

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 325 of 2010

BETWEEN: **NARESH CHAND** (f/n Budhu), of Nukuloa, Ba, Labourer.

PLAINTIFF

AND: **PEOPLES COMMUNITY NETWORK (FIJI ISLANDS) (PCN)** 36
Koroi Place, Samabula, Suva.

DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Counsel: **Non-Appearance for the Respondent/Plaintiff**
Ms M. Chan for the Applicant/Defendant

Date of Ruling: **28 September 2018**

RULING
(Application to Strike Out Plaintiff's Claim)

1.0 Introduction

1.1 On 21 February 2011, Defendant filed Application by way of Summons to Strike out Plaintiff's claim against the Defendant pursuant to Order 18 Rule 1(a)(d) and Order 65 Rule 4 of High Court Rules ("**HCR**").

- 1.2 On 4 April 2014, being returnable date of the Application to Strike Out the Claim (**“the Application”**), Counsel for Applicant informed Court that Respondent passed away and that they served Application on Fiji Public Trustee when Leave was granted for Applicant to serve the Application by way of Advertisement in the Fiji Sun and the Application was adjourned to 1 May 2014, at 10.30am for hearing.
- 1.3 On 1 May 2014, Ms Vir Wati (Respondent’s sister) appeared with Respondent’s son Avikash Chand and informed Court that Respondent is deceased; his wife is unable to attend Court because she is sick; they approached Legal Aid Commission to obtain Probate and seek legal advise and they needed two to three months to obtain Probate and engage a lawyer to do the case.
- 1.4 The Application was adjourned to 12 September 2014 (4 months), to enable Respondent’s representative to obtain Probate and seek legal advice.
- 1.5 On 12 September 2014, Vir Mati appeared with Respondent’s son and informed Court that Letters of Administration was issued in favour of Respondent’s wife who is unable to come to Court because of sickness when the Application was adjourned to 31 October 2014 at 9.30am, to enable Respondent’s representative to obtain legal advice and arrange legal representation.
- 1.6 On 13 November 2014, Reddy Nandan Lawyers filed Notice of Change of Solicitors on behalf of Respondent (Deceased).
- 1.7 The Application was next called on 14 November 2014, when Court granted time to Respondent’s Counsel to regularise pleadings and go through file received from Receivers of previous Solicitor, Messrs. Gordon & Chaudhary and the Application was adjourned to 6 March 2015, for mention.
- 1.8 On 6 March 2015, Court directed Vir Mati to speak to the Lawyer and get documents organized and adjourned Application to 24 March 2015, on which date Counsel for Respondent sought short mention date to file Application to Substitute Administratrix of Naresh Chand as Plaintiff when the Application was adjourned to 1 May 2015, for mention.

- 1.9 On 24 March 2015, Respondent filed Application to substitute the Administratrix of Naresh Chand as Plaintiff/Respondent which was called before the Master when Counsel for parties were present in Court but Application to substitute Plaintiff was adjourned to 14 April 2015, because there was no Affidavit of Service.
- 1.10 On 14 April 2015, Bhan Mati as Administratrix of the Estate of Naresh Chand was substituted as Plaintiff/Respondent and the Application was adjourned to 1 May 2015.
- 1.11 On 1 May 2015, parties were represented by their Counsel when they were directed to file Affidavits and Submissions and the Application was adjourned to 25 August 2018 at 2.30pm, for hearing.
- 1.12 On 14 May 2015, Respondent filed Affidavit in opposition.
- 1.13 On 12 June 2015, Applicant filed Submission.
- 1.14 Application was next called on 2 October 2015, when Counsel appearing for the Respondent informed Court that Solicitor handling this file in their office had opened his own practice and sought further time to file Submission when Court directed parties to file and serve Submissions by 22 October 2015, and adjourned the Application to 5 November 2015 at 9.30am, for hearing.
- 1.15 On 5 November 2015, Respondent's Counsel sought Leave to withdraw as Solicitor for the Respondent when the Respondent who was present in Court sought time to change Solicitors and the Application was adjourned to 25 November 2015, for mention.
- 1.16 On 25 November 2015, Respondent informed Court that her Lawyer, Mr Aman Ravindra Singh informed her that he is not able to attend Court and to seek another date when Court directed parties to file Submission by 31 December 2015, and adjourned the Application to 16 February 2016 at 9.30am, for hearing.

