules.

24. The Plaintiff, after 2 ½ months from the service[2] of the said Summons filed an Affidavit in Opposition on 28/06/2024. Unfortunately, similar structural defects and

[1] Ex-Tempore ruling of Master Lal made on 12/04/2023
[2] As per the Affidavit of Service filed on 23/04/2024, the Summons to Strike Out has been served on the Plaintiff on 10/04/2024

contextual incomprehensibility as of in the Statement of Claim is evident in the Affidavit in Opposition as well.

25. Having painstakingly gone through the Affidavit in Opposition of the Plaintiff, the reasons for delay as relayed by the Plaintiff can be identified from the following averments in the said Affidavit,

> *6. That the Plaintiff disputes the contents of paragraph 6 and further states that all other defendants have been served,* ***whilst the Plaintiff is weighing her options of how to proceed further since the other Defendants are very difficult to locate*** *but nonetheless the Plaintiff has full intention of pursuing this matter as she suffered extensively through the malicious actions of the Defendants.* (Emphasis added)
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> *14. That the Plaintiff also states that there was no deliberate intentions by her to delay this matter,* ***whilst she had been affected with ill health which she had to take care of first and in doing so, it had put a financial burden on her also****, as she has already lost substantially due to the ill actions of the 1st Defendants.* (Emphasis added)

26. In the averment no. 6 above, it appears that the Plaintiff is attempting to mislead the Court by stating that ***"all other defendants have been served"*** and then immediately after, contradicts the same by adding ***"whilst the Plaintiff is weighing her options of how to proceed further since the other Defendants are very difficult to locate"***.

27. What the Court may fathom from the above averment is that the Plaintiff has so far failed to serve the Writ on some of the Defendants and that she has no clue as to how to proceed further in the matter. This is hardly a reasonable explanation for a delay of over 10 months. It is more of a startling revelation of the fact that the Plaintiff had no genuine intention of duly prosecuting the matter which is a typically prejudicial factor towards the Defendants who are already being dragged into this proceeding by the Plaintiff.

28. The other reason the Plaintiff submits to explain the delay in the proceeding is her ill health and financial constraints due to her health issues. This appears to be a casual attempt by the Plaintiff to evade responsibility of orchestrating a delay of over 10 months in the proceedings. There is not an iota of evidence to support the claim of ill health of the Plaintiff given in the lengthy Affidavit in Opposition which runs almost up to 32 pages. She has annexed various documents in support of her claim and even a copy of a Judgment (irrespective of no legal opinions to be averred in Affidavits[3]) but fails to submit a single piece of evidence regarding her alleged ill health.

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[3] The purpose of affidavits is to provide evidence, not vehicles for opinions, submissions or statements of the law: per **Scott, J** in ***Peter J.B. Stinson v Miles Johnson*** [1996] HBC 326/94S Decision 25 July 1996

29. In the absence of any evidence to support the claim of ill health of the Plaintiff, this Court is not inclined to accept the claim that the delay in the proceedings was, in fact, a result of the Plaintiff's alleged ill health. The claim of ill health, without any supporting material, simply appears to be a deceptive tactic to cover up the delay in the proceeding.

30. Pursuant to the facts available before this Court, it is therefore clear, that since the last steps taken in the cause, as highlighted above, for almost an year, the Plaintiff has failed to take any steps to move this matter forward and that the Plaintiff has left the matter dormant during such time.

31. I shall now consider the relevant law regarding the current application before the Court. Order 25 Rule 9 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,

> ***Strike Out for Want of Prosecution (O 25, R 9)***
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> *9. (1) 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.*
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> *(2) Upon hearing the application, the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions.*

32. The grounds for striking out as provided in the above rule are firstly, the want of prosecution and secondly, the 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***). Well before the introduction of this rule, the Courts in Fiji have exercised the power to strike out the cause for want of 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.

33. **Justice Scott**, whilst 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),*** held,

> *"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)".*

34. 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".*

35. Pursuant to the above decision of the Court of Appeal in ***Trade Air Engineering (West) Ltd v Taga*** (supra), 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).

