

SEREMAIA KURUWALE (as next best friend and kin of ETUATE EMORI) v ESALA MATOU RASOVO and Anor

5 HIGH COURT — CIVIL JURISDICTION

CONNORS J

21 November 2003

10 [2003] FJHC 269

Practice and procedure — abuse of process — irregularly filed amended statement of claim — unsworn affidavit — High Court Rules O 2 r 1, O 20 r 3.

15 Plaintiff sought damages for injuries sustained in a motor vehicle accident. The Magistrate’s Court granted an amended statement of claim apparently without objection and the proceedings were transferred to the High Court. Interlocutory judgment was entered in Plaintiff’s favour because of Defendant’s failure to file a defence. Defendant alleged abuse of process because of an irregularly filed amended statement of claim and
20 unsworn affidavit.

Held — No abuse of process since the amended statement of claim while further particularising the claim against the Defendant and enhancing the particulars of damage did not appear to commence any fresh cause of action. No affidavit has been filed and no submissions have been made as to its merit.

25 Orders made.

Cases referred to

Dick v Piller [1943] 1 All ER 627, cited.

30 *Grimshaw v Dunbar* [1953] 1 All ER 350; *Lawrance v Lord Norreys* (1890) 15 App Cas 210, considered.

E. Veretawatini for the Plaintiffs.

Qereqeretabua for the Defendants.

35 **Connors J.**

Background

The Plaintiff on 13 January 2000 filed a writ of summons in the Magistrates’ Court at Nausori claiming damages for injuries sustained in a motor vehicle
40 accident on 13 June 1998.

On 26 February 2003 an amended statement of claim was filed in the Magistrates’ Court at Nausori and a notice of motion was filed on behalf of the Plaintiff on 3 March 2003 to transfer the proceedings to the High Court. The supporting affidavit of Rafik Khan deposes that the injuries, abnormalities and
45 scaring to the Plaintiff child are such that a proper award of damages would exceed the jurisdiction of the Magistrates’ Court.

The Magistrates’ Court on 10 March 2003 granted the motion apparently without objection and the proceedings were transferred to the High Court.

50 The Defendant, despite several letters from the Plaintiff’s solicitor, failed to file a defence to the amended statement of claim and interlocutory judgment was entered on 2 May 2003 in favour of the Plaintiff.

It appears that the Defendants failed to file a defence to the amended statement of claim as they contended that the amended statement of claim had been filed irregularly in that no order for the filing of an amended statement of claim had been obtained from the Magistrate. It is further argued that the affidavit in support
5 of the motion to transfer was unsworn.

Both Parties have filed written submissions and have made further oral submissions on the hearing of the notice of motion and summons.

Summons to strike out

10 It appears from the Defendants' submissions that the issue is the failure of the Plaintiff to obtain leave from Magistrates' Court prior to the filing of the amended statement of claim in that court, which of course was prior to that court granting leave to the transfer of the proceedings to the High Court.

A further issue appearing from the affidavit in support of the summons is that the
15 affidavit in support of the motion to transfer the proceedings from the Magistrates' Court was not sworn or at least bears no signature confirming that it had been sworn and was therefore irregular.

Counsel for the Defendants draws my attention to the words of Lord Herschell in *Lawrance v Lord Norreys* (1890) 15 App Cas 210 at 219 when speaking of the
20 inherent jurisdiction of the court to dismiss an action which is an abuse of the process of the court:

It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances.

25 I am further directed by Counsel for the Defendants to the passage in *Halsbury's Laws of England*, 4th ed, vol 37, para 434 on abuse of process.

The amended statement of claim while further particularising the claim against the Defendant and enhancing the particulars of damage does not appear to commence any fresh cause of action.

30 I am therefore of the opinion that whilst the rules have not been complied with in the filing of the amended statement of claim there has been no abuse of process. I fail to see why leave to file the amended statement of claim would not have been granted if the appropriate application had been made. It follows that there is no prejudice to the Defendant in the irregular filing of the amended
35 statement of claim.

Order 20 r 3 of the High Court Rules allows the Plaintiff to amend any pleadings once at any time before the pleadings are deemed to be closed.

When read with the power given to the court by O 2 r 1 of the High Court Rules it seems appropriate in the circumstances that the amended statement of
40 claim not be struck out.

Notice of Motion

The notice of motion seeks that the interlocutory judgment entered by the Plaintiff against the Defendant on 12 May 2003 be set aside.

45 The Defendants appear to have become preoccupied with the irregular filing of the amended statement of claim and lost sight of the need to file a defence, notwithstanding letters from the Plaintiff urging that they do so, copies of those letters being in the court file and being referred to in the submissions of the Plaintiff.

50 The Defendant refers the court to *Grimshaw v Dunbar* [1953] 1 All ER 350. At 355 it was said by Jenkins LJ:

... a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without
5 injustice to other parties, that that litigant who is accidentally absent should be allowed to come to the court and present his case, no doubt on suitable terms as to costs, as was recognized in *Dick v Piller* [1943] 1 All ER 627

10 There is nothing before me as to the merit of any defence the Defendants might have. No affidavit has been filed and no submissions have been made as to its merit.

Conclusion

The matter appears from the court record to have suffered from bad management from both the Plaintiff and the Defendants throughout its history.
15 Surely the real issue is that the Plaintiff and the Defendants have the opportunity to litigate the matter in a proper way. While there is little justification for doing so, due to the behaviour of the Defendant I think it is appropriate to set aside the interlocutory judgment entered on 12 May 2003.

20 I, for the reasons stated above am not prepared to strike out the action. In the circumstances it seems only reasonable the costs of the notice of motion and summons be costs in the cause.

Orders

- 25 1. Amended statement of claim filed 26 February, 2003 in the Magistrates' Court at Nausori is deemed to be regularly filed in the High Court.
2. That the interlocutory judgment entered by the Plaintiff against the Defendants is set aside.
3. The Defendants to file any defence to the amended statement of claim within 14 days.
- 30 4. Summons to strike out is dismissed.
5. Cost of the notice of motion and of the summons to be costs in the cause.

Orders made.

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