- 1.17 The Application was next called on 15 April 2016, for mention when Vir Mati appeared as Respondent's representative who was instructed by Court to inform Respondent that she will need to file Submission and seek legal advice and adjourned the Application to 16 June 2016 at 2.30pm, for hearing.
- 1.18 The Application was next called on 8 July 2016, when both parties were represented by Counsel and the Application was adjourned to 4 August 2016 at 10.00am, for hearing.
- 1.19 When the Application was called on 4 August 2016, there was no appearance for Respondent when Counsel for the Applicant informed Court that she received letter from Respondent's Solicitors' office requesting that the Application be called at 2.30pm and subsequently her clerk received call from them to say Counsels' vehicle tyre has been punctured and if the Application could be called at 3.00pm.
- 1.20 The Application was stood down till 3.00pm and when it was called at 3.05pm there was no appearance for and on behalf of the Respondent.
- 1.21 The Application was heard and Counsel for the Applicant made brief Oral Submission and relied on Submissions filed and the Application was adjourned for Ruling on Notice.
- 1.22 After the Application was adjourned for Ruling on Notice Mr Aman Ravindra Singh put his appearance for the Respondent and informed Court that he needs to represent Respondent and take instructions from her.
- 1.23 When Court enquired with him as to why no Notice of Appointment of Solicitor was filed he informed Court that his former Associate was handling the file.
- 1.24 When it was put to him that on 25 November 2015, Respondent informed Court that he was her Solicitor, he apologized to Court for misleading the Court and sought time to file Affidavit and Submissions.

1.25 Court refused his Application on the ground that Respondent was directed to file Submission long time ago and Mr Singh was not on record as Solicitors for the Respondent because of his failure to file Notice of Appointment of Solicitors.

2.0 Chronology of Events

2.1 On 24 November 2010, Respondent filed Writ of Summons with Statement of Claim, Ex-parte Notice of Motion for Interlocutory Injunction and Affidavit in Support of the Application by Messrs. Gordon and Chaudhary Lawyers.

2.2 On 19 January 2011, being returnable date of Notice of Motion ex-parte Orders were granted in following terms:-

“1. The Defendant and or its servants and or its agents and or whosoever is hereby restrained from interfering with the Plaintiff in any manner shape or form whatsoever till this matter is determined or till further Order of this Court; and

2. That this matter is set for mention on 4th February 2011 at 3pm.”

2.3 On 4 February 2011, Respondent sought time to serve documents on Applicant and this matter was adjourned to 7 March 2011, when time for services was extended to 1 April 2011.

2.4 On 1 March 2011, Respondent entered Default Judgment in default of Notice of Intention to Defend on 24 March 2011, Respondent filed Summons for Assessment of Damages which was returnable on 5 May 2011.

2.5 This matter was next called on 18 May 2011, before his Lordship Justice Amaratunga who was then sitting as Master when this matter was adjourned to 15 June 2011, as there was no appearance for both parties.

2.6 On 15 June 2011, there was no appearance for Defendant when Court directed Plaintiff to file Affidavit within 21 days which time was extended to 20 July 2011.

2.7 On 6 September 2011, no Affidavit was filed by Respondent as directed by Court and the Summons for Assessment of Damages was adjourned to 10 November

2011, for hearing which date was vacated as Summons was re-listed for hearing on 28 November 2011 and then to 7 February 2012.

- 2.8 On 7 February 2012, hearing date was vacated and adjourned to 15 March 2012.
- 2.9 On 12 March 2012, Respondent filed his Evidence in Chief.
- 2.10 Summary for Assessment of Damages was heard on 15 March 2012, in absence of Defendant and adjourned for Ruling on 14 March 2012.
- 2.11 On 14 May 2012, Ruling was delivered when damages was assessed against Defendant in the sum of \$45,000.00 plus interest and costs.
- 2.12 On 6 July 2012, Respondent issued Writ of Fieri Facias.
- 2.13 On 19 October 2012, Applicant filed Application to set aside Default Judgment and Assessment of Damages which was called on 16 November 2012, before His Lordship Justice Hettiarachchi (as he then was) who adjourned the Application to 24 January 2013.
- 2.14 This matter was next called in this Court on 22 November 2013, when the Application was set down for hearing on 22 January 2014.
- 2.15 On 22 January 2014, this Court made following Orders:-

“1. Order in Terms of prayers 1-4 of the Defendant’s Summons filed on 19th October 2012:-

(i) That the Order granted for assessment of damages, interest and costs by Master Deepthi Amaratunga made in the High Court on 14th May 2012 be set aside;

(ii) That the Default Judgment sealed on 18th March 2012 be set aside;