36. **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.*
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> *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*
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> *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)

37. The first limb in the test for striking out a pleading and/or a matter as expounded 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.*** In considering the above examples, it is clear that the second ground as 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 the broad category of '***the intentional and contumelious default.'***

38. 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".*

39. 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."*

40. **Master Azhar** (as His Lordship then was) 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."

41. In case the Notice under Order 25 Rule 9 was issued by the Court on its own motion, then it must, 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, in such an instance, it is sufficient to establish the Plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences, for the action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

42. In the event that the application for strike out is made by the Defendant, then, there shall be an additional burden on the Defendant to prove that the delay has resulted in prejudice to the Defendant and that a fair trial may not be possible. In the case of ***Pratap v Christian Mission Fellowship*** ***[2006] FJLawRp 26*** the Fiji Court of Appeal held,

> *"[23] The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in* ***Abdul Kadeer Kuddus Hussein v Pacific Forum Line*** ***(unreported, ABU0024/2000) (Hussein)*** *the court, readopted the principles expounded in* ***Birkett v James*** ***[1978] AC 297; [1977] 2 All ER 801*** *and explained that:*
>
> > *The power should be exercised only where the court is satisfied either (i) 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 (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would 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.*

43. Their Lordships in ***Pratap v Christian Mission Fellowship*** (Supra) went on to cite with approval the New Zealand approach in this regard and held,

> *"[24] In New Zealand, the same approach was adopted in the leading case of* ***Lovie v Medical Assurance Society Ltd*** *[1992] 2 NZLR 244 at 248 where* ***Eichelbaum CJ*** *explained that:*
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> *The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since* ***NZ Industrial Gases Ltd v Andersons Ltd*** *[1970] NZLR 58 it has been accepted that if the application is to be successful the Applicant must commence by proving the three factors listed.*

44. The above position in law is, more or less, the principles formulated in ***Birkett v. James*** (Supra). The above cited cases in New Zealand and in Fiji reintegrate the second limb of the test as per ***Birkett v. James*** (Supra) which reads to the effect,

(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.

45. 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".*

46. 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** (as His Lordship then was) 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."*

47. I have at length discussed the reasons for the delay and whether such reasons could be acceptable and/or justifiable in the given facts and circumstances of this proceeding[4]. In view of the findings thereof, this Court is of the considered view that the delay in the proceeding is inordinate and inexcusable on the part of the Plaintiff.

48. Court shall now consider the prejudice to the Defendants and whether a fair trial is still possible under the current circumstances.

49. In the Affidavit in Support filed on 22/03/2024, it is averred that the 1st Defendants had filed their Statement of Defence and Counter Claim on 14/04/2022. The Plaintiff failed to file a Reply to Statement of Defence and a Defence to Counter Claim within the stipulated time and the 1st Defendants proceeded to enter a Default Judgment against the Plaintiff on their Counter Claim. After 04 months from filing the Statement of Defence and the Counter Claim, the Plaintiff filed an application for Setting Aside the Judgment by Default on 19/08/2022 and after filing affidavits and written submissions for and against and upon a Hearing on the said application, the Court had set aside the Judgment by Default on 12/04/2023. The Plaintiff thereafter on 28/04/2023, over an year from the date of filing the Statement of Defence and Counter Claim for the 1st Defendants filed a Reply to Statement of Defence and a Defence to Counter Claim.

50. It is averred by the 1st Defendants and the Court accepts that the above conduct of the Plaintiff is highly prejudicial to the 1st Defendants, as the 1st Defendants had to incur additional costs and legal fees, and the matter was delayed for over 01 year from the time of filing the Statement of Defence and the Counter Claim by the 1st Defendants.

[4] From paragraph 22 to 27 above.

