

RAIJI ELI NAQARASE

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v.

THE PUBLIC TRUSTEE OF FIJI

[HIGH COURT , 1994 (Pathik J) 23 October]

Civil Jurisdiction

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Practice(civil)-striking out of action as an abuse of the process of the Court-Rules of the High Court (1988) O.18 r 18.

The High Court HELD: that the institution of fresh proceedings having the same cause of action as proceedings already disposed of amounted to an abuse of the Court's process. The proceedings were struck out.

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Cases cited:

Ashmore v British Coal Corporation [1990] 2 Q.B. 338

Hunter v Chief Constable of the West Midlands Police [1982] A.C. 529

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Interlocutory application to strike out.

Ram Chand for the Plaintiff

M.L. Ahmadu for the Respondent

Pathik J:

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By Summons dated 20 May 1994 the first and the third defendants applied to Court for an Order that this action be struck out under the 0.18 rule 18 (1)(b) & (d) of the High Court Rules 1988 "as well as under the inherent jurisdiction" of the Court upon the following grounds:

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"(i) That the subject matter of this action has been disposed of by an Order of the High Court of Fiji, dated June 10, 1993.

(ii) That based on paragraph (1) above as well as on the contents of averments in supporting Affidavit, the present action is prejudicial to First, Second and Third Defendants.

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(iii) That the proper course of action opened to the Plaintiff on June 10, 1993, when the High Court Ordered dissolution of the Ex -parte Order and consequent vacation of the Caveat, was to lodge an appeal against the ruling, rather than instituting this present action.

- (iv) That the present action constitutes an abuse of Court process".

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On 20 October 1994 I gave oral judgment and made an order striking out the action and indicated that I will give reasons later and place on the file which I now do.

Mr. Ram Chand who acts for the Plaintiff was ordered to file a Reply to the first Defendant's Affidavits in support of the summons but he failed to do so despite adjournments on a number of occasions on his applications. The matter was dragging on unnecessarily and no further indulgence could be given to the Plaintiff. In any case the Plaintiff's Counsel failed to appear on 20 October 1994, the date set down for argument.

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Two very comprehensive affidavits sworn 4 May 1994 and 5 October 1994 were filed and served on the Plaintiff by the first defendant in support of the Summons. The affidavits were sworn by Peni Se Taganekurukuru, the Assistant Public Trustee of Fiji who was duly authorized to make them. There he sets out the history of the administration of the estate of Ilaitia Voa Niumataiwalu (hereafter referred to as the 'deceased') who died intestate on 17 August 1986, and how the distribution of the assets of the estate took place. The property the subject-matter of this action formed part of the estate of the deceased.

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Briefly the facts as deposed to by the said Taganekurukuru are as follows:-

- (a) Letters of Administration of the estate of the deceased was granted to the Public Trustee in January 1987.
- (b) The property, the subject matter of this action was valued at \$42,000 as at 17 August 1986.
- (c) Since the second defendant, the widow of the deceased, was interested in purchasing the property, after numerous correspondence with the beneficiaries and after tender was called, the second defendant's tender of \$45,000 was accepted by the Public Trustee.
- (d) Caveats were lodged by the Plaintiff and on behalf of other beneficiaries on 1st April 1991 and 2nd October 1992.
- (e) By an ex parte order made on 12 February 1993 in Civil Action No. 49 of 1993, Caveat Regd. No. 327766 was extended until further order and this order was on 8 June 1993 vacated.

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- (f) Subsequent to the said order of 8 June the first defendant sold the said property to the second defendant.

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Now I shall consider the issue before me.

As for ground (i) in the Summons, I agree with Mr. Ahmadu that when the said Order of June 1993 was made vacating the caveat, it enabled the first defendant to proceed to dispose the property which he did.

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The vacation of the said order also meant that the Civil Action No. 49/93 under which the ex parte order of 12 February 1993 was obtained was also disposed. I also agree that to institute the present action (civil action 168/94) which is the same as the said action 49/93 and covering the same subject-matter is an abuse of the process of the Court.

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In Ashmore v British Coal Corporation [1990] 2 Q.B. 338 at 348, on the subject of abuse of process Stuart-Smith L.J. said:

“A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material. In Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529, 536 Lord Diplock, with whose speech the rest of the House agreed, said:

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“My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

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Bearing in mind what is stated in the above-quoted passage I find there is an abuse of process in this case. I agree with Mr. Ahmadu that the contents of the Assistant Public Trustee's Affidavits, which I accept, reveal that the Public

Trustee exercised all reasonable care in the administration and conduct of the estate and in the subsequent steps taken in selling the property in question in the exercise of his powers.

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No Reply to the First Defendant's Affidavits in support of the Summons has been filed despite a Court order to do so. Hence the contents of the affidavits have gone unchallenged. Not only that, the Plaintiff's counsel failed to appear in Court on the adjourned date for argument for some unexplained reason. Most of the adjournments, which were at the behest of the Plaintiff's counsel have come to nought. All this clearly proves an abuse of process.

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For the foregoing reasons, the Plaintiff's action is struck out as an abuse of the process of the Court with costs against the Plaintiff which is to be taxed unless agreed upon.

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(Action struck out.)

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