(iii) That the Order granted for injunction made in the High Court on 19th January 2011 by the Honourable Justice Hettiarachchi be set aside;

(iv) That the Writ of Fieri Facias issued on 30th June 2012 be set aside; alternatively, that the Writ of Fieri Facias be stayed pending determination;

2. That the Defendant to be at liberty to file and serve an application to strike out the Plaintiff's Statement of Claim within 30 days from the date of this Order, failing which, the Defendant is to file its Statement of Defence within 7 days of the expiry of 30 days;
3. That the Plaintiff is to pay the Defendant's costs in the sum of \$800.00;
4. That the application is to be served on the Plaintiff personally and also on the Receiver of the law firm Gordon & Chaudhary. If the Defendant is unable to serve the Plaintiff personally, the Defendant is to apply to Court for substituted service."

2.16 On 21 February 2014, Applicant filed Application to Strike Out Claim.

3.0 Application to Strike Out

3.1 It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional case **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).

3.2 In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. it follows that an application of this kind must be determined on the

pleadings as they appear before the Court...”

No Reasonable Cause of Action

- 3.3 In **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208. 1998L (23 February 2005) his Lordship Justice Gates (current Chief Justice) stated as follows:-

*“A reasonable cause of action means a cause of action with “some chance of success” per Lord Pearson in **Drummond-Jackson v. British Medical Association** [1970] 1 All ER 1094 at p.1101f. The power to strike out is a summary power “which should be exercised only in plain and obvious cases”, where the cause of action was “plainly unsustainable”; Drummond-Jackson at p.110b; **A-G of the Duchy of Lancaster v. London and NW Railway Company** [1892] 3 Ch. 274 at p.277.*

- 3.4 Respondent’s claim is based on alleged dismantling of his home at Jittu Estate, Suva by Applicant’s office.
- 3.5 Applicant in the Affidavit of Father Barr sworn on 19 October 2012, provided following evidence which has not been challenged:-
- (i) Decision to dismantle Plaintiff’s home was by Ministry of Land and Mineral Resources as appears from Annexure “KB7” and “KB8”;
 - (ii) Respondent does not hold a registered Title to the land in question;
 - (iii) Any arrangement for Respondent to occupy the subject land (if any) was between him and Methodist Church of Fiji.
- 3.6 It is clear from the evidence before this Court that the eviction and dismantling of Respondent’s home was done by Ministry of Land and Mineral Resources and not the Applicant and as such there is no cause of action against the Applicant (Defendant).

Abuse of Process

- 3.7 It is well settled that this Court has inherent jurisdiction to strike out the claim

or pleadings for abuse of Court process as well as under Order 18 Rule 18(1)(d) of High Court Rules (paragraph 18/19/18 of Supreme Court Practice 1993 Vol. 1).

- 3.8 At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol. 1 it is stated as follows:-

*“Abuse of Process of the Court” - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see **Castro v. Murray** (1875) 10 P.59, per Bowen L.J. p.63). See also “Inherent jurisdiction”, para.18/19/18.”*

*“Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see **Reichel v. Magrath** (1889) 14 App.Cas.665) (para 18/19/18).”*

- 3.9 It is noted that Respondent continued with this action despite being aware that his house was dismantled by Ministry of Land and Mineral Resources as appears from Annexure KB7 and KB8 by Kevin Barr’s Affidavit.
- 3.10 This Court fails to understand why those letters were not annexed to Respondents Affidavit in Support of Injunction Application or his Affidavit in Opposition to Strike Out Application.
- 3.11 To maintain an action after it is brought to attention of the Respondent that Applicant is wrongly sued with evidence to support such claim is tantamount to abuse of Court process.

4.0 Costs

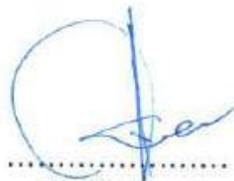
4.1 This Court has taken into consideration that original Plaintiff passed away and his Administratrix is now managing the estate. The Court is of the view that in the interest of justice each party is to bear their own costs.

5.0 Orders

5.1 This Court makes following Orders:-

- (i) Plaintiff's claim against the Defendants is dismissed and struck out;
- (ii) Interim Injunction granted on 19 July 2011, is dissolved;
- (iii) Each party bear their own cost for the Application to Strike Out Plaintiffs Claim.




K. Kumar
JUDGE

At Suva

28 September 2018

PLAINTIFF IN PERSON

CHAN LAW FOR THE DEFENDANTS