51. Moreover, it is evident from the facts before this Court that the Plaintiff has failed to serve the Writ and Statement of Claim and/or move the matter forward in any manner as against the 3rd and 4th Defendants. In such event the Writ shall stand expired as against the 3rd and 4th Defendants. The Plaintiff had averred in her Affidavit in Opposition that she is still undecided on how to pursue the case against these Defendants. This fact, *per se,* is prejudicial to the 1st Defendants as the Plaintiff could further delay the proceedings on the same ground.

52. The 3rd Defendant is the previous owner of the property bought by the Plaintiff which is in the center of the current dispute. The Plaintiff appears to claim from the 1st Defendants *"special damages in the sum of $ 120000.00 for the loss of land to the 1st Defendants or the sum subject to immediate valuation at the time of hearing"* and further, *"general damages for pain and suffering and mental stress and trauma".* From the facts submitted in the Statement of Claim, it appears that the Plaintiff puts the blame on the 3rd Defendant for having encroached upon the land of the 1st Defendants and then deceptively selling the said property to the Plaintiff without disclosing the facts regarding the encroachment. In the event the 3rd Defendant is not duly served, and the Writ being expired as against the 3rd Defendant, the 1st Defendants shall stand prejudiced in properly defending the claim against them. Furthermore, not serving the Writ on the 4th Defendant would have similar effects.

53. At this stage of the case, it is important to note the fact that there was a separate case that had been initiated by the 1st Defendants against the Plaintiff for encroachment of their land by the Plaintiff[5]. In this case the High Court has entered orders by consent to the following effect,

> *"1. That the first declaration in the originating summons is granted, that the* ***encroached area*** *is part of Lot 16 on Depositted Plan No. 4762 on Certificate of Title No. 18811, and which title is registered to the Plaintiff; and*
> 2. *Each party to bear their own costs;*
> 3. *File closed.[6]"*

54. It is clear that by above orders entered by the High Court in HBC 422 of 2019, the portion of land where the Plaintiff is claiming for special damages is, in fact, the land belonging to the 1st Defendants. The claim of the Plaintiff, therefore, becomes an abuse of the process of the Court, as the Plaintiff is actually claiming for damages on a portion of land which is rightfully owned by the 1st Defendants and was illegally encroached upon by the Plaintiff herself for several years. In such case, a claim for *"general damages for pain and suffering and mental stress and trauma"* made by the Plaintiff against the 1st Defendants becomes redundant. It is therefore safe to conclude

[5] HBC 422 of 2019, Vidyotma Narayan and Prakash Kamal Narayan v Babita Devi Kumar Verma and Suva City Counsil.
[6] Order dated 24/08/2022 and sealed on 04/10/2022 in HBC 422 of 2019.

that the claim of the Plaintiff now stands as frivolous and vexatious as against the 1st Defendants.

55. In the above circumstances, it is the considered view of this Court that the prejudice caused to the 1st Defendants by the delay in the proceeding clearly makes a fair trial impossible between the parties and for that fact the entire proceeding by the Plaintiff becomes a mockery of justice.

56. In the same accord, and given the above circumstances, when the Court makes due consideration on the interest of justice, I have no hesitation in holding that the interest of justice demands that the claim of the Plaintiff be dismissed as the claim now falls into the category of a frivolous and vexatious claim.

57. 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.

58. In the circumstances of this case, I reiterate that the delay is almost an year, which is well beyond the acceptable limit of 06 months. The Court therefore cannot find any justification in the position of the Plaintiff, which has no evidential support whatsoever.

59. In Courts considered view, the Plaintiff has resorted to a lethargic and unprecedented approach to its own cause and caused a delay of almost an year. A delay of such a magnitude, in Court's considered view, shall certainly affect the conduct of a fair trial as discussed and found in the foregoing paragraphs of this ruling.

60. Furthermore, this Court concludes that the conduct of the Plaintiff in this matter, as discussed in the foregoing paragraphs, is clear evidence of legal proceedings been brought with no intention of bringing them to a finality, which amounts to an abuse of the process of the Court.

61. Lord Justice Parker in ***Culbert v Stephen Wetwell Co. Ltd,*** *(1994) PIQR 5* held,

> *"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."* (Emphasis added).

