

IN THE HIGH COURT OF TUVALU 2026

CIVIL CASE NO.16/21

MACKENZIE TRADING LTD

PLAINTIFF

BETWEEN AND

TRANSAM LTD,
DIRECTOR OF MARINE,
ATTORNEY GENERAL

FIRSR DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT

Before Hon Justice Sir John Muria

Hearing 13 September 2024 and written submissions

Ms F T Nelu for Plaintiff

Mr B Nia for Defendant

Ms Aitcheson for Second and Third Defendants

RULING

Introduction

There are two applications brought by the Defendants seeking the same order that the plaintiff's case be dismissed for want of prosecution, together with costs. The first application is by the first defendant filed on 5th April 2024 supported by the affidavit of Apisai Kilima and the Second application is by the Second and Third defendants file on 1st July 2024, supported by the affidavit of Siila Tapuaiga. The applications are opposed by the Plaintiff supported by the affidavit of Mackenzie Kiritome dated 21st May 2024.

Background

2. The record shows that the Plaintiff filed its claim on 30th September 2021. The last active step taken in the matter was on 31st October 2023, when the plaintiff's application to amend the Statement of Claim was heard and granted, the default judgment against the first defendant was set aside and the plaintiff was ordered to file Amended Statement of Claim within 14 days from 31st October 2023.

Procedural History

3. It would be helpful to also set out procedural history of this case which is as follows:
 - a. On the 30th September 2021, the plaintiff filed a Writ of summons with Statement of Claim;
 - b. On the 17th December 2021 the first defendant filed a Memorandum of Appearance;
 - c. The plaintiff's Application for Default Judgement against the First Defendant was filed on the 1st November 2021;
 - d. The Application for Default Judgement against First Defendant was heard and default judgement entered against the First Defendant on the 8th February 2022;
 - e. The plaintiff's Application to Amend Statement of Claim was filed on the 7th July 2023; accompanying the plaintiff's application was the *Amended Statement of Claim filed on 14 June 2023 without leave*.
 - f. The Application to Amend Statement of Claim was heard on the 31st October 2023. The parties agreed that if the Amendment was to be granted, then the default judgment entered against the First Defendant must be set aside;
 - g. The Order allowing the plaintiff to amend and to file the amended Statement of Claim within 14 days from date of order and to set aside the default judgment against the First Defendant was made on the 31st October 2023.
 - h. The Notice of Motion to dismiss this action for non-compliance with Court Order was filed by the second and third Defendant on the 29th November 2023.
 - i. The Notice of Motion to Dismiss the Action for want of prosecution was filed by the first Defendant on the 5th April 2024.
 - j. A further application by the second and third defendants was filed on 1 July 2024 to dismiss the plaintiff's case for want of prosecution.

The Relevant Order

4. On 31st October 2023 upon hearing Counsel for the parties on the application to amend the Statement of Claim and first defendant's application to set aside the default judgment the Court made the following Orders:

...IT IS ORDERED THAT:

1. *The Judgement in Default entered against the 1st Defendant on the 8th February 2022 is set aside;*
2. *The Plaintiff is granted leave to amend his Statement of Claim in this action;*
3. *The Plaintiff to file an Amendment Statement of Claim within 14 days from the date of this Order and served on the Defendants;*
4. *Pleadings to continue in the usual way;*
5. *Each Party to bear its own costs of this Application.*

Dated on 31st October, 2023...

5. The Defendants contend that the delay of six months (presumably from October 2023 to April 2024) is inordinate and inexcusable. It appears the Plaintiff has lost interest in the case, and that the Defendant has been gravely prejudiced by the continued pendency of the case without any further action taken by the plaintiff.
6. The Plaintiff in response denies being in breach of the Order of the Court on 31st October 2023. The plaintiff's submission is that it had filed the Amended Statement of Claim on 14th June 2023 but without leave. So its application on 7th July 2023 was for an Order, "To allow the Amended Statement of Claim filed on the 14th June 2023" as filed." The Court granted the Order on 31st October 2023.

Issue for Determination

7. The sole issue for determination is whether the plaintiff's claim should be dismissed for want of prosecution.

Applicable Principles

8. The power of the Court to dismiss an action for want of prosecution is contained in O.29, r1 of the *High Court (Civil Procedure) Rules 1964* which states as follows:

"1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think."
9. The power of the Court to dismiss a case for want of prosecution is discretionary and must be exercised judiciously and sparingly. The guiding test, as laid down in authorities such as the Kenyan case of *Ivita v Kyumbu* [1984] KLR 441, is whether:
 1. The delay is inordinate and inexcusable; and
 2. The Defendant is likely to be prejudiced by the delay; and
 3. Justice can still be done despite the delay.
10. Ultimately, if there is indeed such a delay, the Court must balance the Plaintiff's right to a fair hearing against the Defendant's right to have litigation concluded within a reasonable time.