62. I shall further reiterate the fact that, although the Plaintiff instituted this action against the Defendant, it is apparent from the conduct of the Plaintiff that it did not share any intention to bring these proceedings to a conclusion within a reasonable time.

63. The 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 is 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".*

64. As highlighted in the foregoing paragraphs, the acceptable and/or tolerable period of inaction in any matter is 6 months as per the plain meaning of Order 25 Rule 9. The threshold is six months, and any delay after would be inexcusable and inordinate so long as no reasonable excuse is provided, and justice may not be able to be done between the parties. In this case, there is no justifiable reason given for the delay other than claiming that the Plaintiff was sickly and financially constrained without any supporting evidence.

65. As stated in many previous rulings of this Court, it is to be noted that in litigation there are some parties that pursue their cases sporadically or make default with the intention of keeping the matters pending against the other parties without reaching a finality.

66. The Courts should not ignore such practices or parties. Such practices must be disallowed promptly for reasons that it is an abuse of the process of the Court, and it is a waste of the Court's time and resources which are not infinite.

> '*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition and want their cases to be heard within a reasonable time'* (see; ***Singh v Singh*** -supra).

67. Such a practice is in clear violation of the fundamental rights guaranteed by sections 15 (2) and (3) of the Constitution which read,

> *(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.*
> *(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.* (Emphasis added)

68. In the same context, it is worthy to note the new developments in English Courts where the Courts are to consider the interest of justice in a more general form when compared with individual rights and are more willing to strike out the sporadic claims. In the case of ***Securum Finance Ltd v Ashton [2001] Ch 291 (Securum Finance Ltd)*** it was held,

> *"[30] the power to strike out a statement of claim is contained in CPR r 3.4. In particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case … if it appears to the court that the statement of case is an abuse of the court's process … In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".*
> *[31] In the* ***Arbuthnot Latham case***[7] *this court pointed out in a passage which I have already set out that:*
>> *In* ***Birkett v James*** *the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance."*

69. Further, such a practice may also constitute serious prejudice to the other party as justice may not be done between the parties since the matter is pending idle without any steps being taken to reach a finality over an unprecedented period of time, and especially in the context of this case, where the Plaintiff appears to maintain an almost impossible claim which would otherwise amount to a frivolous and vexatious claim.

70. In its final determination, this Court accordingly concludes that the Plaintiff has failed to duly show cause as to why this action should not be struck out for want of

[7] ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181.***

prosecution and/or as an abuse of the process of the Court and that the 1st Defendants have been successful in proving prejudice on them as a result of the delay and that a fair trial is no longer possible in the given circumstances in the matter.

71. The Court accordingly orders that the Writ of Summons and the Statement of Claim filed on 14/04/2022, to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

72. The 1st Defendants have also moved to have orders entered in favour of their Counter Claim. However, this is not plausible as the Counter Claim of the 1st Defendants needs to be duly proved before the Court as the claim is not one which could be granted on paper. This was already decided by the previous Master of this Court in her Ex-Tempore Ruling made on 12/04/2023.

73. Court shall therefore refuse the application by the 1st Defendants to have the orders entered as per the Counter Claim of the 1st Defendants as prayed for in the Summons filed on 08/02/2024.

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

I. Plaintiff's Writ of Summons and the Statement of Claim filed on 14/04/2022 is struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules subject to payment of costs as follows,

II. The Plaintiff shall pay a cost of $ 5000.00, as summarily assessed by the Court, to the 1st Defendants as costs of this proceeding within 28 days (That is by 14/05/2025).

III. The 1st Defendants within 03 days from today (That is by 23/04/2025) file proper application to proceed with the Counter Claim, if they wish to do so.

IV. In the event no such application is filed by the 1st Defendants, as per Order No. III above, the Counter Claim shall also stand struck and the matter shall wholly stand struck out and dismissed.

L. K. Wickramasekara,

Acting Master of the High Court.

At Suva,
16/04/2025.