Analysis

11. In the present case, there is no dispute that the plaintiff filed its Amended Statement of Claim on 14 June 2023 without leave of the Court and that on 7 July 2023 it filed its application seeking leave to have that Amended Statement of Claim be allowed as filed. So the more immediate question, in my view here, is whether the plaintiff failed to file the Amended Statement of Claim after having been granted the Order on 31st October 2023. The answer becomes obvious when one considers the plaintiff's application and the ensuing Order. In its application dated 7th July 2023 for leave to file Amended Statement of Claim, The plaintiff seeks the following Order from the Court:

1. To allow the amended statement filed on the 14 June 2023.
2. Any other order the court deems fit and proper."

12. Evidence has shown that on the 10 July 2023 Counsel for the plaintiff served Counsel for the first defendant and counsel for the second and third defendants copies of:

- i. Letter of Intention of the plaintiff to amend the statement of claim;
- ii. Motion to file the amended statement;
- iii. Confirmation of intention of client to Court;
- iv. Amended Statement of Claim & additional affidavit of Mackenzie Kiritome.

13. There is clearly evidence that prior to the 31 October 2023 the relevant documents, including the Amended Statement of Claim filed on 14 June 2023 without leave was already served and was in the possession of the defendants. Counsel for first defendant confirmed being served with the Amended Statement of Claim filed on 14 June 2023. The application specifically referred to the "*Amended Statement of Claim filed on 14 June 2023.*" It was filed but the effect of it was that it was irregularly filed. Therefore, when the Order was made on 31 October 2023 permitting it as filed, it must be taken to have then been regularly filed and effective. The Order cured the defect.

14. The Order, as already noted, granted leave to amend and to file the Amended Statement of Claim within 14 days from 31st October 2023. Thereafter the pleadings to continue in the usual way.

15. Thus, in this case, the Court exercised its inherent power and cured the irregularly filed Amended Statement of Claim on 31st October 2023 when it made the Order granting leave to the plaintiff to file and serve the amended Statement of Claim which was already lodged in Court on 14 June 2023. Its legal effect was that the granting of Leave retrospectively authorised the amendment which was already lodged in Court, and secondly, it made the amended Statement of Claim effective as from the 31st October 2023, the date of the Order, because prior to the Order granting leave, the filing done on 14 June 2023 had no legal effect at all.

Result

16. The upshot of all that had transpired was that the amended statement of claim filed on 14 June 2023 had been effectively filed and served on the defendants as from 31st October 2023.

The default in this case is, therefore not on the plaintiff, but rather on the defendants for failing to file their defence to the plaintiff's Amended Statement of Claim.

17. In the present case, since 31 October 2023, there has been a delay of approximately two years since any meaningful step was taken by all the parties to progress their respective cases in the action. The order granting leave to the plaintiff to amend its Statement of Claim was made on 31st October 2023. By that Order, the plaintiff's Amended Statement of Claim was effectively filed and served on the defendants.
18. Evidently, Counsel for the first defendant, in her affidavit filed on 13th September 2024, confirmed being served with copies of the amended Statement of Claim file on 14 June 2023 together with the additional affidavit of Mackenzie Kiritome, as well as the plaintiff's application. Counsel, however, was of the view that *"the plaintiff never filed to (sic) the Court an Amended Statement of Claim which should be dated sometime after the dated of the Order and in effect, would be taken as in compliance with the Order."* Unfortunately that was an erroneous view in the circumstances of this case for the reasons already alluded above.

Disposition and Order:

19. In the present case, I find that there is no basis to dismiss the plaintiff's case.
20. In the circumstances of this case, the Court finds that the interest of justice would be better served by giving both parties the final opportunity proceed and finalise the pleadings stage in the case.
21. Accordingly, the Court makes the following Orders:
 1. The defendants applications to dismiss the plaintiff's action are refused and they are dismissed.
 2. The parties to complete and finalise the pleadings in the action.
 3. The plaintiff to take out a Summons for Directions after the pleadings are close.
 4. Costs to be costs in the cause.

Dated 30th March 2026.



Hon. Justice Sir John Muria
High Court of Tuvalu